

**MAPPING A LEGAL STRATEGY IN COUNTER-TERRORISM FOR THE KINGDOM OF
SAUDI ARABIA IN LIGHT OF UNITED NATIONS SECURITY COUNCIL RESOLUTION
1373**

THE DEGREE OF DOCTOR OF PHILOSOPHY

FAHAD MANA BINJUMMAH

DEPARTMENT OF LAW AND CRIMINOLOGY

SCHOOL OF BUSINESS AND LAW, UNIVERSITY OF EAST LONDON

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ABSTRACT

This thesis focuses on the relationship between the Kingdom of Saudi Arabia's counter-terrorism legislation and United Nations Security Council Resolution 1373 (2001). This project aims to fill a gap in published writings about the impact of the United Nations' obligations under the resolution and the manner in which the Saudi Arabian judicial and administrative systems' respond. The resolution was adopted in the wake of the September 11th, 2001 events which involved 10 Saudi Arabian citizens among the perpetrators. Despite international attention regarding this fact, the Kingdom of Saudi Arabia, itself, has been the victim of a series of deadly terrorist attacks. This thesis maps out the process of developing a national response to these heinous attacks consistent with the provisions of the United Nations resolution. In examining the relationship between international juridical treaties and Saudi Arabian counter-terrorist legislation the thesis offers an account of the complex negotiations between international instruments and the legislative proposals inherent in the Islamic Shariah.

As the political and social considerations are inevitably linked to the analysis of the interaction between domestic laws and international ones, the thesis will use the policy-orientated (New Haven) approach to International Law, as espoused by Rosalyn Higgins, former President of the International Court of Justice (ICJ). The thesis is mainly a library-based or theoretical study, which is informed by semi-structured interviews conducted of former and present policy-making officials of the government of Saudi Arabia.

The thesis will seek to highlight the inclination of the consequential nature of the laws, regulations, and policies, issued by the decision-makers in the Kingdom. The Saudi Arabian strategy of counter-terrorism has experienced several stages in which it tried to harmonize the domestic legal system to the spirit and wording of UNSC Resolution 1373. The resolution

adopted under Chapter VII of the United Nations Charter required all member states to effect conformity of their legal systems in relation to counter-terrorism and terrorism finance, inter-state cooperation and respect for human rights norms. The analysis of the Saudi Arabian legal system will show that although this system has, to a large extent, achieved considerable compliance with UNSC Resolution 1373, fighting terrorism within the Kingdom, and eliminating Al-Qa'idah, nevertheless, it continues to face unique challenges, to which some are still ongoing. The question of respecting international human rights laws is one of primary challenges faced by the system. This is either due to the implementation of the internal judiciary, or the interpretation of international legal norms, which, in essence, do not consider the particularly distinctive role of Islamic Shariah Laws.

This thesis will suggest that there has been insufficient research in exploring and analyzing the development of the legal and policy framework of counter-terrorism in the Kingdom of Saudi Arabia. It offers an analysis of the concrete complexities of developing the legislation that is faithful to the Saudi Arabian system of Shariah, and to its commitments to the international community. The thesis aims to further contribute to the research and policy agendas on counter-terrorism in Saudi Arabia and the greater Middle East and North African Regions.

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LIST OF ABBREVIATIONS

Designated Non-Financial Businesses and Professions (DNFBP)

Financial Action Task Force (FATF)

Gulf Cooperation Council (GCC States 1977)

International Commitment to fight the Terrorism Financing (ICSFT)

International Convention for the Suppression of the Financing (ICSFT) -1999

Islamic Military Counter Terrorism Coalition (IMCTC)

King Abdullah Bin Abdul-Aziz International Centre for Interreligious and Intercultural Dialogue (KAICIID)

Kingdom of Saudi Arabia (The Kingdom)

Mutual Legal Assistance (MLA)

Non-Profit Organizations (NPOs)

Permanent Committee of Counter Terrorism (PCTC)

Royal Saudi Land Forces (RSLF)

Saudi Arabian Federation for Cyber Security and Programming (SAFCSP)

Saudi Arabian Monetary Authority (SAMA)

Saudi Arabian National Guard (SANG)

Special Operations Force (SOF)

Special Security Force (SSF)

United Nations (UN)

United Nations Security Council Resolution 1373 (UNSC Resolution 1373)

INTRODUCTION

Terrorism is a challenge not only to world security but also to the world's legal order as it demands not only an international response but also the coordinated action of states themselves. This thesis shines a spotlight on a case study of the relationship between that international response in the United Nations Security Council Resolution 1373 (2001) and the counter-terrorism strategy of the Kingdom of Saudi Arabia. In engaging with current Saudi counter-terrorism legislation, the thesis evaluates the discontinuities within the existing law and the problems of establishing a coherent legal strategy in common with the principles and provisions of UNSC Resolution 1373. The study focuses on the legislative process of the Kingdom and how this facilitates or inhibits the implementation of the UN strategy. The project aims to demonstrate and explain the manner in which Saudi Arabian counter-terrorism evolved and its current form. In this respect, it will track the Kingdom's legal developments in the face of the evolving terrorism threats and the resultant changing global concerns and responses. It aims to show the different sets of law and regulations, and the structural policy of counter-terrorism that has been passed and established respectively.

The thesis focuses on the following research question: To what extent can UNSC Resolution 1373, genuinely assist in the development of a national legal counter-terrorism strategy in Saudi Arabia? The question will help narrow the scope and sharpen the focus of the entire thesis. The world has faced the threat of terrorism for long periods of time in the modern age, with corresponding actions to try and combat it. The critical historical moment came in the wake of the September 11, 2001 attacks (9/11) in the USA. This was the largest terrorist attack in the modern world by volume of deaths and casualties. Roughly 3,000 citizens of 78 nations died,¹ while many more sustained injuries that would kill more while maiming others

¹ September 11 Attacks, History, 25th August, at [<https://www.history.com/topics/21st-century/9-11-attacks>] (Last Access: 12th September, 2019).

permanently. The attack came with the realization that in the post-cold war era, terrorism was one of the greatest threats to world peace and stability.² The international community made its stance on the fight against terrorism evident and formalized it in policy.

The United Nations Security Council responded to the new scale of threats with two critical resolutions: the first being Resolution 1368 (2001),³ condemning the 9/11 attacks and reiterating the right of states to resort to self-defense, followed by Resolution 1373,⁴ under the United Nations Charter Chapter VII, which provided a comprehensive regime to counter-terrorism through the close co-operation of its members. This resolution is the point of departure for this thesis. The resolution was highly innovative as it sought to create common legal approaches within member states. This resolution would be the framework within which all constituent members of the UN would develop their cooperative measures to independently commit to fighting terrorism. Notably, the focus of the resolution was on a preventive approach to combating terrorism. This new framework was ground-breaking in the annals of counter-terrorism policies owing to several deviations from the standard operating procedures preceding it. It established that terrorism is a threat to the peace and stability of the world, justifying the drastic measures that it would institute. The resolution's first such feature is that it formulated specific guidelines that cooperating member states were to follow. For instance, all member states must prevent and suppress the financing of terrorist acts.⁵ Additionally, it also obligated all member states to share any knowledge or intelligence pertaining to terrorism activities or plans, thereof. Further specific stipulations of the law will be discussed in depth in the third chapter of this thesis. The importance of the subject was evident in the fact that the

² Threat to International Peace and Security Caused by Terrorist Acts, United Nation Office of Counter-Terrorism, available at: <https://www.un.org/counterterrorism/ctitf/en/threats-international-peace-and-security-caused-terrorist-acts-0>.

³ S/RES/1368 (2001), available at: <https://www.un.org/counterterrorism/ctitf/en/sres1368-2001>.

⁴ Security Council Resolution 1373 (2001) on Threats to international peace and security caused by terrorist acts, <https://www.un.org/ruleoflaw/blog/document/security-council-resolution-1373-2001-on-threats-to-international-peace-and-security-caused-by-terrorist-acts/>.

⁵ UNSC Resolution 1373, Article.1.

resolution also established the Counter-terrorism Committee to oversee the adoption and implementation of the resolution. As a result of this policy, the UN had, for the first time, blurred the boundaries between the sovereignty of states, which had always been a fundamental pillar of UN Membership and the UN Security Council. Therein lay the potential areas of conflict for member states in the practical formulation of the required local laws, since each country has unique legislative procedures. One state especially subject to such complexities is the Kingdom of Saudi Arabia, whose unique law-making process poses many challenges to the smooth relationship between national legislation and international obligations under UNSC Resolution 1373. The focus in this project will be on the role that this resolution has played in the elaboration of the counter-terrorism strategy of the Kingdom of Saudi Arabia.

Prior to the landmark 9/11 attacks, the approach toward terrorism was largely reactive to attacks with rudimentary forms of coordination. The initial notable attempt to highlight terrorism within the UN came in 1972, when the General Assembly established the 35-member Terrorism Ad Hoc Committee. The committee met and reported their deliberations thrice between 1973 and 1993. Between 1981 and 1993, as well as 1994 and 2005, the committee held regular biannual meetings. The meetings yielded several resolutions that the General Assembly adopted, noting that the fight against terrorism was deficient and needed a definite structure, including a definition of international terrorism. Resultantly, and in a session, held in 1996, the Sixth Committee of the General Assembly⁶ was charged to work on the aforementioned definition. The definition would not become apparent until 2004, through the UNSC Resolution 1566. As the thesis will suggest, changing forms of terrorism resulted in significantly different types of terrorist threats. This phenomenon has been one of the major challenges to Saudi Arabia's counter-terrorism policy. As we will see, this has necessitated

⁶ United Nations, General Assembly, Resolution Adopted by the General Assembly [on the report of the Sixth Committee (A/51/631)], A/RES/51/210, 88th plenary meeting, 17 Dec 1996, available at [<https://undocs.org/pdf?symbol=en/A/RES/51/210>].

frequent changes to policy and law relating to various forms of terrorism include shootings, hijackings, hostage taking and bombing campaigns. The shifts in the forms of terrorism are also mirrored in the changing types of terrorist organizations and terrorist networks. Over the past 5 years this has included a new terrorist strategy of seizing territory and its hostage population as a base and creating a state-like existence as with the Islamic State (ISIS)/Da'ish.

In the second century (of the Islamic calendar), or 8th century CE, scholars developed a discourse of Islamic law as applied to international relations. One such leading jurist was Imam Muhammad Ibn Hasan Ash-Shaybani who authored *Kitab Al-Siyar Al-Kabir*.⁷ Although sections of this work have been lost, sections of larger work, *Kitab Al Asl*, that concern *Al-Siyar* survive.⁸ The classical jurists concentrated on the development of the doctrine of Jihad. This concept is of course used to refer to extremist and terrorist groups – and indeed has become the currency of terrorist studies discourse with the conjoined terms Jihadi terrorism. However, classical jurists, including Ash-Shaybani developed an Islamic doctrine on the use of force in a manner that is incompatible with the actions of groups such as Al-Qa'idah and ISIS. The doctrine which regulates both the justifications to use force and the restraints on that use of force (combining *jus ad bellum* and *jus in bello*) is highly restrictive on the occasions where force can be used and regulates the use of force itself with early humanitarian principles. As we shall discuss, Shariah Law does not legitimize terrorism.

The Kingdom of Saudi Arabia also occupies the unique position of being a home to several renowned terrorists but also the subject of terrorist threats. Fifteen of the 9/11 perpetrators had Saudi Arabian citizenship. Additionally, the nation is credited as being the location in which Al-Qa'idah was established. The Kingdom has also been subject to exploitation by terrorist groups as an avenue for financing and supporting their activities of

⁷ Khadduri, M. *The Islamic Law of Nations: Shaybani's Siyar* (Baltimore: Johns Hopkins University Press, 1966), 43.

⁸ *Ibid*, 70.

terror. Collectively, these activities may affect the outlook of the international community towards the nation as harbouring terrorists. However, the nation has also had a significant history with terror attacks. Since 1979, when Islamic-affiliated terrorism was first manifested, Saudi Arabia was involved, as the culprits had targeted the Grand Holy Mosque in Makkah. More terrorist attacks followed in the 1990s in the form of bombings, with yet more attacks following in the early 2000s after 9/11. Meanwhile, in an ironic twist, the Kingdom of Saudi Arabia sees itself not only as a victim of fanatical terrorists, but also the victim of the collective international strategy in fighting terrorism.

Given that the core of this project is to establish how well the Saudi Arabian counter-terror laws and policy fit into the framework set forth by international law, it is vital to study the process of legislation that produces the Saudi Arabian law. The insights, therefrom, will help shape the understanding of prevailing procedural rules, regulations and laws in Saudi Arabia, from their pre-9/11 conditions, to adjusting to international standards. This discussion will lead to an exploration of the current counter-terrorism law and policy in the kingdom. This will help us consider any discrepancies between the national and international law. Consequently, the thesis will be better positioned to contribute to our understanding of this subject which has implications for our understanding of the relationship between international law and municipal law.

The Kingdom of Saudi Arabia is an Islamic monarchy, whose primary source of law is the Shariah, based on the Holy Qur'an. This authority is embedded in the Basic Law of the nation, whose Article 7 declares that the ruling regime's authority stems from the Holy Qur'an as well as Prophet Muhamad's *Sunnah* (Establish Example), which supersede all other state regulations. In this sense, then, the Shariah is at the top of the hierarchy of laws in the Kingdom, after which other national regulations follow. Most of the other states that use Shariah Law have codified it, which is the determination of the implementable parts of the law, hence

making it relatively more suited for the evolved systems of governance for the 21st century.⁹ However, Saudi Arabia still uses the Shariah in its uncoded state. Therefore, the implementation of any man-made laws must be limited to areas in which they do not conflict with the Shariah, with which there is no room for compromise. Given this state, interpretation is literal, and implementation is often brutal. This is the first potential source of tension between local and international laws as will emerge later in this chapter.

According to the hierarchy of laws in the kingdom, the Basic Law is second to the Shariah, followed by Regulations, and, finally, regulatory rules. The Basic Law of Governance was the result of a 1992 Royal Decree. A Royal Decree expresses the written will of the King as the ruler of the Kingdom of Saudi Arabia, which no other regulation can violate. It is comparable in status to a constitution in Western democracies. This regulation expresses the three key markers of a constitution, including the sovereign characteristics of the kingdom, regulation of the three primary authorities that govern the state (judicial, legislative, and executive), and the rights due to citizens and the civil society. This Basic Law establishes the kingdom as a monarchical system of governance, led in accordance with the Shariah. Since its formation, this law has only been subject to few changes, such as defining the system of inheritance of the power of governance as following a patriarchal system, strictly within the royal family.

Normal Regulations (equivalent to laws in other legal systems) in the Saudi Arabian Kingdom are binding rules deriving their authority from the Kingdom's Regulatory Authority. This Regulatory Authority is the means used by the Shura Council (Council of Ministers) to establish rules that then become normal regulations. However, this authorization is dependent upon ratification by a royal decree, which is the instrument via which the king expresses his

⁹ Perk, M. 'Reform and Globalization in the 19th Century Ottoman Context Tanzimat Reforms, November, 2018, available at [https://www.researchgate.net/publication/328743855_Globalization_of_the_Ottoman_Empire_in_the_Context_of_Tanzimat_Reforms/stats].

will as the head of state in Saudi Arabia. Evident from the foregoing discussion, then, is a legal structure that is primarily driven by Shariah Law and the will of the incumbent monarch. It is under these prevailing conditions that the national legal and policy structure in Saudi Arabia is expected to have evolved its counter-terrorism measures to conform to the UNSC Resolution 1373.

This thesis, having established the complexity of the process of legislation in the Kingdom, will seek to explore the extent to which Saudi Arabia has succeeded in adhering to the guidelines of UNSC Resolution 1373. It will attempt to understand whether or not the responses of the decision-makers are in line with the letter and the spirit of the resolution and that these activities, taken to deal with terror acts, are reactive or planned. This may help to provide a set of recommendations to the current strategy of the Kingdom for counter-terrorism. The thesis will show how the legal strategy system in the Kingdom has gradually fallen in line with the international legal norms, in general, and the resolution in particular. It will show how the system was at first reactive to events. This meant that policies and law were developed without consideration of the need for a broader preventive strategy. UNSC Resolution 1373 attempts to offer a solution to this issue. It requires the Kingdom to draft a comprehensive plan which will assess potential terror threats and institute measures to prevent their fruition. However, the state is yet to make such progress. For instance, the Kingdom initially intervened in the conflict in Syria. It provided support to rebel forces against President Assad, which saw many Saudi citizens travel to Syria to join opposition groups. However, as the conflict evolved, it became evident that some of these groups were part of terrorist networks. As a result, Saudi citizens who were members of these networks became a security threat for the Kingdom. In response, the government revised its laws to prohibit participation in such groups. The legal environment for counter-terrorism dramatically changed in Saudi Arabia with the issuance of

the Law of Combating Terrorist Crimes and its Financing (2017),¹⁰ generally referred to as the ‘Law of 2017’, which has resulted in noticeable progress, accordingly, as the last chapter of this thesis will discuss. The Security Council’s Resolution 1373, has significant implications that complicate the circumstances of the Kingdom’s conformity with it. For instance, it necessitates cooperation between the police and the intelligence services in the nation. These are two wings of the national security apparatus which, in many nations, are adversarial towards each other. Often, these relations emerge from a lack of action by the former, often due to political considerations and interference. There is also mistrust across nations, which further extenuates the circumstances of international cooperation between them. Additionally, the issue of cutting financing to terror groups is complex. A principal challenge therein is the lack of a comprehensive universally accepted definition of terror. The obligations under Shariah Law places such nations in a worse position. For instance, many citizens of Saudi Arabia participate in Az-Zakaah (obligatory charity), which may be problematic if one of the beneficiaries appears to be affiliated to terrorist organizations. There is also the question of human rights in the punishment of offenders in Saudi Arabia and other Shariah states. For instance, some crimes have physical punishments, such as the decapitation and cutting off limbs, among others. Regardless of the crime committed, some of these actions are in breach of universal human rights, potentially creating another challenge. These are just instances of practical challenges that may inhibit the seamless integration of national legal systems into the framework of the internationally established laws.

This thesis is informed by the policy-oriented (New Haven) approach to international law.¹¹ This approach assumes as a fact that international law is not a system of rules but is essentially an agreement of the aims of the international community, such as creating minimum

¹⁰ See: <https://www.moj.gov.sa/Documents/Regulations/pdf/79.pdf>.

¹¹ Higgins, R. *Problems and Processes: International Law and How We Use it*, (Clarendon Press Publication, Oxford, 1994).

world public order. The legal norms are open to interpretation, as occurs in appellate courts and of course in the International Court of Justice (ICJ), and that this imposes choices on jurists in deciding what is most conducive to world order. Rosalyn Higgins, former President of the International Court of Justice (ICJ), stressed the importance of the decision-maker realizing that justice is a process that takes the political and social context of the action into consideration. The decision-maker will only consider the established rules and will leave out other important factors such as the socio-political context of the controversy under assessment. The essence of her argument is also that the policy-oriented approach is the most effective method for the analysis of international law because it outlines a process that seeks to resolve international law challenges by affording decision-makers a range of viable solutions that are consistent with their objectives and values. Therefore, Higgins' policy-oriented (New Haven) approach, shall serve as the foundation in our understanding of the relationship between Saudi Arabian counter-terrorism laws and policies, and international law. Within this framework, it will be possible to dissect the strategy employed by the Kingdom and the underlying policy considerations. Similarly, the researcher will deconstruct UNSC Resolution 1373, in the context of its adoption. Two issues will be apparent.

I have drawn on Higgins in particular as her approach to international law has elements that are reminiscent of some Islamic jurists who emphasized the need in interpreting legal sources to bear in mind the broad purpose of the norms under consideration. The interpretation and application of any law requires careful evaluation of its purpose and benefits for human endeavour. The Islamic doctrine of public interest, also known as *Maslahah* is an appropriate example. This doctrine has been the subject of study for multiple Muslim scholars, but was originated by Al-Shafi'i, and engaged with by others, including Al-Ghazali and Al-Juwayni. Al-Ghazali, in his efforts to systematize the theory of purposes of the law, named it *Maslahah*. However, other scholars associated with the four main schools of Islamic jurisprudence, have

echoed the theory but used different names for it. For instance, the *Hanafis* (of the Hanafi School) used it under the name of *Istihsan* (juristic discretion), while the *Shafi`is*, before Al-Ghazali, used it under the term of *Ikhlah* (convincing opinion). *Malikis* used it under the name of *Istislah*¹² (to deem proper). The main contention of these scholars is that deploying and applying laws means looking beyond a narrow definition so that the object of justice can be achieved within a society. The doctrine of Jihad, for example, can only be understood in the areas of the use of force and law of war through focusing on the twin objectives of mitigating circumstances for the use of force, and reducing the harm caused as a result of the use of force. Such classical Islamic views have elements of similarity with modern policy-orientated approaches to international law. These deductions offer helpful ways in assessing the response of the Kingdom of Saudi Arabia to terrorism, and the framing of its counter-terrorism policy and law in the context of UNSC Resolution 1373.

Research Methodology

This project is a qualitative study. It will primarily comprise of library-based research, reviewing primary and secondary sources on the subject laws and policies, as well as legal theory. The site of this research has been in the UEL, Institute of Advanced Legal Studies, Naif University, and the British Library. To supplement the information from the desk research, the thesis will also incorporate some first-hand information. This was data collected by the researcher via semi-structured interviews of officials in the government of the Kingdom of Saudi Arabia government between December 2016 and June 2017. The subjects requested anonymity in order to protect their privacy and owing to the sensitive nature of their work. In line with the principles of ethical research, their identities will be protected. The data collected from them encompassed the process of decision making within the Kingdom, including the

¹² Laluddin, H. '*Maslahah's Role as an Instrument for Revival of Ijtihad, International Islamic University Malaysia*', (December 2015).

drafting of resolutions, laws, and provisions addressing the threat of terrorism. The interviews also sought to establish the nature of the decisions on which the government was focused, including whether they were planned and reactive, or whether they were in accordance with the letter and spirit of UNSC Resolution 1373. The data on the current positions and laws will be subject to analysis to assess the operation of the Saudi Arabian legal system within the purview of the aforementioned resolution. The thesis, then, will primarily compare the two foregoing legal regimes. It will offer a view of the contours of Saudi law and policy which will conclude with some recommendations to improve the compatibility between the Saudi Arabian legal system and UNSC Resolution 1373.

The project breaks new ground as it is the first thesis to explore the counter-terrorism legal terrain in the Kingdom of Saudi Arabia. While, there may have been other researchers inquiring into other aspects of terrorism with regard to the Kingdom, such as the military and strategic issues, this is the first study dedicated to the legal aspects of counter-terrorism. It offers insights into the challenges of creating a national counter-terrorism framework that respects both the principles of Saudi Law and international norms. In so doing it stakes out a discussion of how Shariah deals with counter-terrorism. It is hoped that it will assist both the Kingdom and other states in the region to engage with both the positive and negative lessons of this experience. It should be stressed that counter-terrorism legislation in the Kingdom is very new, and scholarly study of it is scant. The latest set of laws and regulations issued to counter terrorism were promulgated at the end of 2017. This thesis will, therefore, attempt to offer an analysis of these set of laws and regulations and examine their relationship with UNSC Resolution 1373.

This is the first thesis to explore the definition of terrorism in Saudi Arabian law and how this relates to the definition of crimes of terrorism encompassed in UN Security Council

Resolution 1566 (2004). It should be recognized at the outset that the definition of international terrorism has been much debated, often unsatisfactorily.¹³

The thesis is also the pioneering enquiry into the tension between the local legal system in the Kingdom and UNSC Resolution 1373. The project appreciates that the resolution makes substantive demands of the counter-terrorism legislation on each UN member. Therefore, there are compatibility challenges, given the different inspirations and basis of the international and local laws. This includes discrete questions such as the manner in which Islamic Law (a source of law in Muslim countries) relates to UNSC Resolution 1373. Another issue is that the law-making procedures in the Kingdom do not conform to the democratic processes that apply to the majority of UN members as envisaged by the UN Security Council in the making of the law. Therefore, the Saudi Arabian case study will allow the thesis to explore the deepest potential areas of conflict between international and local laws.

The thesis is divided into 5 chapters, each of which will contribute knowledge towards providing answers to the research question. The first chapter, for instance, establishes the theoretical framework within which the entire project is set. It delves into the origin and development of the policy-oriented (New Haven) approach as espoused by Rosalyn Higgins, former President of the International Court of Justice (ICJ). The chapter lays the foundation for the development of the essay. It explores the conceptualization of terrorism, including the varied definitions of the same. Further, it explores the development of the law in the Kingdom of Saudi Arabia and the current disposition, giving rise to the tension between local and international laws. The second chapter explores the concept of Jihad, which is closely associated with modern day terrorism. It examines the concept of Jihad, its interpretation by various scholars over time, and its bearing on the war against terrorism. Consequent to

¹³ Saul, B. *'Defining Terrorism in International Law'* (Oxford University Press, Oxford, 2005).

explaining the origin and different views of Jihad, the thesis demonstrates the difficulty for counter-terrorism policy and law that results from the intertwinement of terrorism and Jihad, more so for such a Shariah based legal entity as Saudi Arabia. The third chapter explores the international legal environment and the circumstances surrounding the adoption of UNSC Resolution 1373, a pillar of this thesis. Therefore, it creates a clear comprehension of the international legal strategy against terror to which the research question refers. This provides the context in which to investigate the actual strategy of the Kingdom of Saudi Arabia against terror. Particularly, the tracking of the development of counter-terrorism legislation in the Kingdom before 2001, is vital, as is the description of the legislation mechanisms in the Kingdom. In the fourth chapter, the project commits to exploring the local counter-terrorism strategy in the Kingdom of Saudi Arabia. It looks into the history of the evolution of the strategy. The chapter focuses on the strategy in the period following 9/11 and the passing of UNSC Resolution 1373. It also examines the local legal and policy strategy's conformity to the Resolution and the various realms in which the fight against terrorism is taking place. These chapters collectively set the ground for the discussion in the fifth chapter, which examines the financial element of the fight against terrorism. It examines the role of financing in terror activities. Subsequently, it explores the laws in place to stop such funding. It also includes the legal decisions regarding the international cooperation and human rights as requisite components of the law in counter-terrorism. This chapter is vital as it shows the extent of implementation of UNSC Resolution 1373 that the Kingdom of Saudi Arabia has undertaken and the challenges thereof, especially regarding international cooperation. On the basis of these discussions, the thesis is in a position to make greater contribution on plausible further development that the local law can undergo to match the international strategy better. Evidently, the research question is at the heart of the thesis, acting as the guide for the interpretation of certain concepts and the methodology of the paper.

CHAPTER ONE: THEORETICAL FRAMEWORK:

INTERNATIONAL LAW AND TERRORISM

1.1 INTRODUCTION

This chapter is divided into four main sections. The first section will show us why the Saudi Arabia case is important and selected for this thesis. The second section will focus on the analysis of the policy-orientated (New Haven) approach to international law, and will conclude with a discussion of Rosalyn Higgins as an exponent of this approach. The third section will discuss the global challenges and difficulties of the definition of terrorism.

In the last section, we will show how the Saudi Arabian legal system is structured and operated. The importance of understanding the legal framework of Saudi Arabia lies in the distinct position of Saudi Arabia within the Islamic world, and the otherwise different juridical sources of Saudi Arabian legislation.¹⁴ Saudi Arabia is considered, by many in the Muslim world, to be the main guardian of Islam and its most holy sites of Makkah and Madinah. This distinct identity of Saudi Arabia forms the basis for Shariah Law to be the main source of jurisprudence in the state. Even the political policy of the state is subject to this law.¹⁵ Against this background, we will see how the Saudi Arabian rulers have replaced some classical legal terms with ones that can only be seen in Shariah Law. Other sets of rules are mere regulations that explain and interpret the main source of legislation laid down by God. Even the practices and deeds of Prophet Muhammad (Peace Be Upon Him) are directed by God who informs His Messenger what to legislate. The rules and provisions of Shariah Law, however, are usually loose and generic. This allows jurists and scholars (only the qualified ones, as explained in Chapter Two) to exercise what is called juristic deduction to decree a provision when the main source does not provide a specific answer to a certain issue. The set of rules and provisions that result from this process are usually grouped in what is called in Islam as ‘system’, or literally nizam and cannot be named law. Sheikh Muhammed Rashid Rida defines ‘system’ or nizam

¹⁴ Hegghammer, T. *‘Jihad in Saudi Arabia’* (Cambridge University Press, Cambridge, 2010), P.2.

¹⁵ Baz, B. *‘Al Rushd Bookstore Al Rowdah Riyadh’* (Al-Rushd bookstore, 2015), P.164.

as ‘a set of legal and political provisions, and discretionary penalty, which are not in conflict with Shariah Law and issued by senior jurists.’¹⁶

According to this background, all regulations and regulatory rules are issued after the consideration of Shariah Law. In addition, other regulations were issued after the consideration of UNSC Resolution 1373, such as The Regulation of Terrorism Crimes and Financing, and The Regulation of Electronic Crimes, as well as the establishment of ad hoc criminal courts assigned to adjudicate terror crimes.

1.2 Saudi Arabia as a Case Study

The Kingdom of Saudi Arabia was affected by terrorism, long before the 11th of September, 2001. The horrifying events of 1979 were the beginning of the emergence of terrorist movements, when Juhayman Al-Utaibi, along with a group of his followers, barged into the Grand Mosque of Makkah, Islam’s holiest site. This began a wave of attacks that was the result of regional events, and the Kingdom was the epicentre. Saudi Arabia had been a victim of such violence in past decades, by the time of the 1979 seizure of the Grand Holy Mosque in Makkah by extremists.¹⁷ After intense fighting, the Saudi government was able to take control of situation, and the terrorists who survived were brought to justice. However, this incident was linked to the rise of political Islam in the region which saw the Iranian Revolution of 1979, and the invasion of Afghanistan by the Soviet Union in the same year. These were to mark the next period. A spike in attacks during the 1990s, resulted in Saudi Arabia suffering numerous bombings including major attacks in its capital, the city of Riyadh in 1995,¹⁸ and in Al-Khobar in 1996.¹⁹ These wanton acts of violence eventually culminated in three suicide

¹⁶ Rida, M. ‘*Interpretation of Manar*’ (Cairo, Almanar Edition, 1924), Pp.4-11.

¹⁷ Dahmani, L., 1979: When Juhayman al-Otaybi led the Grand Mosque seizure of the Masjid al Haram in Mecca, Yabiladi, <https://en.yabiladi.com/articles/details/65386/1979-when-juhayman-al-otaybi-grand.html>.

¹⁸ Elliot, A, Community remembers 1995 Riyadh bombing, U.S. ARMY, (2015), https://www.army.mil/article/158924/community_remembers_1995_riyadh_bombing.

¹⁹ Eitan, A. ‘Iran is behind the 1996 terrorist attack on the Khobar Towers in Saudi-Arabia by the Saudi Hezbollah’, *International Institute for Counter-Terrorism*, (2007), at

bombings in a housing compound in Riyadh on 12 May, 2003.²⁰ As many as 34 innocent lives were lost in this single attack. Another explosion occurred in the Al-Mahiah Housing Compound in Riyadh on 10 November, 2003, killing around 17 people and injuring 116 others. I will now turn to discuss the international and regional developments that created the basis for these and other terrorist attacks.

1.2.1 The Iranian Revolution of 1979

In looking at why the Kingdom of Saudi Arabia took steps to introduce counter-terrorism measures, it is important to address prior events which necessitated such measures. Such precursor events include the Iranian Revolution which took place in 1979. This revolution mainly aimed to take a hostile position against the then Iranian regime, which was loyal to the West and wanted it replaced by a radical Islamic rule. The culmination of this revolution was a turning point in the evolution of political Islam among Shi'a Muslims.²¹ These turning points directed both the Sunni and Shi'a Islamist movements towards the creation of a model nation state, while boosting morale and religious fervour along its path. Following the success of the revolution, Shi'a Islamic scholars from Saudi Arabia moved to Qom in Iran and established an organization, named the Assembly of the Hijaz Scholars,²² seeking to establish Khomeini's juristic authority over the eastern region of the Kingdom of Saudi Arabia, which used to be loyal to Najaf (Iraq) in the past.²³ Against this background, a political opposition organization was founded called the Islamic Revolution Organization in the Arabian Peninsula, which opposed the Saudi Arabian government. It introduced itself as a revolutionary state within the

<https://www.ict.org.il/Article/171/Iran%20is%20behind%20the%201996%20terrorist%20attack%20on%20the%20Khobar%20Towers%20in%20Saudi-Arabia%20by%20the%20Saudi%20Hezbollah#gsc.tab=0>.

²⁰ Kegley, C. 'The New Global Terrorism: Characteristics, Causes, Controls', *Upper Saddle River: Prentice Hall*, (2003), P. 20.

²¹ Strawson, J. 'Islam and the Politics of Terrorism: Aspects of the British Experience', in Miriam Gani and Penelope Mathew (eds) *Fresh Perspectives on the War on Terror* (Canberra: ANU E Press, 2008), Pp 9-26.

²² Toby, M. 'Hizbullah al-Hijaz: A History of the Most Radical Saudi Shi'a Opposition Group', *Middle East Journal*, Vol. no. 2 (Spring 2010).

²³ Ibrahim, B. and Al-Sadik, M. 'Shiit Movement in Saudi Arabia, Politics', *Arab Network for Research*, (2013).

Kingdom and called on all Saudi people to move to Iran to learn the Islamic sciences and receive military training.²⁴

The first activity of this organization was to exploit the occupation of the Grand Mosque of Makkah by Juhayman in 1979, by provoking a revolt against the ruling Royal family,²⁵ following a call by Khomeini to do so.²⁶ This resulted in a military clash between them and the Saudi Security forces, accompanied with political slogans greeting Khomeini. In 1987, a military group was created called Hezbollah Hijaz with support of the Iranian Revolutionary Guards as an attempt to have a military base in Saudi Arabia to carry out reprisals after the Hajj pilgrimage in 1987. The group was working as a military wing of the Iranian Islamic Revolution Organization in the Arabia Peninsula until the 1990s when this group became independent and worked on their own.²⁷ Hezbollah Hijaz believed that Khomeini was the legitimate leader of all Muslims in the world and pledged allegiance to him in all of life's affairs. In addition, they believed that any insult, threat of violence, or any a threat of war against Iran is an insult against the entire Islamic world.²⁸ This group targeted vital bases of oil installations in Saudi Arabia at the end of 1980s, as well as assassinating Saudi diplomats in Ankara, Karachi, and Bangkok. However, their most serious sabotage was the bombing of the housing towers of Al-Khobar city in 1996, which was inhabited by Americans. This attack resulted in the death of 19 Americans, and 372 other American wounded soldiers.²⁹ This was the bloodiest attack in 13 years against Americans who lived abroad, since the 1983 bombing of US marine corps camps in Beirut, which resulted in the death of 241 soldiers. The Head of

²⁴ *Ibid.*

²⁵ Hegghammer, T. and Lacroix, S. '*Rejectionist Islamism in Saudi Arabia: The Story of Juhayman al-Utaybi Revisited*', (Cambridge University Press, Cambridge, 2007), Available at: <https://www.cambridge.org/core/journals/international-journal-of-middle-east-studies/article/rejectionist-islamism-in-saudi-arabia-the-story-of-juhayman-alutaybi-revisited/294D1F95102BA3A5029F308523EB6074>.

²⁶ Levitt, M. 'Iran and Bahrain Crying wolf, or wolf at the Door?' *The Washington Institute*, (2014).

²⁷ *Ibid.*

²⁸ Available at: <http://www.alhramain.com>.

²⁹ Hegghammer, T. 'Deconstructing the myth about Al-Qa'idah and Khobar', *CTC Sentinel*, Vol. 1, No.3 (2008).

the Bureau of Investigation at CIA claimed that Iran was responsible for this attack, and that the Iranian Revolutionary Guards and Intelligence oversaw the planning, implementation, and training of the suicide-attackers in the Beqaa Governorate in Lebanon.³⁰

With the arrival of the Arab Spring upon the Arab world, some members of the Shi'a community in Saudi Arabia, who were supported by Iran, started to exploit the status quo and began an uprising against the Saudi government. For example, Nimr Al-Nimer, who received his education from Hawza in Qom, Iran, for ten years, exploited the Arab Spring and started making speeches in Qatif, Saudi Arabia, which was mainly inhabited by Shi'a people, against the Saudi regime. He even demanded secession from Saudi Arabia and the creation of a new state, based on the Iranian system of governance.³¹ In addition, in 2011, some Shi'a people started to launch several attacks against several security checkpoints and vehicles in the city of Awamiyah. The Saudi Interior Minister declared that these people were linked to the Iranian agenda.³²

1.2.2 Soviet Union's Invasion of Afghanistan and The Chechnya Conflict

Having examined the Iranian Revolution as a precursor terrorist event leading to the development of counter-terrorism measures in Saudi Arabia, the chapter now turns to examine another precursor terrorist related event involving the war of Russia against Afghanistan and Chechnya. In the beginning of the 1980s, there was an insignificant presence of armed and radical Sunni Muslim's extremists in the Kingdom. Even the perpetrators of the occupation of the Holy Mosque of Makkah by Juhayman was merely a limited and isolated phenomenon within the political scene in the Kingdom. However, by the mid-1990s, thousands of Saudi fighters had engaged in several wars around the world, including Afghanistan, Chechnya, and

³⁰ Louis, J. *'Freeh with Howard Means, my FBI: Bringing down the Mafia, Investigating Bill Clinton, and Fighting the war on Terror'* (New York: St: Martin's Griffin, 2005).

³¹ Hashim, A. 'Saudi-Iranian Rivalry and Conflict: Shia Province Casus Billi?' *RSIS Commentary*, no.22, (2016).

³² Boghardt, L. 'Iranian Aid to Fighters in the Gulf Peninsula', *The Washington Institute*, (2014).

Bosnia.³³ Also, during the 1980s, there was no existence of Al-Qa'idah, nor the idea of sending Jihadists to the Kingdom. The Kingdom at this time was not concerned about young people joining the Jihad in Afghanistan. Meanwhile, the establishment of Al-Qa'idah in Afghanistan resulted in the creation of a branch in the Kingdom, which was the direct result of the participation of some Saudi citizens in the Afghanistan war. Following the end of the Soviet occupation of Afghanistan, the Saudis who returned to the Kingdom became time bombs who looked for any movement against the government to explode. Indeed, this was what happened during the invasion of Iraq into Kuwait, when these former militants rejected the intervention of foreign forces to liberate Kuwait. One of the main aims of these extremists was to sack the ruling Royal family in Saudi Arabia, on the pretext of the existence of American forces in the Kingdom.³⁴

The extreme violence of terrorism, however, started in the Kingdom in 2002, when the majority of Saudi Jihadists returned to the Kingdom. At the end of May of the same year, the US National Security Agency (NSA) objected to a letter sent by Usamah Bin Laden to Yusuf Al-Ayeri, the leader of 'Al-Qa'idah in the Land of the Two Holy Mosques', which ordered him to launch widespread attacks against the Kingdom. The Head of the CIA, George Tenet, informed the Saudi Ambassador in the USA that Bin Laden had changed his main goals to be directed against the Kingdom.³⁵

What is most interesting about the Saudis who had been recruited by Al-Qa'idah to fight in Afghanistan or Chechnya, is that they did not initially embrace the idea of anti-Americanism or universal terrorist ambitions. Their targeted objective of Jihad was exclusively

³³ Hegghammer, *supra* n. 14.

³⁴ Letter from Abo Hudhayfa to Abo Abdallah, Harmony Database (AFGP-2002-003251) (20 Jun 2000).

³⁵ Suskind, R. *The One Percent Doctrine: Deep Inside America's Pursuit of its Enemies since 9/11*, (Simon & Schuster, 2006), Pp.146-147.

against the Soviet Union (commonly referred to as ‘Russia’).³⁶ However, as time passed, Bin Laden managed to establish educational institutions, military training camps and a global terror network. Using this system, he also managed to deceive the recruits through a systematic method to tempt them to go to Afghanistan, declaring that the fight in Afghanistan was but a stop for the next war in Chechnya. Many of them thought that they would fight in Chechnya, but they found themselves, in the end, in Bin Laden’s military camps. He managed to exploit their real motivations and thoughts, and recruited them for his universal terrorist agenda, including fighting the USA and creating the idea of universal Jihad.³⁷ For example, many of the hijackers involved in the September 11th attacks, beginning with Muhammad Atta, passing through the Hamburg cell and the two hijackers Ahmad and Said Al-Ghamdi, whose real motivation was to join Khattab³⁸ in his war against Russia in Chechnya, instead of being universal Jihadists.³⁹

1.3 Theory and Substance

This chapter now examines the theoretical and academic principles underpinning the concept of terrorism and the basis for the policy-oriented (New Haven) approach adopted in this research thesis.

In the conclusion to *Problems and Processes: International Law and How We Use it*, Higgins sums up her argument, as suggesting that “International law is a process, a system of authoritative decision-making. It is not just the neutral application of rules,” rather she writes, the challenges of international law cannot be “satisfactorily resolved by the invocation of the ‘correct rule.’” The problem exactly is that various, quite plausible, alternative prescriptions can

³⁶ ISN 682., Testimony of Detainees-CSRT,” 2073, and David Morgan, “Saudi Man Admits Enemy Role at Guantanamo Trial,” Reuters (27 April 2006).

³⁷ The 9/11 Commission Report, P.233; Sharon, C. ‘Generational Differences in Waging Jihad’, *Military Review*, Vol. 85, no. 4 (2005), P.84; “Testimony of Detainees-CSRT,” 1274, 2655, and Chris Gourlay and Jonathan Calvert, “Al-Qaeda Kingpin: I Trained 9/11 Hijackers,” Sunday Times, 25/11/2007.

³⁸ The Primary commander of Arab nationals in Chechnya.

³⁹ The 9/11 Commission Report, Pp.160, 165 and 233.

be and have been argued for. The role of International Law is to assist in the choice between those various alternatives.”⁴⁰ Higgins’ analysis of the difference between political decision-making and legal decision-making submits that when individuals use their strength or brute force to make decisions because they lack the requisite decision-making authority, such decisions will be categorized as political decision-making. When the individual making the decision does so because he has the legal mandate to make such a decision, the resultant outcome will be legal decision-making. Advocates of the policy-oriented approach postulate that international law is a process through which players continuously make authoritative decisions.⁴¹

Higgins was drawing on the research work of McDougal and Harold D. Lasswell who argued that the traditional rules-based approach to the study of international law is undermining scholars and practitioner’s ability to gain a clear appreciation of the essence of international law.⁴² McDougal and Lasswell argued that the rules-based approach was undermining scholars’ ability to appreciate how international law is an interconnected, dynamic, and universal process through which players working for different institutions and at varying levels in the community make authoritative decisions with the objective of finding permanent solutions to the challenging policies and conflicts that affect the world.

These decision-making methods and practices have become the core considerations in analysing the effectiveness of the policy-oriented model. Thus, proponents of the policy-oriented approach argue that it focuses on the process of authoritative decision-making rather than on the simplistic application of the laws that govern state conduct in the international

⁴⁰ Higgins, *supra* n. 11, P. 267.

⁴¹ Lindblom, A. *‘Non-governmental organisations in international law’* (Cambridge: Cambridge University Press), (2005), p. 32.

⁴² Harold D. L. and Myres S. m. *‘Jurisprudence for a Free Society: Studies in Law, Science and Policy’* (New Haven press, Martins Nijhoff Publishers), Vol. 7 (1992).

arena.⁴³ The approach breaks down the controversies and links them to the authoritative decision-making processes and it is this link that eventually leads to the resolution of the controversies.

1.3.1 Policy-Orientated Approaches to International Law

The policy-oriented approach or the New Haven School conceives the law as a component of the entire social process of decision-making. The conception of the law as an empirical, well-defined decision-making process within society differentiates the theory from the traditional approaches that views the law as static body of commands that are politically inferior. Legal decisions such as treaties, statutes, regulations and court decisions have three inherent characteristics. These include a message's *policy content*, which includes express or implied injunction, communicator's *authority* and *control intent* of the sent message. An individual generates their authority to make legal decisions from the expectations of the community members' belief that they will be the originators of such decisions. The idea relates to Hurt's rule of recognition of norms generated from the social conventions and practices in a given society. Decisions can only be authoritative when they emanate from individuals the society has given mandate to make them, thus the conception of law as a social process is empirical rather than a normative issue. Besides authority, control intent is also a crucial element that characterises legal decisions, separating them from non-legal decisions in any given society. In this area, the positivists' threat of enforcing sanctions often comes to mind against sovereign actors. However, inducement to comply with legal decisions is an alternative

⁴³ Hoof, G. 'Rethinking the sources of international law' (New York: Brill Archive), (1983), p. 40. See also: Jurgielewicz, L. 'Global environmental change and international law' (New York: University Press of America), (1996), P. 27; Aspremont, J. 'Participants in the international legal system' (New York: Taylor and Francis), (2011), P. 77; Weiler, T. & Baetens, F. 'New directions in international economic law: In memoriam Thomas Walde' (London: Martinus Nijhoff, 2011), P. 416; Cheng, T. 'When international law works: Realistic idealism after 9/11' (New York: Oxford University Press, 2012), P. 50; Wolfe, W. 'Winning the war of words: Selling the war on terror from Afghanistan to Iraq' (New York: ABC-CLIO, 2008), P. ix; Orakhelashvili, A. 'Research handbook on the theory and history of international law' (New York: Edward Elgar Publishing, 2011), P. 337.

strategy to achieve law intent, which involves connecting benefits to compliance to a law-message to promote adherence.

The limitations of the realist theories led to the formulation of the New Haven School of Jurisprudence, which provides more comprehensive strategies for addressing societal problems through application of a disciplined task sequence to find solutions to them. The solution finding sequence entails analysis of the diverse parameters the law seeks to address, reviewing the conflicting claims and interests, analysing similar previous legal determinations and using the findings to predict the future and inventing alternative course of action before recommending better solutions that align with good order.⁴⁴ The framework's initial four steps are analytical while the final one is evaluative and prescriptive. It shows that stakeholders must start by conducting precise diagnosis of the problem before presenting most suitable prescription.

Problems relating to the global order such as the adverse implications of climate change and global warming also share exclusive relationships to the local problems such as traffic regulation in the Kingdom of Saudi Arabia. Analysis of these issues require understanding of all the relevant disciplines to enable adequate grasp of their implications. The policy-oriented approach suggests the need to identify conflicting claims, including the involved parties, the basis of the conflicts and each side's perspectives. Law is instrumental in resolving conflicts within society; thus, knowledge of the players and their spaces is crucial. For instance, any attempt to improve the United States healthcare system and infrastructure by the Congress is likely to result into emergence of powerful lobbyists from various industries including pharmaceutical, doctors and health insurance providers. Similarly, the policy-oriented approach unearths all the contentious issues, involved parties and their perspectives to the

⁴⁴ Wiessner, S. 'The New Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping the Law', *Asia Pacific Law Review*, (2010), 18 (1), pp.45-61.

various stakeholders including the public. It believes that the foundation of getting the most suitable solutions in the public interest is comprehensive and careful analysis of issues affecting the decision makers.

Besides, the third stage of the policy-oriented approach deals with the review of the past trends. It involves evaluation of the previous decisions rendered by the legal system in response to the conflicting claims, taking into consideration the conditioning factors. The phase deals with analysis of all legal decisions within the community under review. While the traditional approaches focused on neutral interpretation of the most recent valid text, the policy-oriented theory arranges all previous decisions in a chronological order to assist with easy identification and analysis of differences across periods. Therefore, this also entails analysis of the decision makers backgrounds to identify the predispositional factors of their determinations such as environmental or issues related to time.

The New Haven School or the policy-oriented approach provides a contemporary methodological and theoretical jurisprudence for application in analysing public international law through the policy-oriented approach. The perspective emanated at Yale Law School faculty in the middle-20th century, proposing international law to be the jurisprudence for social choices, applicable in the analysis of various decision-making processes. Besides, the New Haven School seeks reinforces understanding of the international law as a social process intending to craft minimal global public order on the basis of shared values and responsibilities. The foundation of New Haven School drew inspiration from legal realism tradition and sociological jurisprudence. It primarily focuses on values, social diversity and applicability to diverse areas and issues. Despite the numerous criticisms against this approach, it retains enduring attractiveness as it efficiently and flexibly addresses a broad range of policy issues.

Professors Myres Smith McDougal and Harold Lasswell are credited with the development of the New Haven School. During this period, McDougal had received formal legal history training from classics and Oxford. Similarly, Lasswell was already a renowned 21st century political and social scientists when he met McDougal. The two accomplished experts created a jurisprudential school at Yale University, which adapted social sciences' analytical techniques to the legal prescriptive purposes. The approach deploys several methods to design tools for transforming the civic and public order with the intent of enhancing approximation of human dignity objectives it hypothesizes. The New Haven School perceives law as an authoritative decision-making process that illuminates both predispositional and environmental conditioning factors while appraising decision trends for cohesion with specified objectives. Moreover, the approach offers prediction on potential alternative future decisions alongside their possible consequences, giving experts the essential conceptual tools for inventing and appraising competing decisions to determine the most appropriate courses of action.

The New Haven School is a principal contender against the positivism view, which considers international law to be a policy-oriented decision-making process that involves shared expectations based on common values. Therefore, the New Haven School arose to challenge the positivists' conception of international laws as a system of rules.⁴⁵ Besides, even though it considers the law to be involving policy choices like the legal realists, the New Haven School demonstrates that the international law does not limit its purview to low-conflict situations when dealing with international conflict resolution issues, a concept not considered among the legal realists. Therefore, the policy-oriented approach transcends past the realists into the problem-solving jurisprudence. As such, it challenges legal scholars to undertake

⁴⁵ Jurgielewicz, L. 'Global environmental change and international law: Prospects for progress in the legal order', *American Journal of International Law* (1996), 93 (2), Pp.469-469.

among other things; developing a comprehensive theory, jurisprudence and suitable methodology for conducting inquiry to enable distinction public orders on the basis of law or human dignity, and inventing and recommending authority structures for enforcing world public order.⁴⁶ Therefore, one can perceive the policy-oriented approach as a continuous process that develops the intelligence and appraisal tools for maintaining order within the global community.

The policy-oriented approach to international law can be traced back to 1953, when Myres McDougal delivered an address to students at The Hague Academy of International Law.⁴⁷ The objective of McDougal's address was to critique Hans Kelsen's normative approach to international law espoused in his treatise entitled *Legal Technique in International Law*.⁴⁸ McDougal argued that the role of the jurist within the context of international law is to act as a conscientious analyst of the policy commitments embodied within the procedures and rules of international law.⁴⁹ McDougal added that, in performing this role, the jurist underscores his/her position as the highly skilled specialist in the interpretation of the intimate workings of international law, rules and procedures.⁵⁰ McDougal pointed out that this role prohibits the responsible jurist from portraying him/herself merely as the skilled analyst of the logical interconnections between different legal principles.⁵¹

The policy-oriented or New Haven approach associated with international law is linked to inclusive critiques of political realism, as well as positivism, its capacity to raise critical questions and challenge established doctrines, while stressing the fundamental essential

⁴⁶ *Ibid.*

⁴⁷ The same lecture series that Rosalyn Higgins was to deliver in 1992 and that formed the basis for her book *Problems and Process*.

⁴⁸ Cantegreil, J. 'Legal formalism meets policy-oriented jurisprudence: A more European approach to frame the war on terror', *Maine Law Review*, (2008), 60 (1), P. 98.

⁴⁹ McDougal, M. 'Law as a process of decision: A policy-oriented approach to legal study', *Natural Law Forum* (1956), no. 1 P. 54.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

linkages between law and policy.⁵² According to Professor Neil Duxbury, this approach elaborates the claims of policy science within international law.⁵³ The New Haven school seeks to oppose legal positivism and formalism in global international law therein. This approach is committed to human dignity goals and maintenance and establishment of a world public order, emphasizing the role of international law in edification of grave matters of public law globally.⁵⁴ A close collaboration between McDougall and Lasswell, two Yale professors, served to establish this school of thought within the framework of public international law. A novel policy-oriented approach has also emerged with respect to adaptation to the contemporary era by focusing on interdisciplinary studies.⁵⁵ The original framework has been accorded the status of a Cold War product and a defense of actions of advanced capitalist Western nations.⁵⁶ Professor B.S. Chimni argues this context is no longer relevant in contemporary times, when the rivalry between the capitalist and the socialist blocs has not been revived.⁵⁷ The original policy-oriented approach does, however, offer a comprehensive perspective accompanied by epistemological and ontological premises and contentions.⁵⁸

This approach takes five logics into account namely logics of capital, territory, nature, culture, and law.⁵⁹ The New Haven school continues to be relevant for present policy science as it shows a vitality of vision and method. However, Professor Chimni still alludes to the close of the Cold War as a means of articulating a jurisprudence breaking away from traditional understanding and notions revolving around human dignity propounded by McDougal and Lasswell.⁶⁰

⁵² B. S. Chimni, *International Law and World Order* (2nd ed) (Cambridge University Press 2017), P. 104.

⁵³ Duxbury N. 'Patterns of American Jurisprudence' (Clarendon Press, 1995), P. 203.

⁵⁴ *Supra* no. 51 at P. 104

⁵⁵ *Ibid*, P. 107.

⁵⁶ *Ibid*, P. 108.

⁵⁷ *Ibid*, P. 109.

⁵⁸ *Ibid*.

⁵⁹ *Ibid*.

⁶⁰ *Ibid*.

Therefore, while Professor Chimni argues for the need to place this policy-oriented approach within the context of a new framework, suited to the contemporary context, he does credit the school as being a critical perspective, although in need of reformulation on account of its excessive emphasis on global dynamics predicted on the Cold War. The policy-oriented approach also articulates the response to key issues and considers alternative approaches to international law. Just as the original school of thought focused on a critique of classical realism by McDougal based on six criteria, the present approach needs to be reformulated in light of current contemporary influences.

The original policy-oriented approach focused on a critique of political realism, as working based on untested assumptions, overly focused on actors and ignoring other international relations players, such as non-state actors that shaped the legal and social process.⁶¹ Classical realism also misperceived the growing interdependencies between people thereby making nationalism a moot point in the debate on policy science, according to McDougal.⁶² Classical realism was also confined to law and rules and the sanction of force. In contrast, the New Haven school described legal processes inclusively while considering the global legal order in secondary terms. The perspective calls for a greater role of international morality in the field of international relations. Its excessive focus on the Western world, however, is considered a point of criticism regarding the New Haven school by some legal scholars.⁶³

Additionally, the New Haven school also criticized a positivist approach to international legal systems, in that the policy-oriented approach based its rule skepticism on American legal realism in a pragmatic sense and emphasized law should be a means, not an end. Secondly, the New Haven school has also viewed indeterminacy as a pervasive feature of

⁶¹ *Ibid* P. 112.

⁶² *Ibid*.

⁶³ *Ibid* P. 113.

the rule and that the conceptualization of law through rules hold meaning, when viewed through the prism of semantic, syntactic or communication theories.⁶⁴

Such a dual source of rule skepticism led to the conclusion intellectualism of jurisprudence should not be limited to meaning or application of rules, but the postulation of policy goals for international decision-making processes.⁶⁵ In this sense, the policy-oriented approach exceeded the boundaries of legal realism characteristic of American law. American legal realisms served as a basis of highlighting the deficits of positivism, for McDougal.⁶⁶

Revolting against formalism, McDougal critiqued positivism strictly through the New Haven perspective, emphasizing the social context of rule generation or social and political contextual factors regarding specific application instances.⁶⁷ From the prism of a policy-oriented approach, positivism remained fixated on past dynamics, rather than focusing on the future. Ironically, the very criticism of the original New Haven approach on grounds of ignoring contemporary contextual factors stands out in contrast to McDougal's attempt to address weaknesses of positivist perspectives by proposing a multimethod, contextual and problem-oriented jurisprudence.⁶⁸

The New Haven School also analyses and interprets international law through the power and political perspectives. Proponents of this school of thought consider policy to be the basis of politics and decision-making to be the foundation of power. Therefore, they perceive international law to constitute a flow of decisions that assists in the formulation, application and invalidation of community prescriptions. Besides, they regard international law to entail a complex and comprehensive decision-making process instead of established, fixed rules. While

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, P. 114.

⁶⁷ *Ibid.*, P. 115.

⁶⁸ *Ibid.*, P. 117.

enforcing world public order, the policy-oriented approach majors on value-dependent policies and other factors that aid in decision-making. The theory concerns itself with behavioral and sociological issues while ignoring issues relating to the contents and validity of international law. McDougal and other founding experts sought to reduce the significance of rules of law, maintaining that the concept of international law does not account for most of the issues affecting the contemporary global society. The founders converged that policy is law, formulated through a similar process used in establishing and enforcing laws. Policy-oriented approach exponents consider international law as the expression of a state's foreign policy. As such, the validity of international law is dependent on a nation's foreign policy and the positions and decisions of the individuals and institutions tasked with formulating and controlling national foreign policy.

1.3.2 Rosalyn Higgins Perspective on the Policy-Oriented Approach

Although the foregoing discussions have portrayed the policy-oriented approach as a single coherent perspective on international law, the reality of the matter is that each of the leading scholars within the New Haven School has his or her application of the approach. Rosalyn Higgins is one such scholar, who has developed a unique style of applying the policy-oriented approach. Her published work from the 1960's onwards engaged with critical issues of international law and the emergence of the United Nations' role within it. *Problems and Process: International Law and How We Use It* provides an overview of her contribution just before she was elected a judge of the International Court of Justice. In the introductory chapter of the work Higgins highlights the notion that international law is a series of norms that govern conduct between different states. Higgins argues that the conceptualization of international law as a series of authoritative decisions makes it easier for scholars and practitioners to assess how

international law copes with and contributes to a constantly changing international political environment.⁶⁹

Higgins argues that international law is not just a set of rules; it is a process that must involve a consideration of the principles that underlie any legal provision.⁷⁰ Furthermore, the process must include the capacity to respond to the ever-changing needs of society. Higgins believes that the design of international law has the capacity to solve all problems.⁷¹ Thus, this view of international law creates the impression that Higgins views it as a self-contained system that does not mandate the enactment of a new set of legislation whenever challenges arise. Instead, international law has its own operational system that relies on established values and outcomes to reduce challenges. This is an approach more focused on outcomes versus adherence to strict rules.

Higgins disagrees with those who are reliant on the rules-based approach to international law, which views international law as being effective when states apply existing rules impartially, and that there exists an entity or state that punishes the states that ignore or violate the rules.⁷² Higgins argues that such a view of international law ignores the necessity to interpret and apply the sources of law within the culture of international relations.⁷³ This process of means that the determination of international law cannot merely be following rules. The existing rules should only be viewed as an important component of the international law function and not the only component of international law.

She, therefore, proposes an approach in which she argues that international law is the continuous authoritative decision-making process in which decision-makers have additional

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid.*

⁷³ *Ibid.*

roles that enhance their capacity to handle international law challenges.⁷⁴ Higgins argues that when these decision-makers are making their determinations, they are not making or formulating any new international law rules. Instead, they are trying to choose between competing claims that have a certain degree of legal validity. It is this concept of choices that forms the core component of Higgins' perspective on the process-based approach to international law. Higgins sees the key role of the decision-maker as seeking to ground choices on values that should govern international society.

Further, Higgins attempts to distance herself from the rules-based approach, by highlighting the need for the decision-maker to realize the differences between competing or complementary rules in certain circumstances.⁷⁵ Higgins assesses this necessity from the perspective of competing norms that relate to the achievement of justice. She argues that the achievement of justice in international law rests on the decision-maker's ability to identify and apply the objectives that will deliver justice in each circumstance.⁷⁶ Higgins stresses the importance of the decision-maker realizing that justice is a process that takes the political and social context of the issue under discussion into consideration.⁷⁷ The essence of her argument is also that the policy-oriented approach is the most effective method for the analysis of international law because it outlines a process that seeks to resolve international law challenges by affording decision-makers a range of viable solutions that are consistent with their objectives and values.⁷⁸

In the subsequent sections of her work, Higgins provides specific examples regarding the application of her arguments. This is vital because it provides the audience with tangible results from her arguments that can help improve social outcomes. For example, she addresses

⁷⁴ *Ibid*, P. 4.

⁷⁵ *Ibid*, P. 9.

⁷⁶ *Ibid*.

⁷⁷ *Ibid*.

⁷⁸ *Ibid*, P. 10.

the role of the law on the concept of apostasy under Islamic law and its relationship with international law.⁷⁹ While there is some degree of interpretation needed to address the situation, it is better to take a policy-based stance rather than organizing a legislative response on an international scale. The concept of apostasy denotes the practice in certain states in the Middle East that recommend death for Muslims who renounce their faith. In this analysis, Higgins argues that many international law scholars have used the concept of apostasy under Islamic law to argue that international human rights laws do not apply to all countries.⁸⁰ In particular, they argue that differences between the application of international human rights laws in the West and in the Middle East underscore the fact that international human rights laws are weak in so far as they do not apply to all states.⁸¹ Higgins, however, holds a different view by arguing that an analysis of the effectiveness of international law does not rest on an analysis of practices that violate international law and the consequences for those violations. This analysis rests on the general practice of states that are party to a particular instrument.

Higgins demonstrates that wrongful social policies can remain protected under the rules-based approach. For example, the general practice of apostasy in the Middle Eastern states can be defended and protected under rules-based legal systems. Conversely, policy-based systems easily determine the wrong in such a set of laws such as apostasy. In fact, Higgins analyses the historicity behind each of the challenged conventions and argues that the states which participated in the formulation of the conventions were from diverse religious and cultural backgrounds.⁸² Of the represented states were nations from the Middle East where Islam is the predominant religion and citizens practice the Islamic culture.⁸³

⁷⁹ *Ibid*, P. 98.

⁸⁰ *Ibid*.

⁸¹ *Ibid*.

⁸² *Ibid*.

⁸³ *Ibid*.

Higgins provides further illustrations of the application of her policy-oriented perspective in Chapter 8 of her work. In Chapter 8, *Natural Resources and International Norms*, Higgins conducts an analysis of the concept of expropriation from the perspective of the policy-oriented approach. Higgins argues that when a foreign investor sets up an oil exploration investment in a developing country, the investor always faces the risk that that investment may be expropriated through the process of nationalization.⁸⁴ Such cases of expropriation have occurred in many countries, including Libya, Iran, and Venezuela. Higgins, therefore, wonders how an investor facing the real risk of expropriation can protect his investment in a manner that permits him to maintain his earnings and enjoy significant returns on his investments.⁸⁵ Higgins concludes that there is no way, under international law, that the investor can protect himself against the possibility of expropriation.⁸⁶ Higgins contends that there is no law under international law that permits developed states to intervene on behalf of their corporations and invade the offending country. Such a move would violate the concept of state sovereignty, which is one of the cornerstones of the international legal order. Higgins argues that the most probable course of action for the investor would be to seek compensation equivalent to the capital and the earnings anticipated from the oil resources. Nonetheless, she points out that even seeking compensation would be difficult because there would be no means of compelling the infringing state to pay the compensation awarded. Thus, Higgins concludes that because international law recognizes and respects state sovereignty, the unlawful nature of the expropriation will have no consequence on its status and, as such, the investor's right to seek compensation merely becomes a right that does not confer any remedy. Consequently, the right

⁸⁴ *Ibid.*, p. 139.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

to property will become meaningless because none of the states will be willing to enforce the law.⁸⁷

1.3.3 Application of Higgins' Approach to the Present Research Paper

Higgins closely follows the precepts of McDougal, relying on his principal definitions of authority and conceptions of power and control. For instance, she utilizes McDougal's definition of authority as expectation of appropriateness, which supposes appropriate endowment of personnel with decision-making capabilities. Higgins believes that decision-making is only binding within the legal cycles when it emanates from authorised organs or individuals, within appropriate forums and framework of recognised norms and practices.⁸⁸ Higgins' definition of custom unveils her theory of law. She claims that considering the constant changes that characterise decision trends and rules, the violation of international laws signifies rules to be dependent on power. Furthermore, she buttresses her theoretical underpinnings on the ideas of McDougal and Reisman who stress a more pronounced behaviourist perception that authorities are a set of conditioned subjectivities who indicate appropriate behaviors when tripped by external forces.⁸⁹ Authority determines human behavior through providing a clear course of action that excites internal tension.

Therefore, the present study will follow Higgins' lead and examine Saudi Arabia's counter-terrorism strategy and the UNSC Resolution 1373 (2001). Analysing Saudi Arabia's counter-terrorism strategy will enable the researcher to assess the policy considerations that led to the development of that strategy. Similarly, breaking down UNSC Resolution 1373 will enhance the researcher's capacity to analyse the range of choices that are available to the Saudi Arabian government and the UN Security Council. It will enhance the researcher's ability to

⁸⁷ *Ibid.*

⁸⁸ Carty, A. 'Theory of /or Theory instead of/ International Law' *European Journal of International Law*, (1997), 8 (1), Pp.181-191.

⁸⁹ *Ibid.*

sort out the policy considerations that informed the Security Council's decision to adopt the resolution. The task of disentangling Saudi Arabia's counter-terrorism strategy and UNSC Resolution 1373 will also enhance the researcher's capacity to assess the legality of the two decisions. This approach will eventually lead the researcher to determine how Saudi Arabia's counter-terrorism strategy aligns with UNSC Resolution 1373. However, it should be noted here that the policy-oriented approach as viewed by Higgins assumes a liberal world order, which means that the meta-legal process that Higgins envisions has concrete values that would not necessarily fit well with the view of world order from Saudi Arabia - or perhaps Islamic values in general. Such discontinuities will show difficulties in negotiating the relationship between international law and national legal systems. Therefore, it is important to emphasize the compatibility challenges that arise between the demands of UNSC Resolution 1373 and the Islamic values.

1.4 Challenges and Difficulties in Defining Terrorism

In light of the foregoing examination of the approaches of international law vis-a-vis Higgins and other scholars, this thesis now discusses the challenges and difficulties in defining terrorism. Terrorism has proved to be one of the most challenging and difficult concepts in the field of social sciences, particularly in terms of arriving at a global consensus on its definition. According to erudite academic and erstwhile ICJ judge, Rosalyn Higgins, in her book *Terrorism and International Law* (1997): "Terrorism is without legal significance. It is merely a convenient way of alluding to activities, whether of States or individuals, widely disapproved of and in which either the methods used are unlawful, or the targets protected, or both".⁹⁰ Higgins submits that there is no international law of terrorism and there is no international law about terrorism. Higgins opined that States cannot but use pre-existing institutional

⁹⁰ Higgins. R, & Flory. M. '*Terrorism and International Law*' (Routledge, London, 1997), P. 28.

mechanisms in international law in dealing with terrorism at the national level. Higgins submits that “terrorism is a pernicious contemporary phenomenon that had caused complicated legal problems at the national level, leaving States to take a pragmatic approach in dealing with the elephant in the house orchestrated by terrorism. Higgins submits that there is no universal jurisdiction as a specific principle adopted by the United Nations for dealing specifically with terrorism save for the universal jurisdiction which a national government exercises when dealing with any other acts such as war crimes or crimes against humanity.

On the other hand, the motives of terrorist organizations are another area that is disputed. As captured in the popular phrase “one person’s terrorist is another’s freedom fighter”, violent acts intended to secure freedom from a political entity can be branded as terrorism because the violent group targets a state as a strategy to attain its political freedom as evident in many cases of ethnic terrorism. However, from the opposite perspective, although such groups are in pursuit of political aims, such as attaining freedom, their actions are labelled unlawful, violent terrorism. On the other hand, some terrorist organizations or political groups have consistently accused states of being the actual terrorists, terrorizing populations in countries that they economically or physically destroyed. Randall Law notes that the main problem is that policy analysts, scholars, and laypersons alike often use the word terrorism in a mutually exclusive manner. On one hand, the word terrorism is used normatively, as a moral judgment against acts of violence that are inherently wrong. On the other hand, people imagine that they use the word terrorism analytically, as an objective descriptor. He notes that our human understanding of terrorism is entrenched in a moral revulsion and emotional reaction.⁹¹ Additional examples of conflicting criterion in defining terrorism are analysed in subsequent

⁹¹ Randall D. ‘*Law, Terrorism: A History*’ (Cambridge: Polity Press, 2009), P.2.

sections where a selection of criteria will be identified and applied to the debate regarding the existence of terrorists and the aims of terrorists.

From a basic dictionary perspective, terrorism is explained as the “systematic use of intimidation and violence” to attain political or some other goals.⁹² Related to this, the Oxford Learner’s Dictionary defines it as “the use of violent action in order to attain political aims or to force a government to act.”⁹³ Bruce Hoffman contends that nearly every abhorrent act of violence perceived to be directed against society, whether it entails the activities of anti-government dissidents or governments themselves, organized-crime syndicates, common criminals, rioting mobs, people engaged in militant protest, individual psychotics, or lone extortionists-is often dubbed “terrorism.”⁹⁴ The use of the word “terrorism” is often regarded negatively, particularly after the Second World War. Before then, particularly among the Russian anarchists of 19th century, the word “terrorist” was used to indicate righteousness of cause to demonstrate their aims and tactics. David Rapoport maintains that the Russian rebels identified themselves as terrorists, as opposed to guerrillas, tracing their origin to the “Reign of Terror” following the French Revolution.⁹⁵ As Hoffman contends, the word terrorism had a definite positive connotation during the French Revolution unlike its modern usage. In his book, Hoffman argues that the meaning of terrorism has changed several times between the late 19th century and today. He argues that terrorism gained different connotations depending on the political environment and context in which it happened. In fact, terrorism as a concept is subject to different perceptions particularly in line with the cultural and political environment of the period.⁹⁶ The dynamic and changing nature of terrorism is one of the factors that explains

⁹² Collins Cobuild English Dictionary s.v. “Terrorism,” accessed August 12, 2016.

⁹³ Oxford Learner’s Dictionary s.v. “Terrorism,” accessed August 12, 2016, <http://www.oxforddictionaries.com/definition/learner/terrorism>.

⁹⁴ Hoffman, B. *‘Inside Terrorism’* (Columbia University Press, 2007), P.1.

⁹⁵ Rapoport, D. ‘The four waves of modern terror: International dimensions and consequences’, ResearchGate, (2013). Also see, Cronin, A. and Ludes, J. *‘Attacking Terrorism: Elements of a Grand Strategy’* (Georgetown University Press, 2004), P. 51.

⁹⁶ Hoffman, *supra* n. 94, Pp. 9-19.

why there is still no single agreed definition of terrorism. Enhancements in communication, media, and propaganda coupled with industrialization have allowed the masses to challenge the existing political structures across the globe. This has led to numerous revolutions, national self-determination struggles, and anti-colonial movements. Similar to these changes, terrorism has evolved to become more efficient and dynamic as the world becomes smaller. Anthony Richards contends that the failure to develop a common definition of terrorism has left a vacuum for actors, whether non-state or state, to define terrorism in ways that suit their own perceived strategic and political interests, and, in the case of state responses, “counter-terrorism” remits are often determined accordingly.⁹⁷ In support of this argument, the U.S. “Global War on Terrorism,” for instance, has been subject to numerous debates across the globe with its implications for South Asia and the Middle East. Furthermore, failure to reach a consensus on a commonly agreed definition of terrorism has also prevented the development of international agreements against terrorism.⁹⁸ In the next section, the elements used in defining terrorism will be examined in addition to the numerous definitions of terrorism in the academic literature. The objective is to determine the most appropriate definition of terrorism that will be used in this thesis.

1.4.1 Problems in Defining Terrorism in International Law

One of the most significant problems in international relations that has not yet been solved is the definition of terrorism in line with the principles of international law. The UN Office on Drugs and Crime paper clarifying frequently asked questions relating to countering terrorism and international law notes that “there is no international crime of ‘terrorism’ in the sense of a *delicta juris gentium* and terrorism as such is neither a war crime nor a crime against humanity. One reason for this is the fact that there is, as yet, no general international agreement

⁹⁷ Richards A. ‘Conceptualizing Terrorism’, *Studies in Conflict & Terrorism* 37, no. 3 (2014), P. 214.

⁹⁸ Ganor, B. ‘Defining Terrorism: Is One Man's Terrorist another Man's Freedom Fighter?’ *Police Practice and Research* 3, no. 4 (2002), P. 300.

on a definition of terrorism.”⁹⁹ Certainly, efforts to develop an internationally agreed definition of terrorism have so far yielded little success. Because of the difficulties in reaching an internationally agreed definition of terrorism, the approach adopted in international law has been to bypass a comprehensive and direct definition of terrorism. This inductive approach has resulted in laws that specifically address terrorism to exist in the broader framework of international law including international criminal law, humanitarian law, refugee law and human rights law.¹⁰⁰ Under this approach, international legal scholars have not attempted to define terrorism as a general concept, rather, they have attempted to define specific events such as the taking of hostages, hijackings, bombings, and so on.¹⁰¹ However, this approach has led to the formulation of various conventions on the prevention of terrorism with respect to the various aspects of the phenomenon. Furthermore, the approach inescapably disregards the intent of the terrorist activities and is rather focused on the impact of terrorist attacks.

In contrast to the inductive approach, however, attempts to make use of a comprehensive, all-inclusive approach took place during the 1999 International Convention for the Suppression of the Financing of Terrorism.¹⁰² In Article 2 of the International Convention for the Suppression of the Financing of Terrorism, terrorism is defined as “Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.”¹⁰³ The UN Security Council

⁹⁹ United Nations Office on Drugs and Crime, *Frequently Asked Questions on International Law Aspects of Countering Terrorism*, New York: United Nations, (2009), 41.

¹⁰⁰ United Nations Office on Drugs and Crime, *Frequently Asked Questions on International Law Aspects of Countering Terrorism*, New York: United Nations, (2009), 1.

¹⁰¹ Sözübir, U. ‘Conceptualizing the Definition of Terrorism in Light of the Developments in the Fields of Academics, History and Legislation’, *İhsan Doğramacı Bilkent University*, (2005), P. 22.

¹⁰² *Ibid.*

¹⁰³ General Assembly of the United Nations, Resolution 54/109, “International Convention for the Suppression of the Financing of Terrorism,” December 9, 1999, Available at: <http://www.un.org/law/cod/finterr.htm>.

Resolution 1373 that was adopted on 28 September 2001 denounces the September 11 attacks and requires member countries to take measures to fight terrorism.¹⁰⁴ Nonetheless, UNSC Resolution 1373 does not offer a clear definition of terrorism. Instead, the resolution provides the principles by which member countries shall fight terrorism. The European Union provides yet another broad definition of terrorism. Article 1 of the EU's Framework Decision on Combating Terrorism in 2002 defines terrorism as "Offences under national law, which, given their nature or context, may seriously damage a country or an international organization where committed with the aim of seriously intimidating a population, or unduly compelling a government or international organization to perform or abstain from performing any act, or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization."¹⁰⁵

The two different definitions by two international organizations highlight the difficulties in having one universal definition of terrorism. The UNSC and the European Union have adopted two completely different paths in defining terrorism in order to prevent it. The UNSC's inductive approach permits member countries to reach a written agreement on the acts of terrorism by identifying criminal activities conducted by terrorist groups.¹⁰⁶ On one hand, a single and comprehensive definition of terrorism poses the risk of labelling individuals or other immaterial acts of crime as terrorism because the definitions provided have a wider range.

Another difficulty relates to the type of actors involved. Whereas the major global powers maintain that terrorism crimes should be limited to private actors, excluding state actors from it, smaller powers maintain that state actors have to be included, while some of them want

¹⁰⁴ United Nations Security Council (SC), Resolution 1373, September 28, 2001, Available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/557/43/PDF/N0155743.pdf?OpenElement>.

¹⁰⁵ EU Council Framework Decision, 2002/475/JHA (combating terrorism), (June 13, 2002), 2.

¹⁰⁶ Sözübir, *supra* n. 101, P. 23.

“freedom fighters” to be excluded.¹⁰⁷ For some, terrorism is in the mind of the beholder, based on a person’s national origins and political views. However, for others, terrorism involves criminal acts, based on the laws of any civilized society.¹⁰⁸ The general acceptability of a particular definition of terrorism apparently depends on a particular homogeneity or ideological proximity.¹⁰⁹ Consequently, the failure to arrive at a precise and objective definition of terrorism has been a result of: (a) terrorism assumes different forms; even though it is often equated with political subversion, sometimes it is employed by governments, and it is utilized as a tool of syndicated crime; (b) the criteria used in defining terrorism is largely subjective, because it is primarily based on political considerations; (c) most importantly, terrorism is provoked by a broad range of motives depending on the prevailing ideology and time.¹¹⁰ The difficulty of finding an appropriate definition is that “the spread of terror can be applied downwards, but also upwards. On the one hand, particular groups can make use of terror in their efforts to influence governmental decisions and sometimes even to destroy the structure of the state. On the other hand, some governments spread fear downwards against their own citizens as a form of governance and a strategy to remain in power.”¹¹¹ The differing political perceptions and attitudes that a state adopts toward a particular “militant” or “terrorist” group, as dictated by the state’s own political priorities and compulsions, underscored the work of the United Nations in tackling international terrorism.¹¹² The issue of terrorism has always been linked to the calculations of realpolitik and alliances that are a major characteristic of the UN

¹⁰⁷ Abi-Saab, G. ‘The Proper Role of International Law in Combating Terrorism’, in Andrea Bianchi (ed), *Enforcing International Law Norms against Terrorism*, (Hart Publishing, Oregon, 2004).

¹⁰⁸ Friedlander, R. ‘terrorism’ in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Amsterdam, North Holland, Vol.9, (1986) (1st ed.), 373.

¹⁰⁹ Hafner, G. ‘The Definition of the Crime of Terrorism’, in Giuseppe N. (ed), *International Cooperation in Counter-terrorism: The United Nations and Regional Organizations in the Fight Against Terrorism* (Ashgate Publishing Limited, Aldershot, 2006), P. 36.

¹¹⁰ Elegab, O. ‘*International Law Documents Relating to Terrorism*’ (Routledge-Cavendish, London, 1997).

¹¹¹ Heere, W. P. ‘Terrorism and the Military: International Legal Implications’ (T.M.C., Asser Press, The Hague, 2003), P. 118.

¹¹² Perera, A, P., 567.

voting practice.¹¹³ When the issue of terrorism was taken up in the United Nations General Assembly, it was evident that an agreement on the general definition would not be possible.

Furthermore, the issue of whether the activities of the official forces of a particular state can be regarded as terrorist offenses has also created divisions among members of the international community, particularly between developing and developed countries. If one were to dig deep into the origins of terrorist activity to determine the objectives of the terrorists and why they resort to terrorist methods, the answer in most cases is likely to be some form of state authority and policy, legally enshrined in the sovereign power of the state in question. In most cases, governments are both the primary target of terrorist activity, but also the main actors in the process of enforcing rules against terrorism. This means that the terrorist quarrel is often one between governments and terrorist groups and starts as a reaction against government policy and proceeds as a government's reaction against the first terrorist reaction.¹¹⁴ Those who look at the issues from the point of view of the state view state violence as legal, however much terror it may bring in the minds of the population. Those who view matters from the perspective of state opponents see things differently. To them, the state is the terrorist that makes use of the military arsenal at its disposal to terrorize its people. Therefore, those opposing the state through violent means are viewed as freedom fighters.¹¹⁵ In the Middle East, Israel refers to Palestinians as terrorists and Palestinians accuse Israel of waging a war of terror. Furthermore, while the West expressly categorizes Al-Qa'idah as a terrorist group, many in the Muslim world view Al-Qa'idah and its leadership as freedom fighters involved in the work of liberating the Islamic world from a corrupt and immoral West.¹¹⁶ Three questions come

¹¹³ C.L. Lim, 43.

¹¹⁴ Harding, C. 'The Concept of Terrorism and Responses to Global Terrorism: Coming to Terms with the Empty Sky', in Paul E. and Therese O. September 11, 2001: A Turning Point in International and Domestic Law? (Transnational Publishers, Ardsley, 2005), P.168.

¹¹⁵ Dugard J. 'The Problem of Definition of Terrorism in International Law', in Paul E. and Therese O. (eds), September 11, 2001: A Turning Point in International Law? (Transnational Publishers, Ardsley, 2005) P.188.

¹¹⁶ *Ibid*, P.189.

to mind, firstly are Israeli Defense Forces involved in a legal military action or do its actions amount to state terror? Secondly, are Palestinian suicide bombers militant freedom fighters or terrorists? In addition, is the conflict governed by international criminal law or international humanitarian law?¹¹⁷ Given the actions of the Palestinian militants and Israeli Defense Forces, it is difficult to determine the potential author of terrorism.¹¹⁸ Such difficulties as to what actions constitute terrorism remain an obstacle in developing a universally accepted definition of terrorism.¹¹⁹

An additional problem that confronts scholars in defining terrorism is the fact that it is usually confused or equated with “guerrilla warfare” or “insurgency.”¹²⁰ Similarities in the tactics used by terrorists, insurgents, and guerrillas have made it difficult to determine which one is a terrorist act or a terrorist group. According to Hoffman, guerrillas tend to be larger in number and operate as a single military unit, and insurgents also share the same characteristics, but they often use hit and run tactics.¹²¹ According to Hoffman, what differentiates terrorists from guerrilla groups and insurgents is the fact that terrorists do not operate in the open as armed groups. In general, they do not try to seize or hold territory, intentionally avoid engaging enemy military units in combat, are constrained both logistically and numerically from implementing concerted mass political mobilization efforts, and lack direct control or governance over a population either at the local or national levels. Similarly, Ariel Merari argues that the primary difference between guerrilla groups and terrorist groups is that terrorists do not seek to establish physical control over a particular territory.¹²² With regard to territorial control, both Ariel Merari and Hoffman have a common point that terrorist organizations do not attempt to control a particular territory. However, this idea can be challenged in that there

¹¹⁷ *Ibid*, P.199.

¹¹⁸ Harding, *supra* n. 114, P. 168.

¹¹⁹ Duffy, H. ‘*The ‘War on Terror’ and the Framework of International Law*’ (Cambridge University Press, 2009).

¹²⁰ Hoffman, *supra* n. 94, P. 35.

¹²¹ *Ibid*, P.35.

¹²² Merari, A. ‘Terrorism as a Strategy of Insurgency’, *Terrorism and Political Violence*, Vol. 5, Issue 4 (2007), P.13.

are terrorist groups that currently claim control over particular territories in countries such as Iraq, Syria, and Libya. Following the uprisings and civil wars in the Arab World and North Africa, many terrorist groups such as the Islamic State, Jabhat Al-Nusra, and Ahrar Ash-Sham have taken control over different parts of Syria, Iraq, and Libya. As a result, some terrorist organizations pursue territorial control over particular territories. However, generally, terrorists differ from insurgents and guerrilla groups for the aforementioned reasons and the fact that the latter groups often target law enforcement and the military personnel of the target state as opposed to deliberately targeting civilian populations. It is important to note that the multidimensional interpretations of terrorism, have brought into existence a multitude of laws related to terrorism and counter-terrorism in various jurisdictions. In this consideration, it becomes difficult to criminalize the funding of terrorism, which in turn, acts as a major hindrance in the fight against terrorism.

1.4.2 Various Definitions of Terrorism in Academic Literature

Within the academic literature, there are many definitions of terrorism. However, the definitions vary from one scholar to another because of the complicated nature of terrorism. Terrorist groups across the globe have different tactics, aims, and structures by which to attain their goals. Consequently, their attacking practices and targets often differ from each other. Therefore, different academic definitions of terrorism exist based on the criterion used to define terrorism. State policies and political differences directly influence attempts to define terrorism. In some instances, some terrorism definitions may include several states to be branded as “terrorists” subject to their definition criteria. Additionally, James Lutz and Brenda Lutz contend that universally acceptable definitions are difficult to attain because some countries have tried to make sure that national liberation movements are not categorized as terrorism.¹²³

¹²³ Lutz and James. M, *Terrorism: Origins and Evolution*, Palgrave Macmillan, (2005), P.6-7.

Furthermore, Bruce Hoffman observes that different agencies/departments of even the same government will often find themselves having conflicting definitions.¹²⁴

A significant problematic point in defining terrorism is considered the “normative” nature of the debate. Verena Erlenbusch reasons that dependence on everyday speech has introduced a moral judgment of terrorism as evil or wrong within academic discourse. This judgment has, therefore, become one of the core characteristics of terrorism and is developed into a definition whose apparent purpose is to serve as the foundation of philosophical moral assessment.¹²⁵ In her work, Erlenbusch criticizes the definition of terrorism noting that it is largely premised on objectionable terms proposed by daily speech, and this prevents scholars from developing an objective, clear definition of terrorism. Additionally, Adrian Guelke is also opposed to the normative nature of defining terrorism. Guelke criticizes the definition of terrorism by Alex P. Schmid over his use of the term “violence.” Certainly, violence is an important term in terrorism studies because the identity of the perpetrator(s) of violence is important in describing whether it is a terrorist attack or a case of legitimate use of force. Guelke notes that characterizing an action as violent also often involves disapproval and suggests that it is illegitimate.¹²⁶ Guelke opines that “violence” is linked to illegitimacy, while “force” is a representation of legitimacy. Consequently, according to Guelke, any definition of terrorism that makes use of the term “violence” equally carries that normative presumption with it.¹²⁷ Both the ideas by Erlenbusch and Guelke are important in understanding why some sections of society define terrorism in ways that are entirely different from others. In fact, in some societies, terrorists are regarded as “freedom fighters.” A normative approach toward terrorism directly influences definitional struggles in terms of defining and creating enemies

¹²⁴ Hoffman, *supra* n. 94, P.30

¹²⁵ Erlenbusch, V, How (Not) to Study Terrorism, *Critical Review of International Social and Political Philosophy* 17, no.4 (2014), 472.

¹²⁶ Guelke, A, *The New Age of Terrorism and the International Political System*, Tauris Academic Studies, (2009), P.20.

¹²⁷ *Ibid*, p. 20.

and labelling liberation movements or opposition as terrorists. This trend has gone a notch higher in some countries where any form of dissident, including professional journalists, have been dubbed terrorists and have been prosecuted under terror laws.

1.4.3 Efforts to Develop a Scholarly Definition of Terrorism

Brenda Schultz and James Lutz combined the different works of scholars such as Bruce Hoffman, Martha Crenshaw, and David Claridge and developed a working definition of terrorism as follows: “Terrorism entails political motives and aims. It is either violent or threatens violence. It is designed in a manner that generates fear in a target audience and goes beyond the immediate victims of the violence. The violence is perpetrated by an identifiable organization. The violence entails non-state actor/actors either as the perpetrator of the violence or the victim or both. Finally, the violent acts are designed in a manner that they create power in situations where power had been lacking previously (the violence tries to improve the power base of the organization performing the actions).¹²⁸ The most outstanding feature about this definition is that it does not incorporate the word “civilian” compared with other definitions.

Bruce Hoffman opines that “terrorism is particularly designed to have extensive psychological effects that transcend beyond the immediate terror victims or object of the terrorist attack. It is meant to create fear within, and as a result intimidate a broader target audience, which may include a whole country, a political party or national government, a rival religious group, or public opinion in general. Terrorism is intended to create power where none exists or to consolidate power where the existing power is very little. Through the publicity that their violence generates, terrorist organizations seek to secure the influence, leverage, and

¹²⁸ James and Lutz, B, Global Terrorism, P.9.

power they otherwise do not have to bring out political change either at the local level or at an international scale.”¹²⁹

Carsten Bockstette offers another definition that places more emphasis on the type of victims that terrorists select. He defines terrorism as a political violence in an asymmetrical conflict intended to induce psychic fear and terror through violent destruction and victimization of non-combatant targets. Such actions are meant to pass a message from an illicit clandestine organization. The objective of terrorism is to exploit the media in order to attain maximum possible publicity and consequently, influence the targeted audience in order to achieve short-term and mid-term political goals and/or long-term end states.¹³⁰ This definition has three important differences. Firstly, it labels “non-combatants” as terrorism targets. Secondly, terrorist groups are defined as “clandestine” and “illicit.” Finally, the definition suggests that the aim of terrorism is to attract the attention of the media, enhance publicity, and attain short-term and medium-term political goals and/or desirable long-term gains and objectives.

1.4.4 The Definition Adopted for the Thesis

As is evident from the above definitions of terrorism, there are as many definitions of terrorism as scholars on the subject. Other than the definitions studied so far, a different definition of terrorism will be applied in this thesis in order to critically evaluate Saudi Arabia’s counter-terrorism strategy in light of Resolution 1373 of the UNSC. The United Nations Security Council Resolution 1373 will be analysed within the purview of UNSC Resolution 1566, to further help elucidate the processes and procedure the international community underwent, in order to provide a definitional guide on terrorism, and how member states of the UN should take steps or measures at the national level to counter terrorism.

¹²⁹ Hoffman, *supra* n. 94, 41.

¹³⁰ Bockstette, C. ‘*Jihadist Terrorist Use of Strategic Communication Management Techniques*’, George C. Marshall Center for European Security Studies 20, (2008), P. 8.

In 1972, the UN General Assembly set up a Terrorism Ad Hoc Committee to discuss the issue of terrorism. The UN Ad Hoc Committee on Terrorism was made up of 35 States. This Committee reported to the Assembly in 1973, 1977 and 1993 after they had met. In an effort to address the subject of terrorism, the Assembly continued to meet consistently every two years from 1981 to 1993 as well as 1994 to 2005. In all their meetings, the Assembly deliberated on the issue of terrorism. These resolutions were adopted without a vote and the General Assembly accepted that the fight against terrorism could be effectively intensified or improved by setting up a consensus definition of international terrorism. Another committee was set up in 1996 by the Assembly to address the subject of the definition of terrorism. The Sixth Committee of the Assembly was tasked with the responsibility of meeting annually to thrash out a definition of terrorism. The task of this working group of the Sixth Committee was truncated because of the proposal of the OIC. There was a watershed moment in the efforts to find a functional definition of terrorism. The breakthrough came in 2004 when the Security Council adopted a resolution on the definition of terrorism. This resolution was called Resolution 1566¹³¹ and was the only Resolution that proffered the meaning of terrorism. These two resolutions, that is, Resolutions 1373 and 1566, are quite different for all intents and purposes. At the commencement of its preamble, there was a reaffirmation of UNSC Resolution 1566 in UNSC Resolution 1373. Javier Ruperez submits that UNSC Resolution 1373 represented a major qualitative and quantitative advance in the new approach to terrorism that the United Nations sought to impose”.¹³² UNSC Resolution 1373 is binding on all member states, making it incumbent on member states to ratify and implement the provisions of the international instruments for countering terrorism. UNSC Resolution 1373 also imposes an extensive range of financial, legal and law enforcement cooperation measures. In fact, another

¹³¹ United Nations Security Council (SC), Resolution 1566, (October 8, 2004), Available at: <http://www.unrol.org/files/n0454282.pdf>.

¹³² See: https://www.un.org/sc/ctc/wp-content/uploads/2017/01/2006_03_10_cted_regsummit_en.pdf.

striking thing regarding UNSC Resolution 1373 is that of the establishment of the Counter-Terrorism Committee, comprising 15 members and entrusted with the responsibility of monitoring the compliance of the resolution. Javier Ruperez submits that in adopting UNSC Resolution 1373, the Security Council was entering a virtually new area of political and legal life by imposing and criminalizing terrorism, its perpetrators, accomplices and financiers. UNSC Resolution 1373 mandated member states to take measures against terrorism but was unable to define terrorism or the offences of terrorism it sought to prevent, while UNSC Resolution 1566 gave a proper definition of terrorism and the acts which constitute terrorism. In Paragraph 3 of UNSC Resolution 1566, the Council: “Recalls that criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from any acts, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are in no circumstance justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or any other similar nature...”¹³³ A working group was established under paragraph 9 and 10 and tasked ‘to consider and submit recommendations to the Council on practical measures to be imposed on individuals, groups or entities involved in or associated with terrorist activities, other than those designated by the Al-Qa’idah/Taliban Sanctions Committee...’. The working group was also tasked with the responsibility of considering “the

¹³³ See UNSC Resolution 1566 adopted on 8 October 2004. See also “The United Nations in the Fight Against Terrorism” written by Javier Ruperez (Executive Director Counter – Terrorism Committee Executive Directorate United Nations) stated that “International efforts to eliminate terrorism started year before the United Nations was established. He stated that Terrorism was of concern to the international community as early as 1937, when the League of Nations prepared a draft convention for the prevention and punishment of terrorism. The draft convention defined terrorism as: “All criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public”.

possibility of establishing an international fund to compensate victims of terrorist acts and their families”.

Furthermore, UNSC Resolution 1566 was similar to UNSC Resolution 1373 but provided a general description or plan of a definition of terrorism as well as condemning terrorism and any attempt to justify it.¹³⁴ Wondwossen Kassa¹³⁵ agrees that Paragraph 3 of UNSC Resolution 1566 represents the definition of the concept of terrorism. Kassa further asserted that Paragraph 3 of Resolution 1566 is not an attempt by the Security Council to give a new definition of terrorism.¹³⁶ Kassa further avers that the Security Council’s use of the verb ‘recalls’ is suggestive of the fact that Paragraph 3 alludes to a pre-existing definition of terrorism and not an attempt to provide a new definition of terrorism. Kassa went further to suggest that in both Resolutions, the Security Council espoused the definition of terrorism. Kassa opines that while there is a tacit adoption of Resolution 1373, there was an explicit endorsement of Resolution 1566 and by so doing, reiterating the definition of terrorism under Article 2 of the Suppression of Financing of Terrorism.¹³⁷

At the World Summit held in 2005, a further attempt was made to define terrorism, but this proved futile. A detailed, all-encompassing and comprehensive definition of terrorism was achieved with the convening of two crucial international conferences in 2005. One of the conferences was convened by Saudi Arabia. It was a special counter-terrorism international conference held in Riyadh in February 2005. Another conference, the International Summit on

¹³⁴ See also Resolution 1624 was adopted unanimously on 14 September 2005 at the World Summit following the terrorist attacks of 7 July and 21 July 2005 on London’s public transport that killed 56 people and injured 700 people. Resolution 1624 condemns “in the strongest terms all acts of terrorism irrespective of their motivation, wherever and by whomsoever committed, as one of the most serious threats to peace and security.” It also requires member states to adopt measures to prohibit by law incitement to commit a terrorist act or acts, to prevent such conduct and to deny safe haven to any persons with respect to whom there is credible and relevant information giving serious reasons for considering that they have been guilty of such conduct. Moreso, Resolution 1624 also requires Member States to report to the Counter-Terrorism Committee as part of their ongoing dialogue on counter-terrorism and directs the Committee to continue to assist national governments strengthen their capacities.

¹³⁵ Kassa, W. *‘Rethinking the No Definition Consensus and the Would Have Been Binding Assumption Pertaining to Security Council Resolution 1373’*, 17, *Flinders Law Journal*, (2015).

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*

Democracy, Terrorism, and Security, was held in March of the same year, and was sponsored by the Club de Madrid. Both conferences discussed the question of the definition of terrorism. The report that emanated from the Riyadh Conference re-echoed the view that the continuing absence of agreement on a detailed and comprehensive definition of terrorism was truncating and jeopardizing international efforts to fight terrorism.¹³⁸ The Riyadh Counter-Terrorism International Conference recommended the endorsement of the proposals contained in the UN High-Level Panel's report. The Club de Madrid Summit also endorsed the High-Level Panel's report. However, efforts to accept the proposals and definitions of these conferences were jettisoned by the General Assembly. The 2005 General Assembly World Summit could not take the necessary step expected of it, and so it dropped the definition of terrorism recommended by the conferences from its 'Final Outcome Document'.¹³⁹

1.5 Saudi Legal System

Therefore, this section explores the legal system of the Kingdom. This is very important to this thesis, as there are some special features that distinguish the legal system in the Kingdom and that constitute challenges when discussing conformity of the Saudi strategy to counter-terrorism with international strategy (UNSC Resolution 1373). This section will cover the sources of legal rules, the explanation of some special legal terminologies, and the authorities of the Kingdom (judicial, executive, and regulatory).

Saudi constitutional law has also been affected by this interrelationship, as the Kingdom is a body of international law and has entered into a relationship with other states and international and regional organizations via certain international agreements and

¹³⁸ See Special Counter-Terrorism International Conference in Riyadh in February 2005. See also an article written by Victor D. C. entitled 'Flawed Diplomacy: The UN's and the War on Terrorism'. Potomac Books Inc, Washington, D.C.

¹³⁹ General Assembly, Resolution adopted by the General Assembly, 2005 World Summit Outcome, Available at: <https://www.refworld.org/docid/44168a910.html>.

conventions.¹⁴⁰ This sort of development can also be found in the methodology of the New Haven School, which stipulates that ‘there is interaction between international law and municipal law, so as to create a legal framework that can reduce threats and tensions between these two laws.’

On this basis, Saudi Arabian rulers introduced into the nation’s constitution, several topics that have been part of several international agreements, into which the Kingdom has entered. For example, the right to grant the status of asylum to refugees, respect for human rights, the right to security for all people without any discrimination, the right of individual and intellectual property, and other rights have been all embodied within the Kingdom’s constitution (Basic Law of Governance - 1992).¹⁴¹ The implementation of international law norms at the domestic level, forms one of the main recalls points that Higgins claims, and which constitutes the core of this project.

As can be seen, international law constitutes an important source to the legal system in the Kingdom, however only to the extent that it does not violate Shariah Law. On this basis, it is very important to note that one of the most sensitive implications of this status is that the conformity of domestic Saudi Arabian laws in the context of counter-terrorism to international law is limited to the issue of non-conflict with Shariah Law. This is an important consideration that should be taken into account when analysing the strategy of Saudi Arabia in relation to counter-terrorism. As explained, the legal system in the Kingdom has a special form, either in terms of its religious position or its traditional and customary perspectives. Saudi rulers are always required to commit to Shariah Law. This status was also confirmed by the Royal Decree issued by King Fahd Bin Abdul-Aziz in 1992, embodying the ‘Basic Law of Governance’,

¹⁴⁰ See International Labour Organization, Saudi Arabia, Available at: https://www.ilo.org/beirut/countries/saudi-arabia/WCMS_544148/lang--en/index.htm , also see International Committee of the Red Cross, Saudi Arabia, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=SA.

¹⁴¹ Basic Law of Governance (1992), Royal Decree No. A/90. Articles.10.11.26.

stating that ‘these regulations were issued after a careful consideration by the elite of scholars and experts who took into consideration the position of the Kingdom in terms of its Islamic and Arab declarations and its cultural, social and traditional perspectives.’ This is the big challenge that this thesis faces.

In fact, man-made laws, either within Islamic countries or others, do not often conflict with Shariah Law, particularly criminal law. In addition, the term law was not a new term to Islamic scholars, though the current Saudi rulers reject it. The term law has been used by most Islamic scholars, such as Ibn Taymiyyah,¹⁴² Al-Muradi,¹⁴³ Ibn Khaldun, and Al-Razi, some of whom used the term law in the titles of their books, such as Ibn Jizi the author of ‘Juristic Laws in Summarising Maliki School’ and also Al-Ghazali the author of ‘Law of Interpretation’.¹⁴⁴

This is why there is no term law within the legal system of the Kingdom. However, due to the social and intellectual development within Saudi society, it may be noticed that this severe rejection of these terms has been less intensified, particularly when Saudi society realized that their fears of using these terms are exaggerated or have no logical bases. Saudi rulers will not issue any document or approve any international obligation that may conflict with Shariah Law.

1.5.1 Sources of Legislation in the Kingdom of Saudi Arabia

In this chapter, the researcher also explores the sources of legal legislation in the Kingdom of Saudi Arabia before commencing a discussion on Saudi Arabia’s counter-terrorism measures. The aim of this explanation is to show how the legislative process in the Kingdom operates and to familiarize the reader with certain terminology that the legal system

¹⁴² Ibn Taymiyyah, ‘*Al-Fatawa*’, (5th ed) (Revival of Arab Heritage Publisher, Beirut, 2004), P.241. also, Total Fatwas of Shaykh Al-Aslam Ahmad ibn Taymiyyah, Collection and Arrangement, Abdulrahman bin Mohammed bin Qasim Al-Asmi Najdi Hanbali and his son Mohammed (1st ed.) (1381), p.341.

¹⁴³ Abo Al-Hasan M. ‘*Al Ahkam As Sultaniyyah: The laws of Islamic Governance*’ (Dar ul Thkafah), P.241.

¹⁴⁴ Gallagher, C. ‘*Church Law and Church Order in Rome and Byzantium: A Comparative Study*’ (Routledge, London, 2002).

in the Kingdom uses. This will also provide the opportunity to assimilate the content and framework of the legal system in the Kingdom.

Article 7 of the Basic Law of Governance (1992) provides that ‘Government in the Kingdom of Saudi Arabia derives its authority from the Book of God (Holy Qur’an) and the Sunnah of the Prophet (PBUH), which are the ultimate sources of reference for this and all other state regulations.’ According to this article, Shariah Law is the main source of provisions in the Kingdom, followed by other national regulations. Constitutional customs, which coincide with the establishment of the Saudi Arabian state, follow the above two sources. In addition to these sources, there are two more sources which can be described as new. These are constitution and international laws.¹⁴⁵ The latter is of particular importance as the Kingdom of Saudi Arabia is part of the international community and a body of the subjects of international law. As can now be seen, the sources of legal rules in the Kingdom are diverse. It should be noted here that the Holy Qur’an and the Prophet’s Sunnah (Established Example) are unchanged and constant, while the other ones are variable according to changes of status and time. We explore these sources as follows:

1.5.1.1 Shariah Law

This law is the first and main source of legislation in the Kingdom.¹⁴⁶ Nobody within the Kingdom is permitted to issue any regulation or a set of rules that violates Shariah Law. Rule-makers must formulate legal norms in accordance with Shariah legal norms, otherwise, such rules will lose their legal legitimacy. The Basic Law mentioned Shariah Law in 25 articles as the basic source of legislation. This recurrent emphasis of Shariah Law as a main source of legislation is due to the Islamic character of the Kingdom, which is home to the two most holy

¹⁴⁵ Bin-Baz, A, ‘*Political and Constitutional system in the Kingdom of Saudi Arabia*’ (Al-Rushd bookstore, 2015), P. 170.

¹⁴⁶ Campbell.C. ‘*Legal Aspects of Doing Business in the Middle East*’, Lulu, (2005), P. 265.

sites of Islam,¹⁴⁷ i.e. Makkah and Madinah. It should be noted in this relation that in addition to these two sources, there are several complementary sources of legislation, known as Fiqhi sources. This includes consensus, analogical reasoning, pure reasoning, seeking the public interest, and juristic discretion.¹⁴⁸ These methods touch upon issues that have not been explicitly or directly addressed in the Holy Qur'an or Prophet's Sunnah (Established Example). By using these complementary sources, the jurisprudence refers to the Holy Qur'an and Prophet's Sunnah themselves to find the correct course of action.

1.5.1.2 National laws

Before we embark on exploring these regulations, which constitute the second source of legislation in the Kingdom, it is important first to explain some legal terminology that will be widely used in this thesis to familiarize readers with these terms. In addition, this will help to distinguish these terminologies from similar ones that are used in the legal systems of other countries which have different meanings.

Royal Order: This is a written official document, issued by the King, and expresses the direct and individual will of the King. It is often issued in accordance with a specific formula and is recognized by the public and bears the signature of the King alone.¹⁴⁹ This royal order represents the will of the King. It is an individual will which means that it is unrestricted by legal reference to any institution within the Kingdom, such as the Shura or Ministers' Councils. The King issues such orders according to his evaluation of the interests of the state, as he is the ruler. Royal Order is considered one of the highest regulatory instruments in the Kingdom. These are sovereign decision made only by the King and they cannot be appealed before any judicial authority. The King often issues such orders to, for example, assign a deputy

¹⁴⁷ *Ibid*, P. 167.

¹⁴⁸ Kettell, C. '*Introduction to Islamic Banking and Finance*', (Harriman House, 2008), Pp. 13–12.

¹⁴⁹ Latham & Watkins LLP, *Doing Business in Saudi Arabia*, (2010).

Prime Minister, ministers and their deputies, and members of the Shura Council, judges, security officers, or to issue basic legal regulations for the Kingdom, which is our concern in this thesis.¹⁵⁰

Royal Decree: This is a written official document which expresses the will of the King, as he is the leader of the state. The King issues royal decrees to endorse decisions made already by the Shura or Ministers' Councils in relation to internal or external affairs of the state, to make them formal and effective. All regulations, except those which are referred to as basic regulations, are issued through Royal Decrees.¹⁵¹

Ministerial Order: This is an official document which expresses the will of the president of the Council of Ministers. These orders can be used to assign ambassadors, foreign representatives of the Kingdom, and approve judicial decisions. The main advantage of these orders is their flexible character. These orders also can be issued by the King or one of his deputies.¹⁵²

Resolution of the Council of Ministers: This is an official document with a specific formula, which expresses the will of the Council of Ministers. It comes at the top of the pyramid of the administrative decisions made in the Kingdom. It often deals with the affairs of citizens. These resolutions express the will of all ministers and members of the Council.¹⁵³

Having briefly explained these legal instruments in the Kingdom, we explore the basic and national regulations that are issued through one of the above decisions. In addition to these regulations, there are also regulatory rules. Therefore, there are two types of legal rules: regulations and regulatory rules. The Basic Law, the System of the Shura Council, and the

¹⁵⁰ Alshkly, A. *'General Principles of Laws in the Kingdom of Saudi Arabia'* (King Fahad Library, 2017), P. 70.

¹⁵¹ Noel, J. *'Commercial Law in the Gulf States: The Islamic Legal Tradition'* (Graham and Trotman, 1984).

¹⁵² *Ibid.*

¹⁵³ See The Council of Ministers Law, arts. 19. 20.

System of the Council of Ministers use these two terms to regulate their systems.¹⁵⁴ For example, Article 67 provides that '[t]he regulatory authority shall have the jurisdiction of formulating regulations and rules....'.¹⁵⁵ Also, Article 15 of the System of the Shura Council states the authority of the Council in the 'study of laws and rules'.¹⁵⁶ Article 20 of the System of the Council of Ministers provides that the Council 'examines the projects of regulations and rules.'

Therefore, our next focus in this chapter is to analyse these regulations and rules¹⁵⁷, from the higher ones to the lower in accordance with the principle of legality. This principle means that the higher law or rule is superior to the lower one, and that the latter cannot violate the higher one. According to this principle, the highest law in the Kingdom is the Basic Law, and then the regulations. These are followed by the regulatory rules.

1.5.1.3 The Basic Law of Governance

This law was enacted in 1992 via a Royal Decree issued by King Fahd Bin Abdul-Aziz.¹⁵⁸ It is the top of the pyramid of all regulations in the Kingdom and cannot be violated by any other regulation. Before we understand this law, it is important to note that this law can be equated to the status of a constitution, when compared to the legal systems of other countries. However, it can be differentiated from other constitutions in that the source of this regulation is Shariah Law only and the rulers do not label this set of rules a law, but instead, a 'regulation', as explained previously.¹⁵⁹ The majority of states govern by constitution, which is at the top of the legal system and regulates the constitutional principles according to which the state functions, the relationship between all authorities is organized, and the relationship between

¹⁵⁴ See The Basic System of Governance, *supra* note 11, art. 70; The Council of Ministers Law, arts. 7 & 20.

¹⁵⁵ See Article 67, The Basic Law of kingdom of Saudi Arabia.

¹⁵⁶ See Article 15, The Shura Council Law.

¹⁵⁷ See Article 20, Law of The Council of Ministers.

¹⁵⁸ See The Basic System of Governance, art. 1

¹⁵⁹ See The Basic System of Governance, art. 7.

these authorities and citizens are set up, as this is one requirement of a state of law. As it is known, a constitutional law governs three main issues: 1- the state in terms of its nature, language, nationality and any other thing that has a sovereign character; 2- it regulates the three main authorities within the state, which are legislative, judicial, and executive; and 3- it regulates the issue of the rights of its citizens, civil society institutions and their rights, such as the right to freedom and movement.¹⁶⁰ This is all embodied within the Basic Law.

The Basic Law or literally as in the original Arabic ‘the basic regulation’, involves the main principles and constants upon which the Kingdom is built. It is divided into 9 chapters. Chapter one (4 articles) is devoted to the general principles of the state, its holidays, flag, and emblem. Chapter two (4 articles) states the system of governance in the Kingdom, which is royal and based on the Qur’an and Sunnah. Chapter three (5 articles) talks about the foundations of Saudi society. It regulates the family’s relationships, national unity, and education. Chapter four (9 articles) covers the economic principles in the Kingdom. Specifically, it regulates public and private property, capital, labour affairs, taxes, fees, Zakah, and economic and social development. Chapter five (21 articles) is devoted to rights and duties. It states that the Kingdom is the guardian of Islam. It is concerned about the system of security, the protection of human rights, the social security system, the right to education, public health, environment, the creation and equipping of the armed forces, citizenship rights, and so on. Chapter six (28 articles) deals with the authorities of state. This includes the three authorities: executive, judicial, and ‘regulatory’ authorities. In addition, it regulates the declaration of the state of emergency and general mobilization. It also explains the role of the regulatory authority and its role in issuing regulations and rules. Chapter seven (7 articles) is devoted to financial affairs. It explains the system of revenues, the public treasury, the state budget, and provisions for governing monetary and banking matters. Chapter eight (2 articles) deals with auditing

¹⁶⁰ Alshkly, A. ‘General Principles of Laws in the Kingdom of Saudi Arabia’, *King Fahad Library* (2017), P. 10.

agencies. It also regulates financial and administrative violations. Chapter nine (3 articles) is a general chapter regulating the system of international agreements and treatments. It also deals with the suspension and amending of the Basic law.¹⁶¹

For the purposes of this thesis, we briefly analyse the most important aspects of this regulation. First, the system of governance in Saudi Arabia is monarchical,¹⁶² as can be seen in Articles 5 of the Basic Law (1992). Second, according to Articles 1 and 7, the constitution of the Kingdom is the Holy Qur'an and the Prophet's Sunnah (Established Example) and the government in the Kingdom derives its authority from them. These two sources govern the Basic Law and all other regulations that are issued by any authority. These regulations also participate in the governance of the state, however only to the extent that they do not violate the two main sources. Third, Article 44 states that there are 3 authorities in the Kingdom: Judicial, Executive, and Regulatory authorities. The same article adds that these authorities shall cooperate with each other, however, the King is to be the final authority.

We summarize the Basic Law as a set of rules which organize the form of governance of the state. In addition to this, it organizes the nature of the government, the three authorities and their specializations and relationship. It also regulates the relationship between the state and its citizens in terms of rights and duties of the Shariah Law. The Basic Law also emphasizes the Islamic and Arab identity of the Kingdom, as stated in several articles, such as Article 1, which links the term Arab to the name of the state: The Kingdom of Saudi Arabia.¹⁶³ Article 3 also emphasizes the Islamic identity of the country, as it puts the Islamic emblem '[T]here is no God but Allah, Muhammad is the Messenger of Allah' on the national flag. The Basic Law is flexible, as it can be cancelled, amended, or changed, but only via the issuance of a Royal Decree. There is no complex procedure for this process. However, some articles that are

¹⁶¹ Articles 1- 83, The Basic Law of kingdom of Saudi Arabia.

¹⁶² Joseph, A, K. '*Succession Saudi Arabia*', (2001), Pp. 25-26, 203-207.

¹⁶³ *Ibid*, P.207.

directly linked to Shariah Law, the system of governance, and human rights cannot be prejudiced.¹⁶⁴

The Basic Law has been developed several times since it was created. For example, in June 2017, Article 5 (b) was amended to appear as follows: '[G]overnance shall be limited to the sons of the founder King 'Abd Al-'Aziz' and the sons of his sons'. This dramatic change will move governance from the sons to the grandsons of the founder, which may pave the way for the emergence of what the researcher calls the fourth state of Saudi Arabia.

1.5.1.4 Normal Laws

This is equivalent to the level of a law, when compared to the legal system of other states in the world. These laws involve a set of general binding rules, issued by the Regulatory Authority (this is a legislative authority, which is exercised by the Council of Ministers or the Shura Council) and must also be approved via royal decrees. These regulations cannot be issued via royal order, as is the situation with the basic regulations. Saudi rulers have issued these sorts of regulations to provide a detailed explanation for each major affair in the Kingdom that has been referred to in the basic regulations. For example, Article 45 of the Basic Law provides that '[T]he Holy Qur'an and the Sunnah (Traditions) of God's Messenger shall be the source for fatwa.' This article states that a regulation should organize Al-Fatawa related affairs. Therefore, the Saudi ruler issued a normal regulation that regulates the issue of Al-Fatwa, known as Al-Fatwa Affairs Regulation.¹⁶⁵

1.5.2 Technical Terms of Legal Terminology in the Kingdom

As the Kingdom holds a special position within the Islamic and Arab world, as the guardian of Islam and the most holy places, Saudi rulers consider this a unique honour and

¹⁶⁴ *Ibid*, P.209.

¹⁶⁵ Alsafee, K. 'Guide to Drafting Regulations and Rules in the Kingdom of Saudi Arabia' (Alfalheen, 2015), P. 209.

avoid labelling any set of legal rules as ‘law’. According to one Islamic tenet, there is no opportunity for man-made laws. As explained, the Qur’an and Prophet’s Sunnah constitute the main source of legislation.¹⁶⁶ Based on this principle, Saudi Arabia’s rulers are committed to this tenet and there is no room for man-made legislation. Only rules derived by jurists from the Qur’an and Sunnah can amount to a level of law.¹⁶⁷ Otherwise, the role of rulers is only limited to regulate the interests of the state and citizens by issuing what is called in the Arabia original ‘regulation’.

The Basic Law of Governance (1992): As previously discussed, this law resembles constitution laws when compared to other legal systems in the world. However, Saudi rulers insisted that it not be given the term constitution law due to the strict position taken by them against the term constitution law. This position, however, does not seem to be taken on legitimate evidence referred to in the Qur’an or Sunnah. This rejection of the term constitution law was based on the Islamic character of the Kingdom, where only Allah (the Qur’an) and His Prophet (Sunnah) can legislate. The term Basic Law, in the Arabic original, is ‘Basic Regulation’. Therefore, the Saudi legal system only allows rulers to issue ‘regulations’ that are not covered by Shariah Law. These regulations only govern the provisions of Shariah Law. They are also issued to deal with future matters. Perhaps the reason for this reservation is the lack of familiarity with the content of the Madinah treaty, enacted by Prophet Muhammad (PBUH), after entering Madinah and establishing the Islamic State. This charter is considered to be the first social constitutional contract in history, written with articles, and included aspects of a constitutional nature, such as organising the state’s affairs, the relationship between a state and citizens, the rights and duties of all residents both Muslims and non-Muslims in

¹⁶⁶ See The Basic System of Governance, supra note 11, article. 1.

¹⁶⁷ See The Basic System of Governance, supra note 11, article. 7.

Madinah.¹⁶⁸ This charter refers to concepts and practices of a constitutional nature that were not familiar in the political rules which held sway in the Arabian Peninsula, such as central government, citizenship, personality of punishment, freedom of belief, the right to equality, and other concepts that can be seen in contemporary constitutions.¹⁶⁹

Regulations: As the term ‘constitutional law’ was rejected by Saudi rulers, the term ‘law’, was also rejected. Saudi rulers decided to use the term ‘regulation’, instead. There is no room for the idea of secular law (man-made law).¹⁷⁰ This declaration was further reaffirmed at the Scholars’ Conference held in Makkah (1340 Hijri/ 1921 CE), when they called on King Abd’ Al-Aziz to remove all laws at the time as they believed that foreign man-made laws were in conflict with Islamic rules and concepts. In addition, they claimed that Shariah Law had been significantly ignored within the Islamic states and were limited only to the law of family.¹⁷¹

1.5.3 Mechanism of Implementing Security Council Resolutions Within the Kingdom of Saudi Arabia

Like other countries, Saudi Arabia has made tremendous efforts at implementing counter-terrorism UNSC 1373 in the Kingdom.¹⁷² Generally, there is a designated unit within the Saudi Arabian Foreign Ministry that is responsible for dealing with non-binding UNSC Resolutions. However, for resolutions issued under Chapter VII of the UN Charter, there is a reputable and permanent committee that is responsible for analysis and implementation of these resolutions, with the exception of resolutions related to counter-terrorism. This committee consists of 11 governmental bodies, such as Foreign Ministry, Interior Ministry, Labour

¹⁶⁸ HamidAllah, ‘*Collection of political documents of the Prophet and the Caliphate*’ (4th ed.) (Annafaes Publisher, Beirut, 1983), P.59.

¹⁶⁹ *Ibid*, p.111.

¹⁷⁰ See The Basic System of Governance, *supra* note 11, articles. 44, 67 – 70.

¹⁷¹ Muhammed, M, *The Legislative Development in the Kingdom of Saudi Arabia*, Monchaa, (19770), P. 217.

¹⁷² An interview I conducted with Bureau of Experts at The Council of Ministers on (2016).

Ministry, Finance Ministry, Agriculture Ministry, Industry Ministry, Higher Education Ministry, Presidency of the General Intelligence and so on.¹⁷³

On the other hand, another committee called the Standing Committee on Combating Terrorism (SCCT),¹⁷⁴ which is subordinate to the Security State Agency is responsible for SC Resolutions in relation to combating terrorism. This body also scrutinizes or acts as oversight of the mechanisms for the implementation of these resolutions. It is also responsible for cooperating with the states and international and regional organizations, such as the UN, including its Security Council Committees and other subgroups of counter-terrorism.¹⁷⁵ The Permanent Committee is also responsible for the effective implementation of the recommendations of the Financial Action Group.

In fact, there is no precise way to implement UNSC Resolutions in relation to counter-terrorism. Saudi legislature adopts a flexible approach to the implementation of the Security Council Resolutions. The Permanent Committee first examines the SC Resolutions before it decides on how to abide by them in accordance to the importance and relevance of each resolution. The process of incorporating the SC Resolutions into national laws may require different procedures, such as modifying some articles of a certain law, issuing a royal order, or recommending that the relevant authorities commit to the resolution. For example, Article 32, of the Law of Combating Terrorist Crimes and its Financing (2013) stipulates that “the Standing Committee on combating terrorism at the Ministry of Interior shall put in place necessary mechanisms for the implementation of Security Council Resolutions No. 1267 and 1373 and other related resolutions. Such mechanisms shall be specified pursuant to a decision

¹⁷³ An interview with a staff of the Security Council of the Ministry of Foreign Affairs on (2016).

¹⁷⁴ See at Permanent Committee of Counter Terrorism website, Available at:

[https://pctc.pss.gov.sa/wps/portal/departments/pcct/aboutus/lut/p/z1/04_Sj9CPykssy0xPLMnMz0vMAfljo8ziDT0s3T2cTQz93d1CjA0CzYyCDY3NgwwMLE31w8EKDDxNTDwMTYy8DUyDnA0czcx3U3MggxMfAz1o4jSjwM4GhCnH4-CKPzGh-tH4bXCwwiqAJ8XCVkSnFikX5AbGhphkBMQ7qioCAC4QScI/dz/d5/L0IHSkovd0RNQUZrQUVnQSEhLzROVkuVZW4!/.](https://pctc.pss.gov.sa/wps/portal/departments/pcct/aboutus/lut/p/z1/04_Sj9CPykssy0xPLMnMz0vMAfljo8ziDT0s3T2cTQz93d1CjA0CzYyCDY3NgwwMLE31w8EKDDxNTDwMTYy8DUyDnA0czcx3U3MggxMfAz1o4jSjwM4GhCnH4-CKPzGh-tH4bXCwwiqAJ8XCVkSnFikX5AbGhphkBMQ7qioCAC4QScI/dz/d5/L0IHSkovd0RNQUZrQUVnQSEhLzROVkuVZW4!/)

¹⁷⁵ An interview I conducted with PCTC on (2016).

by the Minister of the Interior”.¹⁷⁶ However, the Saudi legislature adopted a different approach in relation to the implementation of SC Resolution 2170 (2014), with Paragraph 8 calling upon ‘all member states to take national measures to suppress the flow of foreign terrorist fighters to, and bring to justice, in accordance with applicable international law, foreign terrorist fighters of ISIL, ANF...’ In this regard, the Kingdom has undertaken all necessary measures to prevent the flow of fighters to war zones and joining terrorist organizations. One of the most important measures was the issuance of the Royal Order in February 2014 which targeted members of conflicts area outside the Kingdom, either religious, intellectual groups, or those international, regional, or domestic organizations that had been classified as terrorist groups. This also includes people who adopt the ideology or principles of these groups. Therefore, it should be noted that the Saudi legislature aims at the acceleration of the implementation of the SC resolutions having enacted the Law of Combating Terrorist Crimes and its Financing (2017), which criminalized the acts that have been mentioned in the Royal Order.

¹⁷⁶ See Law of Combating Terrorist Crimes and its Financing (2013), Article. 32.

CHAPTER TWO: DEVELOPMENT OF THE CONCEPT OF JIHAD IN ISLAM

2.1 Introduction

This chapter focuses on the concept of Jihad. It starts with the meaning of Jihad and the discussions that revolve around its meaning. It then explores the scope and content of this concept. An analysis of the use of force and the justifications that are given for the use of force are also undertaken. Although the term international law is not known to Islamic jurists, this does not mean that the Islamic jurisprudence does not recognise this type of law. The international law rules were familiar to this jurisprudence but through a different framework. Reference to Jihad has been widely addressed in the context of the relationship between an Islamic country and other non-Islamic countries. *As-Siyar* and *Al-Maghazi* books are the most illustrative books that have been written about the position of Jihad during wars. For this reason, this chapter traces the development of the concept of Jihad from the lens of Islamic jurisprudence which mainly started at the end of the Umayyad period (750 CE). The chapter explains how Islamic jurists have approached the meaning of Jihad. A focus point however will be on the main founder of international law in Islam, Ash-Shaibani, author of *As-Siyar*.

This chapter focuses on addressing the question of Jihad. For the purposes of this thesis, there are three reasons for analysing and discussing the importance of the meaning of Jihad. First, as previously stated, the examination of the legal strategy of Saudi Arabia is a case study in this thesis. The constitutional law in Saudi Arabia is completely based on Islamic laws and Jihad constitutes the most controversial part of Islam, as it is one of the main foundations of Islam. This term has been exploited by terrorists to justify their actions throughout the world, as is the case with Al-Qa'idah and ISIS. Therefore, it is important to elucidate and understand the meaning of Jihad, as perceived by Islamic jurists. Second, Islamic law includes domestic and international laws. Dr Hussni Jaber opines that Islamic law contains a rule that gives

international law precedence over domestic law in the case of a conflict.¹⁷⁷ He cited Sura Al-Anfaal, Verse 72, ‘As to those who believed but came not into exile, ye owe no duty of protection to them until they come into exile; but if they seek your aid in religion, it is your duty to help them, except against a people with whom ye have a treaty of mutual alliance.’ Therefore, the protection of a minority of Muslims who face religious persecution is a duty, based on internal Islamic rules. However, in the case of the existence of a treaty that prevents Muslims intervening in such a circumstance, then such an international treaty would be superior to the internal Islamic rules. Third, there is extreme disagreement between Islamic jurists about the exact meaning and scope of Jihad. This state of affairs has raised several convoluted issues that remain until now unresolved. The lack of a precise meaning of Jihad has pushed many actors to use it to gain specific goals, including political commentators. This status quo presents the problems and challenges of the definition of terrorism. The lack of a unified definition of Jihad (similarly applicable to terrorism) has allowed those who exploit the term to interpret it in an open way. For example, Germany utilised the concept of Jihad during the Second World War in a way that served its political agenda.¹⁷⁸ The meaning that was given to this term by Germany was due to a lack of a precise and coherent meaning of the term which means the word Jihad is open to different interpretations.

The Arabic connotation and denotation of the word Jihad is ‘struggle’. There is both collective and individual notions to its application.¹⁷⁹ According to Zawati Hilmi, a Jihad is a defensive war waged with the objective of entrenching or ensuring there is equity, justice and the protection of basic human rights. Zawati submits that it is misleading to see Jihad as a holy war because there is no approximation in any form or way of the equivalency in Islamic legal

¹⁷⁷ Jaber, H. ‘*International Law*’ (Daralnahda, Cairo, 1973).

¹⁷⁸ Motadel, D. ‘*Islam and Nazi Germany’s War*’ (Harvard University Press, Harvard, 2014).

¹⁷⁹ Zawati, H. ‘*Is Jihad Just War? War, Peace and Human Rights under Islamic and Public International Law*’ (Edwin Mellen Press, 2001), Pp. 49-84.

parlance or discourse pertaining to the concept of Jihad in terms of a group or cooperative religious duty, and the Christianity conception of crusade. Therefore, Zawati Hilmi surmises that the categorisation of Jihad as a holy war is anomalous, inconsistent and misleading. There are also the spiritual and armed conceptualization aspects of the meaning of Jihad. In fact, both earlier and contemporary Muslim scholars as well as orientalist and detractors of Islam, have focused on the belligerency or bellicosity of Islam and have paid less attention to the social or spiritual aspects of Jihad, by all means that there is a spiritual doctrine of Jihad but that the thesis talking about Jihad in the sense of military doctrines of Al-Siyar.

In his seminal work entitled 'Is Jihad a Just War', Islamic scholar Hilmi Zawati commented on the diversity of views on Jihad. Zawati postulated that a substantial number of contemporary scholars have obfuscated the way, manner and types of Jihad. According to Hilmi Zawati 'Al Mawardi highlighted the bifurcation of Jihad into two categories namely: wars against apostates and polytheists and wars of public interest. On the other side of the spectrum, Ibn Qayyim al-Jawziyya discerned or recognized four types of Jihad namely: the struggle against hypocrites, the struggle against non-believers, the struggle against evil and the struggle against self. Struggle here is meant to be in 'the way of God'; or to seek a noble purpose or cause. Michael Knapp. opines that for Muslims, the word Jihad has retained its military and religious denotation into the contemporary period.¹⁸⁰ In Islam, Jihad is founded on indispensable goals, judgments, and reasons, without which the term cannot be understood. Dr Ahmad Al-Tayeb, Imam and Mufti of Al-Azhar, said that for Allah, Jihad is certainly meant for the sake of justice, peace, and security. He added that the war in Islam cannot be for expansion, colonization, in the possession of other lands or resources of other peoples, or in the trade of peace. Islam as a religion does not seek Jihad for non-lofty aims. Therefore, the

¹⁸⁰ Knapp, M. 'The Concept and Practice of Jihad in Islam', *The US Army War College Quarterly: Parameters*, Vol. 33, No. 1 (2003), 81- 94.

word is not meant to allude to holy war. However, Jihad, for Muslims, has been invoked again in its military and religious meaning in modern times particularly following the 11 September 2001 terrorist attacks on the World Trade Centre and the Pentagon, where the term Jihad has been widely used in connection with terrorism. Although much has been discussed and talked about the term Jihad since the start of Islamic jurisprudence in the late Omayyad period, the term is still not well understood by Muslims or non-Muslims. The term Jihad is still seen and construed from different perspectives, depending on the society that defines it.

2.1.1 Terrorism in Islam

The orientalist construction of Islam and its alleged nexus with violence circulates within Western discourses and has impacted both policy makers and the public. In his discussion of the 'Images of Jihad' (2003),¹⁸¹ Strawson suggests that the Western media has played a significant role in constructing Jihad in a way that plays into the hands of terrorists. In addition, Muslims in the West have been forced to be defensive as they attempt to distance themselves from Jihad. Strawson argues that these processes disarm policy makers and the Muslim community from advancing the classical concept of Jihad as a military doctrine based on ethical and legal standards, which is at variance with the actions of Al Qa'idah, ISIS and their satellites. Strawson submitted that real adherence to the doctrines of Jihad can be a weapon against such terrorism.

In addition, Strawson further examined the role of the English media in generating the negativity that associates terrorism with Islam.¹⁸² The English press has often interpreted Islamic laws as being associated with the acts of terror that are occurring internationally. The English media has dedicated numerous efforts to tarnishing the religion of Islam using

¹⁸¹ Strawson J. 'Holy War in the Media: Images of Jihad', in Steven Chermak, Frankie Y. Bailey and Michelle Brown (eds), *Media Representation of September 11* (Westport, CT: Praeger, 2003), Pp. 17-28.

¹⁸² Strawson J. '*Law after Ground Zero*' (The Glass House Press, 2002).

individuals who do not even profess the faith as scholars who are well versed in the study of the Islamic religion. Strawson's postulations present a clear perspective that the Islamic religion has no connection with the occurrence of terrorism and terrorist activities.

2.1.2 Conceptualization of Jihad During the Life of Prophet Muhammad

The Holy Qur'an condemns all acts of terror, especially those on innocent civilians. The connection between terrorism and Islam cannot be traced to the Prophet as the Prophet was against violence. Prophet Muhammad was very clear and emphatic on his stand against attacking innocent civilians, and the only acts of war he was associated with was when he was retaliating against an attack. The role played by the Prophet as a leader is divided into the Makkan and the Madinan periods. Through the analysis of Prophet Muhammad's era, it can be noted that there were no laws that indicate that the Prophet advocated for terrorism. The terrorist acts that are being connected to Islam have no basis in the Prophet's teachings, which is a factor that will be evaluated in the discussion of the modern era and its version of terrorism. There were various justifications of the wars that were conducted during Muhammad's era.

Islamic religious leaders are divided on the definition of Jihad which shows the conflicts that arise when the scriptures in the Qur'an are misinterpreted. Jihad, which is a noun that means "struggle," is a religious duty that Islamic followers have in relation to the Muslim religion. The concept of Jihad is noted in the Qur'an, which, according to the scriptures, is an expression that means "*striving in God's way*" (*Al-Jihad Fi Sabil Allah*). Various Islamic leaders have struggled with the interpretation of the term, which may be a factor that has led to the conflict between various groups within the Islamic religion.¹⁸³ The misinterpretation of the

¹⁸³ Martyrdom F. 'Suicide, and the Islamic Law of War: A Short Legal History', *Fordham International Law Journal*, Vol. 27, No. 1 (2003): 299-369.

concept of Jihad is one of the factors that has led to the conflicts that are arising between the people who understand the concept and those who do not.

The Qur'an and Hadith are important texts that help in understanding the concepts of Islam based on an understanding of the scriptures and the traditions in the text. The concept of Jihad can be seen in two different contexts during Prophet Muhammad's Era. One of the concepts of Jihad is the greater Jihad,¹⁸⁴ which is the spiritual struggle that individuals have within themselves. The Islamic religion, as established by the Prophet, interprets the greater Jihad as the struggle that one should lead a righteous life against the temptations that exist in the world. Prophet Muhammad identified the major Jihad as the struggle that only includes the aspect of being mindful in prayers, charity, and fasting.¹⁸⁵ In the greater Jihad concept, Muslims are expected to be mindful of others and treat them with justice and kindness as a duty to fulfil the criteria of Islamic law.

The connotation of lesser Jihad is the armed struggle to protect the faith and defend the land and property of Muslims. Based on the Prophet's interpretation, the lesser Jihad was used as a last resort after there had been negotiations of peace between the conflicting parties. The concept of Jihad was used defensively and not aggressively, as it may be interpreted in contemporary society, especially by suicide bombers.¹⁸⁶ In this context, many wars during that time were conducted with the intention of defending the property of Islamic groups. Many of the Prophet's followers fought in defense of the Prophet (PBUH) with the objective of protecting their families and the property they had acquired for themselves. The justification for their actions is grounded and rooted scripturally in the Holy Qur'an 22:39-40, which stipulates that permission to fight or defend property that they have acquired is given because

¹⁸⁴ Streusand D. 'What does Jihad mean?' *Middle East Quarterly*, Vol. 4, No. 3, (1997), Pp. 9-17.

¹⁸⁵ Jalaluddin A. '*Islamic Jihad Versus Terrorism*,' (Sentinel, March 2002).

¹⁸⁶ Farhana A and Post J. 'The History and Evolution of Martyrdom in the Service of Defensive *Jihad*: An Analysis of Suicide Bombers in Current Conflicts', *Social Research*, Vol. 75, No. 2 (2008), Pp. 615-654.

of the wrongdoing that has been done unto them, and they shall be given victory by Allah as He is the Most Powerful, as they have been ostracized from their homes without any wrongdoing, but on the basis of what they believe.¹⁸⁷

The misinterpretation of the term Jihad has led to conflicts between Muslims and other religions in the contemporary world. The misuse, misinterpretation or misconstruing of the term, mostly by those who do not understand the concept of Jihad, has connected it with acts of terrorism. The strategic interests of various groups have led to the misinterpretation of the concept, and the media is not helpful in defending the rights of Muslims, as they present the perspectives that certain groups have of the concept. A culture of violence and terrorism has haunted and bedevilled the concept of Jihad, which is making some Muslims question and jettison their faith based on the perceptions of the world.

The interpretation of Jihad during the life of Prophet Muhammad varies with the views of contemporary society. The concept of Jihad was introduced in the *Madinan* period, where the Prophet took a more defined role as the spiritual and political leader of the Islamic religion. The basic concept of Jihad based on the meanings that were laid out by the Prophet meant that the people of Madinah would use the concept to defend their right to worship only when other religious groups attacked them. The military struggles of the Prophet were made in an attempt to defend the property that the Islamic groups had gained for their families and the religion.¹⁸⁸ The Qur'an in 22:39 shows the concept of Jihad as a sanction of those who had been wronged, which was the main concept that was used by the Prophet and his military to defend the wrongs made against them. The scripture further ascertains that fighting in Allah's way is fighting

¹⁸⁷ Knapp *supra* n. 180, Pp. 83-97.

¹⁸⁸ Kermalli F. 'Special to the Morning Call. Prophet Muhammad's Real Teachings are Neglected', *Morning Call*, (12th October, 2002).

against people who fight against you, but not by beginning hostilities, as Allah does not love aggressors.

The attacks made against Prophet Muhammad and his followers made him retaliate in accordance with the laws, which may have been the cause of the spread of Islam. The constant attack of the *Makkans* on Madinah forced the Prophet to establish a strong army that helped defend the religion in all aspects such as worship and property. The Prophet was always willing to enter into negotiations if it helped maintain the peace between the *Makkans* and the *Madinans*. However, soon after the treaties were made, the *Makkans* broke the treaty and resumed their war against Prophet Muhammad. The lesser meaning of Jihad is what is currently being misused by misguided Muslims. The lesser Jihad was helpful in assisting the Prophet create a foundation of the Islamic religion.

There are various misconceptions regarding the methods that the Prophet Muhammad used to persuade followers to convert to the Islamic religion. The Prophet had no power to forcefully convert people to the religion, a factor that researchers have had conflict with. The conversion of people into the religion included an invitation to worship by the Prophet to the people, mostly the *Makkans*, who opposed the practices of Islamic individuals. To ensure that peace prevailed over war, the Prophet often engaged in talks with his opponents regarding the practices, which only led to war when the Prophet was attacked.

In an effort geared towards taking part in the wars that were mostly between the *Makkans* and the *Madinans*, it was perceived that the people of Madinah had to convert to Islam to take part in the wars. It is true to say that most of the wars that were embarked on were religious, which meant that the wars were between Islamic believers and those who were not. The conversion of people to the Islamic religion could be seen as a strategy that the Prophet used. Taking part in the wars took both physical and mental preparation, which means that the

Prophet had to prepare the people for battle using the ways that he knew, which is in accordance with the Islamic religion.

In contemporary times, the forceful conversion of people to an Islamic faith that promotes terrorism instead of defensive wars has affected the way people view the religion.¹⁸⁹ The fact that mendacious religious groups are making people convert to the religion is based on the misconceptions that have been created by the religion. There has been a strain between the Islamic culture and cultures that do not support violence based on religious grounds.¹⁹⁰ Most acts of terror are linked to the promises that are made to young individuals who are given the wrong definition of acts of terror and they are misguided into believing that they are doing the right thing. During the era of the Prophet, there is a lack of evidence that shows the leader forced people to convert to the religion so as to take part in Jihad and not face judgment.

The legacy of Prophet Muhammad should be assessed as to whether he was a diplomatic or a dictatorial leader. Acts of diplomacy are one of the attributes that are connected to the Prophet. The available literature on the role that the Prophet played in the wars showed that his major rivals at the time were the *Makkans*, who practiced pagan worship. As the leader of Madinah, Prophet Muhammad¹⁹¹ instituted rules and laws that protected the rights of the Muslim believers and those of other faiths. Violence was only used as a last resort when peaceful negotiations failed between Muhammad and his opponents. The leader only turned to warfare when he believed there had been a failure in diplomacy. The Prophet believed that by conquering the enemies he had made, people would accept a conversion to Islam as a way of spreading the religion

¹⁸⁹ Thomas J. 'Transnational Terrorist Networks: The Afghanistan-Pakistan Connection', *Centre for the Study of the Presidency and Congress*, Pp. 1-18.

¹⁹⁰ Coker M. 'The New Jihad', *The Wall Street Journal*, 11th July 2014.

¹⁹¹ Jonathan R. 'Jihad in Islamic History. Doctrines and Practice', *Comparative Studies in Society and History*, Vol. 49, No. 4 (2007), Pp. 1014-1015.

The Holy Qur'an does not advocate killing by whatever means, and the only justification for committing murder is in the case of repeat offenders of crimes such as rape and violence against believers. It should be noted that Islam advocates peace building and non-violent acts.¹⁹² Prophet Muhammad followed the law of the Qur'an to the letter, which may mean that the Prophet did not use force in converting the people to the Islamic religion.¹⁹³ There are several misconceptions that are associated with Jihad, and terrorist acts are one that is currently being fought by believers of the Islamic faith in today's society.

The concept of Jihad during the rule of the Prophet in Madinah can be justified from various aspects. Other factors for the justification of the Jihad when Muhammad attacked the *Makkans* were connected to the raids that were made against Prophet Muhammad and the Muslims. The Qur'an mentions that the Muslims were driven out from their homes, which caused them to fight back against those who attacked them.

One of the greatest battles of the time of Prophet Muhammad was the Battle of Badr which took place in the year 624.¹⁹⁴ Based on its mention in the Qur'an and bibliographies of the Prophet Muhammad, the battle changed the perceptions that people had of the Islamic faith. The way Muhammad fought the war against the *Makkans* set the perception that individuals have of the Islamic faith. The Doctrine of Jihad is seen to have originated from the Battle of Badr, considered to be the start of the many Jihad wars that were conducted by Islamic believers.¹⁹⁵ The spread of Islam increased because the Muslim army won the war. From an analysis of the battle in the oasis of Badr, there is a clear trend that is evident from the battle undertaken.

¹⁹² United States Institute for Peace, Islamic Perspectives on Peace and Violence, *USIP*, (24 January 2002).

¹⁹³ Shah N. 'The Use of Force under Islamic Law', *European Journal of International Law*, Vol. 24, No. 1 (2013), Pp. 343-365.

¹⁹⁴ Crone P. '*Meccan Trade and the Rise of Islam*' (Piscataway, New Jersey: Gorgias Press, 2004).

¹⁹⁵ Bonner M. '*Jihad in Islamic History: Doctrines and Practice*' (Princeton University Press, NJ, 2006).

The attributes of the Battle of Badr have been misinterpreted based on the tactics that the Prophet used in fighting against the *Makkans*. False Islamic believers use the war as a mechanism to justify the acts of terrorism that they engaged in, which in the overall sense, shapes people's perceptions of the religion. The concept of taking the loot that was captured from the *Makkans* was a way that the people indicated that they were fighting for Allah. Although the war was conducted for a different reason, many of the Jihadists who practice the lesser Jihad use the war as a way to justify actions made against people.

The crucial factor to note is that Muhammad had already signed a treaty with the people of Mecca, which constituted that no acts of violence would take place. The attack that the *Makkans* had planned for Muhammad is what prompted him to gather his army to defend themselves. In contemporary society, the battles that have taken place that involve the Islamic religion is a factor that has changed people's perceptions of Jihad.¹⁹⁶ The formation of extremist Islamic movements has resulted in other religions having a negative perception of the Muslim faith. The Battle of Badr changed the perception that other groups had of the Islamic faith, leading to war with other groups and conducting acts of terror based on the misinterpretation of the facts.¹⁹⁷

2.1.3 The Classical Conceptualization of Jihad

It is in the classical period that *As-Siyar* (International law that governs Muslims) was developed and later expanded by Islamic jurists in the second century. The book is an important part of the literature concerning matters of Jihad because it provides a broader framework for this concept of war.¹⁹⁸ *As-Siyar* can be classified as a comprehensive manual of the Law of

¹⁹⁶ The Middle East Media Research Institute, Contemporary Islamist Ideology Authorizing Genocidal Murder, MEMRI, (27 January 2004).

¹⁹⁷ Telvick M. 'Al Qaeda Today: The New Face of Global Jihad', *PBS*, (25th Jan 2005).

¹⁹⁸ Ali S and Rehman J. 'The Concept of Jihad in Islamic International Law', *Journal of Conflict & Security Law* (2005), P. 2.

Islam.¹⁹⁹ This law of nations is important to Shariah because of its pragmatic consideration of the relations, political or otherwise, with non-Muslims. After some time, the contents of this law became obsolete, leading to the need for change. As the changes were made, the new legal framework excluded the outdated and irrelevant laws. *As-Siyar* underwent some change, for example, most of earlier writings of Muslim scholars included matters relating to how the spoils of war were to be distributed. The legal universe under the *As-Siyar* was divided into four schools of thought referred to as *Madhhabs* (Hanafi, Maliki, Shafi'i and Hanbali), named after the founders of the respective schools.

The Arab influence on the Islamic religion has led to most Muslim communities realizing cultural affinities, despite the maintenance of specific characteristics for each one.²⁰⁰ Jihad is a culture that is embedded in most Muslims and has been influenced by various socio-historical contexts.²⁰¹ The study of Islamic law should involve the Islamic religion without separation. Many believe that the three generations after Prophet Muhammad's death in AD 632 are the most important when it comes to the development of the Muslim culture and religion. This era is called the First Century of Islam. There is, however, much obscurity over this period because of the miniscule evidence available.²⁰² The holy war was previously known to be a call to give up all things to serve God. One was needed to surrender property, their dignity, and even blood. It has, however, evolved over the years and has come to be perceived as more of a call in the spiritual sense.²⁰³

¹⁹⁹ Bonner, *supra* n. 195.

²⁰⁰ Bassiouni C 'Islamic Civilization' (2012), <<https://mail.google.com/mail/u/0/#inbox/14bcf88a206bacc7>>, (1 March 2015).

²⁰¹ Heck P. 'Jihad Revisited', *Journal of Religious Ethics*, Vol. 32, No. 1 (2004), 95-128 <<http://faculty.georgetown.edu/plh2/Jihad.Revisited.pdf>>, accessed 1 March 2015.

²⁰² Kokoulidou E. 'The Background and Formation of the Four Schools of Islamic Law' <http://www.academia.edu/2310961/The_background_and_formation_of_the_Four_Schools_of_Islamic_Law>, (1 March 2015).

²⁰³ Abdul-Hakim, 'Jihad and Ideology of Terror', <http://www.academia.edu/963431/Jihad_and_Ideology_of_Terror>, (1 March 2015).

After the September 11 attacks in the US, Islam lay among the most misunderstood religions in the world.²⁰⁴ Most people have even associated the religion with terrorism because they believe that the people who conducted the attacks were all Muslims. Terrorism has become a prevalent occurrence with attacks being carried out by some Islamic extremists with great regularity. Such attacks are bound to make issues even more complicated than they already are. The attacks that have been occurring have all been claimed to be Jihad. After the 9/11 attacks, it was clear that the misunderstanding was more than had been thought, hence, there was a need to revisit the doctrine of Jihad and its true meaning under Islamic law.²⁰⁵

The ideology of classical Jihad has raised doubts on the level of compatibility between evolved modern norms and the law that governs the international platform. Saeed argues that Jihad is a term most people do not understand and it should not be equated with terrorism.²⁰⁶ Jihad against oppression, as described by the Qur'an, defines precautionary war and defenses against oppressions and injustices. The classical period, as argued by the author, is an era that focused more on the Jihad of war. There is a paucity of evidence or revelation by modern scholars on the characteristics of Islamic law in the classical period.²⁰⁷

In the 1980s, Abdullah Yusuf Azzam, a Palestinian Sunni Islamic scholar, articulated a doctrine of classical Jihad. This doctrine became a powerful ideological justification for Muslims to be privately involved in fellow Muslims' domestic liberation struggles. This doctrine provided a great deal of impetus to Saudi citizens in terms of mobilization and had great appeal to Pan-Islamists. It also resonated with theological Jihad orthodoxy. Azzam's stance that participation in Jihad was everyone's individual responsibility, did not go down well with the Ulama (Scholars) who were side-lined, and gave Jihadist's carte blanche to fight

²⁰⁴ Aly W. 'Misunderstanding 9/11', *ABC News*, (11th September 2012).

²⁰⁵ Abdul-Hakim, *supra* n. 203.

²⁰⁶ Saeed, A. *Jihad and Violence: Changing Understandings of Jihad among Muslims* (Melbourne: Melbourne University Press, 2002).

²⁰⁷ Gabriel R. 'Jihad: War to the Knife', *History Net*, (2 July 2014).

wherever they liked. Thomas Hegghammer submitted that what was initially the strength of Saudi Arabia, metamorphosed into their weakness and brought about radicalization.²⁰⁸ Hegghammer argued that the classical Jihadist of the Saudi movement arguably came to its peak based on popular support and numbers around 1989. This period witnessed a reduction in the number of Saudis gravitating abroad for Jihad. Hegghammer submits that the retinue of Saudis in the movement were committed individuals who had the willingness to sacrifice all they had to the nation of Saudi Arabia. Hegghammer posited that Usamah Bin Laden's global Jihadist campaign was not well received in Saudi Arabia, especially by the Wahabis because it used violence and extreme tactics.

2.1.3.1 Islamic Scholars of the Classical Era

Abu Hanifah

Abu Hanifah is one of the founders of the Sunni Schools of Law and stood for what was right and was known as very kind-hearted. This Imam had a handful of disciples such as Ibn Shaibani who formed the earliest School of Jurisprudence in Islam. The disciples are believed to be accurate interpreters of the Qur'an because of the way they re-examined the literature and rechecked their findings before accepting them. The jurist's biggest contribution is in relation to the Fiqh, or the jurisprudence of Islam, because he formulated it in a scientific way. The Imam's message was that Islam is merciful and that Allah's Prophets have been sent to close the gaps and enhance intimacy. The Prophets had not been sent to provoke people against other people.

Al-Awzai

²⁰⁸ Hegghammer *supra* n. 14.

This jurist was born in 757 A.D. in *Baalbak* and died in Beirut in 774 A.D. His beliefs were contrary to those of Imam Shafi'i because he believed that Jihad was an individual obligation to the Prophet Muhammad. The jurists have been known to disagree with the opinions of each other or with the Imams.

There are four great Imams who are regarded as the founders of the Sunni Islamic Jurisprudence also referred to as the Fiqh. These Imams are Malik, Shafi'i, Ahmad Ibn Hanbal and Abu Hanifa.

Ash-Shaibani

Ash-Shabani was an Imam, referred to as Imam Muhammad Ibn Hassan Ash-Shaibani who died in 854 A.D. This jurist was one of the disciples of Imam Abu Hanifah. Ash-Shaibani is best known for writing three famous books. One of the books is the *Kitab As-Siyar Al-Saghir*, which means "The Shorter Book on International Law". This jurist had great consideration for *As-Siyar* as the foundation for which the principles of the relationships that exist between non-Muslims and Muslims during the period of war. Additionally, this book also revealed the kind of relationship that the Muslims should have with apostates, that is, those who have decided to abandon the Islamic religion. *As-Siyar* has come to be recognized as a very crucial part of the jurisprudence and law in Islam, thereby making it an important part of Shariah Law.²⁰⁹ The book provided a set of rules on the conduct of the soldiers at war during the late Umayyad and Abbasid periods.

Some scholars have interpreted that classical *As-Siyar* was an advocate for the spread of Islam through force as the basic expression of Jihad.²¹⁰ This interpretation is based on several

²⁰⁹ Muḥammad Ibn-al-Ḥasan aš-šaybānī, *'The Islamic Law of Nations: Shaybānī's Siyar'* (Majid Khadduri tr., Johns Hopkins Press, 1966), P. 36.

²¹⁰ Javaid R and Shaheen M. 'The Concept of Jihad in Islamic International Law', *Journal of Conflict & Security Law*, (2005), Vol. 10, No. 3, 321- 343.

verses such as 2: 191-194 which states that: Fighting should be done in the name of Allah against those who attack but you should not transgress.

It can be argued that the classical period, especially with assistance from the jurists and scholars, permitted the use of force to enforce God's word and implement the Shariah. The scholars further reveal that *As-Siyar* had been used until *Dar-Al-Harb* came to be under the jurisdiction of Islam. This domain has been argued to be affirming territorial jurisdiction and it is understood as the domain of war. Jihad should be a universal obligation. Jahada needs to prevail and the true meaning must be encouraged limitlessly. Unless domination occurs, the world should be divided in two parts, *Dar Al-Islam*, which translates to the house of Islam and *Dar Al-Harb*, meaning the 'House of War' which constitutes the rest of the world.

Imam Shafi'i

Collective and individual Jihad was a major issue in the classical period. This Imam, who died in 825 A.D., formed a jurisprudence school in the nation of Egypt.²¹¹ Imam Shafi'i declared that Jihad was to be conducted as a collective obligation not an individual one. He further stated that Jihad was to remain open until such a time when the opposing party converted to Islam or paid tribute to the religion. His main message was that the religion of Islam was to dominate the others because other religions are void.²¹²

Ibn Rushd

The full name of Ibn Rushd is Abu Al-Walid Muhammad Ibn Ahmad Ibn Rushd, a philosopher and a scholar of Islamic law who explored what Jihad meant to some people. In the Christian setting, he is referred to as Averroes. This scholar wrote books that he believed would help impart skills to a student which would transform them into competent jurists,

²¹¹ Rooij A. 'Al-Shafi', ResearchGate, (2016), available at [https://www.researchgate.net/publication/312293020_Al-Shafi].

²¹² Musa A. 'Al-Shāfi', the Ḥadīth, and the Concept of the Duality of Revelation', *Islamic Studies*, Vol. 46, No. 2 (2007), 163-197.

commonly referred to as the *mujtahid*.²¹³ Ibn Rushd wrote that scholars agreed that Jihad was more of an obligation to the Muslim community to fulfill the scriptures in the Qur'an and not an individual obligation. The verse states that: "*Fighting has been ordained for you, even if you have it*". The philosopher, however, explains that the only condition that needs to be met before a declaration of Jihad against unbelievers is a preceding invitation to accept the Islamic religion.²¹⁴ Ibn Rushd revealed that there had been disagreements among some of the classical jurists on whether this could be a defensive act, and that it could be used to halt an expansionary Jihad. There was a possibility of Christians, Jews and Zoroastrians (commonly referred to as the 'People of the Book') suing for peace. There was, however, a precondition to the declaration, and it involved conversion to the Islamic faith or submission to Muslim authority and payment of the *jizya* tributary tax. The disagreement was that unbelievers should be engaged in battle until they converted, while the other group insisted that unbelievers should choose between war, the tax or Islam.

Ibn Taimiyyah

This jurist is a favourite amongst the Jihadists. The doctrine of Jihad has undergone an evolution that goes back to a group of Salafi Jihadists who influenced it with their intellectual traditions. One of the group members was Taqi Al-Din Ibn Taimiyyah. Ibn Taimiyyah's perspective, like those of other Salafi Jihadists, was influenced by circumstances of a political and secular nature. The jurists believed that those who prevented lawful warfare must be fought whereas Ibn Taimiyyah laid emphasis almost fully on defensive Jihad obligations. The jurist believed that there was no place for offensive Jihad in Shariah Law, arguing that such an act would be considered compulsion, which is a violation of the Qur'anic Prohibition. The Jihadists

²¹³ Gawthrop W. 'Dogmatic Basis of Jihad and Martyrdom', *Small Worlds Journal* (2011), available at [<https://smallworldsjournal.com/jrnl/art/dogmatic-basis-of-jihad-and-martyrdom>].

²¹⁴ March A and Modirzadeh N. 'Ambivalent Universalism? Jus ad Bellum in Modern Islamic Legal Discourse', *European Journal of International Law*, Vol. 24, No. 1 (2013), 367-389, at <<http://ejil.oxfordjournals.org/content/24/1/367.full>>, accessed (1 March 2015).

seemed to be anti-Semitic and anti-American. The mythical idea behind Jihad was the doctrine of lex talionis, which applies the principle of ‘an eye for an eye’.²¹⁵ This perspective led to the radicalization of the classical Jihad in the Muslim faith. Some of the ideas that were developed by the group of the Salafi Jihadists are that the Islamic religion had been marginalized and suppressed. In addition, they believed that Western Countries had the intention of colonizing Islamic states by introducing the ideologies of nationalism, socialism, and fake democracy.²¹⁶ The jurist believed that Muslims should engage in the fight even if they thought they might be killed in the process.²¹⁷ In most of the statements of Ibn Taimiyyah, it is suggested by Sayyid Qutb, that the world is in a state of *Jahiliyya*. *Jahiliyya* refers to an era of paganism before the existence of Islam while exploring the defiance and ignorance of the period. Qutb suggested that a state of *jahiliyyah* still exists in the contemporary Muslim world, explaining that the contemporary world is still in religious and communal decadence. Ibn Taimiyyah argued for the Doctrine of Tawhid, which means the Unity of God. This concept is a consequence of the Manichean Doctrine, which is an old notion that abides by dualism. Tawhid states that all Muslims need to accept the divine law that distinguishes God’s Party from the party of evil.²¹⁸

As indicated by the doctrine, any Muslim who does not use divine law as their source of guidance is a part of *Jahiliyyah* and is no longer part of the Muslim community. Such a state meant that the Muslim was now in apostasy or Takfir as referred to in Islam, despite them being born Muslims. According to Qutb, the only way this state of *Jahiliyyah* could be controlled was through the formation of a Muslim nation. Ibn Taimiyyah supported the declaration and pursuit of war against Muslim governments which he believed had rulers who were not

²¹⁵ Cotte S. ‘Mind Slaughter: The Neutralization of Jihadi Salafism’, *Studies in Conflict and Terrorism*, Vol. 33, No. 4 (2010), 330-352.

²¹⁶ Abdul-Hakim M. ‘Jihad and Ideology of Terror’, <http://www.academia.edu/963431/Jihad_and_Ideology_of_Terror>, accessed 1 March 2015.

²¹⁷ Ul Islam N. ‘The Islamic Legitimacy of the “Martyrdom Operations”’, *At-Tibyaan Publications*, (2013) <<https://theJihadproject.files.wordpress.com/2013/01/mayrtdom-operations.pdf>>, accessed 1 March 2015.

²¹⁸ Abdul-Hakim *supra* n. 216.

applying the use of legal Muslim codes. His justification for Jihad against other Muslim states that had not embraced the use of Islamic codes was that the war would lead to the establishment of an Islamic nation that used divine law. The jurist's Mardin fatwa has been repeatedly used by Islamic militants who translated it to mean that they have the right to declare some Muslims as infidels, meaning that they could wage war against them. Some scholars argue that the jurist's fatwa was erroneous because it violated some of the *Ijmas* of Sunni Muslims.²¹⁹ Qutb embraced the doctrines developed by Ibn Taimiyyah. As such, there was violent Jihad against non-compliant nations which was allowed under the law.

This school of thought on the Jihad during the Classical Period revealed that many Muslim scholars and leaders lost the meaning of what a Jihad should be in the Islamic religion. There had been a rise in the number of Jihadists and groups in contemporary radical Islam that showed no tolerance for others in the world. The classical rule of this concept is that it should only be allowed if non-Muslims trigger it because Muslims are not allowed to kill others in society because they are non-Muslims. The Holy Qur'an supports this, stating "there is no compulsion when it comes to religion".²²⁰ They are only allowed to initiate Jihad if they are denied their religious freedom, or if they realize that there is an intention of the enemy to attack them or they experience oppression. The groups that endorse the wars, modified some of the concepts of the classical doctrine of Jihad and made it serve their ideologies of political resistance in the Islamic community. The sprouting networks of an international nature that have popularized the concept of terrorism and sought to justify suicide attacks against others are evidence of this claim. Jihad is a crucial part of the Islamic religion, and despite its importance, there have been many misconceptions about what it stands for, leading to the non-

²¹⁹ Heneghan T. 'Muslim Scholars Recast Ibn Taymiyyah's Fatwa on Jihad', *Reuters* (2015), at <
<http://www.israinternational.com/component/content/article/42-rokstories/318-muslim-scholars-recast-ibn-taymiyyahs-fatwa-on-jihad.html>>.

²²⁰ Surah Al-Baqara, Verse.256, 'there is no compulsion in religion'.

Muslim community unfairly judging this concept and interpreting it to mean that Muslims are violent and extremists.

2.1.4 Conceptualization of Jihad in the Modern Era

Muslims have retained the military and religious connotation of the term Jihad in modern times. Since the 19th revivalism,²²¹ Jihad has played a role in shaping Islamic reactions to movements such as colonialism. Jihad formed a struggle against such expansions through different Islamic movements. Some of the movements in the 19th century included the Prince Abd Al-Kader Movement in Algeria, Senussi in Libya and the Insurgency Movement led by Ahmad Al-Urabi in Egypt.

2.1.4.1 Islamic Scholars in the Modern Era

The events of September 11, 2001, have had a significant influence on global opinion of Islam in general and the involvement of Saudi Arabia in terrorism.²²² Of the 19 persons, who were responsible for the attack, 15 were Saudi citizens.²²³ Al-Qa'idah organization was led by Usamah Bin Laden who was also Saudi. However, the current global view of Saudi Arabia has changed and the view of Saudi extremism has been reduced as Saudi itself was a target of several terrorist attacks. As the Islamic State (IS), commonly known as Daish, has recently emerged as a terrorist group, which is active in Iraq and Syria, the initial view of Saudi extremism has come to the surface again. The current accusation is based on the idea that IS represents Wahabism. The matter which helped to link terrorism and Saudi Arabia, occurred in the eighteenth century, led by Muhammad Ibn Al-Wahab (1703 - 1792). Wahabism, which emerged in the Arabian Peninsula, is one of the most important doctrines.²²⁴ The doctrine emerged as a response to the situation of Muslims at the time, which had deteriorated in terms

²²¹ Gloud M. 'Religion within Reason', *Policy Review*, no. 146 (Dec, 2007), 25-38.

²²² Taheri A. 'Saudi Arabia: Between Terror and Reform', *American Foreign Policy Interests*, Vol. 26 (2004), 457- 465.

²²³ *Ibid.*

²²⁴ *Ibid.*

of beliefs and habits, such as ‘praying to saints, and believing that saints could guard blessings or perform miracles.’²²⁵ Unlike Wahabism, Natana J. DeLong-Bas argued that the other doctrines emerged as a response to external interventions and aggressions, including European imperialism and a willingness for political independence during the nineteenth and twentieth centuries.²²⁶

It was often believed that Ibn Abd Al-Wahab used Jihad as a tool for proselytization.²²⁷ However, this proved to be untrue as the original writings of Ibn Abd Al-Wahab have made clear that *da'wah* was the standard method that he used to recruit new believers. ‘According to his vision, becoming a Muslim was to be the result of an educational process, rather than a one-time declaration of belief made under the threat of death.’²²⁸ His writings also called for a restricted Jihad, not an open one. In other words, Ibn Abd Al-Wahab adopted the defensive meaning of Jihad that could be only invoked when there is actual aggression directed against Muslims.²²⁹ He even opined that Jihad should not take on an aggressive character during a fight. Therefore, Jihad is not an open principle that is directed against all people and at all times.²³⁰ He also believed that martyrdom is not glorified as such, and that it is only acceptable when a person conducts Jihad with the intention to defend God and God’s community.²³¹ Martyrdom which is carried out on the basis of achieving personal aims or reward is not initially martyrdom.

During the 19th century, Muslims were under the threat of colonialism and intellectual decline. In this period, Jamal al-Din Afghani struggled for the religious and political reform of

²²⁵ DeLong-Bas N. ‘Wahhabi Islam: From Revival and Freedom to Global Jihad’ (Oxford, Oxford Press University, 2004).

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ *Ibid.*

²²⁹ *Ibid.*

²³⁰ *Ibid.*

²³¹ *Ibid.*

Islamic territories.²³² The Muslim scholar had an apparent interest in politics and constantly attempted to obstruct Western colonialism. The primary concerns for Afghani were liberation, unity, and reforms. On the concept of reformation, Afghani advocated for a time-sensitive analysis of the Sunnah and Qur'an and reopening Jihad. Regrettably, Muslim society was under the threat of moral decay as Afghani observed and recommended a genuine interpretation of the Sunnah. Notably, the scholar advocated rekindling the virtues and vices that were once characterized by the Ummah to redeem the lost glory of Islam.

On the idea of unity, Afghani encouraged a new sense of Muslim solidarity and patriotism.²³³ Notably, the Islamist felt that the Sunni-Shia division was not characteristic of Islam and was not harmful to the two distinct groups. On liberation, Afghani opposed Western influence and expansion in Islam, as a result he was accused of being anti-colonialist. Sovereignty and independence were essential according to Afghani, which inspired his thoughts on liberation. Afghani adopted the conservative expression of Jihad to counter the Western invasion of Muslim societies.²³⁴ This Muslim scholar believed that Islamic unity and solidarity would resist such a movement. Notably, Afghani was not in support of spreading Islam by force because he was more concerned with doing things diplomatically.

There are a significant number of Qur'anic verses and traditions of the Prophet Muhammad that restrict a call for Jihad to situations of transgression and persecution by the opponents. In addition, it is evident that the wars fought by the Prophet Muhammad were peaceful and therefore defensive in nature. The verse that is primarily quoted to highlight the defensive nature of the Jihad is in the second chapter of the Qur'an, specifically verse 2:190,

²³² Tahir A. 'Syed Jamal Al Din Afghani (A First Glow of Dawn on the Horizons of the Muslim World)', *Interdisciplinary Journal of Contemporary Research in Business*, Vol. 4, No. 4 (2012), 256-266.

²³³ Isseroff A. 'Jamal al Din al Afghani', *Encyclopaedia of the Middle East* (2017), at [http://www.mideastweb.org/Middle-East-Encyclopedia/jamal_al-din_al-afghani.htm].

²³⁴ Keddie N. 'Sayyid Jamāl al-Dīn al-Afghānī's First Twenty-Seven Years: The Darkest Period', *Middle East Journal*, Vol. 20, No. 4 (1966), 517- 533.

which urges Muslims to fight in accordance with Allah's way, to fight but not to transgress the limits because Allah does not love those who stray.²³⁵

The exponents of an offensive Jihad pay considerable attention to chapter nine of the Qur'an which posits that after the expiration of the sacred months, those who associate others with Allah and His Divinity should be slain, seized or besieged. However, if they are repentant, pay *Zakah* and pray, they should be left alone.²³⁶

Associations affiliated with Islam such as the Europe's Federation of Islamic Organizations have condemned terrorism aggressively and stated that its linkage to all terror activities to Muslims as unjustified. Saudi Arabia's fight against terrorism is evident through the donations the country has been making to fight extremists. In 2014, Saudi Arabia gave the United Nations \$100 million to counter terrorism.²³⁷ An article in the Saudi Gazette highlighted the view of the Kingdom that terrorism is a grave challenge facing the international community and fighting it requires the efforts of people globally.²³⁸

In short, the current understanding of the Islamic religion is not, most of the time, moderate, as was the understanding of the majority of Muslims for several centuries, who adopted the following Statement of God, who says 'And likewise we have made you a moderate nation'.²³⁹ In addition, the Messenger of God said, 'Beware of extremism in the religion for that is what destroyed those before you'. At present, we can see the emergence of many political Islamic groups which proclaim themselves to be agents of God on earth and empower themselves with the authority of speaking on behalf of the religion. They mainly build their

²³⁵ Smith A. 'Words make Worlds: Terrorism and Language', *FBI Law Enforcement Bulletin*, Vol. 76, No. 12 (2007), 12-18.

²³⁶ Qur'an, Surah At-Tawbah, 4.

²³⁷ Gladstone R. 'Saudi Gives \$100 Million to U.N Fight on Terrorism', *New York Times* (13th, August, 2014), <<http://www.nytimes.com/2014/08/14/world/middleeast/saudi-give-100-million-to-un-fight-on-terrorism.html?r=0>>.

²³⁸ The Saudi Gazette. 'Fighting Terror a Global Responsibility', <<http://english.alarabiya.net/en/News/middle-east/2014/06/15/Saudi-Arabia-Fighting-terror-a-global-responsibility.html>> (June 15, 2014).

²³⁹ Qur'an, Surah Al-Baqara, Verse 143.

strength on a lack of public rejection of their claims, although the reality of such claims is aimed at using the Islamic religion for their political and personal objectives. Accordingly, most of these groups have established political parties, as is the situation with the Muslim Brotherhood in Egypt, which set up the party of Freedom and Justice.²⁴⁰ The Salafist movement in Egypt, which set up the party of Al-Nour, the establishment of the Renaissance Movement by the Islamic Renaissance Movement in Tunisia, and the establishment of the party of Justice and Development by Islamists in Morocco are other examples.²⁴¹ The common aim of these groups is to use the Islamic religion as a tool to reach power.

Dr Khalid Ad-Dakheel opines that the slogan of ‘Islam is a religion and state’, unleashed by the Muslim Brotherhood since its creation, has no religious basis.²⁴² He said that this claim is a political slogan, aimed at achieving their goals.²⁴³ He believes that their acceptance of political activities and civil principles of a civil state, such as the devolution of power and separation of powers in Egypt after Hosni Mubarak’s downfall, indicates that they abandon the above slogan when the matter is in conflict with their fundamental principles.²⁴⁴

In light of the foregoing discussion, we distinguish between Islam as a religion, which promotes tolerance, peace, and love, and those political Islamist groups which seek to employ this religion to achieve their own aims and interests, aiming to reach power. We saw, for example, a change in the position of late President Muhammad Morsi on loans. Before he came to power, he was opposed to the notion of accepting a loan as he believed it to be forbidden in Islam, however, after coming to power, he agreed to accept a loan from the International

²⁴⁰ Saleh O. ‘The Cautious Approach: Can the Emerging Islamic Movements Restructure an Arabic State?’, *International Policy*, Vol. 188 (2012), available at <http://www.siyassa.org.eg/newsQ/2369.aspx> (Published in Arabic).

²⁴¹ *Ibid.*

²⁴² Al-Dakheel K. ‘Separation of State and Religion in Islamic History’, *Alhayat* (February, 2014), available at <http://alhayat.com/Opinion/Khaled-El-Dakheel/729863> (Last Access: 23rd June, 2015) (published in Arabic).

²⁴³ *Ibid.*

²⁴⁴ *Ibid.*

Monetary Fund to help the country out of its deep economic crisis.²⁴⁵ He even stated that such an activity is permissible and is in conformity with the Islamic principles when he was in office. These examples indicate that those political Islamist groups lack political maturity and experience, which can enable them to lead the public and help them achieve their aspirations. It, further, shows how the policy of such groups can radically change according to the aims they seek to achieve, even at the cost of compromising with their ideology. Having examined the experiences of these extremist groups, it seems that the depiction of the Islamic world in the fifteenth century of the Islamic calendar (Hijri)/21st Century CE, by these groups, to a large extent, imitates the status of Europe in 15th Century CE, during the medieval period, where the Christian religion was also used as a tool to achieve political aims. Therefore, these groups pose a greater threat to Islam and the Muslim World than foreign enemies.

2.1.5 Legal Literature on Jihad

The legal literature on Jihad largely focuses on the compatibility of Jihad and international law. Specifically, is the use or threat of Jihad in self-defense consistent with modern international law as stipulated in the UN Charter?²⁴⁶

The first article of the UN charter stipulates that its purpose is to maintain global peace and security. Consequently, in their international relations, all member countries have to refrain from either threatening or using force against the territorial integrity or political independence of other states.²⁴⁷ There are two major exceptions to the ban on the use of force in Article 2(4) of the UN Charter: firstly, where force is authorised or used by the Security Council as stipulated in Articles 42-9 and 53 of the Charter; and secondly, where force is used in self-

²⁴⁵ Hassanein M. 'The IMF loan will change the positions of the political forces in Egypt', *Middle East*, Issue: 12 (29th August, 2012), at <http://archive.aawsat.com/details.asp?section=6&issueno=12328&article=692882#.VYq2HXZwYdU>, (published in Arabic).

²⁴⁶ U.N. Charter articles 2(4) and 51.

²⁴⁷ Gray C. 'The Use of Force and the International Legal Order, in Gray, C. (ed.), *International Law and the Use of Force* (2nd ed.) (Oxford, Oxford Press University, 2018), 589, 617.

defense. Article 51 of the UN Charter recognizes the right to self-defense against armed incursion indicating that “nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a member of the United Nations until the Security Council has taken the measures necessary to maintain international peace and security”.²⁴⁸ Therefore, article 2(4) of the UN Charter is able to address the question of aggression. In this regard, the concept of Jihad and self-defense under the UN Charter can serve a similar purpose. Military Jihad in response to aggression can be exercised in a manner consistent with the United Nations Charter.

Article 1(3) of the UN Charter stipulates that one of the main purposes of the UN is to attain international cooperation in addressing international problems of an economic, cultural, social, or humanitarian character and in enhancing and encouraging human rights and respect for fundamental freedoms for all without discriminating because of language, religion, sex, or race.²⁴⁹ Therefore, respect for human rights is at the center of the UN Charter. These rights include the freedom of religion.²⁵⁰ All member countries of the Arab League are signatories to more than one of the UN human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR).²⁵¹ Article 18 of the ICCPR emphasizes the right to freedom of religion and the fact that no one shall ever be subjected to coercion that would impair their freedom to adopt or have a religion or belief of their own choice.²⁵² Peaceful Islamic Jihad, which entails the practice, teaching and observance of religion and worship in a peaceful manner is consistent with the Qur’an’s ban of “compulsion in religion” and respect for other religions.²⁵³ Modern instruments of human rights in Muslim countries safeguard freedom of

²⁴⁸ *Ibid*, P. 228.

²⁴⁹ U.N. Charter Article 1.

²⁵⁰ International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, 52.

²⁵¹ Arab Charter on Human Rights, (22 May 2004), (note 93) preamble, para. 6.

²⁵² International Covenant on Civil and Political Rights art. 18, adopted 16 Dec. 1966, 999 U.N.T.S. 171.

²⁵³ Qur’an, Al-Baqarah 2:62 (“Those who believe [in the Qur’an], and those who follow the Jewish (scriptures), and the Christians and the Sabians (footnote omitted) — any who believe in Allah and

religion. Certainly, compulsion is inconsistent with religion because religion relies on voluntary faith and will, and this would have no meaning if induced through force.²⁵⁴

Does Jihad as a concept provide a religious justification for indiscriminately attacking civilian populations who are not directly involved in hostilities, or does it justify attacks on civilian objects in contravention of international humanitarian law and the criminalization of terrorism? Under international law, there are two important principles.²⁵⁵ Firstly, the distinction principle requires that attacks should only be directed at combatants-civilians who are directly involved in hostilities and military targets.²⁵⁶ Secondly, the principle of proportionality bans otherwise lawful attacks if the expected civilian loss is not proportionate to the expected direct military advantage;²⁵⁷ and it is unlawful to employ means and methods of warfare that are unselective, that is, it cannot target particular military objects.²⁵⁸ Over the recent past, Jihad has been employed by non-state actors such as Al-Qa'idah and Ash-Shabab to justify attacks on civilian populations and civilian objects, and in justifying the use of force in fighting the “far” enemy (the United States and its Western allies,) and “near” enemy (Arab governments that are, in the view of Jihadists, pawns of the U.S.).²⁵⁹ Is the violence against civilians and civilian objects by extremist groups such as Al-Qa'idah and Ash-Shabab compatible with Shariah? No, these indiscriminate attacks on civilian populations contravene several principles derived from the Qur'an such as “kind and just treatment”,²⁶⁰ proportionality,²⁶¹ humanity,

the last day, and work righteousness, shall have their reward with their Lord; on them shall be no fear, nor shall they grieve.

²⁵⁴ League of Arab States, Arab Charter on Human Rights, article 30, *opened for signature* May 22, 2004 entered into force (March 15, 2008).

²⁵⁵ Green L. 'The Contemporary Law of Armed Conflict' (3rd ed.) (Manchester, Manchester University Press, 2008), P. 102.

²⁵⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, article 48.

²⁵⁷ Protocol I, article 57(2).

²⁵⁸ Protocol I, article. 51(4).

²⁵⁹ Gerges F. 'The far enemy: why Jihad went global' (Cambridge: Cambridge University Press, 2005), P. 28.

²⁶⁰ Qur'an, An-Nahl 16:126-128.

²⁶¹ Qur'an, Al-Maidah, 5:32.

justice,²⁶² and fraternity.²⁶³ Targeting civilians contravenes the standard of “just” and “kind” treatment of non-combatants as stipulated in the following passage from the Qur’an: “Allah does not forbid you to deal justly and kindly with those who fought not against you on account of religion nor drove you out of your homes. Verily, Allah loves those who are just.”²⁶⁴ Killing and causing bodily harm to civilians fails the test of ‘just and kind’ treatment. In fact, during Prophet Muhammad’s era, the application of force (*jus ad bellum*) was primarily in self-defense and was controlled by numerous humanitarian rules that regulated the conduct of hostilities (*jus in bello*). Specifically, violence against women, the elderly, the sick, children, clerics, and places of worship was prohibited.²⁶⁵ These limitations are consistent with the law of armed conflict and international humanitarian law. Based on these limitations, the indiscriminate killing of civilians is regarded as a crime against humanity in the Qur’an.

2.1.6 Overlap between the Concept of Jihad and the Concept of Terrorism

Misunderstandings have always existed, particularly in the non-Muslim world, about the concept of Jihad. In the recent past, Jihad has been equated with terrorism, and both concepts have been interpreted to mean the same thing. This false narrative has been amplified by multi-faceted wars against terror, which involves the media as well as the war front. It is true that Jihad and terrorism have some common characteristics such as death and other forms of collateral damage. Nonetheless, there is a significant difference between the two concepts. Jihad is mainly meant for the reformation of harmful trends and societal development, whereas terrorism results in destruction and damage to the entire fabric of society. Terrorism entails the carefully planned perpetration of crimes against humanity which include the mental and physical torture of non-combatant civilians as well as soldiers, the destruction of private and

²⁶² Qur’an, An-Nisa, 4:1.

²⁶³ Qur’an, Al-Mumtahanah, 16:90.

²⁶⁴ Qur’an, Al-Mumtahanah, 60:8.

²⁶⁵ Sahih Muslim, In Hadith, Book 19, No. 4294 and 3261.

public property, and the destruction of military and civil infrastructure to create fear and to harass the civilian population. None of these atrocities are part of Jihad. Unlike terrorism, Jihad is not initiated for the fulfillment of materialistic objectives and desires. The only objective of Jihad is to establish an Islamic social order in line with Allah's commandments. Jihad is aimed at resisting forces that seek to destroy the prosperity and peace of human society. Therefore, it is incorrect and misleading to equate acts of terrorism with the concept of Jihad.²⁶⁶

Jihad from an original Islamic perspective implies making maximum effort to attain a specific objective. It has nothing to do with death, brutality, and the excessive use of force. Consequently, Jihad refers to the struggle and effort undertaken in the pursuit of pleasing Allah and which is directed at achieving the objectives ordered by Allah Almighty²⁶⁷ (establishing a just social and moral order in the world). The major difference between the objectives of terrorism and those of Jihad is that under Jihad, the objectives revolve around eliminating social evils including but not limited to exploitation, injustice, sedition aggression, and lawlessness.²⁶⁸ On the other hand, terrorism promotes these very evils. Therefore, it is evident that while Jihad is a virtuous and worthy concept, terrorism is dangerous to humanity. Secondly, Jihad is not for man-made objectives and personal gratification of any form, it is only launched to achieve the will of Allah. Thirdly, for terrorism, there is no restriction, no limit, and no difference between what is innocent and what is not. It is a brutal application of pressure tactics, including using arms and torturous methods even against innocent civilians. In Islam, such actions are neither permitted in theory, nor tolerated in practice. Under Islamic teachings, combat-based Jihad is only permitted as the last resort.²⁶⁹

²⁶⁶ Schmid E. *'The Routledge Handbook of Terrorism Research'* (London & New York: Routledge, 2011& 2013), P. 86.

²⁶⁷ Jon M. 'Jihad – The Four Forms and the West', Accessed August 18, 2016 at <http://www.islam-watch.org/home/165-jon-mc/1447-Jihad—the-four-forms-and-the-west.pdf>.

²⁶⁸ Peters R. *'Jihad in Classical and Modern Islam'* (Princeton: Markus Wiener Publ., 1996), P. 5.

²⁶⁹ *Ibid*, P. 3.

Based on the foregoing analysis, it is evident that terrorism and Jihad are different in terms of their modes of operation. Jihad, being a noble objective, directed at improving and bettering human society, does not involve inhuman behaviour and is conducted in line with the civilized norms of warfare. However, for terrorists, their guiding principle is that “everything is fair in love and war”, and as such, they do not believe in respecting human values such as equity, justice, moderation, fair play, and respect for the innocent and weak. Certainly, terrorism is a cruel crime against humanity and should not be justified regardless of who commits it. For terrorists, the end justifies the means; however, for Jihadists, both the means and the ends must not only be justified but must also be lawful.

Given the striking differences between Jihad and terrorism, why is Jihad associated more with terrorism than any other concept? Western countries have wrongly presumed that Islam, more than any other religion, has a strong motivation or link to violence and terrorist activity. One of the main factors that has shaped this perception is the negative depiction of Islam by Western media. For instance, when a Christian kills other people, as was the case in Australia’s Hoddle Street Massacre, the media did not refer to the perpetrator as a Christian.²⁷⁰ However, when a Muslim commits the same offense, the media immediately identifies him/her as a Muslim perpetrator. This has put Muslims in an awkward position because on many occasions, they are expected to defend themselves over these blanket condemnations. Muslim communities are continuously accused of committing crimes of which they are oblivious. This express discrimination against Muslim populations largely explains why Jihad and by extension, Islam and the global Muslim community, has been linked to terrorism.

Islamic extremism and terrorism are not new things; however, post 9/11 it appeared in the public imagination as a new phenomenon. The events of 9/11 were a significant turning

²⁷⁰ Holtmann P. ‘The Transformation of the Jihad-Doctrine in Sadat’s Egypt’ (Munich: Grin, 2009), P. 89.

point, not just for governments, but also equally for Muslim communities in both the West and East, who felt that they were sabotaged and harshly judged. In Western countries such as the United States, 9/11 was a signal to governments and their associates that there is a possibility of terrorism and Islamic terrorism occurring again on their own soil. Additionally, after 9/11, the general perception of Islam in the West shifted from being considered as nothing more than a religion like the others, to that of the most dreaded of all religions. The fear of Islam was not only a consequence of the 9/11 and other subsequent attacks, but also a result of the religious motivations that Islamic terror organizations employ to exonerate their acts of terror. It is among the Islamic justifications of terrorism that the concepts of Jihad and Holy War aroused the West to the potential link between terrorism and Islam. Of the many Islamic concepts that have been applied by extremists such as Bin Laden to absolve Islamic terrorism, the most pressing concept that is linked to terrorism is Jihad. There is general confusion as to what Jihad implies, even among the Muslims themselves, and whether terrorism is instigated by Jihad. Before 9/11, Jihad was rarely heard of in many western countries.²⁷¹ However, post 9/11, Jihad became a household concept but without a singular working definition. As a result, because of its ambiguity, people, particularly in western countries, gained their knowledge of Jihad based on public explanations by Islamic extremists, where Jihad is depicted as a violent religious instruction that allows Muslims to fight infidels through means of war and terrorism. Consequently, people in the West have developed a fear of Islam as a religion that recognizes terrorism. For the most part, the media has contributed to the linkage of Jihad and terrorism by publishing many reports on extremist Muslims declaring holy war (Jihad) against the west and its allies. These reports not only guide the people of the West to use the interpretations of Jihad provided by Islamic extremists, but it has also resulted in negative judgments of Muslim communities. Acts of Jihad are an Islamic affair, and as a result, those who assess any act as to

²⁷¹ Bjørge T. *'Root Causes of Terrorism: Myths, Reality and Ways Forward.'* (Routledge, 2005), P. 5.

whether it is an act of Jihad or terrorism, including the media, must take into account of the original Islamic perspective not just the notions propagated by extremist groups such as Al-Qa'idah who use religion to further their own selfish interests.

CHAPTER THREE: ANALYSING UNSC RESOLUTION 1373

3.1 Introduction

The September 11th attacks perpetrated by Al-Qa'idah is the deadliest terrorist attack in human history. The attack carried out by 19 Al-Qa'idah suicide bombers, 15 of whom were Saudi Arabian citizens, resulted in the demise of over 3000 civilians of 78 different nationalities. Records from investigations conducted by law enforcement agencies reveal that the Al-Qa'idah militants posed as passengers and used crude weapons to attack the pilot and passengers. After this, the hijackers took charge of the airplanes, marking the start of the horrific incident. The death toll and the diversity of the people who perished during the attack meant that the attack had a global effect, despite it having taken place in the US. Every country condemned the attack with the then-US president stating that 'democracy and freedom were under attack.' The attacks affected every sphere of human life leaving a scar on the both the affected country and the entire world.

The events of September 11th, 2001, posed a direct challenge to international order in ways rarely experienced before and was seen as a clear threat against international peace and security. The significance of 9/11 thus underlines the terrorist threat to international order and the major challenges that the international community faces in countering that threat. Terrorist attacks that predate 9/11 tended to be confined to bombing buses, tubes, or any public place that caused several deaths and civilian casualties. Other types of terrorism included the assassination of officials, kidnapping and taking peoples as hostages. Post September 11 events witnessed a development in the scale of terrorist acts. Terrorists now are differently organised and possess an ambitious ideology.

For example, terrorists do not necessarily need modern weapons or military aircrafts to carry out their attacks. In the events of September 11th, 2001, the terrorists only needed to change the track of four civil airplanes to cause considerable damage that attracted the

attention of the international community. These attacks are equivalent to the power of the military armies of any state. In terms of the targeted buildings (the Pentagon, the White House, and the World Trade Centre), these were carefully selected and the acts caused international financial damage and civilian casualties

In fact, the era of post 9/11, as will be shown throughout this chapter, confirms the policy of the international community in fighting terrorism. The international community has attempted to follow a policy of cooperation in fighting terrorism since the middle of the last century. From the 1960s, there was a great deal of cooperation around the development of a network of treaties.²⁷² Even before 9/11, the Al-Qa'idah Sanction Committee was created in 1999 by UNSC Resolution 1267. As will be discussed in this chapter, UNSC Resolutions 1368 and 1373 are a continuation of this policy. However, the UNSC, through these two resolutions has put forth several new policies in the fight against terrorism. First, the new presumption of the right to self-defence in the face of a terrorist attack (the implication of Resolution 1368) is one of these new policies. Second, the compulsory harmonization of law and policy by member states (as stipulated in Resolution 1373).

This chapter is devoted to studying UN Security Council Resolution 1373 and its contents, as many of its formulations are indeterminate and open to interpretation. For example, the resolution mentions several acts that are considered terrorism. As states have different points of view about which acts are to be considered terrorism, there is much disagreement as to what constitutes a terrorist act. Some states might rate the actions of the Palestinians against Israel as terrorism, while others might describe them as a resistance to occupation.

Equally applicable, the resolution states that some organisations also engage in acts of terrorism. Again, an organisation that might be classified as a terrorist group by some states

²⁷² See for example, the 1971 Montreal Convention (Adopted on 23rd September, 1971, Entry into Force on 26th January (1973).

may be viewed differently by other states. For instance, organisations such as ‘Ahrar Ash-Sham’ in Syria, Hamas in Palestine, and the Muslim Brotherhood in Egypt are classified as terrorist organisations by several states such as Russia and the US. However, they are viewed as non-terrorist organisations by others. Of course, the political interests of those states play a fundamental role in determining which acts or organisations are terrorists rather than non-terrorist. Accordingly, as there is a lack of an internationally agreed definition of terrorism, this might open a political floodgate for policy-makers as well as law-makers when applying the different definitions as to which acts, or organisations are terrorist. For this reason, the policy-oriented approach becomes extremely important and relevant to this thesis, as this approach also provides a framework for decision-makers to make the best decision when applying a law whose rules or articles are quite open to different and various interpretations for a certain reason, as is the case with Resolution 1373. Therefore, it is vital to the purpose of this thesis to investigate how decision-makers in Saudi Arabia understand international law through Resolution 1373 when countering terrorism. This chapter, therefore, examines the scope of this resolution and the implications that it raises, such as preventing the financing of terrorism, the non-violation of human rights, and cooperation between states in exchanging information to combat terrorism.

3.2 The UNSC Powers

The Security Council has “primary responsibility for the maintenance of international peace and security.” The framers of the United Nations Charter assumed that the task of the organization was to create an international framework that would eliminate “threats to peace, breaches of the peace and acts of aggression” between states. Chapter VII of the charter was framed as the centre of the system of collective security and gave the Security Council powers to take enforcement action against states when international peace and security were

endangered.²⁷³ Under articles 41 and 42, the Council was given non-forcible measures, such as economic and diplomatic sanctions and also forcible measures, originally envisaged to be undertaken by armed forces under the command of the United Nations. The latter ambitions were never realized due to the Cold War and mandatory powers under Chapter VII were not used between 1950 and 1990. The adoption of Resolution 678 in November 1990, which authorized states to use any means necessary to end the illegal Iraqi occupation of Kuwait, opened a new phase of activity by the Security Council.²⁷⁴ This included recognizing that threats to international peace and security also came from terrorist sources. The response to September 11th, 2001 has to be seen in this context.

Chapter VII of the United Nations Charter provides that the Security Council can adopt two classes of resolutions, recommendations and measures (see Article 39). Most Security Council resolutions are of the former class, recommendations when the Council “calls” on members to adopt a particular course of action. They create international obligations, but would not lead to legal sanctions if they are not followed. Measures, however, are mandatory and member states must conform to them. There has been much debate since the 1990s over the scope that the Council has in adopting such measures. The creation of two International Criminal Tribunals in the 1990s was regarded by some practitioners and scholars as a novel interpretation of non-forcible measures under Article 41.²⁷⁵ In the wake of 9/11, the Council went further in expanding the understanding of its powers in the adoption of UNSC Resolution 1373 which was the first time it had attempted to create a common legal framework to be implemented by member states.

²⁷³ See, Sarooshi D. *'The United Nations and the Development of Collective Security'* (Oxford: Oxford University Press, 2000), Erika de W. *'The Chapter VII Powers of the United Nations Security Council'* (Oxford and Portland: Hart, 2004), David M. M. *'The UN Security Council: From the Cold War to the 21st Century'* (Boulder and London: Lynne Rienner, 2004), and: Schweigman D. *'The Authority of the Security Council under Chapter VII of the United Nations Charter'* (The Hague: Kluwer International Law, 2001).

²⁷⁴ Moore J. *'Crisis in the Gulf: Enforcing the Rule of Law'* (New York, London and Rome, Oceana, 1992).

²⁷⁵ UNSC Resolution 827 (1993) on the Former Yugoslavia and UNSC resolution 995 (1994) on Rwanda.

This recognition by the Security Council that acts of terrorism are threats to international peace and security is now well established and was recorded in the notes of the meeting of the five permanent members held in January 1992.²⁷⁶ From the 1990s, the Security Council has adopted many resolutions dealing with terrorism, and several are mandatory resolutions. It is helpful to review some of these examples so that the *modus operandi*, post 9/11, can be placed in context.

The first example is the ‘Lockerbie Bombing’ case. In December 1988, Pan American Flight 103 which departed from London, England on its way to John F. Kennedy Airport in New York City, was destroyed by a bomb that was planted on the aircraft by a terrorist, or a group of terrorists. The bomb exploded only seven minutes after the flight’s departure and completely destroyed the plane. Citizens of Lockerbie, Scotland were rained upon by debris and what was left of the bodies of the passengers and crew aboard the flight. The total death toll included 16 crew members, 243 passengers, and 11 residents of the town of Lockerbie. Two Libyan nationals, Abdelbaset Muhammad Ali Al-Megrahi and Al-Amin Khalifa Fhimah, were found to be guilty of committing this terrorist attack. Three years later, the two accused faced indictments for murder, and conspiracy to murder, by a Grand Jury in the US, and similar indictments by the Lord Advocate of Scotland.²⁷⁷

The US, UK, and France fought to not include the extensive amount of evidence that was collected during the three-year investigation when they presented the case before the General Assembly and the UN Security Council (UNSC). Two Resolutions, 731 and 748, were adopted by the SC in early 1992. Resolution 731 required Libya to respond effectively and fully to requests made by the US, UK, and France. However, when this was not forthcoming, the Council adopted Resolution 748 which mandated economic and transport sanctions against

²⁷⁶ UNSC Note by the President of the Security Council, S/23500 (January 31, 1992).

²⁷⁷ Sophie F. ‘*Legal Means to the Security Council*’ (Lebanon, Zain lawful and publications, 2013), P. 41.

Libya for non-compliance. A key feature of this resolution is that it considered a terrorist act as a threat to international peace and security. The Libyan government challenged the validity of Resolution 731 at the International Court of Justice (ICJ), arguing that the UN Security Council had exceeded its powers and interfered with the parties' rights and obligations under the Montreal Convention of 1971. Libya asserted that it fully complied with Articles 1, 5 and 7 of the Convention. Libya stated that there was no extradition treaty between its government and the other parties, and that accused offenders would have to be prosecuted by the Libyan State, in conformance with the Convention. Libya contended that the US and the UK were rejecting its efforts to resolve the matter within the framework of international law, by disregarding the Montreal Convention. The ICJ took the view that the Security Council was acting within its powers as article 103 of the Charter expressly provided that:

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

As a consequence, Libya was denied the provisional measures it sought.²⁷⁸ The case, thus confirmed that the Security Council possessed wide powers which the Council itself could determine. This case should be seen in the context of the re-assertion of Security Council activism as a consequence of the end of the Cold War. It is also predictive in dealing with the question of terrorism which was to become an increasing international concern in the new political landscape. The case, however, dealt with a different form of terrorism that was to

²⁷⁸ Case concerning the application of the 1971 Montreal Convention concerning the aerial incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom) ICJ Reports 1992, 3. For commentary on the case with regard to the implications of the powers of the Security Council, see: Thomas M. F. 'The 'Powers of Appreciation:' who is the Ultimate Guardian of UN Legality?' *American Journal of International Law*, Vol. 86 (1992), 519-523; W. M. R. 'The Constitutional Crisis in the United Nations', *American Journal of International Law*, Vol. 87 (1993), 83;100: Jose E. A. 'Judging the Security Council', *American Journal of International Law*, Vol. 90 (1996), 1-39.

become a threat as the 1990s progressed, as it increasingly became non-state actors that were to be the source of violence.

Other and particularly relevant examples are the Security Council's activities over Al-Qa'idah and the Taliban. In the 1990s, the Council adopted a series of resolutions condemning support for terrorism and terrorist acts connected to these two organizations. In 1998, Al-Qa'idah attacked the US embassies in Kenya and Tanzania. UNSC Resolution 1189 (1998) condemned the attacks and called on states and international institutions to cooperate to suppress such breaches of the peace and to bring the perpetrators to justice. The resolution recalled the note issued by the President of the Security Council in January 1992 and the Council, "expressed its deep concern over acts of international terrorism and emphasized the need for the international community to deal effectively with all such criminal acts." A year later, it adopted UNSC Resolution 1267(1999) which stated:

Strongly condemning the continuing use of Afghan territory, especially areas controlled by the Taliban, for the sheltering and training of terrorists and planning of terrorist acts, and reaffirming its conviction that the suppression of international terrorism is essential for the maintenance of international peace and security, to deplore the fact that the Taliban continued to provide safe haven to Usamah Bin Laden and to allow him and others associated with him to operate a network of terrorist training camps from Taliban-controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations.

Acting under Chapter VII the Resolution insisted that the Taliban cease these activities and required it to hand over Usamah Bin Laden without further delay to appropriate authorities in a country where he has been indicted, or to appropriate authorities in a country where he will

be returned to such a country, or to appropriate authorities in a country where he will be arrested and effectively brought to justice.

The Resolution then imposed a ban on all flights to and from Taliban controlled-territory and froze its assets.

The Security Council adopted 1269 (1999) soon after the last Resolution. This Resolution was significant as it anticipated the principles that were to be elaborated in 1373 two years later, as it emphasized, the necessity to intensify the fight against terrorism at the national level and to strengthen, under the auspices of the United Nations, effective international cooperation in this field on the basis of the principles of the Charter of the United Nations and norms of international law, including respect for international humanitarian law and human rights.

This turn to the relationship between international norms and the legal provisions of member states was to be monumental. It was to take the shock of September 11th, 2001, and to turn that idea into a detailed plan of action.

Early in the new century, the terrorist attacks continued and were becoming more serious and dangerous not only to the states that were targeted, but also to international peace and security. The worst terrorist attack perpetrated by Al-Qa'idah was against the USA, when the World Trade Centre towers, and the Pentagon were attacked. This event pushed the whole world and in particular the UN Security Council to address the growing threat that terrorism has started to pose to international order. To this effect, the SC issued Resolution 1368 immediately after these attacks as a first step to combat terrorism in a more planned and

strategic way. This was followed immediately by the issuance of Resolution 1373, which marks a new era of combating terrorism where several new policies were finally adopted by the SC.²⁷⁹

The next document worth discussing in the framework of this study is the UNSC Resolution 1368, taking into consideration that this resolution formalizes the initial response of the international community to the 9/11 terrorist attacks in the United States (hereinafter referred to as UNSC Resolution 1368).²⁸⁰ Notwithstanding the fact that UN Resolution 1368 is quite brief, it contains important facts concerning the incentives of the United Nations in the field of counter-terrorism.

In an analysis of UNSC Resolution 1368 (2001), it is essential to point out that the drafters of the resolution placed a special emphasis on the purposes and principles of the Charter of the United Nations that constitute the basis for the issues raised in the framework of UNSC Resolution 1368. Furthermore, in the preamble, the drafters of UNSC Resolution 1368 recognize the intrinsic right to both collective and individual self-defence under the provisions of the United Nations Charter. This implies that the right to individual and collective self-defence is considered by the drafters as a legal basis for elaborating a response in the framework of UNSC Resolution 1368.

To continue, Article 1²⁸¹ of the UNSC Resolution 1368 strictly and unambiguously accuses the 9/11 terrorist attacks in the United States of being “a threat to international peace and security.”²⁸² That is, the drafters of UNSC Resolution 1368 provide two reciprocal considerations with regard to the events of September 11th, 2001. First, the 9/11 attacks are recognized as acts of international terrorism and second, the 9/11 terrorist acts are considered

²⁷⁹ *Ibid*, p.105.

²⁸⁰ UN SC Resolution 1368.

²⁸¹ Unequivocally condemns in the strongest terms the horrifying terrorist attacks which took place on 11 September 2001 in New York, Washington, D.C. and Pennsylvania and *regards* such acts, like any act of international terrorism, as a threat to international peace and security.

²⁸² *Ibid*, UN Charter Article 1.

a threat to international peace and security. It can be presumed that this recognition of the 9/11 terrorist acts as a threat to international peace and security is not incidental as by doing so, the drafters of UNSC Resolution 1368 intend to justify and legitimize the subsequent military measures taken in response to the 9/11 attacks in accordance with the UN Charter.²⁸³

Furthermore, it is also deemed judicious to analyse Article 3 of UNSC Resolution 1368 (2001). Thus, in the text of this Article, the drafters accentuate the common responsibility of all states to cooperate in an urgent and expeditious manner in order to remedy the existent threat by bringing to justice the perpetrators, sponsors and organizers of the 9/11 terrorist attacks. In other words, the drafters of UNSC Resolution 1368 do not restrict the 9/11 terrorist attacks to the U.S. boundaries, but rather impose the responsibility of restoring justice on all countries.²⁸⁴

Resolution 1368 stresses the obligation of the international community to prevent and suppress international terrorism through collaboration and the systematic implementation of international counter-terrorist legal instruments, including Security Council resolutions, “in particular Resolution 1269 (1999) of 19 October 1999.”²⁸⁵

The resolution ends with a commitment by the Security Council to “express its readiness to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations.” This indicates that there was extensive discussion among the members of the Security Council on how to ensure that this objective becomes a clearer program of action.

There are several implications in relation to the adoption of the resolution. Fry’s argument that the criminalization of terrorism before and after the 9/11 terrorist attacks

²⁸³ *Ibid*, UN Charter Article 1, see Byres, (2002).

²⁸⁴ *Ibid*, Article 3.

²⁸⁵ *Ibid*. Article 4.

significantly differs is important. According to the author, the 9/11 terrorist attacks have raised the collective “abhorrence” of the international community in respect to international terrorism.²⁸⁶

In other words, the researcher aims at showing that the 9/11 terrorist attacks have caused the international community to reconsider its strategic paradigm in relation to counter-terrorism. In this light, UNSC Resolution 1368 may be viewed as both the formal reflection of the aforesaid reconsideration and the turning point in the construction of a new anti-terrorist doctrine at the international level.

In the framework of U.S. politics, the new doctrine is frequently known as “the war on terrorism.”²⁸⁷ Referring to Young’s theorizing on the evolution of terrorism as a legal concept, it is deemed prudent to highlight that the states do not share a common understanding of terrorism, especially at the international level. Each state utilizes the definition it can retrieve from its domestic legislation.

3.3 The UNSC Resolution 1373

UN discussions on the critical importance of a common international approach to countering terrorism produced Resolution 1373 (2001) some 17 days after the attacks. It was to be a detailed and comprehensive resolution which not only created international obligations, but also created a template for national legislation. At the same time, it created an institutional framework to monitor compliance with it.

The resolution consists of a preamble and nine articles. In its preamble, UNSC Resolution 1373 (2001) articulates that the resolution is a logical continuation and

²⁸⁶ Fry J. ‘Swindle of Fragmented Criminalization: Continuing Piecemeal Responses to International Terrorism and Al Qaeda,’ *New England Law Review*, Vol. 43 (2008-2009), P. 817.

²⁸⁷ Young R. ‘Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and Its Influence on Definitions in Domestic Legislation,’ *Boston College International and Comparative Law Review*, Vol. 29, Issue 1 (2006), P. 23.

reaffirmation of preceding UNSC Resolutions, such as Resolution 1269 (1999)²⁸⁸ and Resolution 1368 (2001):²⁸⁹

The Security Council reiterates its Resolutions 1269 (1999) of 19 October 1999 and 1368 (2001) of 12 September 2001, and

Reaffirming also its unequivocal condemnation of the terrorist attacks which took place in New York, Washington, D.C. and Pennsylvania on 11 September 2001, and expressing its determination to prevent all such acts,

Reaffirming further that such acts, like any act of international terrorism, constitute a threat to international peace and security,

Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001),

Reaffirming the need to combat by all means, in accordance with the Charter of the United Nations, threats to international peace and security caused by terrorist acts.

The preamble, therefore, sets the scene of the new state of affairs. In particular, it reiterates the issue of self-defense. However, what is significant is that this resolution, while not undermining the option to use force against terrorist attacks, turns to another response by:

Calling on States to work together urgently to prevent and suppress terrorist acts, including through increased cooperation and full implementation of the relevant international conventions relating to terrorism,

²⁸⁸ UN SC Resolution 1269.

²⁸⁹ UN SC Resolution 1368.

Recognizing the need for States to complement international cooperation by taking additional measures to prevent and suppress, in their territories through all lawful means, the financing and preparation of any acts of terrorism.

The resolution, thus, affirms a two-track approach which sanctions both forcible and non-forcible measures at the same time. Put another way, the use of force and international criminal law will coexist side by side.

3.3.1 Article 1

Article 1 of the Resolution formalizes the intent of all states by obligating them to carry out the following functions: 1) to cease and avert the financing of terrorist attacks; 2) to recognize the wilful financial facilitation of terrorists by citizens as criminal offenses; c) to immediately cease all funding and assets of individuals or legal entities involved in terrorist acts; D) to restrain citizens or any persons and organizations from fostering terrorists' access to any financial resources or economic benefits.²⁹⁰

3.3.1.1 Financing Terrorism

Article 1 of Resolution 1373 advanced by the Security Council asserts that member states ought to pass regulations that curb the financing of terrorism. As part of its strategy to prevent the funding of terror, the Security Council proposed the establishment of a joint body to oversee the war against terror. This strategy resulted in the creation of the counter-terrorism task force in the year 2005.²⁹¹ Furthermore, Resolution 1373 facilitated the formation of the Financial Action Task Force (FATF), a global body tasked with abating and fighting the financing of terror groups as well as curbing money laundering.²⁹² The FATF Report provides

²⁹⁰ UN SC Resolution 1373, Article 1.

²⁹¹ United Nations. Tackling the Financing of Terrorism. CTITF Working Group Report, New York: CTITF, (2009).

²⁹² FATF. FATF 40 Recommendations. Financial Action Task Force, 2003.

forty recommendations aimed at defining the extent of money laundering and outlawing terrorism financing activities.

3.3.1.2 Criminalizing the Financing of Terrorist Groups

UNSC Resolution 1373 classifies every form of financial activity geared towards facilitating terrorism as being both unrelated offenses as well as a predicate crime to money laundering. The resolution establishes the criminalization precedents by the objectives of the global conference for the containment of terrorism financing.²⁹³

3.3.1.3 Freezing Financial Assets of Terrorists

This mandate forms one of the primary obligations of Resolution 1373. UN member states have the authorization to instantly freeze assets and funds linked to any terrorist organization. Furthermore, the SC resolution requires the application of Article 17 composed by the global conference for the containment of the financing of terrorism.²⁹⁴

3.3.1.4 Preventive Measures for Terrorism Financing

SC resolution in line with international law bars financial institutions from hosting bank accounts with unknown ownership. Also, the resolution makes use of the FATF standards and norms as the benchmark for acceptable financial practices.

3.3.1.5 Institutional Measures to Combat Terrorism Financing

International organizations such as the Financial Intelligence Unit play a crucial role in curtailing terrorism. The unit has the responsibility of collecting, analysing, and publishing reports on any dubious financial activities reported by financial institutions.²⁹⁵

²⁹³ United Nations. International Convention for the Suppression of the Financing of Terrorism. New York: United Nations, (1999).

²⁹⁴ Article 17.

²⁹⁵ Vortmeyer M. 'Financial Intelligence Units: An Overview', *World Bank*, International Monetary Fund, (2004).

3.3.1.6 Alternative Money Transfer Systems

Numerous avenues exist through which funds are transferred across the globe. SC Resolution 1373 requires that all governments regulate and provide the requisite oversight on these platforms to prevent terrorism financing.²⁹⁶

3.3.1.7 Non-Governmental Organizations (NGOs)

According to Resolution 1373, states ought to oversee and regulate all the activities carried out by non-profit organizations. Hence, nations ought to ensure that the legal frameworks available provide the required level of protection to prevent the proliferation of terrorism through NGOs. Furthermore, the recommendation necessitates the need for nations to conduct thorough audits²⁹⁷ on NGOs to identify terror groups posing as legal entities.²⁹⁸

3.3.1.8 Criminalizing Assistance to Terrorists

According to the United Nations Office on Drugs and Crime, the term assistance pertains to aiding terrorist activities either explicitly or implicitly.²⁹⁹ SC Resolution 1373 requires all states to outline all activities purported to aid the operations of terrorist organizations within their jurisdiction. In line with the legality principle, nations ought to provide detailed definitions of all acts considered to be criminal offenses.³⁰⁰

3.3.2 Article 2

In addition to this, members of the UN Security Council formalized their will in Article 2 of UNSC Resolution 1373 to take all the necessary steps and measures in order to prevent the furtherance of terrorist acts and terrorists.³⁰¹ In other words, it is incumbent on the members

²⁹⁶ FATF Recommendation VII.

²⁹⁷ FATF IX Special Recommendations VIII.

²⁹⁸ FATF. FATF Standards: FATF Special Recommendations . FATF, (2001).

²⁹⁹ UNODC Model Legislative Provisions Against Terrorism Article 18.

³⁰⁰ UNODC. Manual on Mutual Legal Assistance and Extradition. Manual, New York: United Nations, (2012).

³⁰¹ UN SC Resolution 1373, Article 2.

of the UN Security Council to take an active part in restricting terrorists from having access to or benefit from any service that may consequently help them to carry out terrorist acts.

3.3.2.1 Suppressing Terrorist Recruitment

Terrorists use recruitment drives as one of the strategies that facilitate their continued existence and operationalization. As part of the implementation process of Resolution 1373, the Security Council recently passed Resolution 2214 with the aim of curbing terrorist recruitment.³⁰² One of the strategies embraced by SC Resolution 1373 involves outlawing terrorism recruitment. The illegalization of terrorist recruitment activities makes it difficult for terrorist groups to sign up new militants. Furthermore, security apparatus established by nations have the mandate of tracking the movement of foreign fighters aspiring to link up with terror groups. Foreign fighters form an important source of both manpower and capital hence prohibiting their movement plays an important part in fighting terrorism.

3.3.2.2 Eliminating the Supply of Weapons and Ammunition

Another mandate of SC Resolution 1373 revolves around limiting terrorists' access to firearms. Resolution 1373 posits that all member states ought to ratify the law against the illegal trafficking and manufacture of weapons.³⁰³ In regard to weaponry manufacturing, Resolution 1373 requires the appointment of designated arms manufacturers tasked with the mass production of both weapons and ammunition. Furthermore, the UN requires the establishment of verification protocols as well as the creation of entities tasked with the audit of weapons. In regard to possession, Resolution 1373 prescribes the formulation of laws involving the acquisition of arms and ammunition by civilians. This law ought to specify the rules of acquisition, licensing of dealers, transportation, tracking, and record keeping of weaponry.

³⁰² UN SC Resolution 2214.

³⁰³ UNODC, United Nations Convention Against Transnational Organized Crime and the Protocols Thereto. (New York: United Nations, 2004).

Similarly, the resolution provides the requisite framework necessary to regulate the process of arms dealing by both brokers and sellers. This regulation pertains to the relevant registration and licensing protocols formulated by countries. Lastly, Resolution 1373 compels nations to oversee the importation and exportation of weaponry. Regulating the weapons trade plays a pivotal role in staving off the arming of terrorists, which adversely affects their operations. The United Nations notes that the failure of regional authorities to offer the requisite oversight and regulations on the arms trades leads to conflicts and instability. The proliferation of illegal firearms into war-torn regions exacerbates conflicts as well as hinders UN peacekeeping endeavours.³⁰⁴

3.3.2.3 Prevention and Deterrence of Terrorist Acts

Nations react in various ways to impending terror threats and in the case of a real terror attack. For instance, the September 11th terror attacks that occurred in New York ushered in a new age in the anti-terrorism battle. These terror attacks necessitated the US government to take proactive measures rather than reactive measures. As a result, the US Army has, in the recent past, attacked the Taliban terrorist group in their Afghanistan background. Also, it participated in the Iraq war that led to the capture of Saddam Hussein.³⁰⁵ SC Resolution 1373 also advocates for the formation of an international intelligence agency tasked with coordinating the sharing of vital terrorism information.

3.3.2.4 Special Criminal Protocols and Safeguards

UNSC Resolution 1373 does not require the formulation of special investigative and prosecution procedures. Instead, it allows for the use of exceptional investigative approaches which refers to strategies applied by law enforcement authorities in investigating terrorism

³⁰⁴ UNODA, The Impact of Poorly Regulated Arms Transfers on the Work of the United Nations. UNODA Occasional Papers, United Nations, (2013).

³⁰⁵ Eldridge et al. 9/11 and Terrorist Travel: Staff Report of the National Commission on Terrorist Attacks Upon the United States. Staff Report, National Commission on Terrorist Attacks Upon the United States, (2004).

threats. However, the UN discourages the use of such techniques as they allow for the infringement of fundamental freedoms and rights. Resolution 1373 also sets the foundation that facilitates the formulation of witness protection protocols. According to a UNODC report, witness protection facilitates the success of various criminal prosecutions and investigations.³⁰⁶ Due to the immense influence wielded by terrorist groups, there is a need for governments to protect witnesses.

3.3.2.5 International Legal Collaboration

Legal agreements take the form of bilateral, multilateral, regional, or sub-regional agreements. Article 3 of Resolution 1373 calls for the implementation of all the relevant protocols and conventions on terrorism. It also requires increased cooperation between states in the anti-terrorism battle.

3.3.2.6 Extradition

UNSC Resolution 1373 proposes several measures that outlaw the harbouring of terrorist dissidents within a certain jurisdiction. It also provides legislative measures to facilitate the extradition of terrorists to countries where they face terrorism charges. The resolution recommends the criminalization of all activities that propagate terrorism activities aimed against another country.³⁰⁷

3.3.2.7 Joint Legal Assistance

International legal collaborations involve the partnership and symbiotic functioning of law enforcement and judicial agencies between countries. Joint legal aid allows for the execution of searches and seizures within another country's jurisdiction. Furthermore, such

³⁰⁶ UNODC. Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime. United Nations, (2008).

³⁰⁷ Technical Guide: To the Implementation of Security Council Resolution 1373, Technical Guide, Counter-Terrorism Committee, (2009).

partnerships enable the sharing of vital information and evidence that results in the conviction of suspected terrorists. Joint legal assistance takes the form of cross-border investigations and joint exploratory teams.

3.3.3 Article 3

In like manner, Article 3 of UNSC Resolution 1373, stipulates that all States should augment their cooperation to speed up and facilitate the exchange of operational information, particularly information regarding the movements and actions of terrorists or terrorist networks.³⁰⁸ It needs to be highlighted that UNSC Resolution 1373 does not obligate the states to cooperate, but calls upon them to do so.

3.3.3.1 Sharing of Information

Article 3 of Resolution 1373 calls for member countries to intensify and accelerate the sharing of operational information.³⁰⁹ Hence, nations have formed national counter-terrorism frameworks that constitute the sharing of intelligence, international cooperation, and coordination. Furthermore, the Article promotes the establishment of globally accepted institutions such as Interpol to facilitate the worldwide anti-terrorism battle.

3.3.3.2 Bilateral and Multilateral Agreements

Sections B, C, and D in Article 3 of Resolution 1373 provide the platform through which nations enter into mutually beneficial partnerships. Such partnerships aim at suppressing criminal activities that contribute to the war against terror.³¹⁰ For instance, the joint military

³⁰⁸ UN SC Resolution 1373, Article 3.

³⁰⁹ UN SC Resolution 1373, Article 3 Section A.

³¹⁰ Commission on Crime Prevention and Criminal Justice. Requesting mutual legal assistance in criminal matters from G8 Countries: A step-by-step Guide. Agenda Item, (Commission on Crime Prevention and Criminal Justice, 2011).

incursion into Afghanistan by American and British forces exemplifies the formation of partnerships to fight terrorism.³¹¹

3.3.3.3 Measures in Regard to Asylum and Refugees

Section F of Article 3 of Resolution 1373 aims at ensuring all nations conform to human rights treaties.³¹² Furthermore, all member states need to uphold all the international laws before granting asylum or refugee status to an immigrant. Numerous terrorists and militants travel to foreign countries posing as refugees. Section G of Article 3 of the Resolution asserts that conformity to international laws and treaties ensures that extraditions occur. This provision allows for the deportation of facilitators and perpetrators of criminal acts.

3.3.4 Other Articles

A series of significant inferences can be made by having recourse to Article 4 of UNSC Resolution 1373.³¹³ By taking a closer look at the legal prescriptions of the Article, it is apparent that UNSC Resolution 1373 illuminates the linkages between international terrorism and other crimes that can be carried out in a global context.³¹⁴ Thus, the drafters of the Resolution appear to be preoccupied with the interconnections between international terrorism and other global criminal phenomena, such as transnational organized crime, money laundering, illicit drugs, the illegal movement of chemical, nuclear, biological and other hazardous materials, and illegal arms-trafficking.

Article 5 of Resolution 1373 declares that methods, practices, and acts of terrorism violate the core principles and purpose of the United Nations.³¹⁵ Hence, parties guilty of planning, inciting, and financing terrorism acts directly intrude upon the primary function of

³¹¹ Foreign Affairs Committee, *Global Security: UK-US Relations*. (London: The Stationery Office Limited, 2010).

³¹² UN SC Resolution 1373, Article 3 Section F.

³¹³ UN Resolution 1373, Article 4.

³¹⁴ UN Resolution 1373.

³¹⁵ UN Resolution 1373, Article 5.

the United Nations. Similarly, Article 6 formulated in line with Rule 28 provides the guidelines for the formation of the Security Council Committee.³¹⁶ The Security Council Committee provides the requisite oversight during the enactment of Resolution 1373. In contrast, Article 7 instructs the Security Council Committee to delegate duties to its members within the first month of its formation.³¹⁷ The Secretary-General of the United Nations provides legal counsel during the delegation process. Article 8 of the resolution declares the commitment of the Security Council to implement all the aspects of Resolution 1373.³¹⁸

The question is why the drafters of UNSC Resolution 1373 underlined the nexus between terrorism and other criminal offenses. The answer is that the success and implementation ability of terrorist acts depends on other criminal activities that cannot come out as terrorism. Therefore, the treatment of other global criminal phenomena is expected to help decrease the risk of terrorist attacks.³¹⁹

The key legal provisions of UNSC Resolution 1373 have been overviewed, hence, the major legal issues brought about by these provisions are now briefly discussed.³²⁰ Thus, the first significant issue to be inferred from the key legal provisions of UNSC Resolution 1373 is the question of the thematic areas that has been put forth as a result of the adoption of the Resolution.³²¹

An analysis of UNSC Resolution 1373 shows that it is possible to discern the following major thematic areas: a) effective and efficient mechanisms of international and national

³¹⁶ UN Resolution 1373, Article 6.

³¹⁷ UN Resolution 1373, Article 7.

³¹⁸ UN Resolution 1373, Article 8.

³¹⁹ Bianchi A. 'Assessing the Effectiveness of the UN Security Council's Anti-terrorism Measures: The Quest for Legitimacy and Cohesion', *The European Journal of International Law*, Vol. 17, No. 5 (2007), 881-919.

³²⁰ UN Resolution 1373.

³²¹ Conte A. 'Human Rights in the Prevention and Punishment of Terrorism: Commonwealth Approaches: The United Kingdom', *Canada, Australia and New Zealand* (New Zealand, The Law Foundation, 2010), P. 62.

counter-terrorism;³²² b) effective and efficient means of international cooperation among nations in the field of counter-terrorism; c) effective and efficient ways of implementing UNSC Resolution 1373 in practice; and d) effective and efficient means of enforcing and observing the implementation of UNSC Resolution 1373 (2001).³²³

The major thematic areas of the resolution rest on specific legal provisions. Thus, the first group of laws encircles those regulatory prescriptions that articulate mandatory measures against the financing of terrorism.³²⁴ The second group of laws embraces those legal statements that pertain to an intense fight against terrorism as a criminal phenomenon. Finally, the third group of laws dictates a conglomeration of common counter-terrorism measures that are ‘called upon’ by the states to bring them to life.³²⁵

One of the possible ways of expanding knowledge on how UNSC Resolution 1373 can be instrumental in practical counter-terrorist activities is to explore the causes and circumstances under which the resolution was issued.

To elaborate further, not only the grievous nature of the 9/11 terrorist acts, but also the ensuing atmosphere of panic, extreme emotional tension and social perplexity, can be viewed as the prerequisites to the adoption of UNSC Resolution 1373. It is considered good judgement to agree with Hinojosa-Martinez that post 9/11, social factors had a crucial influence on the issuance of UNSC Resolution 1373.³²⁶

³²² Counter-Terrorism Committee. Global Survey of the Implementation of Security Council Resolution 1373 by Member States. Survey Report, United Nations, 2011.

³²³ UN SC Resolution 1373.

³²⁴ Okeke N. ‘The United Nations Security Council Resolution 1373: An Appraisal of Lawfare in the Fight Against Terrorism’, *Journal of Law and Conflict Resolution*, Vol. 6, No. 3 (2014), Pp. 39-47.

³²⁵ Hinojosa M. ‘A Critical Assessment of the Implementation of Security Council Resolution 1373’, *Research Handbook on International Law and Terrorism* (Edward Elgar Publishing 2014), at [https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2427857].

³²⁶ *Ibid.*

To this end, based on the criteria for the adoption of international legislation, the UN Security Council succeeded in enacting Resolution 1373, unanimously.³²⁷ A review of the history of Resolution 1373 should start with an analysis of the process of negotiation as the key procedural step on the road towards the ratification of this Resolution.

This notwithstanding, it is still possible to infer some implicit knowledge about the nature and particularities of the procedural steps taken by the negotiators and drafters of UNSC Resolution 1373.³²⁸ To start with, it needs to be acknowledged that there is a standard procedure of negotiating and drafting resolutions to which the UN Security Council adheres, irrespective of the fact that, in the case with UNSC Resolution 1373, the UN Security Council took a substantial step back from the general procedure. Thus, UNSC Resolution 1373 exemplifies that the procedure of negotiating and drafting resolutions in the framework of the UN Security Council has undergone a crucial evolution.³²⁹

In this light, it is necessary to emphasise that none of the previous resolutions of the UN Security Council imposed on all member states of the United Nations specific counter-terrorist obligations and responsibilities. UNSC Resolution 1368 is not an exception.

Thus, prior to September 11th, 2001, the adoption of UN SC resolutions demonstrated a certain pattern, that is, the next resolution repeated and reaffirmed the previous one. However, this pattern cannot be traced in the relationship between UNSC Resolutions 1368 and 1373. There is no doubt that the two resolutions are connected thematically, both of them being directed at the prevention and suppression of international terrorism. Nevertheless, the nature of the prescriptions in the two resolutions is substantially different.

³²⁷ *Ibid.*

³²⁸ UN Resolution 1373.

³²⁹ Talmon S. 'Notes and comments the Security Council world legislature', *The American Journal of International Law*, (2005), P. 187.

On the one hand, UNSC Resolution 1368 declares a strong intention to fight international terrorism without prescribing any procedural steps in this field. The declaratory nature of UNSC Resolution 1368 manifests itself through the following wording: “unequivocally condemns”, “expresses”, “calls”, and “decides”.³³⁰ On the other hand, UNSC Resolution 1373 prescribes specific actions and measures to be taken in order to actualize the objectives of counter-terrorism in the global context. The nature of UNSC Resolution 1373 is manifested through the following wording: “decides”, “directs”, “notes”, “acting”, “shall”, etc.³³¹

Another important difference between UNSC Resolution 1368 and UNSC Resolution 1373 originates from the fact that the former merely imposes on states the moral imperative to create pressure, whereas, the latter creates two sets of obligations relating to the criminalization of international terrorism. In this sense, Fry writes that UNSC Resolution 1373 obligates states to enact effective domestic legislation (first obligation) that will criminalize specific acts in order to subsequently use domestic law to fight terrorism under the auspices of this resolution (second obligation).³³²

In fact, UNSC Resolution 1373 has more practicability in terms of counter-terrorism because it is instrumental both in prosecuting terrorism globally with the help of the existent old means and creating new mechanisms of prosecution. However, Fry admits that the creation of criminal laws and the proliferation of prosecutions under the criminal statutes are subject to scrutiny and diligent inspection by the international community, “and may be the reason why the United Nations has stayed with this piecemeal approach to the criminalization of terrorism since 9/11.”³³³

³³⁰ UN SC Resolution 1368.

³³¹ UN SC Resolution 1373.

³³² Fry, *supra* n. 286, P. 409.

³³³ *Ibid*, P. 409.

Regardless, UNSC Resolution 1373 should be considered much more progressive compared to UNSC Resolution 1368, particularly due to the fact that the former is directed at altering the current state of affairs in the domain of international counter-terrorism. It is undisputed that UNSC Resolution 1373 provides all states with a very broad discretion on the meaning of terrorism, whereas UN Resolution 1368 does not set forth the meaning of terrorism at all. Last but not least, it needs to be asserted that, while UNSC Resolution 1368 aims at disciplining all states in terms of counter-terrorism, UNSC Resolution 1373 gives specific orders to states to take specific measures and steps in the field of counter-terrorism.

3.4 The Obligatory Nature of the Decision

The general aspects of the creation and utilization of UNSC Resolution 1373 have been discussed; hence, it is vital to explore the specific details of the legal actualization of UNSC Resolution 1373 in practice. This question pertains to the status of UNSC Resolution 1373 as an international legal decision. In order to provide a clear answer to the aforesaid question, it is essential to gain insights into the obligatory legal nature of UNSC Resolution 1373 as an international legal instrument. For this purpose, it is suggested that we have recourse to Rosand's study.

According to Rosand, the obligatory nature of UNSC Resolution 1373 should not be questioned or diminished. The author urges that the underlying idea of UNSC Resolution 1373 is to give birth to uniform obligations for all member states of the United Nations in order to prevent and suppress terrorism in a global context.³³⁴ Hence, it follows that UNSC Resolution 1373 does not merely declare or execute the specific counter-terrorist obligations of the drafters, but rather creates new obligations which go beyond the existent international counter-

³³⁴ Rosand E. 'Security Council Resolution 1373, the counter-terrorism committee, and the fight against terrorism', *The American Journal of International Law*, Vol. 97, No. 2 (2003), P. 333.

terrorist protocols and conventions that tend to bind only those countries which have become parties to them.

It is possible to prove the binding nature of UNSC Resolution 1373 through a detailed analysis of the factors indicating the mandatory prescriptions of this resolution. In this light, it needs to be stated that the most important factor revealing the mandatory nature of UNSC Resolution 1373 lies in the fact that it is explicitly prescribed in the text of the resolution that this resolution is adopted under Chapter VII of the Charter of the United Nations.³³⁵

The mention of Chapter VII in the text of UNSC Resolution 1373 is not accidental. It should be clarified that there are two chapters of the Charter of the United Nations which directly regulate the functions and powers of the UN Security Council. Thus, Chapter VI of the UN Charter regulates that the UN Security Council is empowered to settle all disputes arising in the field of international law by peaceful means. On the other hand, Chapter VII of the UN Charter clearly articulates that, under specific circumstances, the UN Security Council is entrusted to respond to threats and breaches of international law, particularly through the concerted action of the entire organization.

Taking into consideration that UNSC Resolution 1373 has been enacted under Chapter VII of the Charter of the United Nations, it is possible to concede that the aforesaid resolution is obligatory in nature and has a binding effect not only on members of the UN Security Council, but also on all member states of the United Nations.

In addition to this, the mandatory nature of UNSC Resolution 1373 is manifested in other significant provisions of the resolution. Thus, it is extremely important to note that UNSC Resolution 1373 gives birth to a counter-terrorism committee of the Security Council (hereinafter referred to as the CTC) which consists of all members of the Council. The overall

³³⁵ UN SC Resolution 1373.

purpose of the CTC is to monitor the implementation of UNSC Resolution 1373. This goal conveys the impression that UNSC Resolution 1373 is mandatory in nature in terms of imposing on all member states of the United Nations a set of obligations and responsibilities that are to be supervised by the CTC.³³⁶ To sum up, there is no doubt that UNSC Resolution 1373 is obligatory in nature and has a binding effect not only on its drafters, but also on all member states of the United Nations.

In view of the fact that the implementation of UNSC Resolution 1373 is mandatory in nature, it obligates sovereign states in accordance with the principles of international law, taking into account that the binding nature of the resolution cannot contradict the principles of international law. Therefore, in order to better grasp the requisite nature of UNSC Resolution 1373, it is necessary to shed light on those principles of international law which are triggered in the text of the resolution by placing a special emphasis on the principles of international cooperation and assistance in the field of international counter-terrorism.

To start with, it is reasonable to agree with Vermeulen et al., who claim that all principles of international cooperation in criminal matters should be categorised into general principles and special principles.³³⁷ As far as the first group of principles is concerned, Vermeulen et al., state that the types of general principles of cooperation are closely related to situations of direct cooperation between different countries in the fields of international criminal law. In the context of this project, it needs to be construed that the general principle of cooperation is dictated by UNSC Resolution 1373 because the resolution manifests itself as the current international legal framework which designates the desired point of the future policy options in the field of international counter-terrorism.

³³⁶ Rosand, *supra* n. 334, P. 333.

³³⁷ Vermeulen G. and Debondt W. *'Rethinking international cooperation in criminal matters in the EU: Moving Beyond Actors, Bringing Logic Back, Footed in Reality'* (IRCP research series, 2012), Vol. 42, P. 105.

Following the reasoning of Vermeulen et al., it is possible to discern the following general principles of cooperation in the domain of international counter-terrorism which originate directly from UNSC Resolution 1373: a) the principle of augmented cooperation for the purpose of complete implementation of the pertinent international conventions concerning terrorism; b) the principle of international cooperation for the purpose of taking additional measures to avert and suppress the instances of terrorism in the territories of the member-states; c) the principle of intense cooperation on judicial and administrative issues in order to prevent the commission of terrorist acts; d) the principle of direct cooperation through the enactment of bilateral and multilateral agreements and arrangements directed at the prevention and suppression of terrorist attacks, as well as on taking serious actions against the perpetrators of terrorist acts; and e) the principle of increased cooperation and complete implementation of the pertinent international protocols and conventions pertaining to terrorism and the UN SC Resolutions 1269 and 1368.³³⁸

Apart from the above, it is advisable to extend the aforesaid list of the cooperation principles by adding a series of general principles that were identified by Vermeulen et al. The authors point out four general cooperation principles that are utilised by sovereign states in terms of their cooperation in international criminal matters.

These principles are as follows: 1) double criminality; 2) horizontalization and decentral communication in conjunction with decentral decision-making processes; 3) increased stringency in cooperation, which involves consultations and discussions concerning consistency issues, consent, grounds for refusal, capacity, deadlines, etc.; and 4) mechanisms of correction, including trust-building measures, flanking measures, minimum standards and the practical application of the “*lex mitior*” principle.³³⁹

³³⁸ UN SC Resolution 1373.

³³⁹ Vermeulen, *supra* n. 337, P. 105.

Taking into consideration that the aforementioned principles are relevant to any context of international cooperation in criminal matters, they are also relevant in the context of the applicability and enforceability of UNSC Resolution 1373. As far as the principle of double criminality in international cooperation in criminal matters is concerned, it needs to be explicated that the effective enforcement of UNSC Resolution 1373 is dependent on the concept of double criminality, whereby criminal conduct, namely a terrorist act, is punishable in both home and host states.³⁴⁰

Viewing this principle through the prism of UNSC Resolution 1373, it should be added that it is impossible to ensure the effective enforcement of UNSC Resolution 1373 merely by means of criminalizing terrorism in one or several countries. The key rationale of the principle of double criminalization stems from the rule that the effectiveness of the prosecution of terrorism at the international level may be attained only through the identical or similar criminalization of terrorist acts in all member states of the United Nations. Certainly, this objective is not completely attainable.

The next principle, the principle of horizontalization, calls for decision making and communication to be done at a decentral level instead of central level. This principle implies that the effectiveness of UNSC Resolution 1373 will only be fully realised if member states of the United Nations cooperate under the principle of decentralization and horizontal decision-making, whereby each member state takes an equal stance and say in the process of criminalization and prosecution of international terrorism.

In like manner, the third principle of cooperation stipulates that UNSC Resolution 1373 is a binding document and, therefore, it is incumbent on all member states to fulfil their

³⁴⁰ *Ibid.* p. 108.

obligations under the resolution in a stringent and coordinated manner. This implies that a member state of the United Nations is not allowed to act differently or discretely.

The last but not least principle clearly prescribes that genuine cooperation always entails additional mechanisms of correction and rehabilitation that are to be triggered in case of emergencies and unexpected challenges. In relation to this, the “*lex mitior*” principle, or in other words, the milder law principle, should also be taken into consideration in the actualization of UNSC Resolution 1373, when it is inadequate to apply the ex-post-facto doctrine to persons guilty of terrorism.

The SC claims that the obligatory nature of its resolutions and its power to intervene in conflict resolution from the same Charter of the UN, in accordance with the Articles, means that the UN Security Council does have specific powers and authority to settle the above cases. These powers and authority originate from Articles 39, 40, 41 and 103 of the UN Charter. Thus, in order to understand how the UN Security Council may address the issues relating to the failed implementation of UNSC Resolution 1373, it is essential to analyse the pertinent Articles of the UN Charter. To start with, Article 39 of the UN Charter prescribes that it is incumbent on the UN Security Council to determine the presence of “any threat to the peace, breach of the peace, or act of aggression.”³⁴¹

That is, the UN Charter imposes a very strict and concrete obligation on the UN Security Council to inquire into the nature of all global disturbances or incidents in order to ascertain whether these disturbances or instances constitute a threat to peace, a breach of peace, or an act of aggression.³⁴² It is extremely important to note that Article 39 of the UN Charter highlights the duty of the UN Security Charter to address any threat.

³⁴¹ UN Charter, Article 39.

³⁴² UN Charter, Article 39.

This implies that the nature or specificity of threat must not be viewed as a justification to refrain from determining the existence of a threat. The next important point made by the drafters of Article 39 of the UN Charter is that the threat at issue must be directed at peace or security.³⁴³ A mental note should be made that Article 39 of the UN Charter does not articulate on international peace or security.

Therefore, it is possible to infer that any infringement of peace at any level (international, regional, sub-regional, or national) must be examined by the UN Security Council in order to verify its menacing nature. Hence, it should be presupposed that a state's failure to implement UNSC Resolution 1373 may be viewed as a threat to peace and security in cases when such a failure has led to a terrorist emergency in a country, region, or globally.

An analysis of the legal provisions of Article 39 of the UN Charter shows that it is important to note that this Article refers directly to Articles 41 and 42 of the UN Charter by granting the UN Security Council the power to decide what measure must be taken in case of a threat to peace and security.³⁴⁴ However, in contrast to the first part of Article 39, the second part of Article 39 describes the restoration of international peace and security. To this end, it needs to be clarified that, although the UN Security Council is obliged to determine all threats to peace and security at different levels, it is still empowered to decide on the measures applicable to the restoration of peace and security exclusively at the international level.³⁴⁵ Shifting the focus of research to Articles 40 and 41 of the UN Charter, it is well advised to note that Article 40 empowers the UN Security Council to call upon any country which fails to implement UNSC Resolution 1373 to comply with the provisional measures, "without prejudice to the rights, claims, or position of the parties concerned."³⁴⁶ Furthermore, the last

³⁴³ UN Charter, Article 39.

³⁴⁴ UN Charter, Article 39.

³⁴⁵ UN Charter, Article 39.

³⁴⁶ *Ibid.* Article 40.

sentence of Article 40 of the UN Charter prescribes that “the Security Council shall duly take account of failure to comply with such provisional measures.”³⁴⁷

The legal wording of this sentence is obscure and overgeneralised because this legal provision does not make it possible to understand how the UN Security Council will take into account a state’s failure to implement SC Resolution 1373. It is difficult to predict what legal consequences will ensue should such a situation arise. At this point, it becomes important to take Higgins' theory into account, as it helps states to reach the broadest and most practical interpretation of the UNSC Resolution, when it comes to implementing it. This can be imagined, for example, if the state, in the given situation, determines what is in the best interests of the public, when interpreting the UNSC resolution. On the other hand, Article 41 of the UN Charter articulates that the UN Security Council is entitled to make decisions on what measures, with the exception of the use of military forces, are to be employed to enforce its decisions.³⁴⁸

In view of the above, it should be emphasised that Article 41 of the UN Charter best articulates how UNSC Resolution 1373 can be enforced in case of a state’s failure to implement it.³⁴⁹ To be more precise, Article 41 of the UN Charter entitles the UN Security Council to apply any possible measure to coerce the enforcement of UNSC Resolution 1373, with the exception of the use of force.

Another important feature of Article 41 of the UN Charter is that the article prescribes that the UN Security Council calls upon member states of the United Nations to apply the measures directed at the enforcement of UNSC Resolution 1373 on the country which has failed to implement the aforesaid resolution. Last but not least, Article 41 of the UN Charter specifies

³⁴⁷ *Ibid.* Article 40.

³⁴⁸ *Ibid.* Article 41.

³⁴⁹ *Ibid.* Article 41.

exactly what measures may be taken in relation to the countries which have failed to implement UNSC Resolution 1373.³⁵⁰ These measures include complete or partial interruption of economic relations, and the severance of diplomatic relations. As a result, the world witnessed a surge in the number of treaties which were geared towards stemming terrorism and organized armed conflicts.³⁵¹

Another avenue commonly used by terrorists for funding involves the use of non-governmental organizations operating within certain jurisdictions. According to a report prepared by FATF in 2013, a majority of terror organizations in West Africa made use of NGOs to access funding.³⁵² Terrorist groups operating in the Middle East make use of informal systems for value transfer to source funding,³⁵³ and in regard to illegal trade, terrorism networks take part in drug trafficking and smuggling as an avenue for raising revenues. For instance, the Taliban and Al-Qa'idah terrorist groups depend on the poppy trade in the region to generate income to fund their activities.³⁵⁴ Alternatively, terrorist groups partly rely on contributions from their members to fund organizational operations and administrations.³⁵⁵

3.4.1 The Role of the Counter-Terrorism Committee (CTC) in the Commitment of States to the Resolution's Orders

After the chief principles of international cooperation to counter-terrorism have been discussed, it is the right time to focus on the role and function of the CTC in ensuring that all

³⁵⁰ *Ibid.* Article 41.

³⁵¹ O'Donnell D. 'International treaties Against Terrorism and the use of Terrorism During Armed Conflict and by Armed Forces', *International Review of the Red Cross*, (December 2006), 853-880.

³⁵² FATF. Targeted Financial Sanctions Related to Terrorism and Terrorist Financing (Recommendation 6). Financial Action Task Force, (2013).

³⁵³ Morris J. 'Vulnerabilities and Responses to Terrorist Financing: An Exploration of Informal Value Transfer Systems, Islamic Charities, and Businesses and Financier', *Internet Journal of Criminology*, (2014), 1-27.

³⁵⁴ Berry L, Glenn E. C, Rex A. H, and Nina A. K. 'A Global Overview of Narcotics Funded Terrorist and Other Extremist Groups', *Library of Congress*, (2002).

³⁵⁵ Feiler. G. 'The Globalization of Terror Funding. *Mideast Security and Policy Studies*' (Bar Ilan University, 2007).

member states of the United Nations are fully committed to the commands and prescriptions of UNSC Resolution 1373.³⁵⁶

An analysis of the legal wording of UNSC Resolution 1373 shows that the CTC is the principal mechanism of the implementation of this Resolution in practice. According to Rosand, the basic idea underlying the adoption of the CTC is to enable the UN Security Council to effectively monitor the states' efforts to implement UNSC Resolution 1373.³⁵⁷

For this purpose, the CTC constitutes a “whole” body which consists of all fifteen members of the UN Security Council. In another publication, Rosand unveils that the CTC is an offspring of the UN Security Council, which has been established to utilise and rationalise the powers of the Security Council.³⁵⁸

In view of the above, it is extremely interesting to note that the CTC is considered successful in coercing member states of the United Nations to take adequate steps in the implementation of UNSC Resolution 1373. In this sense, Rosand writes that due to the work of the CTC, the majority of countries have already undertaken the required measures in promoting the international counter-terrorism machinery.

The same conclusion is made in the publication by Cortright et al., who point out that the CTC has succeeded in making most of the states adopt pertinent counter-terrorism legislation, augment their border controls, practically participate in terrorism-related international treaties, and become proactive fighters against the proliferation and maintenance of a safe haven to terrorist perpetrators and their aides.³⁵⁹

³⁵⁶ UN SC Resolution 1343.

³⁵⁷ Rosand E. 'The Security Council's efforts to Monitor the Implementation of Al Qaeda/Taliban Sanctions', *The American Journal of International Law*, Vol. 98, No. 4 (2004), Pp. 745-763.

³⁵⁸ Rosand E. 'Security Council as Global Legislator: Ultra Vires or Ultra Innovative', *Fordham International Law Journal* Vol. 28, (2005), P. 542.

³⁵⁹ Cortright D. 'An Action Agenda for Enhancing the United Nations Program on Counter-Terrorism' (University Of Notre Dame, 2004).

Further elaborating on the role of the CTC, it may be appropriate to note that the practicability of the CTC in terms of international counter-terrorism is dictated by its structure. As the foregoing discussion suggests, the CTC consists of all members of the UN Security Council, while all member states of the United Nations are required to report to the CTC on the steps taken in implementing UNSC Resolution 1373.

The CTC consists of three subcommittees which are empowered to review the reports, “with the assistance of a group of experts hired by the UN Secretariat on short-term contracts.”³⁶⁰ Also, it is significant to mention that the CTC has ten experts, eight of whom are authorised to review the reports provided by member states of the United Nations and two are entrusted to coordinate the CTC’s technical assistance program.

Despite the fact that UNSC Resolution 1373 established the CTC, the text of the resolution does not provide insight into the means by which the CTC should utilise its activities. It is insufficient to actualise the CTC only through the legal provisions of the resolution, because the resolution does not actually provide comprehensive guidance on how the CTC should operate and “what role it should play in combating terrorism.”³⁶¹

Moreover, Rosand underlines an important feature of the CTC which makes it possible to understand the intrinsic role played by this structure. According to Rosand, the CTC acts as a mediator seeking to establish a dialogue between the members of the UN Security Council and the UN member states on how best to create global capacity in the framework of international counter-terrorism. To this end, it is possible to infer that the CTC focuses on the promotion of relationships with other organisations in the global, regional and sub-regional context.³⁶²

³⁶⁰ Rosand, *supra* n. 334, P. 333.

³⁶¹ *Ibid.* P. 335.

³⁶² *Ibid.*

Scrutinising the existent functions of the CTC, such as its global oversight over the implementation of UNSC Resolution 1373 or mediating between the members of the UN Security Council and member states of the United Nations, it can be deduced that the CTC is not a sanctions committee, nor is it a global prosecutor's office. Notwithstanding the fact that UNSC Resolution 1373 imposes specific uniform requirements and obligations on all member states of the United Nations, the CTC adopts an individual approach to every state at issue in terms of helping it implement UNSC Resolution 1373, particularly because the CTC is highly sensitive of each state's ability to implement the dictates of UN Resolution 1373 at its highest possible speed, taking into account that there is a disparity in the countries' capacity in this respect.³⁶³

In other words, the factor of relativity plays a fundamental role in the CTC's actualisation of its functions. The fact is that the CTC is preoccupied with not making countries feel threatened by the provisions of UNSC Resolution 1373. In this vein, Rosand writes that the existent imposing requirements reveal that there is significant potential for specific countries to experience the menace of threat from the implementation of UNSC Resolution 1373.³⁶⁴ In this light, the role of the CTC is not to enforce the implementation of the resolution on all countries of the world through targeting or condemning individual states, but to focus instead on the issues of technical capacity building.

Furthermore, it needs to be pointed out that dialogue and consensus constitute the two major techniques utilised by the CTC in practice. The CTC frequently engages in dialogue with all countries which are members of the United Nations, pertaining to the implementation of UNSC Resolution 1373 at the national levels. It should be noted that the CTC intends to

³⁶³ Chairman Greenstock's remarks at Security Council, 57th sess., 4561st mtg., (June 27, 2002), UN Doc. S/PV.4561, p. 2.

³⁶⁴ Rosand, *supra* n. 334, P. 333.

continue this dialogue as long as it is essential to ensure that every country at issue has taken effective measures in relation to all the issues highlighted by the resolution.³⁶⁵

However, the problem is that UNSC Resolution 1373 prescribes no deadline for the implementation of its measures. This implies that the process of ensuring the practical actualisation of the resolution by the CTC and member states of the United Nations may not result in the desired outcomes.

Despite this, the CTC makes strenuous efforts to ensure the implementation of UNSC Resolution 1373. To this end, the CTC maintains its nonconfrontational approach to achieve cooperation with different international, regional, and sub-regional organisations. It is well-established that the CTC recognises the substantial role and benefits of different organisations which may play an important role in battling terrorism at the international level. Therefore, the CTC has been proactively and actively engaged in creating and sustaining dialogue with such organisations.³⁶⁶

The reason why the CTC deems it well advised to maintain excellent relationships with various international, regional, and sub-regional organisations lies in the fact that these organisations are capable of playing a significant role in implementing UNSC Resolution 1373. To be more precise, various international, regional, and sub-regional organisations have a real potential to provide a regional or local forum of action, interchange, assistance, or encouragement. Furthermore, international, regional, and sub-regional organisations can actually help the CTC to monitor the implementation of UNSC Resolution 1373 in practice. As an added benefit, the aforesaid organisations can help promote international support for the implementation of UNSC Resolution 1373.

³⁶⁵ Guidance for the Submission of Reports Pursuant to Paragraph of Security Council Resolution 1373 (2001) of 28 September 2001' <[http:// www.un.org/Docs/sc/committees/1373/guide.htm](http://www.un.org/Docs/sc/committees/1373/guide.htm)>.

³⁶⁶ *Ibid.*

In view of the above, it can be said that the CTC's overall message to various international, regional and sub-regional organisations manifests itself in the following: 1) all organisations should be determined in fighting against terrorism through advanced mechanisms and in conformity with their mandates; 2) the organisations at issue should foster a discussion of counter-terrorist measures in order to share best practices and expertise; and 3) it is desirable that all organisations at issue elaborate and implement their own counter-terrorism assistance plans.³⁶⁷

In summary, it can be said that the CTC plays a very important role in the implementation of UNSC Resolution 1373. Despite this, the CTC is incapable of ensuring the comprehensiveness and effectiveness of the actualisation of the resolution's provisions in practice, unless all member states of the UN, in conjunction with relevant international, regional, and sub-regional organisations, take an active part in facilitating the CTC's role.

3.4.2 The Process of CTC Observation of the Application of UNSC Resolution 1373 and the Issue of International Cooperation and the Problem of Non-cooperation of States

The preceding discussion has made it clear that the CTC plays a key role in the supervision of the implementation of UNSC Resolution 1373. However, the question is how to ensure that the CTC carries out its supervisory and conciliatory functions in accordance with UNSC Resolution 1373 and other international instruments. In other words, it is also vital to ascertain how the CTC deals with the non-application of UNSC Resolution 1373 by certain parties, especially when particular states explicitly refuse to cooperate with the international community in the field of counter-terrorism.

³⁶⁷ Outcome document of the special meeting of the Counter-Terrorism Committee with international, regional, and sub-regional organizations,' UN Doc, S/AC.40/2003/SM.1/4, <<http://www.un.org/Docs/sc/committees/1373/>>.

North Korea is one such problematic state which must be taken into consideration. It is undisputed that the United States is the present leader in the field of international counter-terrorism. The tensions and controversies in the relationship between the United States and North Korea are detrimental to the cause of international counter-terrorism. Furthermore, the United States is a member of the CTC and thus, its presence in the main supervising body over the implementation of UNSC Resolution 1373 undermines North Korea's willingness to follow the prescriptions of the resolution.

There are many reasons for and factors involved in North Korea's non-cooperation in terms of implementing the provisions of UNSC Resolution 1373, but it is incumbent on the United States and other members of the UN Security Council to adopt a specific approach to North Korea to convince it that the existent strategy of counter-terrorism is universally beneficial for all countries. However, it seems that neither the UN Security Council, nor its offspring (the CTC), currently utilize a specific approach to North Korea. In relation to this, it is useful to refer to Cotton's publication on the effects of global security issues on North Korea's international position and standpoint.³⁶⁸

In his article, Cotton states that the US-led anti-terrorist coalition is particularly interested in the obstruction or prevention of weapons proliferation.³⁶⁹ The fact is that the so-called Proliferation Security Initiative (PSI) is directly applicable to North Korea. This implies that the global strategy of weapons non-proliferation primarily targets North Korea. On the other hand, the strategy of weapons non-proliferation constitutes one of the cornerstones of the contemporary global counter-terrorist strategy.

³⁶⁸ Cotton J. 'The Proliferation Security Initiative and North Korea: Legality and Limitations of a Coalition Strategy,' *Security Dialogue*, vol.36, no. 2, (2005), Pp. 193-211.

³⁶⁹ *Ibid.*

Hence, this results in a very controversial and unpredictable situation wherein the global strategy of counter-terrorism calls upon universal cooperation between all countries of the world, whereas on the other hand, a significant element of this strategy (the element of weapons non-proliferation) is directly applicable against North Korea.³⁷⁰ In other words, the CTC is tasked with the problem of ensuring cooperation with North Korea in the domain of counter-terrorism when part of the global counter-terrorist strategy targets North Korea itself. The intrinsic contradiction within the international counter-terrorist strategy has resulted in North Korea's non-cooperation in this domain. In this light, Cotton correctly acknowledges that after the terrorist attacks of 9/11, the problem of weapons non-cooperation has become the most important global concern.³⁷¹

However, on the other hand, the CTC is tasked to ensure the ubiquitous implementation of UNSC Resolution 1373, especially through the process of international cooperation between states. In this vein, the CTC is actually incapable of ensuring the cooperation of North Korea in terms of implementing UNSC Resolution 1373 as long as North Korea remains a target of the international non-proliferation strategy.

As the foregoing discussion suggests, there is a clear contradiction in the international counter-terrorist strategy in relation to North Korea. Thus, on the one hand, UNSC Resolution 1373 requires the total cooperation of all countries concerning the implementation of the resolution at the national level, whereas on the other hand, North Korea is inherently non-cooperative in this field due to the adverse effects of the global weapons non-proliferation strategy targeting this country.

Despite this, the problem of non-cooperation should not be reduced to the situation of North Korea. There is a large spectrum of other objective reasons why it is sometimes difficult

³⁷⁰ *Ibid.*

³⁷¹ *Ibid.*

to ensure collaboration among various states in the field of counter-terrorism. These reasons include but are not limited to discrepancies in the countries' cultures, political views, religious issues, personal positions and interests of the political elites, etc. In order to better understand the underlying reasons for non-cooperation between various states in terms of bringing the provisions of UNSC Resolution 1373 into life, it is essential to explore the situation in different countries.

In relation to cultural diversity, Bianchi and Naqvi state that cultural issues may either be facilitative or detrimental to the global efforts of counter-terrorism, highlighting that the existence of strong cultural and political linkages may be instrumental in carrying out less burdensome action.³⁷² This implies that the more developed the cultural ties between different countries, the easier it is to ensure UNSC Resolution 1373 is implemented there, because cultural and political ties constitute important prerequisites to the implementation of the resolution at the regional level.

In agreement with Bianchi and Naqvi, Samuel also believes that cultural factors play a fundamental role in the promotion of cooperation or non-cooperation in the field of international counter-terrorism. Samuel states that the issue of cultural relativism has a serious effect on the domain of UN law-making. To put it briefly, it is widely recognized in the framework of international law that no legal norm can operate independently within a vacuum, but instead manifests itself through particular cultural contexts.³⁷³

Following Samuel's reasoning, it can be inferred that due to the diversity of cultural contexts, there exist unequal, competing and sometimes, contradictory civilizational perceptions, interpretations, and expectations of internationally agreed norms, rules, and

³⁷² Bianchi A and Naqvi Y. *'Enforcing international law norms against terrorism'* (Hart Publishing, 2004), P. 232.

³⁷³ Samuel K. *'The OIC, the UN, and counter-terrorism law-making: conflicting or cooperative legal orders?'* (Hart Publishing, 2013).

principles from the side of various countries and international actors. Similar to Samuel, Wyler and Papaux point out that cultural influences constitute the prisms through which it is possible to measure the degree of cooperation or non-cooperation between various countries, while all norms can be viewed from the aforesaid prisms as either univocal or universal.³⁷⁴

Cultural disparity undoubtedly explains the lack of immediate and uncontroversial cooperation between countries in terms of implementing the precepts of UNSC Resolution 1373. However, the factor of culture is not the only determinant in relation to cooperation and non-cooperation in the field of international counter-terrorism. There are others, such as the diversity of political views. Williamson writes that political, as well as religious, motivations are the driving forces not only for the terrorists but also for the counter-terrorists.³⁷⁵ This suggests that different political motives can bring different actions.

Focusing on the reciprocity between the diversity of political views on the one hand and cooperation between countries in the field of counter-terrorism on the other hand, it is essential to take into account that different countries pursue different political objectives by applying the same provisions of UNSC Resolution 1373.³⁷⁶

According to Williamson, the formation of political views is frequently shaped by the specificities of a political environment. In other words, antidemocratic political regimes may give rise to political views which oppose or handicap the implementation of UNSC Resolution 1373, whereas, democratic political regimes may give rise to political views which advocate the implementation of UNSC Resolution 1373. Similar controversies can be projected onto the relationship between religious/personal views on the one hand, and cooperation in the field of international counter-terrorism.

³⁷⁴ *Ibid.*

³⁷⁵ Williamson M. *'Terrorism, War and International Law: the legality of the use of force against Afghanistan in 2001'* (Routledge, 2016), P. 41.

³⁷⁶ *Ibid.*

3.5 The Security Council's Legislative Power

Wouters and Odermatt state that, as per Article 103 of the UN Charter, should conflict arise with regard to the obligations of UN member states outlined in the current Charter and those obligations outlined in other international agreements, the obligations in the current UN Charter take precedence.³⁷⁷ There has been debate regarding the authenticity of how the SC carries out its decisions. The authors also argue that Article 103 allows the SC the power to make adaptations to existing international laws. It can also be argued that SC resolutions can modify treaties that already exist although obligations that are binding in SC resolutions also take precedence over obligations of international law.³⁷⁸ The authors state that the SC should not be underestimated when it comes to modifying current international agreements and the SC has the power to get rid of, or rewrite any current international law depending on the situation.

Wouters and Odermatt discussed Stefan Talmon's theories and viewpoints with regard to the SC's power within the legislation. They mention that Talmon provides several examples of the SC's modifications to a treaty or international law principle. One of the more well-known examples of this is Resolution 748 which was adopted in 1992. The SC demanded that the nationals of Libya be turned over to the United Kingdom and the United States which overruled the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.³⁷⁹ Another example that was introduced by Talmon with regard to modifying international law is the situation in which the SC made the decision that the US and the UK were the only powers to occupy Iraq, as was decreed through Resolution 1483.

³⁷⁷ Wouters J and Odermatt J. 'Quis Custodiet Consilium Securitatis? Reflections on the Lawmaking Powers of the Security Council', in Popovski V. and Fraser T. (eds.), *The Security Council as Global Legislator* (Routledge, 2014), Pp. 71-96.

³⁷⁸ Al-Haj T. 'Resolution 1373 and the War on Terrorism' (Lebanon, Zain Lawful and Publications, 2013), P.108.

³⁷⁹ Talmon, *supra* n. 329, P.9.

It appears that the articles by Talmon, and, Wouters and Odermatt are in agreement in relation to the SC's obligatory nature to be able to override international law. However, Talmon argues that Resolution 1483 modifies any current armed conflict with regard to international law where the question arises as to whether or not a party occupying power is enough motivation for constituting fact-based tests. The opinions of Wouters and Odermatt appear to be situated around the ideas of Talmon as his theories are the primary focus in their paper. However, with time, the authors' evolving opinions and positions become more distinct.

There are many examples showing the legislative power of the SC and its abundant capacity to modify or adapt any international law with respect to treaties and obligations because of the UN Charter and its binding resolutions. These examples have shown that the SC has exercised restraint rather than demonstrating a propensity in the direction of the abolition of treaty law. There are very few examples of the SC adapting a treaty regime permanently and when it does, it stays to the relevance of already existing obligations internationally. Another key example to support this is that of Somalia. The Security Council extended UNCLOS provisions to eliminate piracy in Somalia's territorial waters. However, the SC continues to affirm that this applies only to Somalia and does not affect the obligations of other UN member states or international law.³⁸⁰ In addition, it stands by the claim that this resolution does not claim to establish or develop additional customary international law. Although the UNCLOS has been modified as a result of these resolutions, the SC contributed to this only to the extent required by the piracy threat in Somalia. Wouters and Odermatt extend an opinion that the SC limits itself to only the immediate needs of the situation rather than modifying a treaty permanently or dismissing the state's will.

³⁸⁰ Wouters J and Odermatt J, *supra* n. 377, Pp. 71-96.

Talmon notes that many writers use the term ‘international legislation’ in a broader sense which can be defined as the product and process of consciously making changes or additions to national laws.³⁸¹ This term can also be used to describe the development of customary international law, the end of law-making treaties, and the adoption of binding decisions that employ international organizations. One of the biggest differences in opinion between the authors of these two articles, is Talmon’s discussion of the ad hoc crimes of the war tribunal for Rwanda and Yugoslavia. The SC’s resolutions that established these war crimes and the UN Compensation Committee-forced obligations on Iraq solidified the Iraq-Kuwait border, declared the application of the Fourth Geneva Convention to Palestinian territories, and imposed economic sanctions which have been defined as legislative acts or international legislature in previous literature. However, member states have used these terms upon the implementation of Resolutions 1373 and 1540.

The practice of member states appears to follow Krzysztof Skubiszewski (1926-2010), former Polish Minister of Foreign Affairs, who states that the term ‘international legislation’ should be defined as law-making which mirrors national legislation. However, the basic features of international legislation are constantly being questioned as the literature has yet to identify those basic features and international legislation does not necessarily need legislative activity on the member states. There is a contradiction though; most resolutions set forth by the UN SC which impose sanctions on a country’s economy require some level of legislative activity making them applicable to an individual or a group of individuals. The measures seen in these resolutions have been aimed towards individuals at not at member states although not the primary feature of international legislation.³⁸² However, by the middle of the 1990s, the SC developed targeted sanctions aiming its measures towards specific individuals or groups of

³⁸¹ *Ibid* 14.

³⁸² *Ibid*.

individuals that had been identified as the ones posing a threat to peace by primarily using travel bans and financial sanctions?³⁸³

Talmon believes that the foundation of international legislature is the abstract, general character of those obligations that have been imposed which could potentially be triggered by specific events, situations, or conflicts although they are not exclusively restricted to the aforementioned. These obligations are worded in neutral language and can be applied to many different types of cases and situations. While Resolution 1390 provides specific language, Resolution 1373 is more generalized and uses simpler language. Wouters and Odermatt saw this slightly differently, however, believing that the language used in Resolution 1373, regarding international legislation and the powerful force driving the SC was very specific and provided more detail than most other resolutions in the UN Charter.³⁸⁴

There has been a large amount of debate and questioning of the legislative power of the SC with regard to UN SC resolutions and obligations of international law. The establishment of the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY) is the most primitive example of how the SC uses legislative power. Many writers and people in general believed that, as per the ad hoc Tribunal, the SC does in fact have an extensive amount of legislative power although Article 42 of the UN Charter prevents the SC from using its power as a form of punishment. However, the SC does in fact have this power leading to legislative domination over situations related to counter-terrorism.

Article 42 of the UN Charter³⁸⁵ stated that the Security Council has the authority to take action under its own recognizance sea, air, or land forces to regain or maintain international peace and security should it feel that Article 41 obligations have been shown to be inadequate.

³⁸³ *Ibid.*

³⁸⁴ Wouters J and Odermatt J, *supra* n. 377, P.9.

³⁸⁵ UN Charter Article 42.

Such action could include blockades, demonstrations, and other means that involve forceful missions by way of sea, air, or land. The argumentative debates that have come about surrounding the SC and its legislative power to be able to ignore previous resolutions and go with what it feels is right at that point in time have been plentiful and quite strenuous. The SC's original purpose was to be the central international organ that was given the great responsibility of maintaining international peace and security. Debates date as far back as the situations of the *travaux préparatoires* and the Dumbarton Oaks proposals, and were revived after the Cold War when the Security Council started to be more active. Additionally, it was seen as an important component in increasing efforts to encourage international relations law. While the SC's legislative power is typically discussed by both Talmon, and Wouters and Odermatt in correlation with judicial review, the two areas of discussion are completely separate from one another.³⁸⁶

The main question that has arisen from these debates is whether or not the SC is bound by the law or unstoppable and *legibus solutus*. The answer is simple: the SC is not in any way above the law, or at least that statement is part of these debates. Despite its high level of excellence in terms of its political character and how it functions, the SC pulls its authority from treaties concluded by member states. The best example of the SC's ability to use its legislative power as previously mentioned and which also brought about more significant debate is UNSC Resolution 827, which was adopted on May 25, 1993, and was the statute of the ICTY. In October 1992, it was brought to the attention of the SC that a substantial number of violations of international humanitarian law had been committed by former Yugoslavia. The SC passed Resolution 780, requiring the Secretary-General to investigate these violations as

³⁸⁶ Talmon *supra* n. 329.

per previous resolutions which affirmed that individuals should be held responsible for their crimes.³⁸⁷

By establishing an *ad hoc* international tribunal, the SC is allowed to persecute those who commit criminal acts such as the atrocities of former Yugoslavia, making it consistent with the direction of the SC and this resolution. In fact, the Secretary-General proclaimed its high-level support for the ICTY to establish a tribunal that would focus on how to manage significant breaches of humanitarian law. It was in February 1993, when the Secretary-General presented his report to the SC although it was determined that the state of affairs in the former Yugoslavia was a threat to international security and peace.³⁸⁸ This led the SC to initiate and implement Resolution 827 and an international tribunal which would be used as a deterrent for crime, bringing those individuals responsible for committing these crimes to justice and restoring international security and peace.

The ICTY has elaborated extensively on specific crimes that fall under this statute. These include the concept of significant breaches, the definition of genocide and the protected group within this definition, subjective and objective elements of humanity crimes, and the definitions of specific offenses such as extermination, torture, deportation, and slavery. The Tribunal's territorial, personal, and temporal jurisdiction for punishing individuals for these crimes appears in Articles 6 and 8 of the Tribunal. These two Articles allow jurisdiction over natural citizens who committed crimes after January 1, 1991 in the former Yugoslavia. Even though the ICTY and courts on a national level hold jurisdiction over these crimes, the ICTY has primary say in requesting national courts to comply with its capabilities and a binding

³⁸⁷ UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (1993).

³⁸⁸ *Ibid.*

obligation has been placed on member states as per Article 29 to cooperate with all investigations and prosecutions of these individuals.³⁸⁹

3.6 The Implications of UN Security Council Resolution 1373

In accordance with UNSC Resolution 1373, the SC is now following a rather comprehensive and remedial approach to these events. It seeks, through this resolution, to establish an international regime of cooperation between states to counter-terrorism. Thus, the response of the SC to terrorism now is collective and based on a planned and calculated approach. There is no individual response to every single event of terrorism, as the SC now is demanding states to have their own legislation to fight terrorism by endorsing the international regime of cooperation. However, the application of this resolution raises several implications. These, in turn, raise difficult challenges for the application of this resolution on the national levels.

There are three implications raised by the resolution: 1. intelligence and police cooperation; 2. human rights law; and 3. cutting terrorist finance. These three implications also raise several problems, such as the international sovereignty and the principle of the non-intervention in other states' affairs, and the existence of unified national legislations to counter-terrorism. The respective implications of Resolution 1373, and the challenges faced by the aforementioned implications are discussed in detail in this section of the thesis.

3.6.1 Human Rights Law and Terrorism

Section F of Article 3 of Resolution 1373, posits that every member country ought to observe the pre-established benchmarks of human rights law before providing asylum.³⁹⁰ Furthermore, section G of the article asserts that jurisdictions ought to ensure that perpetrators

³⁸⁹ *Ibid.*

³⁹⁰ UN SC Resolution 1373, Article 3 Section F.

of terrorist acts do not manipulate the refugee status provided for by the resolution.³⁹¹ These two articles provide the basis for the application of human rights statutes as prescribed by the United Nations and international law. However, the application of these two provisions of the resolution by member nations has come under intense scrutiny in relation to the violation of human rights. According to a survey published by the SC in 2011, various nations have amended their legislation on terrorism to uphold human rights provisions.³⁹²

Also, these states have empowered their respective judicial systems to tackle terrorism threats in a manner that does not refute the human rights standards established by the United Nations. Every nation has felt the adverse effects of terrorist attacks in the form of lost human capital in the wake of terrorist insurgency in various parts of the world. These continued acts of terrorism have had dire consequences for regional stability as well as for human rights in many regions. Terrorism attacks directly impact various aspects of human rights such as liberty, physical wellness, as well as the ‘right to life’. Consequently, governments have come up with stringent legislative measures to counter these effects of terrorism. Despite these measures, numerous challenges involving human rights violations exist in regard to the application of Resolution 1373.

3.6.2 Challenges Facing Human Rights

Human rights law is one of the biggest challenges to that effect. Combating terrorism through Resolution 1373 might conflict with human rights law. Upholding every individual’s right to life is one of the greatest obstacles in the anti-terrorism war. Every state has the mandate to protect and safeguard every person’s right to life regardless of their social standing. These rights have very few exceptions. However, the advent of terrorism has adversely affected the

³⁹¹ UN SC Resolution 1373, Article 3, Section G.

³⁹² Counter-Terrorism Committee. Global Survey of the Implementation of Security Council Resolution 1373 by Member States. Survey Report, United Nations, (2011). P. 60-84.

right to life in numerous ways. Firstly, terrorist attacks result in many fatalities through deliberate killings of hordes of people by terrorists.³⁹³ On the other hand, law enforcers, through the use of certain judicial precedents, adversely affect an individual's 'right to life' while conducting counter-terrorism operations. Both local and international human rights legislations ensure that states provide for the safety and well-being of their citizens.

However, the legislative protocols put in place by some states have gravely undermined the right to life as spelled out in UN's Universal Declaration. In certain circumstances, law enforcers make use of 'targeted killings' that involve eliminating terrorist suspects rather than bringing them to face justice.³⁹⁴ The implementation of legislation that give provisions for 'shoot to kill' directives have dire consequences on the individual's right to life. According to a report by the special rapporteur on arbitrary executions, various states have wholeheartedly embraced 'targeted killings' as an anti-terrorism tool.³⁹⁵

According to Article 3 of the UN Universal Declaration of Human Rights 1948, upholding the right to life of any individual forms the very basis of justice, peace, and freedom across the globe.³⁹⁶ However, the continued threat that terrorism has had on humanity has necessitated the adoption of more stringent policy measures to counter this constantly evolving threat. The adoption of such policy measures that include the use of 'targeted killings', pre-trials, and 'shoot to kill' directives by various nations pose a threat to the very foundations of Resolution 1373.

³⁹³ Fitzpatrick J. 'Speaking Law to Power: The War Against Terrorism and Human Rights', *European Journal of International Law*, Vol. 14, No. 2 (2003): 241-264.

³⁹⁴ Schorlemer V. 'Human Rights: Substantive and Institutional Implications of the War Against Terrorism', *European Journal of International Law*, Vol. 14, No. 2 (2003), 265-282.

³⁹⁵ Alston P. 'Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions: Study on Targeted Killings. United Nations General Assembly', *United Nations Human Rights: Office of the High Commissioner* (2010), P. 14.

³⁹⁶ United Nations. Universal Declaration of Human Rights. Office of the United Nations High Commissioner for Human Rights, (1948).

Human trafficking is also one of the pertinent challenges facing the anti-terrorism war in this century. Terrorist groups have increasingly made use of trafficking and kidnapping strategies as a way of terrorizing society as well as raising finances for their operations.³⁹⁷ Terrorists also utilize human trafficking as a recruitment strategy in which they utilize kidnapped individuals as suicide bombers or as carriers. In the recent past, terrorist groups such as ISIS have utilized human trafficking to recruit foreign militants from the West.³⁹⁸ The ISIS has made use of various platforms such as social media to recruit vulnerable minors from Europe and North America. ISIS have primarily made use of deceit to lure young school girls with the aim of using them as Jihadi wives.³⁹⁹ Human trafficking curtails an individual's freedom by limiting his or her movements, as well as coercing the said individual into carrying out particular actions against his or her will.⁴⁰⁰ The Boko Haram and ISIS are two terrorist organizations notorious for human trafficking. In 2015, the Boko Haram abducted and committed despicable atrocities to over 200 school girls in the northern localities of Nigeria as a ploy to spread fear into the populace.⁴⁰¹ The weak legal frameworks put in place in the region have enabled the terror group to impose their rule in the border regions of Nigeria and Chad.

Also, the use of torture in the counter-terrorism movement is one of the ways in which universally accepted human rights are contravened. Similarly, state agencies make use of torture in the war on terror to extract vital information as well as confessions from uncooperative terrorist suspects.⁴⁰² Despite the legitimacy of the use of torture mechanisms in counter-terrorism operations, human rights activists have questioned the morality of using

³⁹⁷ Shelley L. 'Dirty Entanglements: Corruption, Crime, and Terrorism' (Cambridge, Cambridge University Press, 2014).

³⁹⁸ Weiss M and Hassan H. '*ISIS: Inside the Army of Terror*' (Regan Arts, 2015).

³⁹⁹ Binetti A. 'A New Frontier: Human Trafficking and ISIS's Recruitment of Women from the West', *Georgetown Institute for Women: Peace & Security*, (2015).

⁴⁰⁰ Sageman M. '*Understanding Terror Networks*' (University of Pennsylvania Press, 2004).

⁴⁰¹ Adepelumi P. 'The Root Causes of Human Trafficking in Nigeria', Fact Sheet, Doha: UNODC, (2015).

⁴⁰² Durosaro W. 'The Use of Torture in the War on Terror: Should this 'Exceptional Measure' Be Justified in 'Exceptional Times'?', *American Journal of Humanities and Social Sciences*, Vol. 2, No. 2 (2014), Pp. 88-93.

torture to fight terrorism. Despite the constant clamour by human rights activists, numerous jurisdictions still uphold the use of torture as a counter-terrorism approach.

Notwithstanding the existence of freedom, counter-terrorism policies and strategies embraced by nations have adversely affected the liberty clause. As a part of counter-terrorism measures, nations have permitted pretrial processes such as denial of bail and pretrial detention of terrorism suspects.⁴⁰³ Furthermore, a majority of terrorism laws implemented by nations deny suspects the right to appeal which represents a violation of an individual's right to liberty.

Article 4 of the universally accepted Declaration of Human Rights posits that every individual has the right to protection against any form of arbitrary or unlawful interference with their liberty.⁴⁰⁴ Many nations have responded to the ever-growing terrorist threat by implementing various policies in line with Resolution 1373. One of the common strategies used by governments involves detention.⁴⁰⁵

Article 5 of the Declaration of Human Rights forbids any individual to be subjected to torture or any form of degrading treatment.⁴⁰⁶ However, terrorist organizations have embraced the use of various torture techniques as a strategy of spreading fear amongst civilians.⁴⁰⁷ The drastic measures being employed by terrorist groups with the aim of continuing their agenda as well as countermeasures undertaken by the government continue to pose a serious threat to human liberty and freedom. As the anti-terrorism war continues in the 21st century, so do the impediments to fundamental human rights of freedom and liberty.

⁴⁰³ Dandurand Y. 'Handbook on Criminal Justice Responses to Terrorism', *United Nations Office on Drugs and Crime*, (2009).

⁴⁰⁴ Michaelsen C. 'Balancing Civil Liberties against National Security? A Critique of Counter-terrorism Rhetoric', *University of New South Wales Law Journal*, Vol. 29, No. 2 (2006), Pp. 13-26.

⁴⁰⁵ Human Rights Watch. Human Rights and Saudi Arabia's Counterterrorism Response Religious Counseling, Indefinite Detention, and Flawed Trials. Human Rights Watch, (2009), Pp. 2-28.

⁴⁰⁶ United Nations. 'Universal Declaration of Human Rights'. Article 5.

⁴⁰⁷ OHCHR. Human Rights, Terrorism and Counter-terrorism. Fact Sheet, Office of the United Nations High Commissioner for Human Rights, n.d. P. 26.

Civil strife and uprisings experienced in the Middle East and North Africa have also contributed to the deterioration of border controls in the region. The recent civil unrest that affected countries in the Middle East has adversely affected peace and stability in the area. The civil strife in neighbouring countries has greatly increased the number of asylum seekers fleeing war torn countries such as Syria and Yemen. The influx of these asylum seekers to Europe has brought significant problems in regard to the effective inspection and screening of people entering the peaceful jurisdictions in the Middle East. The high number of refugee seekers fleeing conflict zones has heightened the region's susceptibility to proliferation by terrorists.⁴⁰⁸ The spread of terrorist dissidents masquerading as asylum seekers has significantly increased the terror threat in European countries and it has become difficult to identify terrorist impersonating refugees without undermining their rights. For instance, France recently experienced a spate of terrorist attacks in its capital that resulted in 129 fatalities and more than 350 casualties. The attackers belonging to the ISIL terrorist group had entered the country as asylum seekers fleeing the Syrian war.⁴⁰⁹ Furthermore, the instability affecting the region has reduced the capacity of its neighbouring countries to verify the authenticity of travel documents issued by asylum seekers from the MENA region.

This particular implication raises one of the greatest challenges in putting in place the requirements of UNSC Resolution 1373. The application of its requirements will be impeded by such acts that could amount to a level of human rights violations, as explained above. Therefore, due consideration must be given to the balance between the legal requirements of Resolution 1373 and the practices of states when considering issues related to human rights.

3.6.3 Cutting Terrorism Financing

⁴⁰⁸ Andreopoulos G. *'Policing Across Borders: Law Enforcement Networks and the Challenges of Crime Control'* (New York: Springer-Verlag, 2014).

⁴⁰⁹ United Nations. France: draft resolution REV. United Nations Security Council, 2015.

Section A of UNSC Resolution 1373, reiterates the need to cut the supply of financial support to terrorist organizations as a way of curtailing their operations.⁴¹⁰ According to a report published by the IMF, there exist various strategic options for jurisdictions wishing to formulate the requisite legal framework to curtail terrorism financing.⁴¹¹ The need to block the revenue channels used by terrorist groups to spread terrorist acts across the globe first emerged during the SC's general meeting in 1999.⁴¹² The advent of terrorist activities as a growing threat to world peace directly violated the principles and purposes of the UN Charter. The Security Council proposed the adoption of preventive strategies to limit access to financial support by terrorist organizations.⁴¹³

As a result, the world witnessed a surge in the number of treaties geared towards stemming terrorism and organized armed conflicts.⁴¹⁴ As part of Resolution 1373, the UN Security Council proposed several strategies to aid in the anti-terrorism movement. Another commonly used avenue by terrorists for funding involves the use of non-governmental organizations (NGOs) operating within certain jurisdictions. According to a report prepared by FATF in 2013, a majority of terror organizations in West Africa made use of NGOs to access funding.⁴¹⁵ Terrorist groups operating in the Middle East make use of Informal Value Transfer Systems (IVTS) to source funding,⁴¹⁶ and in regard to illegal trade, terrorist networks take part in drug trafficking and smuggling as a means for raising revenue. For instance, the Taliban and Al-Qa'idah terrorist groups depend on the poppy trade in the region to generate income to fund

⁴¹⁰ UN SC Resolution 1373, Section A.

⁴¹¹ 'IMF Suppressing the Financing of Terrorism: A Handbook for Legislative Drafting. Legal Department', *International Monetary Fund*, (2003, 1-10).

⁴¹² United Nations, *International Convention for the Suppression of the Financing of Terrorism*. New York: United Nations, (1999).

⁴¹³ Counter terrorism Threat Assessment and Warning Unit. *Terrorism in the United States*. Washington D.C: Counterterrorism Threat Assessment and Warning Unit, (1998).

⁴¹⁴ O'Donnell, D. 'International treaties Against Terrorism and the use of Terrorism During Armed Conflict and by Armed Forces', *International Review of the Red Cross*, (2006), 853-880.

⁴¹⁵ FATF. Targeted Financial Sanctions Related to Terrorism and Terrorist Financing (*Recommendation 6*). Financial Action Task Force, (2013).

⁴¹⁶ Morris. J. 'Vulnerabilities and Responses to Terrorist Financing: An Exploration of Informal Value Transfer Systems, Islamic Charities, and Businesses and Financier', *Internet Journal of Criminology*, (2014), 1-27.

their activities.⁴¹⁷ Alternatively, terrorist groups partly rely on contributions from their members to fund organizational operations and administration.⁴¹⁸

3.6.4 Challenges in Criminalizing the Funding of Terrorism

One persistent loophole in the criminalization of terrorism funding involves the use of informal systems for transferring money such as *Hawala*. Many reports have persistently linked this informal transfer schemes with the financing of terrorism. For instance, a report published in 2002 by the United Nations linked financial transactions between the perpetrators of the September 11 attack on the *Hawala* system.⁴¹⁹ The prevalence of *Hawala* as a financial service provider in South Asia and the Middle East has continued to inhibit the criminalization of terrorism financing in the region. The informal nature of the monetary transfer networks makes them highly vulnerable to be used as a conduit to transfer funds to terrorist groups. The difficulty encountered in regulating informal money transfer systems is one of the challenges inhibiting the criminalization of terrorism financing. In an attempt to regulate the informal monetary transfer platforms, governments in the Middle East and South Asia have implemented policies that legalize the use of such networks.⁴²⁰

However, the high costs of registration and licensing associated with *Hawalas* has jeopardized the integrity and transparency of the informal money transfer sector.⁴²¹ The mode of operation during transactions makes these informal systems highly susceptible to usage by terrorist groups. Informal systems such as the *Hawala* and *Fei Chien* do not necessarily require the physical transfer of money from one geographical region to another. Furthermore, the high

⁴¹⁷ Berry L, Glenn E. Curtis, Rex A. Hudson, and Nina A. K. *supra* no. 345.

⁴¹⁸ Feiler G. '*The Globalization of Terror Funding*', *Mideast Security and Policy Studies*, Bar Ilan University, (2007).

⁴¹⁹ Buencamino L, and Gorbunov S. 'Informal Money Transfer Systems: Opportunities and Challenges for Development Finance', DESA Discussion Paper, United Nations, (2002).

⁴²⁰ Wang J. 'Regulating Hawala: a comparison of five national approaches', *Journal of Money Laundering Control*, Vol. 14, No. 3 (2011), 210-224.

⁴²¹ Morris J 'Vulnerabilities and Responses to Terrorist Financing: An Exploration of Informal Value Transfer Systems (IVTS)', Islamic Charities, and Businesses and Financiers, *International Journal of Criminology*, (2014), 1-27.

transaction costs associated with other forms of transfer schemes have only served to increase the popularity of the informal monetary transfer sector. The low costs of operations using Hawala coupled with the anonymity of the transfers make such transfers a preferred channel for facilitating financial aid to terror networks.⁴²²

Section A, of Article 1, of UNSC Resolution 1373, posits that every nation ought to limit the accessibility of funding by terrorist networks.⁴²³ These provisions of the resolution have formed the basis of the terrorism laws being formulated by nations. However, the existence of informal monetary transfer systems entrenched in the financial sector of some countries continues to create loopholes in the war against terrorism. The existence of informal money transfer frameworks promises to continue to be an obstacle in the concerted efforts being made by nations to starve terrorist networks of funding.

Distinguishing between terrorism financing and other forms of money laundering activities is one of the many problems facing the criminalization of terrorism financing. One of the crucial steps in criminalizing terrorism funding involves distinguishing between money laundering and terrorism financing. Financing terrorism activities manifests itself in various ways that bear semblance to the methods adopted by international criminal syndicates.⁴²⁴ Despite the fact that terrorists make use of money laundering techniques, the utilization of this illegal method varies in that criminal syndicates use money laundering as a way of legitimizing revenues collected. In contrast, terrorist organizations solely use money laundering strategies as a way of advancing their terrorism objectives. Despite the effectiveness of the strategy, the complexity of the global financial network and the sheer volume of transactions makes the

⁴²² Levi M. 'Combating the Financing of Terrorism: A History and Assessment of the Control of 'Threat Finance'', *British Journal of Criminology*, Vol. 27, No. 1 (2010), 156-172.

⁴²³ UN SC Resolution 1373, Article 1 Section A.

⁴²⁴ Kovac M. 'International Criminalization of Terrorism, PhD Thesis, (2007).

strategy less effective.⁴²⁵ Every financial transaction from any region across the globe triggers a ‘money trail’ that enables the details of the specific transaction to be tracked. However, the different financial laws adopted by various jurisdictions coupled with confidentiality protocols observed in the financial sector lessen the effectiveness of financial monitoring. A report published by the Financial Action Task Force provided a set of forty recommendations geared towards the eradication of all financial activities that propagate terrorism.⁴²⁶

Section B, of Resolution 1373, posits that every type of wilful provision of financial aid to a terrorist organization, either implicitly or explicitly, constitutes a criminal activity.⁴²⁷ Criminalizing the provision of financial assistance to terrorist organizations first appeared during the international convention held in 1999, aimed at suppressing the growth of terrorist groups. The complexity of the global financial system and the advent of globalization has continued to limit the effectiveness of anti-terrorism laws adopted by countries since numerous transactions occur at an international level curtailing the effectiveness of national laws.

Freezing the financial assets tied to terrorist organizations is one of the primary challenges in the criminalization of terrorism funding. Another widely used scheme in curtailing a terrorism network’s access to monetary support involves the freezing of financial assets linked to terrorist networks.⁴²⁸ The complexity and ever-changing nature of funding and support networks embraced by terror networks makes it difficult to bar such groups from accessing funding.⁴²⁹ The sixth recommendation of the Financial Action Task Force mandates every nation to develop the necessary legislations to aid in the implementation of financial sanctions aimed at terrorist entities. The effective prevention of terrorism activities requires the

⁴²⁵ Pieth M. ‘Criminalizing the Financing of Terrorism’, *Journal of International Criminal Justice*, Vol, 4, No. 5 (2006), 1074-1086.

⁴²⁶ United Nations, Tackling the Financing of Terrorism. CTITF Working Group Report, New York: CTITF, (2009).

⁴²⁷ UN SC Resolution 1373, Section B.

⁴²⁸ UNODC *Legislative Guide to the Universal Legal Regime Against Terrorism*. New York: United Nations, (2008).

⁴²⁹ UNODC Handbook on Criminal Justice Responses to Terrorism. Vienna: United Nations Office on Drugs and Crime, (2009.)

establishment of a universal criminal justice system tasked with investigating incidents of terrorism funding. Various states have fulfilled this requirement by the United Nations by developing mechanisms that enable the detection and freezing of funds associated with terrorist financing. For instance, the US created the foreign assets control office responsible for overseeing the confiscation of financial assets linked to extremist organizations.⁴³⁰ The establishment of efficient financial freezing protocols provides a proactive avenue for deterring access to funds by terrorist groups. Reliable freezing protocols facilitate one way to fight against terrorism by curtailing the sympathizers of terrorist groups from funding their operations.⁴³¹ It also aids in the exposure of terrorist funding money trails that facilitate the tracking of terrorist dissidents. Furthermore, this strategy increases the costs of transactions incurred by terrorist entities as well as diminishing their scope of operation.

Section B, of Article One, in Resolution 1373, mandates every member state to instantly block access to financial or economic resources associated with terrorists.⁴³² This provision in the resolution also extends to individuals suspected of facilitating the spread of terrorism by availing funds aimed at propagating terrorism.⁴³³ The advent of novel money transfer networks such as internet-based transfer networks such as PayPal and the anonymity of the transfers makes it difficult to wholly curtail terrorist access to finance. More legislative measures at the international level ought to take effect so as to increase the effectiveness of the laws developed by member states.

The sovereignty of nations acts as a major hindrance in the fight against terrorism. The varying laws applied in different jurisdictions in relation to terrorism and anti-terrorism laws

⁴³⁰ US Department of Treasury. Calendar Year 2013 Twenty Second Annual Report to the Congress on Assets in the United States Relating to Terrorist Countries and International Terrorism Program Designees. Terrorist Assets Report, (Washington).

⁴³¹ FATF: *FATF 40 Recommendations*. Financial Action Task Force, (2003).

⁴³² UN SC Resolution 1373, Article 1, Section B.

⁴³³ UN SC Resolution 1373, Section C.

make it difficult to criminalize the funding of terrorism. However, as highlighted in the third section of Chapter One of this thesis, McDougal's policy-oriented (New Haven) approach to international law could aid governments and judiciaries in the fight against terrorism. For example, it would be fair for a jurist to consider the difference between a Muslim who indulges in terrorism activities and a non-Muslim who is also a terrorist. Although the underlying factor is that in the two cases both persons are terrorists, the level of danger that the non-Muslim terrorist possess is grave. It is only through the analysis of existing situations as suggested by McDougal that a jurist can give fair opinions on these two types of terrorism. It is, therefore, worth concluding that McDougal's policy-oriented approach to international law could aid in the fight against terrorism since it has the capability of producing an effective international regime of cooperation among states regardless of the existence of varying laws applied in different jurisdictions in relation to terrorism.

Another aspect that obstructs the criminalization of terrorism, revolves around the rapid spread of technological advancements.⁴³⁴ The utilization of the Internet framework, as well as mobile money transfers, has adversely affected the criminalization of terrorism funding. The existence of alternative money transfer channels away from the traditional banking system has also increased terrorists' access to finance.⁴³⁵ The constantly evolving financial sector makes it increasingly difficult to link the numerous financial transactions conducted by terrorist organizations. Hence, administrations in collaboration with the UN Security Council need to put in place measures to curtail the terrorists' use of technology to access funding.

In short, the aforementioned challenges in fighting terrorism make it quite difficult to produce an effective international regime of cooperation among states. The reason there are several challenges in relation to cooperation is that no agreement between nations about the

⁴³⁴ Vortmeyer, M. 'Financial Intelligence Units: An Overview', *World Bank*, International Monetary Fund, (2004).

⁴³⁵ UNODC The Use of the Internet For Terrorist Purposes. United Nations, (2012).

meaning of terrorism neither the meaning of Jihadi terrorism has been realized, which will be examined in Chapter 4. Applying Resolution 1373 seems quite challenging in this regard. There must be a great deal of cooperation and coordination between nations to produce as much as possible a unified or similar legal system to cut the financial support received by terrorist actors.

3.6.5 Intelligence Sharing and Police Cooperation

The gathering and dissemination of intelligence between law enforcement agencies plays a crucial role in the anti-terrorism war. Intelligence helps in understanding the administrative and organizational structure of terrorist organizations. Similarly, intelligence facilitates the unravelling of impending terrorist attacks before they occur.⁴³⁶ As a result, various nations have entered into agreements and treaties that allow for the exchange of sensitive information aimed at fighting terrorism. Intelligence relations between nations such as the UK, and the US, exemplify the existence of collaborative efforts against terrorism.⁴³⁷ NATO is another agency that plays a crucial role in counter-terrorism. NATO has a mandate to increase awareness of pre-eminent attacks as well as developing the capacity to counter a terror attack. Another form of intelligence sharing manifests itself in the form of issuing travel advisories, which are notifications warning of pre-eminent terror attacks and advising people against visiting certain regions during certain periods.⁴³⁸ Another facet of the global anti-terrorism war involves the formation of joint operations between law enforcement agencies between nations. Interpol arguably is the largest joint police force operating on a worldwide scale. Interpol has the mandate to provide support to law enforcement units within the UN's

⁴³⁶ Flavius-Cristian M and Ciorei M. 'The Role of Intelligence in the Fight Against Terror', *European Scientific Journal*, Vol. 9, No. 2 (2013).

⁴³⁷ Svendsen A. *'Intelligence Cooperation and the War on Terror: Anglo-American Security Relations After 911?'* (Routledge, 2010.)

⁴³⁸ United Nations: United Nations Field Security Handbook. New York: United Nations, (2006.)

jurisdiction.⁴³⁹ Interpol plays a crucial role in offering logistical support in the war against terrorist organizations and criminal cartels.

3.6.6. Challenges of Intelligence and Police Cooperation

The failure to act upon arrest warrants issued by nations against suspected criminals, as well as extradition refusals, is of one of the key challenges facing international police cooperation. Political prejudices have often obstructed the execution of arrest warrants as well as extraditions that have had adverse effects on the anti-terrorism war.⁴⁴⁰ Section G, of Article 3, of Resolution 1373, posits that nations ought to ensure that perpetrators of terror attacks do not abuse asylum protocols.⁴⁴¹ The United Nations developed a model treaty to facilitate the extradition of criminal dissidents from member states. The structure and contents of the extradition treaty developed by the secretary general facilitate collaborative efforts between nations during extraditions. The treaty stipulates the responsibilities and obligations of the involved nations in the event of an extradition.⁴⁴² The resolution bars any nation from hosting any individual or organization that has perpetrated any manner of terrorism against other countries.

Another obstacle hindering international police cooperation and the sharing of intelligence involves the issue of law enforcement. Many states have formulated policies that spell out the strategies used in detecting and responding to terror threats. These policies vary from one nation to another depending on the preferences and the threat level posed by terrorism in specific regions. The varying terrorism legislations adopted by different nations hinder both bilateral and multilateral efforts by law enforcement agencies to respond to a terror threat.

⁴³⁹ Technical Guide: To the Implementation of Security Council Resolution 1373. 'Technical Guide, Counter-Terrorism Committee, (2009).

⁴⁴⁰ United Nations. Workshop Identifies Challenges to International Law Enforcement Cooperation in Countering Organized Crime. Press Release, Bangkok: United Nations, (2005).

⁴⁴¹ UN SC Resolution 1373, Article 3 Section G.

⁴⁴² UNODC. Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters. Manual, (United Nations, n.d.).

Despite the fact that the sharing of intelligence between countries has steadily increased in the 21st century, the varying capacities to establish counter-terrorism units still inhibits information sharing. Furthermore, differing political ideologies and the battle for economic supremacy between nations still act as a deterrent in law enforcement.

The resolution depends on sharing intelligence information among states. This, in practice, seems difficult and sometimes impossible depending on which states are involved in the given event of terrorism. To solve the problem of terrorism or to counter a certain event, intelligence information needs to be shared between the given states. But, most of the time this does not happen. Therefore, this is a serious challenge. The cold war which pit Russia against the USA is one of the many instances where nations failed to share information. In recent times, the US and China have embroiled themselves in a bilateral supremacy battle that has hindered the sharing of intelligence between the two powers. Policy differences between nations have culminated in tensions and the failure to disseminate multilateral intelligence. After the terror attack that hit the US in 2001, China failed to offer full logistic and intelligence support to the US in the war against Al-Qa'idah⁴⁴³ and this escalated into full-blown diplomatic tensions between the two countries. These diplomatic tensions have greatly inhibited counter-terrorism efforts between the two nations through the failure to share information. The Boston bombing atrocity was committed by a person from Chechnya who came from Russia to America, thereby implicating Russia in this event, but how can Russia and USA share any intelligence information when they do not trust each other?

In addition to this, there is another problem that constitutes a significant challenge, which is, the divergent views of states about what is meant by terrorism on the national and international levels. So, what may be considered a non-terrorist act, and therefore, an internal

⁴⁴³ Kan S, U.S.-China Counterterrorism Cooperation: Issues for US Policy. Washington D.C: Congressional Research Service, (2010).

affair for a state, could be a terrorist act and an international matter as well. The problem of Tibet is considered to be an internal affair to China and they view their acts against this country as not being terrorism, whilst these have been considered, otherwise, by the international community. So, here, we have two problems: one is related to intelligence sharing as China will not share information with any state and also the divergent views among states about what is meant by terrorism. The same can be applied to the Soviet Union's (USSR) invasion of Afghanistan, where the former considered that their actions were not acts of terrorism, as Afghanistan was considered to be a threat to them, whilst the latter considered these actions to be crime and acts of terrorism, and that they had the right to defend themselves.

Also, UNSC Resolution 1373, advocates for the use of collaborative legal assistance as a way of promoting counter-terrorism. This form of cooperation involves the formation of a joint task force between countries with the aim of facilitating the sharing of intelligence information. Such arrangements facilitate searches and seizures within another country's jurisdiction. These collaborative measures also facilitate the execution of judicial duties on a global scale. The International Criminal Court based in the Hague exemplifies international legal cooperation that culminated in its formation. The court has a mandate to preside over cases involving people charged with committing crimes against humanity such as cyber-terrorism.

Similarly, religious differences have greatly inhibited information sharing, for example, in the Middle East. The diplomatic tension between countries that play a vital role in upholding peace as well as fighting terrorism in the region impedes efforts to eliminate the threat of terrorism in the area.⁴⁴⁴ This religious divide has not only impinged on intelligence sharing but also police cooperation between the nations. The historical tension between Israel and the

⁴⁴⁴ Shelley S. *'Dirty Entanglements: Corruption, Crime, and Terrorism'* (Cambridge University Press, 2014).

Islamic states coupled with civil strife in the Middle East is one of the biggest challenges facing the region in its fight against terrorism.

Article 3, of UNSC Resolution 1373, provides the platform through which international cooperation and sharing of information occur. Section A, of Article 3, of Resolution 1373, posits that nations ought to find ways of accelerating and intensifying the dissemination of intelligence.⁴⁴⁵ Furthermore, Section B, of Article 3, of Resolution 1373, asserts that the sharing of information ought to occur based on domestic and international legislations.⁴⁴⁶ However, the historical rivalry between various nations and differing ideologies promises to continue acting as a deterrent to intelligence sharing between some of the nations.

In light of the above challenges, it seems that the application of the resolution is quite difficult, in particular the resolution's approach to respond to terrorism is of international character where it seeks international intervention to combat terrorism. In other words, the resolution seeks to implement its aims via establishing an international regime of cooperation. It is not an individual response that the SC seeks to achieve. It is not, for example, dealing with the problem of getting Saddam Hussein out of Kuwait. It is an international task where states are called upon to collectively combat terrorism, in particular, that the resolution aims at solving this problem. However, in the course of establishing this international regime, human rights, intelligence sharing and police cooperation, and cutting terrorism finance constitute a serious impediment. This section sought to pay attention to this important difficulty before embarking on analysing the legal system in Saudi Arabia.

⁴⁴⁵ UN SC Resolution, 1373, Article 3 Section A.

⁴⁴⁶ UN SC Resolution 1373, Article 3 Section B.

CHAPTER FOUR: THE SAUDI ARABIAN STRATEGY OF COUNTER-TERRORISM

4.1 Introduction

So far, we have examined the international strategy of counter-terrorism through a thorough analysis of Resolution 1373. The aim of this study is to draw on the Saudi strategy of counter-terrorism and examine the conformity of the Saudi strategy to the international one. In order to achieve this end, the thesis now examines the general and legal strategy of counter-terrorism in Saudi Arabia. This chapter explores how the Saudi authorities have developed legal and administrative measures to respond to international, regional, and domestic threats and acts of terrorism, and in particular, how the danger of terrorism has dramatically changed over the last two decades. The chapter, will describe the national measures taken by the Saudi authorities to develop its system of combating terrorism. This is followed by exploring the two important responses of the Saudi Government to improve its security and judicial systems to fight terrorism. Next, the chapter explores the legal system of counter-terrorism in the Kingdom. It analyses some parts of the Law of Combating Terrorist Crimes and its Financing, of 2014 and 2017, which is important to understand the challenges that face the conformity of both international and national strategies.

4.2 Saudi Arabian Strategy of Counter-Terrorism

The means by which acts of terrorism can be prevented is an important consideration. Although these means are carried out outside the criminal law domain in the legal system of Saudi Arabia, the failure to apply these means may require this law to intervene. These means aim at preventing a terrorist attack before it occurs or reducing their effects after they occur. The selection of these means depends on knowing the types of terrorist acts to be prevented and identifying the potential techniques that the terrorists may use to achieve their goals. The effectiveness of these means depends on the element of surprise. So, it is often said that there is a sense of competition between the terrorists who seek to undertake an act of terror and the

authorities who seek to prevent them. One of the most important lessons learnt from the aftermath of 9/11, was how governments and intelligence agencies need to collaborate and prevent acts of terrorism from occurring.

It should be noted in this regard that the UN has formed commissions and adopted several declarations and resolutions, encouraging all states to cooperate with each other to prevent acts of terrorism taking place. It also calls upon all states to establish principles of criminal justice. The Eighth UN Congress on Crime Prevention and Criminal Justice, held in 1990, recommended action against organized crime and terrorism. The Congress also recommended strengthened international cooperation against terrorism.⁴⁴⁷ In addition, Resolution 1373 imposed another obligation on states requiring them to prevent the presence of terrorists on their territories.⁴⁴⁸ It also imposed another obligation on these states to prevent those who finance, organize, facilitate or commit acts of terrorism by using the territory of that state to commit such acts against other states or against the nationals of these states,⁴⁴⁹ by, for example, rejecting granting refugee status for them. In addition, the resolution asked states to control their borders and prevent terrorists crossing it which also requires that travel documents are checked to ensure their validity.⁴⁵⁰ Hence, there are a set of measures that national legislatures should follow to prevent the occurrence of the crime of terrorism in pursuance of international and national legal obligations.

As far as the Kingdom is concerned, although the Saudi government has undertaken several measures to counter terrorism following the events of September 11th, Al-Qa'idah's

⁴⁴⁷ "United Nations Congresses on Crime Prevention and Criminal Justice 1955–2010: 55 years of achievement". *United Nations Office on Drugs and Crime*. United Nations. February 2010.

⁴⁴⁸ UNSC, Resolution 1373, Article 2 (C)," Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens.

⁴⁴⁹ *Ibid*, (D)," Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens.

⁴⁵⁰ *Ibid* (G), Prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents.

attacks against Saudi citizens and foreigners within the Kingdom in 2003 and 2004 constituted a turning point in relation to the Kingdom's efforts to combat terrorism and its financing.⁴⁵¹ The Kingdom's policy considers Al-Qa'idah as a serious threat to the ruling regime in the Kingdom,⁴⁵² following the returning of many Saudi people who took part in the Jihadi attacks in Afghanistan and Iraq. These incidents have pushed the Saudi government to decisively undertake rigorous measures against terrorism and extremism; and to change its then strategy of combating terrorism to a more rigorous one, where Saudi Arabia has started to establish a totally new strategy to face these threats. The Kingdom has launched a comprehensive campaign against terrorism, utilising three critical key areas: men (human resources), money (financial control), and mindset (de-radicalization). This is an attempt by the Kingdom to implement measures to prevent the occurrence of terrorist acts or to mitigate their severity.⁴⁵³

The Kingdom has set up a highly sophisticated anti-terror apparatus that has been involved in providing training programmes and devoting various units and personnel of the Royal Saudi Armed Forces, the Ministry of Interior and other governmental and private entities to fight terrorism. In addition, the Kingdom has invested vast amounts to enhance its cybersecurity as a response to the development of cyber-attacks by terrorists, and also to fight extremist thoughts, which are one of the main causes for the emergence of terrorism in the Kingdom. These three concerns underpinning the Saudi strategy of counter-terrorism are analysed in the following sections.

4.2.1 Human Resources Development

This area of concern focuses on developing and training units and personnel who are working in the area of combating terrorism.

⁴⁵¹ Report to Congressional Requesters, U.S. Agencies Report Progress Countering Terrorism and Its Financing in Saudi Arabia, but Continued Focus on Counter Terrorism Financing Efforts Needed. (Sep 2009), Pp.9.

⁴⁵² *Ibid.*

⁴⁵³ *Ibid.*

4.2.1.1 Main Forces

The Kingdom of Saudi Arabia has started to strengthen its forces by focusing first on internal security forces. Several forces have been devoted to fight terrorism. For example, the Kingdom's U.S.-trained Special Operations Force (SOF) specialises in provincial counter-terrorism and internal security operations. The SOF's units have recently been involved in military operations against Shia Houthi rebels and ISIS in Syria. Several other sub-units of the navy and marines were also required to undertake direct tasks, including counter-terrorism, hostage rescue, and intelligence-gathering. Due to the increasing threat of terrorism, the Saudi government assigned three Special Forces Companies to tackle this threat. As part of the policy of cooperation, the U.S. Navy SEALs trained several Royal Saudi Navy and Marines forces in fighting terrorism. The Ministry of the Interior's Special Security Force (SSF) was also required to deal with internal security operations, including fighting terrorism, using all methods, protecting VIPs at home and abroad, protecting vital installations and facilities, and others. Even the conventional forces of Saudi Arabia, such as the Saudi Arabian National Guard (SANG) and the Royal Saudi Land Forces (RSLF) were actively involved in several military operations against the ISIS forces in early February 2016 in Syria during airstrikes with the U.S.⁴⁵⁴

4.2.1.2 Supporting Forces

Both the SANG and the RSLF are in charge of the defence and safety of the Kingdom against any act of aggression, especially in the context of increasing threats in recent years either from IS in the north, Houthis in the south or Iran in the Arabian Gulf. The Kingdom has, therefore, allocated three military cities, located in strategic locations in the Kingdom, which are in charge of an immediate response to any threat of terrorism. There is also a fourth city

⁴⁵⁴ White Paper: Saudi Arabia Counterterrorism, the Embassy of the Kingdom of Saudi Arabia, Washington, (2017).

which is currently under construction. The RSLF can intervene to support any operation against terrorist threats. For example, it intervened in the war against IS in Syria and Iraq during the US coalition against IS in 2006.⁴⁵⁵

Despite several important successes achieved in relation to counter-terrorism in the Kingdom through strengthening the capabilities of the police, security and intelligence services,⁴⁵⁶ this does not mean that the Kingdom is safe against possible terrorist attacks in the future. The fight against terrorism needs to be dealt with from its roots. Despite the strong substructures of Saudi Arabia's strategy against terrorism, the Kingdom's boundaries still constitute a formidable challenge in this relation. For example, Yemen still constitutes a source of concern to the Kingdom. After several terrorists fled to Yemen, Al-Qa'idah's subdivisions in Saudi and Yemen merged under the name of Al-Qa'idah in the Arabian Peninsula (AQAP), aiming to continue their Jihadi activities in the region. This has made Yemen as a base and launching pad for this terrorist group to carry out individual attacks against the Kingdom.⁴⁵⁷ For example, one of the Saudi citizens belonging to this group was sent to the Kingdom as a suicide bomber to kill the then-Defence Minister in August 2009.⁴⁵⁸ Although the attack failed, as David Cook said, according to the Jihadi concept, there is no place for failure. It is therefore considered by them to be a delayed success.⁴⁵⁹

In relation to the northern boundaries with Iraq, in addition to the Kingdom's existing security precautions, the Kingdom has erected an 821 km security fence (3.4 Billion USD), equipped with the latest control devices.⁴⁶⁰ However, the northern border constitutes a real danger, particularly with the existence of IS and other potential groups which have emerged

⁴⁵⁵ *Ibid.*

⁴⁵⁶ Report to Congressional Requesters, U.S. Agencies Report Progress Countering Terrorism and Its Financing in Saudi Arabia, but Continued Focus on Counter Terrorism Financing Efforts Needed. Sep 2009. Pp.18.

⁴⁵⁷ Hegghammer, *supra* n. 14, P.353.

⁴⁵⁸ Slackman, M. 'Would be Killer Linked to Al Qaeda, Saudi Say', *New York Times*, (2009), at [<https://www.nytimes.com/2009/08/29/world/middleeast/29saudi.html>].

⁴⁵⁹ David C. 'Understanding Jihad' (Cambridge, Cambridge University Press, 2015).

⁴⁶⁰ Saudi General Directorate of Border Guard, <http://fg.gov.sa/>.

from it, and in particular the ability of these groups to use heavy weapons that might penetrate these security precautions.

In addition, in the era of globalisation, the question of security becomes more challenging to Saudi Arabia's counter-terrorism strategy. An unstable status in a certain part of the world may constitute a threat to stability in any other part of the world. It is an interrelated problem. Nowadays, the threats of terrorism have been mutual for all states. There is almost no state that is immune from the threats of terrorism. The existence of well-trained personnel is still not enough to combat these threats. Against this background, the decision-makers in the Kingdom have undertaken a collective approach to combat the threats of terrorism through creating universal centres and joining the international and regional coalitions. The Kingdom adopted the idea of creating an international centre of counter-terrorism, within the UN framework, which resulted in the foundation of the international coalition against the IS, and the Arab coalition against Houthis in Yemen. The Kingdom also supported the regional power in western Africa, known as G5, strategically and financially, spending nearly 100 million dollars. The Kingdom also founded the Islamic Military Counter Terrorism Coalition (IMCTC), whose headquarters is in Ar-Riyadh to counter terrorism.⁴⁶¹

In fact, it seems that the decision-makers, by adopting a collective approach to combat terrorism, have become fully aware of the danger of increasing terrorist organisations, which have reorganised to work collectively, as was realised with Al-Qa'idah in Yemen and Saudi Arabia. However, combating terrorism in one region may result in its prevalence or growth in nearby states, in particular if the latter do not take sufficient action to confront it. For example, as a result of the collective military efforts to combat terrorism in Nigeria, the Nigerian Government, with the support of allied states, managed to dramatically decrease the threats of

⁴⁶¹ Islamic Military counter Terrorism Coalition, <http://imctc.org>.

terrorism, especially related to Boko Haram, a matter that forced the terrorist organisation to lose most of the territory that was under their control. However, terrorism has prevailed in nearby countries, such as Cameroon and Niger, the number of victims of terrorism in Niger increasing eightfold in 2015 over the previous 15 years as a result of Boko Haram's expansion. In Cameroon, the death rate increased by 4% in 2015, compared to 2014. It was estimated that 1,081 were killed as the result of Boko Haram's operations in 2014- 2015.⁴⁶² In addition, 34 people were killed as the result of other affiliates of Al-Qa'idah.⁴⁶³

4.2.2 Cybersecurity

In addition to the above policy and as terrorist activities have been widely carried out through information warfare, the Saudi Arabian government enacted laws against 'cyber-crime' in 2007. For this purpose, the Ministry of Defence created special departments, working in both the private and public sectors, whose tasks were to defend the Kingdom against cyber threats. Heavy penalties were laid down for anyone involved in cyber related crimes.

In modern warfare, competition is not limited to the size of the fleet, but how data is exploited to increase combat efficiency and maintain progress through cybersecurity. This caused the Kingdom to address this issue. However, it seems that the terrorists who have been affected by counter-terrorism measures have sought to launch more cyberattacks against the Kingdom, making Saudi Arabia the most affected country in the Middle East by cyberattacks. This has forced Saudi Arabia to concentrate on the question of cybersecurity. For example, under the auspices of Crown Prince Muhammad, an international conference was held in Riyadh in 2017 to address the issue of leadership and control under the theme of 'The Coalition Against Terrorism: Strategies and Capabilities', which aimed to devise scientific solutions and recommendations; a better knowledge of strategies and capabilities to combat terrorism; and a

⁴⁶² 2016 Global Terrorism Index Report.

⁴⁶³ The International Conference on C41 Solutions 2017, <https://www.c4iconf.com/ar>.

mix of counter-terrorism methods, within the frame of developing the concepts of leadership and control. The conference resulted in a foundation of a specialised centre of advanced leadership and control studies. This centre is considered firstly as a regional one and secondly as a universal one.⁴⁶⁴

Not satisfied with this, Saudi Arabia also increased its focus on cybersecurity, which led to the establishment of The Saudi Federation for Cyber Security and Programming (SAFCSP), headed by a minister, to build specialized national capacities, spread the culture of cybersecurity and programming, and raise the awareness of Saudi society about the dangers of electronic media. The federation also founded the Prince Muhammad bin Salman College for Cybersecurity, Artificial Intelligence and Advanced Technologies, to graduate a professional and capable generation in advanced technologies.⁴⁶⁵ In 2017, the Kingdom also organised an international conference on electronic security which addressed the security and electronic challenges which impact the Kingdom and the whole region, with an emphasis on finding solutions.⁴⁶⁶

These efforts resulted in the establishment of the National Cybersecurity Authority (NCA), presided over by a minister, and linked directly to the head of state, King Salman Bin Abdul-Aziz. This government entity aims to boost the cybersecurity of the Kingdom, protecting vital interests and the national security of the Kingdom as well as sensitive infrastructure of the state. The authority embraces most of the security departments in the Kingdom in one place. It consists of the Head of State Security, the Head of General Intelligence, Deputy Minister of Interior, and Deputy Minister of Defence.⁴⁶⁷ As can be seen from this membership, the Kingdom of Saudi Arabia has made a significant effort in relation

⁴⁶⁴ *Ibid.*

⁴⁶⁵ The Saudi Federation for cybersecurity programming and Drones, <https://safcsp.org.sa>.

⁴⁶⁶ International Cyber Security Conference (CSC), <https://aawsat.com>.

⁴⁶⁷ See: <https://cisomag.eccouncil.org/saudi-arabia-sets-national-cyber-security-authority/>.

to the field of cybersecurity. This is a positive indicator of the capability of the government to protect the nation against cyberattacks.

4.2.3 Extremist Thoughts

Both Saudi officials and religious leaders realise and agree that ‘intellectual perversion’ is one of the most dangerous reasons for the emergence of terrorism.⁴⁶⁸ It is this deviance, that makes terrorists conduct bombings which kill innocent men, women and children. In order to fight this menace, the Kingdom of Saudi Arabia initiated wide-ranging counter-terrorism campaigns. Central to Saudi Arabia’s counter-terrorism endeavours has been the utilization of unconventional ‘soft’ measures planned to combat the mental and ideological justifications for extremism and terrorism.⁴⁶⁹ The essential aim of this technique is to fight and engage a deviant philosophy that the Saudi Arabian government ascertains is based on a corrupt and degenerate understanding of Islam. The driving force for this approach came, to a large extent, from the acknowledgment that extremism and terrorism cannot be fought through conventional security measures alone. The Kingdom has formulated a strategic plan to combat extremist ideologies and intellectual perversion. It starts with a series of educational steps aimed to weaken extremist views and prevent the activities of those who support and call for terrorism. The development of public education, counselling programmes, review of publications, and other steps, were among the measures undertaken in terms of education and re-education. The government also reformed the Kingdom’s religious studies curriculum, following a large number of accusations that Saudi Arabian schools support hatred and violence. However, the Kingdom also paid particular attention to educators and conducted several training programmes for teachers to enhance their religious tolerance. In addition to this, officials and religious

⁴⁶⁸ The Deputy Crown Prince of Saudi Arabia confirmed this status during The First National Conference on Intellectual Security (May 2009).

⁴⁶⁹ Boucek C. ‘Saudi Arabia’s “Soft” Counterterrorism Strategy: Prevention, Rehabilitation, and Aftercare’, *Carnegie Endowment for International Peace*, (2008). P. 24.

figures also launched a media campaign as a part of their fight against extremism. This approach was supported by the government and religious clerics. Then Minister of Interior, Prince Naïf Bin Abdul-Aziz, stated that the achievement of integration requires combining efforts, and that the most important part, that of ‘intellectual security’, needs to be taken into consideration so as to protect society from extremism and terrorism.

Moreover, religious pioneers, such as the Grand Mufti of Saudi Arabia, published a number of statements critical of terrorism and extremist thought. Secretary General of the Islamic World League also confirmed that terrorism can only be defeated by eliminating the extremist ideology that fuels terrorism. He added that it is true that military efforts are critical in this relation, however, this technique helps combat terrorism, but does not eliminate it at its roots. Terrorism needs to be combatted by eliminating its ideology.⁴⁷⁰

Rehabilitation Centre: Muhammad Bin Naïf Counselling Care Centre, established in 2006, seeks to “re-educate” its beneficiaries by involving them in religious talks and providing psychological counselling. The program by and large comprises of one-to-one and group sessions between beneficiaries(wrongdoers) and religious scholars, psychiatrists, and clinicians, about their convictions. The officials of this program endeavour to convince the beneficiaries that their religious legitimization for their activities is based on a misunderstanding of Islam. Mental counselling incorporates conventional strategies as well as innovative training activities such as art therapy. The program draws intensely on the family and tribal relations of the beneficiaries. Family members can visit and phone the centre, and reformed beneficiaries are permitted to leave, to go to family occasions such as weddings and funerals. Those who finish the program and are regarded to be fit for discharge are given a social bolster to help with their reintegration into society, such as counselling, jobs, and

⁴⁷⁰ U.S. Agencies Report Progress Countering Terrorism and Its Financing in Saudi Arabia, but Continued Focus on Counter Terrorism Financing Efforts Needed, United States Government Accountability Office, (2009).

stipends. In addition, these social services are expanded to the family and tribes of the discharged members, as a means of including the beneficiaries' wider social network in their recovery. The members of the centre take part in the program for 6 to 8 months.⁴⁷¹ The Saudi government had stated that it bolsters the activities of the Sakinah (or Tranquillity) Campaign, which is an independent nongovernmental organization involved in engaging discussions using the Internet, with people who have accessed extremist websites.⁴⁷² Moreover, in 2008, the King of Saudi Arabia also began a series of conferences to advance interfaith discourses. The primary conference was facilitated by the Muslim World League in Makkah in June 2008 and was attended by 500 Muslim researchers from around the world.

As part of the efforts of engaging with its citizens, the Kingdom, in April 2003, founded the King Abdul-Aziz Centre for National Dialogue (KACND). This Centre aims to fight extremism, create a modern culture for different sections of the Saudi society, and present the true image of Islam. One of the main recommendations that these conferences proposed was the call for the rejection of any fatwa made by individuals in relation to issues of national interests, such as peace and security. They reaffirmed that these matters must only be tackled by qualified official bodies that represent the country. The Government also tracks the illicit, immoral, and illegal contents of some websites related to extremism by filtering and monitoring them.⁴⁷³

In addition, the King Abdullah Bin Abdul-Aziz International Centre for Interreligious and Intercultural Dialogue (KAICIID) was established in Vienna. It is 'an intergovernmental organization whose mandate is to promote the use of dialogue globally to prevent and resolve

⁴⁷¹ Boucek C. 'Extremist Reeducation and Rehabilitation in Saudi Arabia Publication: Terrorism Monitor', *The Jamestown Foundation, Global Research Analysis*, Vol. 5, Issue: 16 (2007), at {<https://jamestown.org/program/extremist-reeducation-and-rehabilitation-in-saudi-arabia/>}.

⁴⁷² U.S. Agencies Report Progress Countering Terrorism and Its Financing in Saudi Arabia, but Continued Focus on Counter Terrorism Financing Efforts Needed, United States Government Accountability Office, (2009).

⁴⁷³ See, King Abdul-Aziz Centre for National Dialogue available at <https://www.kacnd.org/>.

conflict to enhance understanding and cooperation and foster dialogue among people of different faiths and cultures that bridges animosities, reduces fear and instils mutual respect.’⁴⁷⁴ Furthermore, the Global Centre for Combating Extremist Ideology (GCCEI) was also founded in Ar-Riyadh in 2017. The Centre is a standard bearer rallying the international community in combating extremist ideologies. It aims to effectively fight and refute extremist ideology in coordination with states and organisations.⁴⁷⁵

Saudi authorities expressed that the “mindset” pillar is the most challenging aspect of the country’s counterterrorism strategy and will remain a long-term challenge. In any case, Saudi officials state that the Saudi Arabian government is committed to fighting extremist ideology. This pushed the new leadership in the Kingdom to pursue a policy of openness to the world. For example, the Kingdom is now allowing women to drive cars, run businesses, travel freely, and has also relaxed dress-code regulations for women. In addition, the Kingdom created the General Authority for Entertainment aimed at transforming the domestic travel and entertainment industry. This has led to the promotion of performing arts, re-opening of cinemas, and more. On religious affairs, the Kingdom has met, for the first time in its history, Lebanon's Maronite Patriarch in late 2017, and the Vatican's Pontifical Council for Interfaith Dialogue in April, 2018.

The efforts of the country are not limited to policy efforts. Indeed, several legal measures were taken by the Government. The Kingdom issued Resolution 163, in March 1997, which founded a committee from various security agencies to block nearly 400 websites which seek to promulgate radical religious calls to violent Jihad. In 2007, the Saudi Council of Ministers also enacted the Law to Fight Cyber-Crime.⁴⁷⁶ The law calls for long prison sentences and huge

⁴⁷⁴ See, King Abdullah Bin Abdul-Aziz International Centre for Interreligious and Intercultural Dialogue, available at <https://www.kaiciid.org/>.

⁴⁷⁵ Report to Congressional Requesters, U.S. Agencies Report Progress Countering Terrorism and Its Financing in Saudi Arabia, but Continued Focus on Counter Terrorism Financing Efforts Needed, (Sep 2009), Pp.13.

⁴⁷⁶ See https://www.mcit.gov.sa/sites/default/files/anti_cyber_crime_law_en_0.pdf.

finer for anyone who establishes a website that promotes radicalism or publishes any information on how to make explosives. In early 2014, a Royal Decree issued in the Kingdom imposed tougher prison sentences for Saudis who travel outside the country to fight with terrorist groups.⁴⁷⁷ In early March of 2014, under the auspices of the Ministry of Interior, several regulations were issued, which outlawed any activities that support terrorist groups, in particular the Muslim Brotherhood, ISIS(Daish), and Al-Qa'idah.⁴⁷⁸

According to Saudi Arabian authorities, the success rate of the 'soft' strategy of fighting terrorism ranges from 80% to 90%.⁴⁷⁹ There are a number of other states who adopted this strategy, such as Egypt, Algeria, Singapore, Indonesia, and the US army in Iraq through following the programme of Task Force 134. However, the 'soft' strategy still raises challenges to the Kingdom which need to be addressed. For example, its current sudden social openness with the world is one of those challenges. It is true that the new policy does not contradict Islamic rules, however, the overall hard-line character of Saudi society might not accept the openness policy and in turn, may generate another wave of extremism. Therefore, it is advisable that this sudden openness with the world not occur too quickly, but rather be implemented at a gradual pace.

In addition to this, the failure to rehabilitate terrorists who completed the rehabilitation programme is one of the biggest challenges to this strategy. It is true that the expected rate of the failure, which ranges from 10 to 20% is relatively small, however, this figure is still significant if one takes into consideration the number of terrorists under detention. For example, in 2014, six members of Al-Qa'idah in the Arabian Peninsula (AQAP), based in Yemen, attacked a Saudi border check-post from the Yemeni side. Four of those attackers were

⁴⁷⁷ For instance, in May 2014, the Saudi Ministry of Interior assessed that at least 1,200 Saudis had voyage to battle in Syria, and a few free gauges suggested that the figure may be more than 2,500 Saudis.

⁴⁷⁸ Counter Extremism Project, Available at: <https://www.counterextremism.com/threat/muslim-brotherhood>.

⁴⁷⁹ Boucek, *supra* n. 469, P. 21.

Saudi nationals, who were previously imprisoned for charges of committing terrorist attacks. In addition, and in the same year, four attackers assaulted several members of the Saudi Shi'ite community who were praying. It appears that three of those attackers were previously in prison on the charge of being part of Al-Qa'idah. Several weeks later, 77 persons who were related to this incident were arrested and it was revealed that 33 of them were previously in jail for terrorism related-charges.⁴⁸⁰

All in all, Saudi Arabia's relative victory in its campaign against radical belief systems is having a substantial effect on extremist thought. As a result of the ideological and organizational audits conducted by well-known Saudi scholars, who solemnly renounced their prior fatwas in support of terrorists and, particularly, Al-Qa'idah sympathizers, wrote audits withdrawing from previous radical and degenerate considerations. Comparative steps have been embraced by foreign terrorist theologians who have begun to abandon their radicalism.

4.3 Development of the Judicial and Security Structure of Counter-Terrorism

The rapid and new challenges and threats have rendered the old methods adopted previously by the Kingdom outmoded, necessitating new strategies capable of addressing and dealing with these new challenges. In fact, the new leadership in the Kingdom has assumed a new position and adopted a new policy that can address these challenges. The new leadership has taken a number of steps toward implementing this new policy and decided to merge all units that are responsible for combating terrorism into an independent agency (Security State Agency), separated from the Ministry of the Interior. It also created the Public Prosecution office as an independent judicial body. These new developments are of important reference, as the legal procedures of counter-terrorism were revised. These new changes will be further explored as follows.

⁴⁸⁰ Watannews, Available at: <https://watannews-ye.com/15878/>.

4.3.1 Security State Agency

The Saudi Interior Ministry is responsible for all 13 provinces of the Kingdom; their affairs; internal security; guarding of borders; serving the citizens and foreigners; combating crimes, drugs, and smuggling; and other services. The Ministry was also in charge of combating terrorism, being financed through various specialized agencies and departments and operating in coordination with other ministries and agencies such as the Foreign Ministry, National Guard, and intelligence agencies.⁴⁸¹ Bearing in mind that the Interior Ministry bears a heavy burden of responsibilities, this, in fact, might reduce the quality of its services to the citizens as well as the foreigners. In light of the foregoing, King Salman issued Royal Order No. 293A on 20th July, 2017, establishing a new governmental body known as the Presidency of State Security. This body is in charge of several activities that were initially under the responsibility of the Interior Ministry. This body is directly linked to the Prime Minister (The King) and is led by a minister. It specializes in all affairs of the security of the Kingdom, such as counter-terrorism and its finance. This body also involves several departments and agencies, which are responsible for the security of the state, such as general investigation, special forces, special emergency forces, National Information Centre, and others. The Royal Order states that there is now a need to make this development and change for the continuous strengthening of the security sectors according to the latest divisions of administration, so they can effectively and genuinely function to face the current security challenges. This development would enhance the counter-terrorism strategy in the Kingdom from a security and intelligence perspective as well as financial. It would also boost the capacity of the Kingdom to take the initiative to face any terrorist challenges before they even take place, as the new body is equipped with the latest technologies and tools, for example, collecting information and analysing this in relation to any

⁴⁸¹ See, Saudi Ministry of Interior, available at <https://WWW.moi.gov.sa/>.

potential threat of terrorism. This, in turn, would help in the preparation of precise reports so that decision-makers can take the most relevant response to the threat.⁴⁸²

This type of governmental body exists in many countries around the world. For example, in the USA in 2002, the American Government merged more than 22 administrations and agencies into a single agency called the Department of Homeland Security (DHS) with the aim of enhancing the security of the state to more effectively combat the threat of terrorism.⁴⁸³ This is considered one of the most important developments in the US administration over the last 50 years. This was what caused then President George W. Bush to say that the USA's security needs a comprehensive and unified system to face the international threat of terrorism. The Saudi Presidency of State Security is, to a large extent, similar to the USA one. However, there had already been strong collaboration between the DHS and the Interior Ministry of Saudi Arabia⁴⁸⁴ before the establishment of the Presidency of State Security. Therefore, it is anticipated that this cooperation will increase.

4.3.2 Public Prosecution

This is yet another new step taken by the Government to face the new challenges. It is an independent judicial body. Among its several functions, it is in charge of investigating crimes in the Kingdom. It is a legal representative of Saudi society, as it represents them in seeking punishment for criminals. The members of this body enjoy judicial immunity. Before the Public Prosecution obtained this name, it went through different stages.

1. First stage: During this stage, the main duties of this body were initially conducted by criminal investigative officers, who were part of the police section. These members were assigned the duty of investigating and prosecuting criminals.

⁴⁸² Royal Order No. 293A on 20th July 2017.

⁴⁸³ See, United States Department of Homeland Security, available at: <http://www.dhs.gov/>.

⁴⁸⁴ White Paper: Saudi Arabia Counterterrorism, The Embassy of the Kingdom of Saudi Arabia, Washington, 2017.

2. Second stage: Royal Decree No. 56 was issued in late 1989, creating the Bureau of Investigation and Prosecution (BIP), and was under the oversight of the Interior Minister (the executive authority), which was the initial name of this body.

3. Third Stage: The latest Royal Order issued in 2017, amended the BIP to ‘Public Prosecution’ and linked its office directly to the King. However, it is not linked to the Interior Ministry anymore.⁴⁸⁵

The last Royal Order explained the reasons behind amending the name of this body. One of these reasons is that the nature and function of this body has a judicial character. Also, the change is in line with the development of the concepts and rules of the public prosecution that are followed by most states in the world, however, with consideration of Islamic Shariah rules. Another reason was the necessity of the separation between the executive authority and this body, as it is a part of the judicial authority in the Kingdom. The Public Prosecution body should be given total independence in order to ensure that it performs its duties impartially.

The independence of the Public Prosecution, linked to the King, from the executive authority is one of the most important features of having an impartial body, which can bear its responsibilities with an ability to genuinely function. This is one of the most important developments that the Royal Order brought forward.

According to the formal website of the Public Prosecution, its vision is to promote justice and the protection of the society with distinguished performance. It also states that this body aims to protect rights and freedoms, and support the oppressed and punish oppressors, in accordance with the legal texts and the established rules, and in cooperation with the relevant judicial and security bodies.⁴⁸⁶

⁴⁸⁵ Revamped prosecution office now directly under king, Arab News, (2017), available at: <https://www.arabnews.com/node/1116821/saudi-arabia>.

⁴⁸⁶ Saudi Public Prosecution, <https://www.pp.gov.sa/>.

4.4 The Binding Legal Framework of Taking National Legal Measures

All states are committed to protect their security and public order from the dangers of terrorism. This responsibility requires these states to take all measures to prevent, criminalise, and punish the acts of terrorism, taking into account the norms of international law. Terrorism is an international crime as it violates international legal norms, either those which are referred to in international conventions, or customary international law.⁴⁸⁷

As mentioned earlier in this thesis, the matter that has facilitated the task of implementing international law in the face of terrorism is that individuals are subjects of international law. Hence, individuals enjoy rights and bear responsibilities under public international law. Public international law also imposes obligations on states to combat terrorism and develop the means of international cooperation, as terrorism constitutes a threat to national and international societies together.⁴⁸⁸ In the context of combating terrorism, there are 13 international conventions and 3 protocols to counter terrorism,⁴⁸⁹ each of which has been ratified by the Kingdom and is designed to combat a certain aspect of terrorism and determine a set of acts that need to be criminalised by the relevant members within their legal systems. These international acts constitute the response of the international community to the threat of terrorism. Therefore, and according to Resolution 1373, any step to enact an international act of counter-terrorism should essentially aim to securely provide the states' members with the relevant mechanisms to prevent and criminalise these acts. It should, however, consider the measures adopted and followed by states as well as the basic values and principles necessary for all democracies. In particular, the adoption of the measures to prevent acts of terrorism should be taken on the basis of respecting the rule of law and human rights, as the conflict

⁴⁸⁷ Cassese A, Gaeta P, Baig L, Fan M, Gosnell C, and Whiting A. *'Cassese's International Criminal Law'* (3rd ed.) (Oxford, Oxford University Press, 2013), P.146.

⁴⁸⁸ Jeanclous.Y. 'Terrorism et, 'international (collection Etudes stretiques et internationals Bruylant, (2004), P.13-45.

⁴⁸⁹ WWW.unodc.org/unodc/en/terrorism/conventions.html.

between international and domestic legal norms, the priority of application at the national level is for international legal norms, as explained in Chapter Three.

UNSC Resolution 1373, declares that ‘acts, methods, and practices of terrorism are contrary to the purposes and principles of the United Nations.’ Paragraph 3 (d) adds that all states to ‘[b]ecome parties as soon as possible to the relevant international conventions and protocols relating to terrorism.’ The resolution also affirms that all acts of terrorism ‘constitute a threat to international peace and security’. Based on this, the resolution calls upon all states to take all necessary measures to prevent acts of terrorism. It is well known that the provisions of this resolution are mandatory, based on Chapter VII of the UN Charter. The resolution, therefore, requires all states to join all international actions that seek to counter terrorism and implement their provisions.

These international acts are not enough to meet the aims for which they are enacted. The provisions of these international acts need to be incorporated into the domestic legislations of states and the latter should criminalise and punish acts of terrorism. Therefore, the punitive system of any state, including criminalization and punishment, to combat terrorism is an essential step and such action renders any act of terrorism a domestic act, even when the sources of the enactment of the domestic law are derived from an international source, such as an international convention or any other international legal act. The criminal responsibility of committing an act of terrorism only takes place through domestic legislation. This caused some scholars to define the domestic crime of terrorism as a crime of an international concern.⁴⁹⁰ This is because such acts may breach international peace and security especially if their scope is expanded to reach the level of war.⁴⁹¹ Therefore, once states ratified such international legal

⁴⁹⁰ Martin, C. ‘Terrorism as a Crime in International and Domestic Law:: Open Issues’, In L. Van den Herik & N. Schrijver (Eds.), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge: Cambridge University Press, 2013), 639-666.

⁴⁹¹ Stanislav J and Kirsch B. ‘la terrorism et la guerre (Terrorisme et securite internationale Collection etudes strategues International – Bruyant, (2004), P.5-12.

acts to counter terrorism, they are supposed to incorporate them into their domestic legislations. This is an important step, not only for the more effective implementation of the measures of counter-terrorism, but also to establish a legal basis for legal staff, including judges and lawyers to make decisions. The incorporation of international legal acts into domestic laws should not be overlooked, as it is a part of the state's sovereignty and also so that terrorists cannot exploit it.

4.5 National Relevant Legal Framework

To avoid the problem of enacting irrelevant punishments or the escape of terrorists, some international legal acts for combating terrorism require the states to enact penalties of a certain gravity. For example, The Hague Convention 1970⁴⁹² and the Montreal Convention 1971⁴⁹³ require states to punish acts of terrorism with 'severe' penalties. However, other conventions ask for 'proportional' penalties, such as the International Convention against the Taking of Hostages 1979 and the Terrorist Bombings Convention 1997. Therefore, the international conventions have left states with significant discretion to determine the extent of the severity of penalties, as the legitimacy of these penalties depends on the criterion of proportionality, which should be in parallel with the gravity of the acts.

It is also worth noting that the international conventions do not impose obligation over the states in relation to the issuance of the legal characterization of the acts that have been mentioned in their provisions. In other words, those states are only obliged to criminalise the acts that have been included within the conventions, however in accordance with the legal characterisation that the national legislature adopts.⁴⁹⁴ The decisive element of the national criminalisation, based on an international obligation, is related to the acts themselves rather

⁴⁹² See Article 2 of The Hague Convention, 1970.

⁴⁹³ See Article 3 of and The Montreal Convention, 1971.

⁴⁹⁴ Guillaume G. 'le terrorisme international, Encyclopédie Dalloz', *Droit international*, III, 1998, P. 17.

than on the international legal characterisation of these acts.⁴⁹⁵ For example, and in the context of the principle of complementarity, if a national court deals with an act as an act of terrorism, and that such an act is under the scope of the ICC's jurisdiction (given that the act comes under the enumerated crimes in Article 5 of the ICC Statute), then the ICC may not claim the admissibility of the case even if this act is labelled by the ICC as a crime against humanity. The priority here is extended to the legal characterisation that is provided by the domestic legislature not to the one stipulated by the Statute of the Court.

4.6 Terrorist Crimes as an Independent Crime

The definition of terrorism received some attention and symbolic international attempts at the United Nations, however, the criminalization of terrorism and the establishment of an independent crime punishable under domestic laws did not find due deliberation until after the adoption of Resolution 1373, which created the committee of combating terrorism and obliged all states to provide the SC with periodic reports about their efforts taken to combat terrorism especially the legal criminal measures. Some states treat some acts of terrorism as normal crimes, such as acts of killing, beating, public incitement, and others. They consider that damage or danger is the determining factor in deciding the criminal outcome of this crime, ignoring the special elements that should be available to label these acts as terrorism. However, other states treat these acts as terrorist crimes. and they require special intent to render these acts as terrorism, in particular the special intent to commit an act of terrorism, though distinct legislations in various states differ in the definition of this intent. However, it can be noted that dealing with acts of terrorism as normal crimes may lead a state to breach its international obligations, in particular when it comes to determine the gravity of the act.

⁴⁹⁵ Cryer R, Hakan F, Darryl, and Elizabeth W. *'An Introduction to International Criminal Law and Procedure* (3rd ed.) (Cambridge, Cambridge Press University), P. 63.

In relation to the Saudi strategy of counter-terrorism, it was dealing with acts of terrorism without adapting the term terrorism, as this was derived from Islamic Shariah. This system called the crimes of terrorism crimes of *Hirabah*,⁴⁹⁶ where these crimes were considered as part of the corruption (or the spreading of evil) on earth, and it adopted the maximum penalties for the offenders, including the death penalty. The reason for adopting such extreme punishments is because these acts do not only harm individuals (victims), but also the whole society and, therefore, these victims do not have to forgive the offenders. This is the scenario upon which the judges establish their decisions against these offenders.

In addition to this, decisions of judges are also made on the basis of some national laws in relation to certain acts of terrorism, such as Article 4 (8), of the Border Security Law, which states that '[i]nspecting people in the border area and outside Customs Department and investigating the reason for their presence and their ID. If their presence in the area is proved illegal, they should be extradited to the competent authority, having applied the Law of Border Security against them'. Paragraph 7, of the same Article states that 'inspecting land and sea transport, which are in the border area'. In addition to this law, Article 4, of Weapons and Ammunition Regulation placed strict limitations over the manufacturing of weapons as well as their equipment, spare parts, importation, selling, transferring, and even possession. Article 34, of this regulation refers to the deterrent penalties that might reach up to a sentence of 30 years in prison and a fine of 300,000 Saudi Riyals (USD\$80,000). Furthermore, in fighting the financing of terrorism, the Kingdom depends on the provisions of the Anti-Money Laundering Regulation, in particular Article 2, that includes legitimate and illegitimate funds from the finances that may be used for terrorist purposes.⁴⁹⁷

⁴⁹⁶ Report of the Kingdom of Saudi Arabia submitted pursuant to paragraph 6 of Security Council Resolution 1373 (2001) concerning counter-terrorism.

⁴⁹⁷ *Ibid.*

However, having joined several international agreements on counter-terrorism, the Kingdom had to change its strategy and view the crimes of terrorism as special crimes. According to this new trend, Royal Decree No M/16., issued in 2013, specialised in the crimes of terrorism as such, called 'Law Concerning Offenses of Terrorism and its Financing'. This law established a special court for these crimes, a special committee for mutual legal assistance, a permanent committee of counter-terrorism, and also a Special Financial Investigation Department to investigate terrorism financing and money laundering. As can now be seen, the Kingdom has undertaken a special and comprehensive legal and judicial system, assigned only for the crimes of terrorism, and in accordance to international standards.

Then, another Royal Decree, No. 92, was issued in 2017, that enacted a new law of counter-terrorism and its finance. This law replaced the previous one and involved some new changes. This law also deals with procedures and penalties relating to acts of terrorism. These issues are explored and discussed later in this chapter.

4.7 Defining Terrorism

The legal confrontation of terrorism firstly requires a definition so it can be criminalised and punished. There is no internationally unified definition of terrorism. Several international acts and conventions mention acts of terrorism without specifying a unified definition of terrorism. With the issuance of UNSC Resolution 1373, there is growing agreement on a unified definition of terrorism, as the Resolution arguably indicates in the view of several scholars. As mentioned in Chapter One,⁴⁹⁸ this thesis builds on the definition of the crimes of terrorism as laid down in UNSC Resolution 1566. In this part, we analyse the definition of terrorism as adopted by the Saudi legislature in the Law of Crimes of Terrorism and Finance

⁴⁹⁸ Paul S. 'The Security Council Starts Legislating', *American Journal of International Law*, Vol. 96 (2002), P. 903, Szasz argues that the resolution imposes on states a binding force to define terrorism. See also Curtis A W. 'Building Capacity to Combat International Terrorism: the Role of the United Nations Security Council', *Journal of Conflict Security Law*, Vol. 8, No. 2, (2003), Pp. 294-5.

2017; and will show how this definition fits with the one laid down in Resolution 1566 in view of Resolution 1373.

Before we analyse the definition that has been used by the Saudi legislature, it is worth discussing the scholarly arguments about the permissible scope of the definition that can be taken by a national legislature. It has been widely argued that Resolution 1373 does not provide a definition of the act of terrorism.⁴⁹⁹ Other scholars opined that the resolution does tacitly involve a definition, based on ‘previous counter-terrorism legal instruments’,⁵⁰⁰ specifically, the definitions provided in the Suppression of Financing Convention⁵⁰¹ and Resolution 1566. However, those with the view that Resolution 1373 does not provide a definition argue that had the resolution provided such a definition, states would have been literally obliged to it. Taking together the arguments of the tacit definition of terrorism in Resolution 1373, and those who assumed the problem of bindingness, this hypothesis raises the question of whether or not states are literally required to only criminalise the same acts as the definition states, or can they go beyond the scope of the definition and add more acts to it. In other words, if the content of the Resolution does not require states to go beyond the scope of its definition, this means that when the states adopt a broader definition, this does not mean that the latter would be in conflict with the resolution. However, if the resolution means that states are required not to go beyond the terrorist acts that the resolution mentions, this means that any broader definition would be in conflict with the resolution. Therefore, does the resolution bind states to only those terrorist acts it encompasses or are the states free to go beyond the scope of the resolution’s definition?

⁴⁹⁹ Ben S. ‘*Defining Terrorism in International Law*’ (Oxford University Press, 2006) Pp. 316-7, 320. See also, Kent Roach, *Defining Terrorism: the need for a restrained Definition*, in Nicole LaViolette and Craig Forcece (eds), *The Human Rights of Anti-terrorism*, Irwin Law, (2008), Pp. 97-8.

⁵⁰⁰ Wondwossen D. ‘Rethinking the ‘no Definition’ Consensus and the ‘would have been’ Binding Assumption Pertaining to Security Council Resolution 1373’, *Flinders Law Journal*, Vol. 17 (2015), P. 140.

⁵⁰¹ Article 2(1) of the Convention defines a terrorist act as any ‘act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or abstain from doing any act.’

Some scholars argue that the resolution does not restrict states in going beyond the terrorist acts it captures.⁵⁰² The Resolution only imposes a duty on states to criminalise and punish those who are engaged in the conduct it captures. It is argued that the Resolution neither explicitly nor implicitly imposes a duty on states not to adopt a broader definition. States fail to comply with the Resolution's instructions only if their domestic definitions do not cover all conduct that the Resolution captures.⁵⁰³ The states are then free to criminalise more acts on top of the ones captured in the Resolution. Indeed, the Saudi legislature has adopted a broader definition than the one that the Resolution implicitly endorses in the two legal instruments, namely the Suppression of Financing Convention and Resolution 1566, as explained below. However, whether such a definition is too broad to the extent that it raises the question of human rights related-violations and political exploitation of broadness is a different issue that will be addressed in the next chapter. In the forthcoming sections, reference will be made to the analysis of the Saudi definition of terrorism.

The Law of Combating Terrorist Crimes and its Financing (2017)⁵⁰⁴ defines terrorism as:

[a]ny act committed, individually or collectively, directly or indirectly, by a perpetrator, with the intention to disturb public order, destabilize national security or State stability, threaten national unity, suspend the Basic Law of Governance or some of its provisions, cause damage to State facilities or natural or economic resources, attempt to coerce any of its authorities into a particular action or inaction, cause harm or death to any person, when the intention of such act, by its nature or context, is to terrorize people or force a government or an international organization to commit or refrain from committing a

⁵⁰² Wondwossen, *supra* n. 500, Pp. 149- 152.

⁵⁰³ See Paragraphs 2 (b) and (c) of Resolution 1373.

⁵⁰⁴ See <https://www.moj.gov.sa/Documents/Regulations/pdf/79.pdf>.

certain act, or threaten to carry out acts that would lead to or instigate any of the aforementioned intentions.

As well as any conduct constituting a crime under Saudi Arabia obligations in any of the international treaties or protocols related to terrorism or its financing - to which Saudi Arabia is a Party- or any of the acts listed in the Annex of the International Convention for the Suppression of the Financing of Terrorism.

Article 3, of the Law states the acts of terrorism by looking at the aims of these acts. Article 3, of the Law identifies acts of terrorism by looking at the aims of these acts. It states that ‘Notwithstanding the principle of territoriality, the provisions of this law shall apply to any person, Saudi or non-Saudi, who commits, aids, attempts, instigates, participates, or conspires to commit outside the kingdom a crime provided for in this law, and is not tried for, if such crime is to:

1. Change the government system in the Kingdom,
2. Suspend the Basic Law of the Government or some of its articles,
3. Coerce the state into a particular action or inaction,
4. Assault Saudi citizens abroad,
5. Cause damage to state properties abroad, including embassies or other diplomatic or consular premises,
6. Carry out a terrorist act on board any means of transport registered in the Kingdom or carrying its flag, or
7. Undermine the interests of the Kingdom, its economy or national or societal security’.

In general, the Saudi legislature adopted an inclusive approach to the definition of terrorism which embodies a comprehensive and common definition of terrorism through a general frame that includes both international and national acts of terrorism. In addition, the Saudi legislature approached an analytical method in determining seven groups of acts of terrorism, expressed in a broad way. These acts threaten several rights, such as the right to life, right to well-being, right to property, right to safe transport and security. The Saudi legislature stays away from narrowing the scope of the definition, which might fall short of unpredictable acts that might not be covered by a narrow sort of definition.

As can be seen now, the terrorist acts that have been criminalised by this Law do not only include the ones mentioned in Resolution 1566, but include other acts which have been added to its scope. This caused Ben Emmerson, Special Rapporteur on Counter-Terrorism and Human Rights, to say '[d]espite many positive developments, I am concerned about the unacceptably broad definition of terrorism and the use of Saudi Arabia's 2014 counter-terrorism law and other national security provisions against human rights defenders, writers, bloggers, journalists and other peaceful critics'.⁵⁰⁵ However, it seems that most states which defined terrorism adopted a broad approach so it can be flexible to the extent that it can cover any new form of terrorist acts, as the manifestation of terrorism keeps developing and changing. According to more than 500 state reports submitted to the CTC, almost all the definitions of terrorism by these states are not just innumerable, but also very broad and vague.

Considering that a too-broad definition of terrorism might raise human rights-related violations, it seems that Resolution 1566 does not explicitly or implicitly forbid states to approach a more comprehensive definition than that of the Resolution. Therefore, even if the

⁵⁰⁵ Saudi Arabia Must Reform Counter-Terror Law and Free Peaceful Critics, Says UN Rights Expert, United Nations Human Rights: Office of the High Commissioner (Geneva, 5th May, 2017), available at <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21585&LangID=E>> (Last Access: 14th July, 2018).

national definition encompasses a wider scope, this does not mean that the latter is contrary to the Resolution's provisions.

4.8 Criminal Conduct

In this regard, it is important now to explain the conduct of terrorists and their relationship with the concept of violence, in the context of the Law of Combating Terrorist Crimes and its Financing (2017). The older version of this law in 2014, when defining terrorism, used the term 'every act', whereas the new version uses 'every conduct' or Solok (In Arabic). This usage indicates that the Saudi legislature's orientation is to adopt a wider scope so it encompasses not only the act as such, but it includes other related action, including endorsement, showing sympathy, or incitement to terrorist acts, or propagating extremist thoughts, even when they happen by the way of omission. As terrorism is a crime that might violate or threaten human rights, public security and order, this conduct could lead to these outcomes. The Law of 2017 referred to the term violence as 'harming any person, or causing his death'. The definition also does not fall short of violent conduct, but also it includes a list of activities that has been declared to be the conduct of terrorism, including 'disturbance of public order, unsettling the security of the community and the state security, or jeopardizing its national unity'. On this basis, the Saudi legislature also approaches a wider concept of violence that is embodied within any terrorist criminal conduct. For example, he criminalised the conduct of showing sympathy with terrorist thoughts as well as inciting people to join terrorist groups. This sort of criminalised conduct does not accompany the traditional meaning of violence. The Saudi legislature emphasises this trend when it expanded the scope of violence in relation to terrorist conduct to include the new forms of terrorism, which are associated with new technologies. Therefore, it determined that the sort of violence that might constitute the conduct of terrorism is the establishment of a data system for terrorist purposes. It went further

when it criminalised the conduct of using the territories of the Kingdom as a base for meeting and planning to commit terrorism.

It can be noted here that the Saudi legislature tends to adopt the wider concept of violence, as was asserted in the report of Special Rapporteur Doudou Thiam,⁵⁰⁶ submitted to the International Law Commission, which states that terrorism is described by the use of violence. Therefore, the traditional concept of violence should be extended to the broad meaning of it so it can cover all forms of terrorist acts that technology facilitates.

4.9 Criminal Activities and the Crime of Terrorism

The crime of terrorism is not only the actual act of violence itself, but includes other activities that are associated with the violence. For example, there are many crimes related to terrorism, such as the attempt to commit a crime of terrorism or to secure finance for terrorism; the creation of a terrorist organisation; or providing assistance to terrorists. Some people call these sort of crimes ‘indirect terrorism. On a national level, the criminal legal systems of states deal differently with those who assist terrorists in terms of the degree of danger of their actions and the penalties imposed. For example, some of these legal systems deal differently with those who assist terrorists compared to the main perpetrators.⁵⁰⁷ Hence, an independent category was established which includes partners, accomplices, inciters, and so on. These people are given lesser punishments than those who commit the barbarity. Other criminal justice systems deal with terrorist accomplices in the same way as the perpetrators in terms of the gravity of their conduct and the corresponding punitive actions.⁵⁰⁸

The aforementioned Law of 2017, as it particularly relates to criminal terrorist conduct and the broader concept of violence within the meaning of terrorism, provides numerous

⁵⁰⁶ Doc. A/CN. 4/387. Ann. CDI, 1985, II, Ieme partie, p.77. see also, *Le regles internationales relatives a la lute contre le terrorism*, op. Cit., p. 49.

⁵⁰⁷ See Article 27 of the Criminal Code in China.

⁵⁰⁸ See Article 61 of the Criminal Code in Japan.

penalty provisions for those who collude with terrorists. For example, some were treated the same as the main terrorist perpetrator(s), whilst others were given lesser punishments, as discussed in the next sections.

Incitement to Terrorism

This is one of the key strategies that terrorist organisations use to support and justify their claim and call for acts of violence. Resolution 1373 states that this sort of strategy is against the principles of the UN. The SC also calls upon all states to criminalise such acts through their legal systems (Resolution 1624). The prohibition of incitement to terrorism is an indispensable part of public security and order.

The legal system in Saudi Arabia, as is the case with many states in the world, criminalises certain forms of incitement to terrorism, such as incitement via lecturing, gathering, religious platforms, or the Internet. It also outlaws this conduct as an independent offense and is punished to the extent of the law as the perpetrator(s) of the crime. Characteristically, the Saudi justice system uniquely criminalises a distinctive and serious form of incitement to terrorism, known as the incitement to terrorism via fatwa (religious edict).⁵⁰⁹ This form of incitement has been one of the main sources of terrorism in the Kingdom, which was the reason for the emergence of many terrorists who were recruited on the basis of fatwas to conduct Jihad, as was seen in Chapter Two. This is what caused the Council of Senior Scholars in the Kingdom in September 2014, to prohibit the joining of any extremist groups in conflict zones, such as in Syria and Iraq. The Kingdom also sought a policy to counter those who call people to join terrorist groups. On 16th February 2017, the Saudi authorities arrested a number of inciters who were engaged in activities related to promoting and publishing the thoughts of the IS, recruiting people, and inciting people to join the Syrian conflict.

⁵⁰⁹ See Article 35 of the Law of Combating Terrorist Crimes and its Financing (2017).

Terrorist Organisations

Due to ever present danger of terrorist groups, in particular the ones that have spread to more than one state and are well-known as transnational organised crime, Resolution 1373 was concerned about the close relationship between international terrorism and transnational organised crime. Due to the dangerous characteristics of such organisations, the mere plan to establish such an organisation is viewed as a crime.

In order to suppress the activities of recruitment and propaganda of these dangerous groups, many states introduced measures to declare them illegitimate, basing such a decision on the grounds that the aims and activities of these groups lead to terrorist acts or facilitate them. Each country has flexibility to define these groups. For example, the framework decision of the European Union Council on 13th June, 2002, stated that a terrorist group is an assembly which is organizational in structure, consists of more than one individual and whose activities involve conducting terrorist acts.

As far as the Kingdom is concerned, the establishment of organisations or political parties is forbidden. However, several secret entities opposed to the policy of the Kingdom, and with affiliations to external organisations, such as Al-Qa'idah, or backed by foreign states such as Iran, were created. The Saudi legislature criminalised these organisation as well as the participation in them as a preventive measure against terrorism to deter any one who may have sympathy towards these groups. In 2014, the Committee created via Royal Order held a meeting with the aim of producing a periodic report on unlawful terrorist factions and organisations.⁵¹⁰ It introduced a list of several organisations and groups that are considered to be terrorist entities, including IS(Daish), Hezbollah in the Kingdom, Houthis, Muslim Brotherhood and all internally recognised terrorist groups. The Kingdom warned its citizens

⁵¹⁰ Royal Order No A/44.

and residents of the sanctions, issued through the Royal Order that it will encompass anyone who engages, invites, incites or belongs to unlawful organisations and groups. It also includes anyone who pledges allegiance to any party, organisation, or even an individual inside or outside the Kingdom. However, this Royal Order granted the Saudi people who joined terrorist groups outside the country a deadline to review their situations and, therefore, return to the country with the hope of repentance and never to return to these activities.

4.10 The Duality of the Standards of Terrorism Lists

All state members of the UN are committed to forbid all organisations listed on the terrorist list by the SC. In practice, whilst some states create their own list of terrorist groups, other states do not consider these groups to be terrorists. For example, whilst the Muslim Brotherhood (Al-Ikhwān Al-Muslimūn) is considered a terrorist organisation by the Kingdom of Saudi Arabia and United Arab Emirates, it is not designated as a terrorist entity in other countries such as Turkey and Qatar. The latter countries even allow the members of this organisation to freely operate in their territories. This situation detracts from the effectiveness of international and regional efforts to counter terrorism and extremist thought. It also opens the opportunity for them to publish propaganda and promote their ideologies. However, this state of affairs is due to the political interests and the security considerations of each state whereupon they decide how to deal with those groups. What is important in this regard is to show that this state constitutes tension between the national strategies of counter-terrorism and the international ones. It constitutes a legal and practical challenge to counter terrorism among states at national and international levels. Efforts should be consolidated and coordinated between these states on the one hand and between them and the international organisation, in particular the UNSC on the other. There should also be unified criteria in the identification mechanisms of terrorist networks.

Finally, the issues that have been raised in this chapter, in turn, highlight an important issue in relation to the response of the Saudi strategy of counter-terrorism to the three main implications that Resolution 1373 raises, which are financing terrorism, international cooperation, and human rights, in the context of the legal framework of combating terrorism in the Kingdom. These concerns will be discussed in the next chapter.

CHAPTER FIVE: EXTENT OF IMPLEMENTATION OF UNSC RESOLUTION 1373

5.1 Introduction

One of requirements of UNSC Resolution 1373 is to combat the financing of terrorism. The Resolution calls upon member states to enact or modify national legislation on counter-terrorism. As emphasised in Chapter Four, the Kingdom of Saudi Arabia committed to this Resolution by enacting the Law of Counter-Terrorism and its Finance that was replaced by the Law of 2017. In addition to this, the SC's strategy further requires states to counter all forms of terrorism financing and implement the respective international criteria, including the international conventions of suppressing terrorism financing. The crime of terrorism was regarded as a mere punishable financial crime. However, having issued this Resolution, a number of laws and regulations were enacted to control the financing of terrorist activities.⁵¹¹ Most financial institutions have been subject to several stringent requirements in relation to monitoring the transactions and behaviours of customers. The FATF, for example, was founded to assist in countering financial crimes, including terrorism. The first part of this chapter discusses the extent to which the Kingdom of Saudi Arabia has committed to the second requirement of the SC's strategy of counter-terrorism. The legal strategy of Saudi Arabia of countering terrorism financing has gone through various stages. It was not a crime in its own right, rather it was a part of the money laundering crimes, before it was treated as a distinct crime with a special law to govern it. The chapter, then, investigates the Kingdom's commitment to the SC's requirement to combat terrorism financing, bearing in mind the different aforementioned stages, before and after the issuance of the SC's strategy of counter-terrorism. It will highlight certain challenges that might hamper the implementation of the SC's strategy, including kidnapping hostages for ransom, and the independence of non-profit institutions in the activities of financing terrorism.

⁵¹¹ Overview of the Fight Against Terrorist Financing, Advantage, at <https://complyadvantage.com/knowledgebase/anti-terrorist-financing/>.

The strategy of counter-terrorism of the SC also requires the member states to cooperate together either via the framework of the UN and its main branches and relevant agencies, or through regional agreements and bilateral ones. The importance of this requirement derives from the fact that the crime of terrorism has been of a cross-border nature where the question of cooperation becomes critical. This question will be addressed in the second section of this chapter, which discusses how the Kingdom of Saudi Arabia has committed to the third requirement of the SC's strategy of counter-terrorism. In this regard, the chapter will focus on three means of cooperation: extradition, legal assistance, and intelligence cooperation. This is discussed with reference to some potential challenges that might obstruct the implementation of this requirement. The chapter then completes the exploration of the implementation of the requirements of the SC's strategy that was first presented in the previous chapter. However, the success of the commitment to these requirements is usually contingent on the respect of human rights. The CTC calls upon all member states to fully commit to respecting human rights when countering terrorism. This particular point is scrutinized in the last section of this chapter. It examines the extent to which the Kingdom of Saudi Arabia adheres to the question of human rights. The chapter highlights a number of examples, including the right to personal safety, the right to privacy, and the commitment to the principle of due process, in particular the period of detention.

5.2 Terrorism Financing

Since the Kingdom of Saudi Arabia has one of the highest GDPs and is one of the main oil producers and exporters in the world,⁵¹² the Government joined the World Trade Organisation (WTO), whose function is to facilitate trade with greater safety, freedom, and flexibility. Consequently, joining this organisation required the Kingdom to introduce more

⁵¹² Crystal J. *'Oil and Politics in the Gulf: Rulers and Merchants in Kuwait and Qatar'* (Cambridge: Cambridge University Press, 1995).

changes and increase flexibility in its national systems of trade, investment, and economy, such as the establishment of the capital market and investment sectors. These economical changes have, to a large extent, corresponded with the Afghani-Russian war and the Iraqi war which allowed some people to exploit these two significant regional events, the two wars and the new trade flexibility, in financing terrorist organisations and terrorists; and money laundering.

However, the policy of the Kingdom in fighting these new terrorist activities (terrorism financing) was based on the same one regarding the initial fight against terrorism. This counter-terrorism was based on Shariah Law, which considers terrorism financing an anti-social offence and is inseparable from terrorism (one crime). Although terrorism and terrorism financing are two distinct crimes, under Shariah Law, both crimes are treated as terrorism. Any form of cooperation between a terrorist and his financier is seen as a terrorist offence but is not treated as an associated crime, even if the act of terrorism is never committed. The act of terrorism financing is still punishable and Saudi judges regard these two incidents as one crime.⁵¹³ However, following the events of 11th September that had adverse consequences on most states in the world, including the Kingdom, the latter had to make fundamental changes to its financial sector, particularly because the Kingdom was accused of being the main source of terrorism financing. This forced the Kingdom to adopt a strategy to deal with the challenges of terrorism financing. The Kingdom started to cooperate with the United States Department of Treasury, aiming to develop its financial system.⁵¹⁴ In addition, several permanent committees were founded, including the Anti-Money Laundering Committee,⁵¹⁵ the Permanent Committee of Counter-Terrorism, and the Financial Intelligence Unit, which is currently under the supervision of the Head of State Security. The main duty of this Unit is to receive and analyse

⁵¹³ MENAEATE, Mutual Evaluation Report, Anti-Money Laundering and Combating the Financing of Terrorism, Kingdom of Saudi Arabia, 4 May 2010, 63.

⁵¹⁴ Report to Congressional Requesters, U.S. Agencies Report Progress Countering Terrorism and Its Financing in Saudi Arabia, but Continued Focus on Counter-Terrorism Financing Efforts Needed. Sep 2009.

⁵¹⁵ Generally, see, SAAMLC, at (<http://www.sama.gov.sa/en-US/AntiMoney/Pages/Home.aspx>).

reports about suspicious financial transactions, and then to generate its own reports and pass them to the relevant committees. This Unit also cooperates with its counterparts in other states in relation to money laundering and terrorism financing.⁵¹⁶ In addition, the staff of this Unit have been trained under a system of cooperation with the US Treasury in order to develop their abilities and skills to familiarise themselves with money laundering and terrorism financing challenges in accordance with international obligations, which have been adopted by the Kingdom in its strategy.⁵¹⁷

5.2.1 The Kingdom's International Commitment to Combat Terrorism Financing

The Kingdom's international commitment to fighting terrorism financing is based on the International Convention for the Suppression of the Financing of Terrorism 1999 (ICSFT) and UNSC Resolution 1373. The ICSFT requires states to criminalise all acts that are considered crimes within the previous conventions and commit to the definition of these crimes (the previous nine conventions, which defined the crimes of terrorism).⁵¹⁸ It also criminalises the collection and provision of funds with the intention of using them wholly, or partially, for criminal acts. The crime of terrorism financing is a special and standing crime and not only an associated crime.⁵¹⁹ On this basis, the crime of financing occurs regardless of the occurrence of the act of terrorism itself. Resolution 1373 emphasises this state of affairs, where it considers the crime of terrorism financing as a distinct and independent crime. The Resolution imposed obligations on all states to prevent, criminalise and punish acts of terrorism financing and to

⁵¹⁶ Generally see, SAFIU,

https://www.moi.gov.sa/wps/portal/Home/sectors/safiu/contents/lut/p/z1/jVHBTsMwDP0VduCI7DbZ2h09GE3pJAioW5cLClUYgS5ILCrw90TTTkt5pvl9_z8nkFBBcrpzm60t63TTejXavKMOeci4nGRjcsZkpTFchrPI4wSWB0A1xkJniwQ00U2xpxE-TiVjCEXuOfwsaclz-T3A9Tw-if9BXenREIK9n23UwSqbp03Px6qV-u0q61uLqzrzN4fM7vE3oGu36zpzNY4vw93q0HV-eQ_ACm9RSK2FCKR8X0aHqFD2Z9yH5xvmvYIPHo1g_UHvykeJHxuy7L6_mv08ytFo9EfzLOjCw!!/dz/d5/L0IHSkovd0RNQUpRQUVnQSEhLzROVkuVZW4!/.

⁵¹⁷ Report to Congressional Requesters, U.S. Agencies Report Progress Countering Terrorism and Its Financing in Saudi Arabia, but Continued Focus on Counter Terrorism Financing Efforts Needed, United States Government Accountability Office, September 2009, p.11.

⁵¹⁸ ICSFT, Article 2.

⁵¹⁹ *Ibid.*

prosecute the perpetrator(s).⁵²⁰ This Resolution constitutes a new framework to counter terrorism financing and a new legal act that supplements the previous legal acts which were adopted before the events of 9/11.

5.2.2 Combating Terrorism Financing in the Kingdom

Saudi Arabia has been involved in combating terrorism financing since it enacted the Anti-Laundering Law in 2003. This was followed by issuing the 2005 Implementing Regulations of this law. In addition, several other regulations and rules were issued by supervisory authorities. The Kingdom also established a number of permanent national committees to coordinate its policy efforts. Article 2 (d), of the 2003 law considers the crime of terrorism financing as a type of money laundering crime and was not considered as a standing crime as such. The Saudi specialists clarified that there is no need for a particular statutory crime since terrorism financing is already criminalised by Shariah Law.⁵²¹ Article 2(d), in this regard is, then, a complementary statutory arrangement. As it can be seen now, it seems that the Saudi statutory offense for terrorism financing does not fit in with international obligations, whether those referred to in the ICSFT or UNSC Resolution 1373. It also does not seem to conform to the international criteria, which were adopted by the FATF on anti-money laundering and terrorism financing, ever since the Kingdom became the founding member of the Middle East - North Africa FATF (MENAFATF) in 2004,⁵²² which was established with the aim of implementing and promoting international guiding principles in relation to combating money laundering and terrorism financing. On the other hand, although the Saudi policy of dealing with these crimes is founded on Shariah Law, there is no legal barrier to combat them in accordance with a law that would treat these acts as independent crimes.

⁵²⁰ UNSC, R. 1373, Article A/1.

⁵²¹ UN, S/2004/884.

⁵²² Nicholas R. 'The Kingdom of Saudi Arabia: a critical review of its response to money laundering and terrorist financing', CREST, Paper presented at Turbulence in the Kingdom – financial crime risks in Saudi Arabia, (Sep 2017).

5.2.3 MENAFATF's Assessment of Saudi Arabia

The Kingdom underwent a mutual assessment, conducted by both MENAFATF and FATF, to ensure that it was committed to the international standards of countering money laundering and terrorism financing.⁵²³ The Kingdom passed this assessment and has been delegated as an observer member of FATF. However, the assessment made several recommendations for the Kingdom to follow. For example, it recommended that the Kingdom make several changes to the legal framework that organises the issues of money laundering and the financing of terrorism in accordance with international standards. Also, it urgently asked the Kingdom to make a conceptual difference between the crime of money laundering and terrorism financing. Another recommendation was that the Kingdom creates a legal basis for freezing the funds and assets of terrorist entities, as there was no clear basis. This basis should conform to Resolution 1373. Competent authorities with responsibility for implementation must be identified and a procedure to monitor the freezing of funds as well as a procedure for the implementation of penalties should the financial authorities fail to comply with their duty to freeze funds.⁵²⁴ As a consequence, Saudi experts reviewed the legal and institutional framework, regulations, guidelines, and other tools related to the crime of money laundering and terrorism financing through financial institutions (FIs) and Designated Non-Financial Businesses and Professions (DNFBPs).⁵²⁵

Following these recommendations and the expert review, the shortcomings of the then legal and institutional system were addressed, in particular, with the enactment of a new money laundering law in 2012, which made significant modifications to the previous law of 2003. This included adding 3 new articles to the law and a number of subjective and formulative

⁵²³ Rules Governing Anti-Money Laundering and Combating Terrorist Financing, Third Update, Feb (2012).

⁵²⁴ MENAFATF, Mutual Evaluation Report, Anti-Money Laundering and Combating the Financing of Terrorism, Kingdom of Saudi Arabia, (4 May 2010), 145. 185.

⁵²⁵ *Supra* n. 523.

modifications to another 20 articles to conform as much as possible to international and domestic requirements. The Implementation Regulations were also updated. The crime of terrorism financing was accordingly, considered to be a standalone crime when the Law of Combating Terrorist Crimes and its Financing was issued in 2013, and went into effect in February 2014.⁵²⁶ Article 32 of this law authorises the Permanent Committee of Countering Terrorism to introduce a clear mechanism for the implementation of Resolution 1373's provisions.

In addition to this, the Kingdom made other changes and updates to the Law of Combating Terrorist Crimes and its Financing (2013), when it issued its new version in 2017. The Kingdom therefore submitted a new and comprehensive report to MENAFATF about its progress towards the implementation of recommendations of their assessment. Following these important events and developments, MENAFATF conducted another assessment in October 2017 of the legal, procedural and institutional developments introduced by the Kingdom. The discussion of these changes concluded in June 2018. As a consequence, in June 2019, the FATF accepted Saudi Arabia as a member of state, instead of being an observer.

5.2.4 The National Legal Framework for Combating Terrorism Financing

As previously stated, the legal basis for combating terrorism financing is the Law of Combating Terrorist Crimes and its Financing (2017). This law refers to terrorism financing as:

Providing funds for committing a terrorist crime or for the benefit of a terrorist entity or a terrorist individual in any form stipulated in this Law, including financing the travel and training of a terrorist individual.

⁵²⁶ Law of Combating Terrorist Crimes and its Financing, Article B/1, 2013.

Article 4/1 of the Law also defines funds as ‘assets, economic resources or properties of any value or type, however acquired, whether material or immaterial, movable or immovable, tangible or intangible, along with documents, deeds, transfers, letter of credits and instruments of any form, whether inside or outside the Kingdom. This includes electronic or digital systems and bank credits that evidence ownership or interest therein, also all types of commercial papers, securities, or any interest, profit or other income generated from such funds.’⁵²⁷ Article 47 of this Law states that the crime of terrorism financing stretches to any conduct that incorporates the accumulation or arrangement of assets – alongside other forms expressed by the law, for example, receiving, distributing, moving or exchanging stores or their proceeds - whether directly or indirectly - realizing that they will be utilized by an individual or groups or for an act of terrorism, composed or otherwise, even when the act itself does not occur or the money was not used.⁵²⁸ It is worth mentioning that the extent of crime grows to cover any type of financing for other aims, for example, the invitation or advancement of ideologies or orchestrating training places or giving a safe house to individuals or any type of financial means. In addition, the material element of the penalty of terrorism financing expands in accordance with the definition given in Article 47 to sufficiently and adequately include the material elements stated in Article (2) (a) (b) of the ICSFT. The Law also criminalises an attempt, involvement as a partner, incitement, or assisting to commit a crime of terrorism financing. This also applies to the act of joining a terrorist organisation. As can be seen, this Law deals with criminal intention in the crime of terrorism financing in the same way as it did with terrorist crimes, where the broad meaning of this element is undertaken in the definition. This is in conformity with the international standards.⁵²⁹

⁵²⁷ See <https://www.moj.gov.sa/Documents/Regulations/pdf/79.pdf>.

⁵²⁸ Law of Combating Terrorist Crimes and its Financing (2017), Article 47.

⁵²⁹ *Ibid.*

5.2.5 The Mechanism of the Implementation of the United Nations Convention Against Transnational Organized Crime

Further to criminalizing terrorism financing by law as an independent crime, a set of executive procedures were taken by the Kingdom to implement the International Convention for the Suppression of the Financing of Terrorism via Ministerial Decision No. (1697) dated 14th March 2012, based on Royal Order No. (1804) dated 3rd December 2011.⁵³⁰ These procedures treated crimes alluded to in Article 2, as crimes carried out in the Kingdom, and subjected all legal bodies to financial, penal, and administrative responsibility. The procedures likewise incorporate reallocation rules in terrorism financing violations; rulings on the extradition of offenders; mutual legal help; steps taken by law enforcement entities for investigation and assessment; controlled conveyance of funds; and other rules identified with jurisdiction and victims' protection. It is additionally worth noting that commitments forced on financial institutions in relation to Anti-Money Laundering (AML) regulations, for example, the disallowance of opening unknown accounts, and measures of confirming permanent or temporary clients, are mandated by the Law of Combating Terrorist Crimes and its Financing (2017).⁵³¹

5.2.6 The Mechanism of the Implementation of Resolution 1373

Saudi Arabia has a legitimate reason for implementing UNSC Resolution 1373 as per Article 32 of the Law of Combating Terrorist Crimes and its Financing 2013.⁵³² The set of mechanisms required to implement Resolution 1373 and other related resolutions was put into

⁵³⁰ This explanation of the mechanism of the implementation of Resolution 1373 is based on the report of MENAFATF, see MENAFATF, Mutual Evaluation Report 4th Follow-Up Report for Saudi Arabia, (17 June 2014).

⁵³¹ *Ibid.*

⁵³² This explanation of the mechanism of the implementation of Resolution 1373 is based on the report of MENAFATF, see *ibid.*

place by the Permanent Committee on Combating Terrorism, and which were issued by the Minister of Interior in 2012.⁵³³

The above mechanism incorporates procedures taken by the authorities in the Kingdom to classify individuals (nationals and residents) and entities that possess or direct financial activities associated with terrorism or its financing, notwithstanding other procedures for Saudi nationals and expatriates, and entities included by a foreign organization or state on the national records.

As per the mechanism, all government bodies as well as private institutions are equipped to freeze and stop transactions (Ministry of Interior; Ministry of Justice; Ministry of Finance; Ministry of Commerce and Industry; financial and non-financial organizations; and businesses) and shall deny and stop financing terrorist conduct and immediately freeze funds and any benefits or monetary assets owned by people who conduct, or try to conduct, take an interest in or encourage terrorist acts; relating to bodies owned or controlled, directly or indirectly, by such people; possessed by people and substances that work for or under direction of said people and bodies; in addition to natives who purposely give or gather finances using any and all means, regardless of whether directly or indirectly or inside the Kingdom domains, to be utilized in terrorist conduct.

The procedures taken by the Kingdom's authorities to identify people and bodies by their national records include the following: during the underlying doubt stage, there shall be, immediately and without earlier notice, and within three working days, prudent seizure of accounts or end of dealings led by financial and non-financial establishments and also professions and businesses specifically by the Ministry of Interior (General Directorate of Investigation) and SAMA in accordance with the system carried out through the

⁵³³ See the Royal Order No. 25505 dated 14 April 2012.

correspondence channel amongst them and the FIU as per the requirements assigned thereto. In the event that investigations show the suspicion is true, the Ministry of Interior shall assign skilful authorities within five working days, calling them to freeze and stop monetary transactions on investment portfolios and properties, including companies and land claimed by those people or bodies.

Furthermore, the rules and directions issued by the supervisors to financial institutions (FIs) and designated non-financial businesses and professions (DNFBPs) incorporate an extraordinary section under those rules identified with the announcement of commitments of those institutions applying UNSCRs. The Saudi Arabian Monetary Authority (SAMA) issued directions routed to banks within the rules and administrative procedures of the self-regulatory organizations (SROs) work received in October 2013. The Capital Markets Authority of Saudi Arabia (CMA) issued a statement to the authorized people on their commitment to enforcing UNSCRs.

5.2.7 Kidnapping for Ransom

In the context of combating terrorism financing, kidnapping for ransom is considered the main source of, and most dangerous challenge in combating terrorism financing. In 2014, the UN report emphasised that kidnapping as a tactic to fund terrorist activities has dramatically increased.⁵³⁴ The UK Foreign and Commonwealth Office also stated that the amount of money asked for by kidnappers has dramatically risen.⁵³⁵ It usually ranges between 600,000 to 8,000,000 million euros for each ransom. This source of income constitutes nearly 5-50% of the total income of terrorist groups. For example, during the period from 2008 to 2018, terrorist

⁵³⁴ United Nations, "Sixteenth Report of the Analytical Support and Sanctions Monitoring Team submitted pursuant to resolution 2161 (2014) concerning Al-Qa'idah and associated individuals and entities," September 29, 2014. http://www.un.org/ga/search/view_doc.asp?symbol=S/2014/770.

⁵³⁵ Dettmer J. 'Al Qaeda Growing Rich Off Ransom Payments', *Daily Beast*, (December 22, 2012), at [<http://www.thedailybeast.com/articles/2013/12/22/al-qaeda-growing-rich-off-ransom-payments.html>].

groups, including Al-Qa'idah and IS and others managed to make 222 million USD from ransom payments.⁵³⁶ More than half of the budget of Al-Qa'idah in the Arabian Peninsula was funded via kidnapping for ransom.⁵³⁷

This tactic is, in particular, more challenging for the Kingdom of Saudi Arabia, as kidnapping people for ransom is a very common phenomenon in countries bordering the Kingdom, namely Iraq and Yemen. The Kingdom has experienced this problem several times, for example, the Saudi Ambassador in Yemen was kidnapped in March 2012 by Al-Qa'idah who asked for a great amount of money and also for some prisoners to be freed. The Saudi security spokesman condemned this incident and refused to cooperate and respond to their requests. However, the Ambassador was later released in 2015 via cooperation between Saudi and Yemeni Intelligence.

Saudi's policy of non-cooperation with kidnappers is similar to the policy of several other countries, including the USA and UK and may play a strong role in preventing or, at least, mitigating the problem of terrorism financing. In our aforementioned example of the Saudi ambassador in Yemen, the Saudi Government managed to arrest the kidnappers and handed them to the judicial department, who then tried them and punished them. On the other hand, other countries such as Germany and France have a different strategy to deal with kidnappers, as they give precedence to the safety of their citizens over any other aspect. For example, in 2010, France paid millions of dollars to Al-Qa'idah to free Pierre Comate, who was kidnapped in Mali.⁵³⁸ This policy might have adverse effects on those states who refuse to adhere to the requests of kidnappers and puts hostages in immediate danger. For instance, in 2009, four European hostages (1 British, 2 Swiss, and 1 German) were kidnapped. The UK

⁵³⁶ Knickmeyer E. 'Al Qaeda-Linked Groups Increasingly Funded by Ransom', *Wall Street Journal*, (July 29.2014), at [<https://www.wsj.com/articles/ransom-fills-terrorist-coffers-1406637010>].

⁵³⁷ *Ibid.*

⁵³⁸ African al-Qaeda demands swap for French hostage, *BBC* (11 January 2010), at [<http://news.bbc.co.uk/1/hi/world/africa/8452500.stm>].

followed its policy and refused to pay the ransom to Al-Qa'idah, while the other countries had different policies and paid the ransom. These two contradictory policies resulted in the death of the British citizen and the other hostages were released.⁵³⁹

This problem attracted the attention of the SC, which adopted several resolutions under Chapter VII of the UN Charter that emphasised Resolution 1373's requirements, asserting that terrorists should not gain any ransom or benefit from any political compromises.⁵⁴⁰ However, the challenge is still outstanding, as there are several countries which do not commit to this requirement. For example, it was submitted that Qatar routinely engages,⁵⁴¹ as a participant, in negotiations with terrorists in relation to freeing hostages, even if the latter is not Qatari.⁵⁴² They have engaged in many negotiations and paid millions of dollars. For example, Qatar paid nearly 1 billion dollars to free 26 of its citizens who were kidnapped in Iraq during a hunting trip.⁵⁴³ This issue has raised the fear of the neighbouring states in the region and, indeed, was one reason why some Gulf countries, including Saudi Arabia, decided to break their relationship with Qatar.

5.2.8 Non-Profit Organizations (NPOs)

The right to the establishment of associations is usually protected by human rights law. There are many non-profit associations and institutions in the Kingdom which are concerned with humanitarian, social, cultural, professional, and scientific aspects. However, organisations that carry out political or sectarian activities are forbidden. The right to raise money and use it to implement the aims of these associations is the most essential element of their establishment. Therefore, placing limitations on their sources of funding to exercise their activities constitutes

⁵³⁹ Dettmer, *supra* n. 535.

⁵⁴⁰ For example, UNSCRs: 2133 (2014), 1904 (2009), 1989 (2011), 2083 (2012).

⁵⁴¹ Bakr A, "Qatar Pares Support for Islamists but Careful to Preserve Ties," *Reuters*, (November 2, 2014).

⁵⁴² Callimachi, R. 'Paying Ransoms, Europe Bankrolls Qaeda Terror', *New York Times*, July 29, 2014, at [\[http://www.nytimes.com/2014/07/30/world/africa/ransoming-citizens-europe-becomes-al-qaedas-patron.html?_r=1\]](http://www.nytimes.com/2014/07/30/world/africa/ransoming-citizens-europe-becomes-al-qaedas-patron.html?_r=1).

⁵⁴³ Solomon, E. 'Financial Times', (June 5, 2017), <https://www.ft.com/content/dd033082-49e9-11e7-a3f4-c742b9791d43>.

a blatant intervention in the right to establish these associations.⁵⁴⁴ Before the events of September 11th, there was no management organisation or clear legislation that organised the work of these associations in Saudi Arabia.

NPOs are particularly vulnerable to being misused for terrorism financing purposes.⁵⁴⁵ It became evident, particularly after 9/11, that the Kingdom of Saudi Arabia was facing a great challenge. A number of Saudi charitable associations, such as Al-Haramain Foundation, were accused of funding terrorist organisations.⁵⁴⁶ Several philanthropic Saudi nationals used to send their *Zakah* and donations to places where Muslims need more help than any other places in the world, in particular the conflict zones, aiming to mitigate the suffering of affected Muslims. Such compassion is derived from an Islamic principle that a Muslim's support for other Muslims is obligatory. As is well known, the common rule is that each person is free to use and spend his or her money, but within a legitimate scope. This is what Saudi society has done for the last 50 years. Unfortunately, some extremists misled the public by stirring up their religious passion via pictures of dead Muslim children so they can obtain donations and *Zakah*. They used these funds to finance their terrorist activities. Although the right to freedom of association is protected, however, it is not absolute. This can be limited for national security or public order requirements as long as these limitations have legal bases. Resolution 1373 compels all states to prevent acts of terrorism financing. In addition, the ICSFT calls upon states to forbid all activities that are related to terrorism financing.⁵⁴⁷ As NPOs are particularly vulnerable to being misused for terrorism financing purposes, states are required to ensure that

⁵⁴⁴ (A/HRC/23/39).

⁵⁴⁵ Hayes B. 'Counter-Terrorism, "Policy Laundering," and the FATF: Legalizing Surveillance', *Regulating Civil Society*, Transnational Institute (TNI) and Statewatch, (2012), P.28. *Regulating Civil Society*, International Center for Not-for-Profit Law, (April. 2012).

⁵⁴⁶ Al Haramain Case Study, National Commission on Terrorist Attacks Upon the United States, Chapter 7.

⁵⁴⁷ ICSFT, Article A/8.

they cannot be exploited by any terrorist organisations. Equally, those states are also required not to disrupt or discourage the activities of legitimate charities.

For these reasons, the Kingdom has faced a huge challenge. It had to choose how to deal with charities and donation transactions. There were two choices for the Kingdom. The first option was to allow people the freedom to spend their *Zakah* and donations, either externally or internally, via charities that are under governmental oversight and administrative and legal jurisdiction. This choice enables donors who are driven by their religious duties to fulfil their aims. However, this option means that some of these resources might reach terrorist organisations and this, in turn, makes the government liable. The second option is to allow people to donate and pay *Zakah* through specific national charities, which are authorised by the Ministry of Labour. On the other hand, charitable donations and foreign relief assistance could be consolidated into one institution or government body. This entails state responsibility for any misuse or transgression. This state of affairs would then require the Kingdom to make a greater effort to avoid these resources reaching terrorist organisations.

As can be seen, the Kingdom had two choices and there is a strong argument for both. The Kingdom chose the second option. It prevented all sorts of charities at mosques and only allowed those charities that have a permit to work, and monitored its activities, organised its work, and penalised all violations under the Civil Society Associations and Organizations Law. The Kingdom also forbade these charities to make any external donations or *Zakah*, as this must be done through the King Salman Humanitarian Aid and Relief Centre (KSRELIEF),⁵⁴⁸ which is now the only body authorised to make such monetary transactions. This strategy concurs with the SC Resolution 1373 and the ICSFT, which aims to prevent or at least mitigate

⁵⁴⁸ Generally, see King Salman: Humanitarian Aid and Relief Centre, at <https://www.ksrelief.org/Arabic/Pages/Home.aspx>.

terrorism financing. Thus, the Government, as can be seen, also committed to its international legal commitments, that is the Resolution and the ICSFT.

However, this choice raises a new challenge for the Government. When someone has a desire to donate or pay their *Zakah* to a certain party and that such a desire is derived by religious duty (a mandatory duty), this might increase the potential for these donors to look for alternative charities (civil ones), which are supposed to be restricted, instead of governmental ones to send their money to. This becomes more challenging when this happens through social media which is usually exploited by terrorist organisations when they call for donations, in particular those organisations which have a variety of means to manipulate governmental measures. For example, it was detected in the Kingdom that some people were sympathetic with some donation campaigns run on Twitter. The organisers of these campaigns ask the donors to call them through Skype and then ask them to buy international prepaid cards and send the numbers of these cards to them. The organisers then sell the cards and send the revenue obtained from this process to Syria to fund their terrorist related-activities.⁵⁴⁹

In addition to the above challenge, another problem results from the first one. The false aims that the terrorists use to manipulate people to obtain their donations raises another problem as to how the Government can identify those donors who purposely use this method to take part in these illegal activities.⁵⁵⁰ While some donors are manipulated by false calls for donations, others are aware of the real aim of these activities and it can then be difficult for the Government to detect them. It is quite difficult to obtain evidence that these funds, transferred over the Internet, were used for terrorist related-activities. This challenge highlights the importance of monitoring, blocking, or deleting websites that look suspicious, although at the same time, it raises the question of the right to privacy and human rights. The latter question

⁵⁴⁹ FATF Report, Emerging Terrorist Financing Risks, (October 2015), Case Study: 20.

⁵⁵⁰ *Ibid.*

will be discussed in the next section. Yet, there is still a lot of work to be done by the Government to improve the vitality of social media for the purpose of investigation and using it as evidence within the judicial system in Saudi Arabia.

5.3 International Cooperation

Sovereignty is one of the most important principles of international law. This means that all states have a right to control their territories.⁵⁵¹ However, this principle does not constitute an obstacle for criminals who seek to take advantage of it and exploit geographical limitations.⁵⁵² In the past, Saudi prosecutors did not have to look for evidence of any crimes committed outside the Kingdom. However, this has now been changed. The articulation of the advanced dimensions of the phenomenon of modern criminality, including the external dimension, cannot be conducted only within the internal border of a country. It needs exchange of information and evidence between countries in order to counter this phenomenon. Crimes of terrorism, in particular, have a strong aspect of external dimension, as they are called trans-border crimes and require effective cooperation among states to force international law. No country can stand alone in its battle to counter terrorism unless it follows a cooperative approach with other countries and adopts judicial mechanisms which enable it to carry out effective measures across borders, so it can ensure that terrorists have no safe place to hide. Hence, counter-terrorism nowadays is implemented through establishing bilateral, regional, and international agreements, which provide member states with legal rules of international cooperation, not geographically defined. For example, the events of 11th September show that the perpetrators of this event crossed national borders, trained in one country, and developed their plan in other states. Therefore, states have to accept international cooperation in the battle to counter terrorism so they can prevent terrorists escaping punishment and, at the same time,

⁵⁵¹ Harrington J. 'Police Cooperation against Transnational Criminals', in Boister, N, Currie R, (eds.) *Routledge Handbook on Transnational Law* (Routledge, 2015), P. 109.

⁵⁵² Boister N. 'An Introduction to Transnational Criminal Law' (Oxford, Oxford University Press, 2012), Pp. 8-9.

maintain their sovereignty. International cooperation in countering terrorism has become an international duty, finding its source of obligation in Resolution 1373, which calls upon all states to provide assistance to each other in relation to counter-terrorism, including reporting the movement of terrorists, and providing judicial and administrative assistance. This Resolution noted the close relationship between international terrorism and transnational organised crimes. The United Nations Convention against Transnational Organized Crime (UNCATOC) is another legal basis for requiring international cooperation to counter terrorism.⁵⁵³ However, the scope of international adherence to international cooperation for countering terrorism is not only determined by Resolution 1373 and the UNCATOC, rather its scope is also determined by bilateral, regional, or international agreements. Thereafter, the implementation of international cooperation occurs in accordance with the provisions of these agreements. However, in the absence of such an agreement, a state that is required to provide international assistance will abide by its own legal rules. However, it has to provide maximum assistance and consider the international legal principles and international legal cooperation, such as the principle of state sovereignty and reciprocity.

Consequently, a number of states entered into bilateral agreements as well as those states who shared the same traditions, borders, or close interrelationships.⁵⁵⁴ Among these countries is Saudi Arabia, which ratified the UNACTOC⁵⁵⁵ and the Riyadh Arab Agreement for Judicial Cooperation,⁵⁵⁶ the Arabian Agreement of Counter-Terrorism, and the Convention on the Implementation of Judgments, Disputes and Judicial Declarations in the GCC States,

⁵⁵³ The Secretary General of the United Nations: Address at the Opening of the Signing Conference for the United Nations Convention against Transnational Organized Crime, Palermo, (12 December 2000), available at http://www.unodc.org/unodc/en/about-unodc/speeches/speech_2000-12-12_1.html, accessed 22/3-15.

⁵⁵⁴ UNODC, (2012), p. 19-20.

⁵⁵⁵ See UN Treaty Collection at: https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-12&chapter=18&lang=en.

⁵⁵⁶ See UNHCR at: <http://www.refworld.org/docid/3ae6b38d8.html>.

1997.⁵⁵⁷ The Kingdom also entered into a number of bilateral agreements in relation to extradition and legal assistance. The most important ways of engaging in international cooperation to counter terrorism are extradition and legal assistance to ensure that terrorists have no safe place. In addition to this, intelligence cooperation is another important international cooperation, as it is a preventive measure to prohibit the occurrence of a crime or mitigate its outcomes. These are discussed and analysed in the following sections, showing the extent to which, the Kingdom of Saudi Arabia has adhered to them under the Law of Terrorist Crimes and Financing 2017, as this law assigned a full chapter to deal with the issue of international cooperation.

5.3.1 Extradition

The extradition of criminals for justice, as one of the images of international cooperation, is vitally important to try them and enforce the sentences issued against them by a requesting state. This is because the trial of terrorists is usually vested in the national courts, as there are no international courts which have jurisdiction. International agreements and protocols in relation to counter-terrorism require their member states to consider extradition in relation to the crimes embedded in these international legal agreements and protocols. Also, prevention agreements, generally, specify the sorts of illegal activities, however, they do not organise the way by which national authorities apply their domestic laws.⁵⁵⁸ Therefore, it would be possible to implement an agreement correctly once the detail of the national system becomes deceptive. This makes the agreement workable.⁵⁵⁹ In organising the issues related to extradition, the Saudi authorities relied on Article 42, of the Basic Law of Governance, which provides that '[t]he State shall grant political asylum if public interest so dictates. Laws and

⁵⁵⁷ See: <https://arbitrationlaw.com/library/gulf-cooperation-council-gcc-convention-execution-judgments-delegations-and-judicial>.

⁵⁵⁸ Boister, *supra* n. 552, P. 125.

⁵⁵⁹ The most famous case of this nature is the judgement by an English Court of Appeals in *R v Safi (Ali Ahmed)* (2003, EWCA Criminal Division 1809, ILDC 253).

international agreements shall specify the rules and procedures for the extradition of ordinary criminals. 'In addition, in the context of counter-terrorism, the authorities rely on the Law of Combating Terrorist Crimes and its Financing 2017, in relation to the issue of extradition, where Article 73 of this law provides that 'the accused or convicted may be extradited to or by another state for any of the offenses provided for in the Law, provided that extradition is affected pursuant to a valid agreement between the Kingdom and the requesting State or reciprocity principle. If a request for extradition is rejected for any of these crimes, he shall be tried by the competent courts in the Kingdom. In this regard, the investigations carried out by the requesting state shall be used, and the Regulations [of this law] shall determine the mechanism of receiving and extradition '. In its approach to extradition, the Kingdom relies on the agreements that it ratifies. In case where there is no agreement, the Kingdom follows the principle of reciprocity that is commonly adopted by the vast majority of states.

In addition, the Saudi authorities follow many other states' policies in relation to the issue of extradition of its citizens, that is, it does not extradite its citizens. In this case, the Kingdom tries those wanted through its own courts. However, rejecting a request for extradition raises several challenges. This resulted in several states being critical of the practice of non-extradition of citizens and some states found alternatives to the issue of non-extradition. For example, the Netherlands and the USA signed an extradition treaty where both countries agreed to extradite their citizens to the other state, however on the proviso that after having been tried by the requesting state, they must return to their own country to complete their sentence if the individual is subsequently convicted of another offence in their own country.⁵⁶⁰ This researcher believes it would be positive to further study this issue to determine whether a future change in Saudi policy is possible as it would ensure that criminals do not escape justice.

⁵⁶⁰ Treaty of Extradition between the United States of America and the Kingdom of the Netherlands, JUNE 24, 1980, Article, 8. <https://internationalextraditionblog.files.wordpress.com/2011/03/netherlands.pdf>.

It is well known that some governments support terrorism and terrorist organisations for their own political aims,⁵⁶¹ where terrorists can find a safe place to stay. The case of Lockerbie is a good example in this regard. The Libyan law of penal procedures prevents the extradition of citizens to be tried outside the country which enabled the Libyan Government to refuse to extradite its citizens in this case. Further to this, in the case that the given state is not involved in the terrorist activity, the sentence the terrorist receives in his home country may be lighter than that given in the place where the crime was committed. For instance, if a foreigner commits a terrorist crime in the Kingdom of Saudi Arabia, such an act usually attracts a death sentence, whereas, in his own country, the sentence is usually lesser, such as prison, hence, it would be better for him to be tried in his own country. These different outcomes for the same person for the same act do not fulfil the ultimate aim of international cooperation.

Based on its international commitments, the Saudi Public Prosecutor revealed that in 2015 and 2016, the Kingdom handed over 91 wanted criminals of different nationalities and for different crimes, including terrorist crimes, to states to which the Kingdom of Saudi Arabia had entered into bilateral, regional, and international agreements. In accordance with the principle of reciprocity and courtesy, and during the same period of time, the Saudi authorities handed 14 criminals wanted for different crimes including terrorist crimes to states with which there were no agreements between them. It is worth noting that if the Kingdom rejected a request for extradition, the relevant Saudi judicial body would try the wanted person, with the help of investigations done by the country who sought extradition.⁵⁶² On the other hand, the principle of extradition or trial cannot be implemented unless the requesting state exchanges legal assistance with the requested state. This, in turn, shows the importance of legal assistance.

5.3.2 Mutual Legal Assistance (MLA)

⁵⁶¹ State Sponsors of Terrorism, U.S. Department of States, <https://www.state.gov/j/ct/list/c14151.htm>.

⁵⁶² Saudi Gazette, 17 Sep, 2017, <http://saudigazette.com.sa/article/517389/SAUDI-ARABIA/Saudi-Arabia>.

MLA is another method of cooperation among states and provides assistance in investigatory and prosecutorial activities. It is also used by states to obtain materials that cannot be obtained through the domestic enforcement of law. This method of cooperation is usually required from courts or prosecutors and is referred to as 'judicial cooperation'.⁵⁶³ MLA also deals with all aspects of criminal cases, including collecting evidence and hearing witnesses. Therefore, nowadays this has become an important factor in the global government, because domestic legal enforcement authorities cannot work outside its valid jurisdiction. MLA is an important part of the international obligation, just like extradition of the wanted, imposed by Resolution 1373, which obliges all states to provide each other with all maximum legal assistance in the context of investigatory and prosecutorial activities and all criminal procedures related to terrorist crimes.⁵⁶⁴ In addition, the Resolution calls upon all states to take all measures and establish bilateral and collective agreements to counter terrorism. The Resolution focuses attention on this particular method and broadens its scope, especially when the Resolution uses the term 'maximum legal assistance'. States need to understand this method in its wide usage, as intended by the Resolution, because this would boost counter-terrorism strategies.

In addition, UNLACOT also follows a wide scope of MLA. This convention involves a number of measures that a state needs to implement in the context of providing MLA to each other. The wide scope of the concept of MLA undertaken by this convention can be noted in one of its articles which states that any request for any investigative measure that is not mentioned in the convention should be given, as long as this request does not contradict with domestic legislations. It also allows information sharing between states without the need for a

⁵⁶³ Requests for Mutual Legal Assistance in Criminal Matters, Guidelines for Authorities Outside of the United Kingdom, (2015).

⁵⁶⁴ Vervaele J, A, E. 'Mutual Legal Assistance in Criminal Matters to Control (Transnational) Crime', in Currie, R, J., Boister N, (eds.), *Routledge Handbook on Transnational Law* (Routledge, 2015), P. 134-135.

formal request.⁵⁶⁵ As the Kingdom of Saudi Arabia is a party to the Arabian Agreement of Counter-Terrorism, it is committed to providing maximum legal assistance for all criminal procedures of terrorist crimes.⁵⁶⁶ In addition, a number of international agreements require nominating a central authority, assigned with the responsibility of receiving MLA, its implementation, and referring it to the relevant authorities. For this reason, the Kingdom of Saudi Arabia established the Permanent Committee of Legal Assistance, which is tasked to send and receive MLA requests between states and international and regional organisations in order to counter terrorism and achieve as much international cooperation as possible in collecting evidence, investigating suspects and the wanted, and discovering the records of criminals and prosecuting them. The Law of 2017 assigned to this Committee the task of receiving MLA in relation to the terrorist crimes referred to in this Law.⁵⁶⁷ As previously mentioned, the Law of 2017 criminalised all acts of terrorism that are criminalised by all conventions and protocols plus the acts that the Law of 2017 added. Therefore, the Committee exercises its mission to punish crimes either mentioned in the Law of 2017 or any of the other conventions and protocols.⁵⁶⁸

The Law of 2017 follows the same approach as UNSC Resolution 1373 and UNLACOT by expanding the concept of MLA. This can be noted when the Law authorises administrative authorities, criminal control authorities, law enforcing bodies, and supervisory authorities which are responsible for countering terrorism and its finance, investigation, inspection, fund freezing, arresting, prosecution, and trials to exchange the available information with counterparts in other states, conducting investigations on behalf of the Kingdom, creating mutual investigatory teams to provide assistance, or ‘controlled delivery’ of money by other

⁵⁶⁵ UNLACOT, Article 18.

⁵⁶⁶ UNLACOT, Articles 15 and 18.

⁵⁶⁷ Saudi Press Agency (03 March 2014).

⁵⁶⁸ Law of Combating Terrorist Crimes and its Financing (2017), Article. 74.

states through current agreements or the principle of reciprocity.⁵⁶⁹ The Law also authorises the Financial Investigation Unit to exchange information or make agreements with foreign bodies.⁵⁷⁰ However, this power given to the Financial Investigation Unit is conditioned on its commitment only to use the information given to it for the assigned purpose. It is true that the Law asks for this limitation, nonetheless, this does not limit the clear expansion in the meaning of the concept of MLA. The above limitation is only related to financial issues. It seems this particular condition is a measure to protect bank secrecy rules.

The Kingdom is also concerned with MLA in the context of criminal crimes. This was endorsed in the Riyadh Arab Agreement for Judicial Cooperation.⁵⁷¹ This principle is also embraced in the Arab Gulf States, as the Saudi Public Prosecutor stated ‘[t]he Gulf states believe in the importance of developing judicial cooperation relations between their judicial agencies to ensure cooperation and achievement as soon as possible, such as the use of public prosecutors for a direct communication base with all the available means of communication between them in relation to the exchange of information of international terrorist crimes and organised crimes.’ The Kingdom has always declared its readiness to cooperate with other states to counter terrorism, however, it rarely mentions a specific situation. For example, in 2016, A spokesman for the Saudi Arabian Ministry of Interior, General Mansour Al-Turki mentioned that Saudi and German security experts exchanged information about evidence that proved that one of the terrorist attackers in Germany was in touch with IS by using one of the social media outlets, using a Saudi phone number.⁵⁷²

As explained earlier, the extradition of wanted persons and MLA are usually carried out via international, regional, or bilateral agreements. At the same time, we often see some

⁵⁶⁹ Law of Combating Terrorist Crimes and its Financing (2017), Article. 72.

⁵⁷⁰ Law of Combating Terrorist Crimes and its Financing (2017), Article. 80.

⁵⁷¹ Generally, see, Riyadh Arab Agreement for Judicial Cooperation, at <http://www.refworld.org/docid/3ae6b38d8.html>.

⁵⁷² Independent, Attacks-Spiegel, Sami Aboudi (8Aug, 2016), <https://www.independent.co.uk/news/world/europe/saudi-arabia-isis-terror-attacks-germany-bavaria-axe-attack-a7178501.html>.

states enter into a bilateral agreement, and also into international and regional ones for the same subject. This usually raises a question about a potential contradiction that may occur between these different agreements to which a state is party. What is the position of the Kingdom in this regard? In order to answer this question, we refer to Higgins' approach. In making a decision as to which choice to select from two strong ones, Higgins tends to select the one that achieves the given aim of the context. By looking at the principle of extradition and MLA, we note that these two means aim to prevent transnational organised crimes by ensuring that a criminal does not escape justice. This is one of the preventives means of countering international terrorism to prevent the occurrence of crimes in the future. The approach of the Kingdom, in this regard, is embodied in the Royal Decree (No. 14, 1999), and issued in relation to the ratification of the Arabian Agreement of Judicial Cooperation. This Decree states that in the case of the contradiction between the provisions of this Agreement and another agreement, an agreement that more secures the extradition of the wanted and fulfils security and judicial cooperation, shall apply. The Saudi Arabian Kingdom suggested modifying this Agreement in a way that concurs with the latter approach by the Kingdom, which is what happened. Article 69, of the Arabian Agreement was modified in a way that corresponds with the Kingdom's view that makes the achievement of the ultimate aims of the Agreement a criterion of making a choice between two contradictory agreements. As can be seen, it appears that the policy of the Kingdom in selecting the most judicious decision that achieves the given aim of the policy is in conformity with Higgins' policy-orientated approach.

The Saudi authorities, follow many state policies in relation to the issue of extradition. It does not extradite its citizens. It also requires double criminality, where the given crime for which extradition is requested should be criminalised in the legislation of both countries. This policy concurs with the principle that a state does not participate in punishing acts that are not penalised in its own legislation. However, this principle becomes less important when it comes

to terrorist crimes, as most international conventions and protocols of counter-terrorism do not require such a condition, but only require them to include a number of crimes within their national legislations. Such an inclusion would enable the criminal legislation of the member states to be harmonised and the legal terminologies of international cooperation would be unified, resulting in the similarity of crimes, set out in the legislations of all states. This makes the condition of double criminality less needed.

5.3.3 The Rule of Non-Enquiry

In regard to the question of extradition, the rule of non-enquiry was for a long time seen as an essential standard and commonly used within the common law states.⁵⁷³ The principle means that the requested state abstains from investigating the justice system of the requesting state and the conditions of extradition.⁵⁷⁴ However, the principle has lost its underlying weight recently. Especially in the context of conventions, such as the UNLACOT,⁵⁷⁵ where states are usually inclined to abandon this principle in practice due to the trust problems between member states in relation to the given convention. When it comes to MLA, it is well known for speed and flexibility and extensive investigations concerning the specifics of the justice system of the other state could straightforwardly challenge this point. As explained, the crimes of terrorism are crimes that constitute a threat to international peace and security, therefore all states are required to counter them. If we consider the rule of non-enquiry from the wide perspective of international law, we follow Higgins' policy-oriented approach in selecting the best decision that could achieve the aim, which, in our context, is the prevention of terrorism and ensuring terrorists do not escape punishment. This would generate a sense of flexibility among states in relation to the question of international cooperation. In fact, there are some states who followed

⁵⁷³ Currie R, and Rikhof J. *'International & Transnational Criminal Law'* (Irwin Law Inc, 2010), P. 488-489.

⁵⁷⁴ Parry, J. 'International Extradition, the Rule of Non-enquiry and the Problem of Sovereignty', *Boston University Law Review*, Vol. 90, (2010), Pp. 1978-1986.

⁵⁷⁵ Currie R, and Rikhof J, *supra* n. 573, P. 534.

the flexible approach in the context of MLA. For example, in the case of the “Bali Nine” (2005), where nine Australian citizens were arrested on charges of drug trafficking at the airport in Bali, Australian authorities showed full flexibility and completely cooperated with Indonesian authorities, even though the Indonesian Government may have sentenced the accused to death for their crimes. In this regard, the Commission of the AFP commented that “we operate within our criminal-justice system here in Australia, and if we only co-operated with countries that had the same criminal-justice system, then our co-operation wouldn't extend very far beyond Australia. We have to work with the systems that operate in other countries, and to a large degree this has been successful”. Senator Chris Ellis also commented on this case, saying that “It's certainly not in breach of Australian law for there to be police-to-police assistance on a matter which may carry the death penalty”.⁵⁷⁶ Indeed, several of those arrested were sentenced to death in 2015 and the rest were sentenced to life in prison. Such flexibility between states in mutual cooperation is a positive response to the requirements of UNSC Resolution 1373.

5.3.4 Intelligence Cooperation

As terrorism is an international affair, the response to combat it has been increasingly undertaken in coalition, where states provide financial, technical, and logistical help to each other, as well as security training and intelligence support to increase the potential to combat terrorist threats.⁵⁷⁷ The specialised departments and agencies of counter-terrorism in the Kingdom of Saudi Arabia have started to exchange intelligence with other states and regional and international bodies, as a sort of early warning to combat terrorism. The Kingdom's commitment to this cooperation stems from the international and regional conventions it signs,

⁵⁷⁶ The Monthly, Australian Exceptionalism – The Bali Nine and the Future of the Death Penalty, July 2007 Edition, available at <http://www.themonthly.com.au/issue/2007/july/1283823425/daniel-hoare/australian-exceptionalism>, accessed on 3/6-15.

⁵⁷⁷ Moynihan H. ‘Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism’, *Chatham House*, Nov (2016), at [<https://www.chathamhouse.org/2016/11/aiding-and-assisting-challenges-armed-conflict-and-counterterrorism>].

or the principle of reciprocity.⁵⁷⁸ In order to combat terrorism, the Kingdom's cooperation with organisations and states is as follows:

1. Cooperation with Organisations

a. Interpol: The Kingdom exchanges a wide range of information through the Interpol database. For example, in March 2009, the Kingdom gave the names of nearly 80 persons suspected of being terrorists and related to Al-Qa'idah. This is the largest number in the history of Interpol. In addition, this cooperation was a reason for the Kingdom to gain the confidence of Interpol, the Middle Eastern states, and the northern states of Africa, who unanimously voted, at the headquarters of the Office in Lyon in April 2018, for the Kingdom to host the regional office of Interpol in the Middle East and the northern African region.⁵⁷⁹

b. Egmont Group of Financial Intelligence Units: In accordance with the Kingdom's strategy of counter-terrorism, the Saudi Arabian Financial Investigation Unit (SAFIU), a member of the Egmont Group,⁵⁸⁰ exchanged intelligence through the group's secret site in relation to those who have been classified or are suggested to be classified as suspects of committing illegal financial operations. This cooperation process was conducted through flexible procedures in relation to the exchange of intelligence, or providing assistance, except the ones that might impede investigations' related activities or any other legal process within the legal system of a state. The Kingdom is party to this Group⁵⁸¹ as well as to MENAFATF.⁵⁸²

⁵⁷⁸ Counter Terrorist Crime and Financing, Article. 72.

⁵⁷⁹ See at, <https://www.spa.gov.sa>.

⁵⁸⁰ See at, <https://egmontgroup.org/>.

⁵⁸¹ Generally, see, FAEF, at www.fatf-gafi.org.

⁵⁸² Generally, see, MENAFATF, at www.menafatf.org.

c. The Islamic Military Alliance to Combat Terrorism: This alliance consists of 44 member states and its headquarters is in Ar-Riyadh. Its main goals are the exchange of intelligence among member states, supporting states, and international organisations in relation to counter-terrorism and supporting other alliances.⁵⁸³ For example, the Kingdom provided military assistance to West African states, including Mali, Burkina Faso, Chad, and Niger; and also delivered financial assistance of USD\$100 million.

2. **Cooperation with States:** The Kingdom has paid significant attention to this aspect of counter-terrorism, as was asserted by the Secretary of the Saudi Standing Committee of Counter-Terrorism during my interview with him on February 2017.⁵⁸⁴ He mentioned that the Kingdom has played a vital role, in recent years, in detecting several terrorist plans and the infiltration of terrorists into the territories of several European capital cities. For example, he stated that ‘the Saudi Intelligence service exchanged information about a shipment of explosive parcels sent from Yemen to the USA through the Emirates Airlines, which were supposed to target several sites of Jewish worship and that President Obama thanked the Kingdom for its efforts to thwart these threats before they took place.’ In the interview, the Secretary provided me with more examples of the efforts and the outcomes of the Kingdom’s cooperation with states in relation to combating terrorism.⁵⁸⁵ He told me that ‘Prime Minister David Cameron mentioned the information received from the [Saudi] Kingdom in relation to a suicide bombing in London in October 2015.’⁵⁸⁶ ‘In December 2016, Prime Minister Teresa May declared that the information received from the Kingdom helped save a lot of innocent people in the UK, during her meeting with the leaders of the Gulf Cooperation Council, convened in Bahrain’.⁵⁸⁷ The Secretary also asserted to me that the Kingdom is concerned with the security of all states

⁵⁸³ Generally, see, IMCTC, at <https://imctc.org>.

⁵⁸⁴ An interview conducted with the Secretary of Saudi Standing Committee of Counter-Terrorism, (2016).

⁵⁸⁵ *Ibid.*

⁵⁸⁶ *Ibid*, Notes are retained in the name of the author, and the quotation is approved by interviewee.

⁵⁸⁷ *Ibid.*

in the world through cooperative means even with states with which there is no Saudi representative or there is no cooperation with them. He continued, ‘the Kingdom does not hesitate to exchange or send intelligence with any states as a sort of an early warning through different methods. This includes the submission of intelligence through the permanent delegate of the Kingdom to the UN to the permanent delegate of the targeted states or through a mediator; the submission of the intelligence to the nearest Embassy of the targeted states or through an embassy of a mediator; or the submission of the intelligence to the resident counterpart in the Kingdom who in turn passes the information to the targeted state.’⁵⁸⁸

Having explored the strategy of the Kingdom in relation to its policy of cooperation with states and organisations, based on Resolution 1373’s obligations, there are several challenges that might impact both the international and Saudi strategies of counter-terrorism. For example, the commitment of the Kingdom to Resolution 1373 raises a legal question. In case a state provides assistance (submitting information) to another state in relation to combating terrorism and the latter exploits such assistance to conduct illegal acts under international law, will the assisting state be responsible for this act under international law? For instance, is the installation of airbases in a state’s region illegal in the case where flights from these bases are utilized to carry out airstrikes in breach of international law? In the event that the assisting state provides intelligence to bolster these strikes, is it obliged to verify in advance the circumstances in which this information will be utilized? It is true that Resolution 1373 obliges states to cooperate with each other, nevertheless this does not mean that such an obligation is not limited. Cooperation among states is limited to not being contrary to international law. The law in this zone incorporates a common rule, provided in Article 16 of the International Law Commission’s Articles on State Responsibility, which declares that a

⁵⁸⁸ *Ibid.*

state that helps or aids another state commit a universally wrongful act by the beneficiary state is universally responsible.⁵⁸⁹

There are a few limits on what can be uncovered within the setting of sensitive counter-terrorism activities, owing to worries that a revelation may compromise national security or have a negative effect on the relationship with other countries. Also, there is a demand for private meetings between officials in government, and between governments, so that each side can comprehend the other's legitimate reasoning for military actions. Such meetings or consultations can offer assistance to outline the public discussions on a few central legitimate issues. However, fundamental information about how countries comprehend the lawful system administering their assistance, and the lawful rules underlying the conduct that they aid, is unlikely to be so delicate.⁵⁹⁰ There should be a better balance between sufficient involvement and the reservation of information. The Director of the USA National Intelligence, James R Clapper, stated that there is a need to establish a sweet spot between involvement and the protection of information.⁵⁹¹

Other challenges that might impact the international strategy of counter-terrorism is the importance of the presence of well-trained people who are able to detect accurate information and data for decision-makers. For example, regarding the Brussels' attacks in 2016, the investigations showed that there was a weak system in exchanging intelligence among the different security services and the inaccuracy of the intelligence that they collected in relation

⁵⁸⁹ Moynihan, *supra* n. 577, P.2.

⁵⁹⁰ *Ibid*, P.45.

⁵⁹¹ Intelligence Information: Need-To-Know Vs. Need-To-Share – Analysis, Office of the Director of National Intelligence, <https://www.dni.gov/index.php/who-we-are/organizations/national-security-partnerships/ise/ise-archive/ise-news/1903-intelligence-information-need-to-know-vs-need-to-share-analysis?highlight=WyJuZWVklwiBmVIZGVklwiBmVIZHMiLClnbmVIZCIsIm5lZWVkaW5nliwidG8iLCJ0byCiLCJrbm93liwia25vd2luZyIsImtub3dzliwia25vdyciLCJ2cyIsIm5lZWVkaW5lZWVkaW5nliwidG8iLCJ0byBrbm93liwidG8ga25vdYB2cyIsImtub3cgdnMlXQ==>

to the extreme terrorist networks.⁵⁹² The investigations of the Parliament Committee stated that the security services failed to obtain accurate and precise information on those who carried out the attacks at the metro station and the airport in Brussels. Several experts claimed that there was a failed system of exchanging intelligence between the six police stations in Brussels; between the local police and the federal police; and the different security services.⁵⁹³

A further challenge is the lack of interest of states in the intelligence that they receive. For example, in the 1990s, the Kingdom of Saudi Arabia called for the international community to hand over Usama Bin Laden to its authorities, however, there was no response to this call. In addition, in 2014, then King Abdullah, during his meeting with the ambassadors of some states, sent a message to the leaders of the world stating the importance of combating terrorism, using force, wisdom, and speed, referring to the danger of IS. He added that any neglect of this phenomenon would lead to the spread of terrorist threats to Europe and the USA within months. The President of Turkey had also warned Belgium about Ibrahim Al-Bakrawi, one of the perpetrators of the Brussel attacks in 2016,⁵⁹⁴ but the authorities in Belgium neglected this information. Therefore, if the international community had responded to the Kingdom's warnings and calls, would the events of 11th September have happened, would we have witnessed the spread of IS, and would the Brussels attacks have taken place?

It seems currently that most states have realised the need to commit to Resolution 1373 in relation to the importance of cooperation, so they can address the danger of terrorism. For example, in November 2017, and for the sake of boosting the role of the security services between countries in the European Union, the latter approved a package of new amendments, aimed to improve cooperation and the exchange of intelligence between these countries. For

⁵⁹² Renard T. 'European and Global, Counterterrorism in Belgium: Key Challenges and Policy Options', *Egmont Paper*, October (2016), at [https://www.egmontinstitute.be/content/uploads/2016/10/Egmont-Paper-89_OFFICIAL-FINAL.pdf?type=pdf].

⁵⁹³ *Ibid*, P. 45.

⁵⁹⁴ *Ibid*.

instance, if any terrorist attack takes place in some of these countries, all states must share all intelligence quickly. In addition, if any of these states prohibits a person access to its country, this information should be shared with the others. The Kingdom of Saudi Arabia also developed its strategy of sharing intelligence with other states and put this issue on top of its priorities to combat terrorism.

5.3.5 Future Challenge

The big future challenge for intelligence agencies and the states' strategies of counter-terrorism was discussed by former US Secretary of Homeland Security, Jeh Johnson, in 2014, during an interview with CNN at the Reagan National Defense Forum, that "The new phenomenon that I see that I'm very concerned about, is somebody who has never met another member of that terrorist organization, never trained at one of the camps, who is simply inspired by the social media -- the literature, the propaganda, the message -- to commit an act of violence in this country." This is known in the field of counter-terrorism as the 'Lone Wolf'.⁵⁹⁵ The lone wolf has long been a problematic issue for policymakers and intelligence agencies. The isolation and withdrawn nature of this phenomenon makes it troublesome to proactively accumulate data about their potential pernicious malignant intentions.⁵⁹⁶

In September of 2014, Abu Muhammad Al-Adnani, the official representative of IS, encouraged devotees, sympathizers and Muslims living in Western nations to "kill [Westerners] in any manner".⁵⁹⁷ In fact, he depended on the fertile ground that Al-Qa'idah had already laid since 2000 in the USA. The most vocal advocate of this phenomenon was Yemen preacher: Anwar Al-Awlaki,⁵⁹⁸ who was one of the writers of Al-Qa'idah's journal, which

⁵⁹⁵ Koran L. 'Threat of lone wolf attacks worries Homeland Security chief', *CNN Politics*, (November 17, 2014), [<https://edition.cnn.com/2014/11/16/politics/homeland-security-lone-wolf/index.html>].

⁵⁹⁶ One of the most famous attacks of lone wolves is the Oklahoma City bombing.

⁵⁹⁷ Celso A. 'More than the Voice of the Caliphate: The Destructive Legacy of Abu Muhammad Al-Adnani', *International Journal of Political Science*, Volume 2, (2016), P. 86.

⁵⁹⁸ Heffelfinger C & Shane S. 'the Rise of Annawr AL-Awlaki', *Carnegie Endowment for International Peace*, (2010), at [<https://carnegieendowment.org/2010/06/01/rise-of-anwar-al-awlaki-event-2920>].

issues its articles in English. In the literature, the Internet plays a major role in lone wolf terrorism. It is believed to be a driver of the threat, by others as a quicker actor, and by a few commentators as a surrogate community – a social space in which the lone persons feel they belong.⁵⁹⁹

Senator Dianne Feinstein, member of the Senate Intelligence Committee, also referred to this, stating that the question of lone wolves is a big problem, including the use of the Internet by homeless Muslims, who are fuelling this phenomenon.⁶⁰⁰ The multiple attacks that were witnessed in 2014 reveal that the propaganda being publicized has an effective impact and the best way to combat this is through the exchange of intelligence. However, this is a harsh response, as it entails the use of certain techniques that might not satisfy the Americans. This is what caused the UN's Counter- Terrorism Committee Executive Directorate to caution that the quick pace of technological progress encouraged international communication, travel and access to data.

However, it seems that lone wolves are not totally isolated. They have been communicating in the virtual world, obtained training and were recruited through chat rooms. This led Robert Hannigan⁶⁰¹ to accuse several US tech companies, working within the Silicon Valley, to be the favourite command and control network for terrorists,⁶⁰² revealing that members of IS (Daish) in Syria and Iraq used social media to intimidate people and inspire potential extremists throughout the world to join them.

It can be noted from the statement of the Head of British Intelligence, that governments concerned with the war on extremism are not individually able to face the phenomenon of lone

⁵⁹⁹ Dickson L. 'Lone Wolf Terrorism. A Case Study: The Radicalization Process of a Continually Investigated & Islamic State Inspired Lone Wolf Terrorist', *Malmö University Faculty of Health and Society*, (2015), at [<http://www.diva-portal.org/smash/record.jsf?pid=diva2%3A1487949&dswid=1707>].

⁶⁰⁰ See: <https://www.politico.com/blogs/politico-now/2014/10/feinstein-lone-wolf-terrorism-a-growing-problem-197643>.

⁶⁰¹ Director of the UK government's intelligence and security organisation GCHQ.

⁶⁰² Fisher A, *Perspectives on Terrorism, Terrorism Research Initiative*, Vol. III, Issue 6, (2014).

wolves. In fact, it may only happen through cooperation with private companies owning social networking websites in the sense of spying on the users. However, the dilemma faced by these developed states, which are democratic in nature, is the issue of a breach of privacy and the right of everyone to privacy, which in turn, will violate the national laws of these states that prevent the use of spying techniques on its users. Thus, the question in such a scenario is, which is more important and vital -the protection of privacy or the protection of societies and the lives of people from the threat of terrorism? Which of these two arguments should take priority? These are two opposing arguments, and each has strong reasonings to defend its argument. How can this dilemma be solved?

In the context of countering organised terrorism, international cooperation should be based on a fundamental principle that should conform to human rights' requirements and the protection of the freedoms of individuals. If this basic condition is not met, then the measures undertaken to counter terrorism will be criticised and not considered legitimate, hence, the matter might be exploited by criminal organisations.⁶⁰³

5.4 Human Rights

The importance of human rights laws is that the overlap between national security and human rights has been one of the thorniest issues in international law.⁶⁰⁴ Legal systems usually face a dual responsibility towards the question of human rights. States face a dilemma of being obliged to ensure their citizens are safe from terrorist attacks whilst at the same time ensuring that their general human rights are protected when taking anti-terrorism measures. The measures taken to counter terrorism and protect human rights should be complementary to each other and reinforce each other's goals. The Human Rights Committee of the United Nations

⁶⁰³ Nadelmen E. *'Cops Across Borders: The Internationalization of U.S. Criminal Law Enforcement'* (Pennsylvania State University Press, 1993), p.5.

⁶⁰⁴ Steiner H, Alston P, and Goodman R. *'International Human Rights in Context'* (Oxford, Oxford University Press, 2008), P.375.

asserted that states shall be committed to undertake necessary measures to protect its individuals within its jurisdictions, however, the personal security of those people shall not be ignored.⁶⁰⁵ The European Human Rights Court also emphasised that not all means of counter-terrorism are acceptable, and that states, under the pretext of countering terrorism, cannot adopt any measures without considering the question of human rights.⁶⁰⁶

The question of the threat of terrorism and human rights requires states to consider the balance between both and that such a balance is subjected to the degree of danger of a state's national security. If the danger reaches a level of gravity that triggers a state of emergency, then the rules to counter such a state of affairs need to increase the powers of governments to react to such a danger, using their power, resources, and flexibility. The reconciliation between these two questions can occur without sacrificing human rights' considerations in any way,⁶⁰⁷ as there are rights which cannot be undermined under any reason, such as the right to life and personal safety. The then-Secretary General, Kofi Annan, also asserted during the international summit on democracy and terrorism held in Madrid in 2005, that human rights and the rule of law should be respected, and that the disregard for human rights would be in contradiction with a successful strategy of counter-terrorism. He added that states which sacrifice human rights in reality are assisting the terrorists, as this may make the terrorists' goals easier to achieve, as those who have had their human rights violated may lose trust in their government and cause them to re-evaluate their principles.⁶⁰⁸

The balance between human rights and national security is usually subjected to a set of political, social, religious, and cultural factors. The aggregation of these factors plays an important role in how the legal systems of states deal with the above two questions. Higgins

⁶⁰⁵ See: Delgado Puez V. Colombia, case No. 196/1985. July, (1990).

⁶⁰⁶ Klass and others. V. Germany Series A no 28 (1978) para 79.

⁶⁰⁷ Eric A. P. and Adrian V. *'Terror in the Balance: Security, Liberty, and the Courts'* (Oxford, Oxford University Press, 2007), P.4.

⁶⁰⁸ Robert P. B. *'Non-State Actors and Terrorism'* (The Hague: T. M. C. Asser Press, the Hague, 2008), P. 176.

refers to them as extra-legal considerations that cannot be separated from the decision-making process, and can be taken into consideration by decision-makers in order to reach the best possible decision. Higgins opines that justice, the meaning of which differs from one society to another, cannot be achieved without considering these factors. Usually, decision-makers, in the context of criminal justice, face dilemmas as to how to apply legal rules that may appear contradictory with the given context, and this may result in justice being jeopardised. This scenario corresponds with the question of human rights in the Kingdom's policy, which considers Islamic Shariah to be the only source of all its legal regulations, which, in turn, aims to protect human rights in accordance with the international criteria of human rights that conform only to the doctrine of Shariah Law and Saudi culture. The Saudi Arabian policy is based on Shariah Law, is different to the European or American understanding of human rights, though there might be some similarity in the two concepts. This state of affairs has been emphasised by several Saudi officials, including the Saudi Crown Prince, who said 'We don't share values. But we also believe that different states in the US also don't share values. There are different values between California and Texas. So, how do you expect us to share your values 100 percent when you do not share your own values?'⁶⁰⁹ In Saudi Arabia, some steps that are taken by the government in relation to the question of human rights, such as the establishment of the National Assembly of Human Rights, have been widely denounced by extremists. They accused the government of "abandoning Islamic values and adopting the Jewish concept of human rights." To back their claim, they cited former Malaysian Prime Minister Mahathir Muhammad's outrageous assertion that Jews "invented human rights and democracy" so as to achieve legal equality with Christians and thus seize control of government

⁶⁰⁹ Goldberg, J. 'Saudi Crown Prince: Iran's Supreme Leader 'Makes Hitler Look Good', *The Atlantic*, Apr 2.2018.see at, <https://www.theatlantic.com/international/archive/2018/04/mohammed-bin-salman-iran-israel/557036/>

in predominantly Christian countries, implying that the same would be done in the Muslim world.⁶¹⁰

In this section, we discuss the question of balance between Saudi national security and human rights in the context of counter-terrorism, as perceived by the Saudi Government's policy, and the extent to which this policy is in conformity with the international legal commitments.

5.4.1 The International and National Legal Framework

Saudi Arabia is a member of the United Nations Human Rights Council. It has been elected for the fourth time from 2017 to 2019. In addition, the Kingdom is a party to another 5 out of 9 international conventions and 3 protocols on human-rights-related issues. It is also a member of the Arab Charter on Human Rights.⁶¹¹ These memberships require that the Kingdom is committed to its international and regional responsibilities on the question of human rights. Resolution 1373 also made a narrow reference to the question of human rights and this was in the context of granting refugee status. However, the first chairman of the CTC asserted in 2002, that the assessment of whether states comply with human rights rules is outside its jurisdiction. This caused some member states of the UN to pay more attention to counter-terrorism imperatives, as a way of a formal pretext to ignore human rights. For example, the UK argues that the UN Charter imperatives are superior to the ones laid down in the CTC under Resolution 1373.⁶¹² This made the SC issue Resolution 1456, in 2003, which calls states to 'ensure that any measure taken to combat terrorism complies with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law;'.⁶¹³

⁶¹⁰ Taheri A, Saudi Arabia: Between Terror and Reform, American Foreign Policy Interests, (2004).

⁶¹¹ Saudi Human Rights Commission, <http://www.hrc.gov.sa/ar-sa/Pages/home.aspx>.

⁶¹² Mariner J. 'The UN Counter Terrorism and Human Rights', *The Stanley Foundation*, (September 2017).

⁶¹³ UNSC, Resolution 1456 (2003), Article, 6.

Thereafter, the CTC started to require states to respect their responsibilities towards human rights when countering terrorism. In 2005, the Human Rights Committee decided to assign a Special Rapporteur whose mandate was to boost and protect human rights in the context of countering terrorism. Therefore, the Kingdom of Saudi Arabia is committed to respecting human rights before the SC (the CTC).⁶¹⁴

The history of the protection of human rights in the Kingdom has gone through different stages, each having a different form that suited the given period of time. The most important change undertaken in this regard is the issuance of the Law of Basic Governance, which explicitly confirms the necessity of the protection of human rights. For example, Article 26 provides that ‘the State shall protect human rights in accordance with the Islamic Shari‘ah.’ It also emphasises the importance of respecting a number of human rights, such as justice and equity before judiciary and the right to security.⁶¹⁵ Article 36 provides that ‘the State shall provide security to all its citizens and residents. A person’s actions may not be restricted, nor may he be detained or imprisoned, except under the provisions of the Law.’ Thereafter, a number of laws were issued that were concerned about the question of human rights that together establish a legal framework for the protection of human rights.

In addition, a number of human rights’ departments were founded in the Kingdom within several ministries. In 1997, the King issued a Royal Order that established the High Committee of Human Rights, whose members were high-profile officials in the Kingdom. This Committee also founded the National Assembly of Human Rights in 2004. This is the first independent body, the civil assembly, which is not subjected to any governmental supervision and whose mandate is to defend the human rights of all Saudi citizens, residents, and visitors. In 2008, the Saudi Government established an independent governmental body, called the

⁶¹⁴ UNHR, Resolution No. 08, http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2005-80.doc.

⁶¹⁵ Saudi Basic Law, Article 74.

Human Rights Body and whose president is a minister; and serves at the pleasure of the King. This body aims to protect the human rights in accordance with the international criteria that are in conformity with Shariah Law and Saudi culture.⁶¹⁶ In addition to these steps, a number of governmental and non-governmental institutions were created in the Kingdom to look after the question of human rights. One of the most important ones is the King Abdul-Aziz Centre for National Dialogue, which aims to address national issues, including human rights issues through a national dialogue which brings together all different communities and societies. It also aims to create a suitable and valid environment in which people can express their opinions through national meetings in different parts of the Kingdom.

5.4.2 Human Rights and Counter-Terrorism in Saudi Arabia

The Law of 2017 does not make any reference to the question of human rights when countering terrorism, however, it refers all issues that have not been addressed by it to the Law of Criminal Procedures, which is the one that makes reference to the question of human rights.⁶¹⁷ The Law of 2017 should have reference to the question of human rights due to its importance to ensure that the authorities enforcing this Law are committed to upholding human rights. In this section, we discuss some human rights issues in the Kingdom in the context of countering terrorism.⁶¹⁸

5.4.2.1 Right to Personal Safety

Most human rights conventions forbid torture, cruel treatment, and degrading penalties. Despite the existence of such human rights conventions, states who have suffered from terrorism have gone through exceptional experiences that oblige them, equally, to undertake exceptional measures to combat it. Some people opined that some states have used torture as a

⁶¹⁶ Saudi Human Rights Commission, <http://www.hrc.gov.sa/ar-sa/Pages/home.aspx>.

⁶¹⁷ *Ibid*, Article. 93.

⁶¹⁸ *Ibid*.

legitimate means of power. For example, Dershowitz⁶¹⁹ opines that the result of a simple analysis of the calculation of cost and benefit of the use of torture which does not lead to death is clear and does not require argument. This is because the torture of one terrorist in a way which does not lead to death who is hiding important information about a supposed terrorist act is much better than the devastating outcome (thousands of victims) that may occur if the terrorist act takes place.⁶²⁰ Such an opinion raised the concern of the Office of the High Commissioner for Human Rights in relation to allegations that some states have used secret detention centres, where suspects were moved to other places through illegitimate ways.⁶²¹

It is the opinion of the researcher, based on the experiences of some states, that the use of violence as a way of countering terrorism will generate more violence and therefore, result in more victims. In addition, states should enable their citizens to use their rights and not sacrifice those rights when countering terrorism.⁶²² The latter mission should be conducted through legal tools. The right of people to be protected from torture is an absolute right and cannot be derogated for any reason under international law. Judge Frank Forter⁶²³ stated that absolute rules inevitably lead to exceptions and these exceptions would erode the rules.⁶²⁴ In his assessment of the British legislation of counter-terrorism issued in 1996, Lord Lloyd stated that the legislation against terrorism should be close and similar to criminal law and the law of procedures as much as can be done. He also added that crimes and the extra authority can only be justified if they are necessary to counter the expected threat and that the balance between

⁶¹⁹ Professor of Law at Harvard University.

⁶²⁰ Dershowitz A. *'Why Terrorism works, Understanding the threat, responding to the challenge'* (London, Yale University Press, 2002), P.249.

⁶²¹ Lord John Marris of Aberavon's Report, Role of Parliaments in Achieving Balance between National Security and Human Security and Individual Freedoms; and between Containment of Risk, Session 117 (Geneva, 8-10 October 2007).

⁶²² Walker C. 'Clamping Down on Terrorism in the United Kingdom', *Journal of International Criminal Justice*, Vol. 4, No. 5, (2006). P.182.

⁶²³ President of Supreme Court of the United States.

⁶²⁴ United States, 341 U.S. 494, 524 Dennis V. <https://www.courtlistener.com/opinion/104914/dennis-v-united-states/>.

security necessities and the rights and freedom of individuals should be balanced, and that national laws should be in conformity with states' responsibilities under international law.⁶²⁵

The Kingdom is a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Saudi Criminal Procedures Law also forbids abusing those who have been arrested, physically and morally,⁶²⁶ and that they shall not be subjected to torture or degrading treatment. The same Law also provides that the investigation of a suspect shall not be carried out in a way that may affect the will of suspect, and that coercion shall not be used.⁶²⁷ Further to this, another Royal Decree was issued which punishes the abuse of power in any criminal proceedings, such as violating human rights or mistreatment.⁶²⁸ These prohibitions are also asserted in the Law of Prison and Detention. The latter law prohibits assaulting prisoners and detainees in any sense of assault, and that any perpetrators should be disciplined.⁶²⁹ There are five prisons for the accused and those convicted of crimes of terrorism. For example, the prison of investigation is one of these prisons and is under the oversight of the State Security Presidency. There are also a number of offices established to follow and address the complaints of prisoners, such as offices of banks, political parties, the Public Prosecutor, and the body of human rights. In addition, all investigation rooms are fitted with CCTVs to ensure the integrity of the investigation procedures.⁶³⁰

In his former capacity as UN Special Rapporteur, Ben Emmerson⁶³¹ visited the Kingdom of Saudi Arabia in 2017, to assess the progress made by the state in its legal and policy systems in the fight against terrorism, in relation to international human rights law and

⁶²⁵ Walker. C, p.1147.

⁶²⁶ Saudi Criminal Procedures Law, Article 2.

⁶²⁷ *Ibid*, Article 102.

⁶²⁸ Royal Decree No 43, Article 2.

⁶²⁹ Saudi Law of Prison and Detention, Article 28.

⁶³⁰ Saudi Human Rights Commission.

⁶³¹ UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concludes visit to Saudi Arabia, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21584&LangID=E>. Assigned for the issues of the protection of human rights and its development in the context of counter-terrorism.

standards. He praised the transparency and the high-end, constructive and cooperative manner facilitated by the Saudi government to this official visit. He also visited a number of prisons, including the prison of investigation and some divisions of police, and conducted a number of interviews with some suspects and those convicted of terrorism. Further to this, he showed his admiration, in particular, with the circumstances of detention in the five prisons. He also checked all utilities in all prisons and spoke with most of the staff in the prisons. He confirmed in his report that the level of care and the circumstances of detention in these utilities, including the medical and entertainment facilities, is of high quality.⁶³²

The Special Rapporteur also mentioned that despite the positive developments, there were still a number of human rights concerns with regard to abusive counter-terrorism, security-related legislation, and the ‘overboard’ definition of terrorism adopted by the Kingdom. Particularly, he was concerned about the death sentence and that such a sentence should be only applied against the perpetrators of the most serious crimes that result in the loss of many lives. This has been addressed in the Law of Combating Terrorist Crimes and its Financing (2017), which declares that the death penalty will only be applied to crimes stipulated in the law, which result in the death of one or more persons.⁶³³ The same Law also authorises the relevant court with the right to use the death penalty against any person who abducts a person, or uses means of transport, if accompanied by the use of a weapon or explosives. Generally, the death penalty is only applied in the Kingdom for the gravest crimes and on a low scale, as such cases are reviewed by 15 judges throughout different stages of the trial.⁶³⁴ However, with the existence of all these guarantees, there is also a big challenge in relation to the death penalty. Most states have abolished the death penalty and therefore may refuse any sort of cooperation with those states that have not. The challenge becomes worse,

⁶³² *Ibid.*

⁶³³ *Ibid.*, Article 50.

⁶³⁴ Saudi Human Rights Commission.

as the four most populous countries in the world apply the death penalty. This may result in difficulties in areas of inter-state cooperation over terrorism.

In this regard and in order to avoid the above challenges, and according to the view of Higgins, who opines those extra-legal considerations should be taken into account when making a decision, this researcher believes that the religion of Islam (Shariah Law), is a relevant consideration, as this determines the existence of the death penalty. Thereupon, if this penalty is a reason for the loss of cooperation with other states who consider this punishment as contradictory to human rights, then the Kingdom of Saudi Arabia would face two choices: one being to keep the punishment and lose the opportunity to cooperate with states who do not wish to deal with countries who apply the death penalty, or two, it may look for an alternative solution that boosts the relationship with those states and therefore effectively counters terrorism. The Kingdom should decide which approach might help it to achieve its ultimate goal, which is, in this regard, countering terrorism. Therefore, according to Higgins' policy-oriented approach, this researcher suggests that the Kingdom abandon the death penalty in such cases, as this may accomplish the interests of Saudi society and at the same time correspond to the enactment of Shariah Law which also seeks to fulfil the interests of Islamic society. This does not mean eliminating the death penalty from Islamic legislation in an absolute sense, however, it could involve a suspension of this penalty and replacing it with life sentences or long-term imprisonment. There are a number of instances that show that some Islamic rulings have been suspended and replaced with other ones due to changing interests and that such a change occurs over time. For example, the Holy Qur'an, which is the first source of Shariah Law, specifies eight categories of people who are entitled to receive financial support. One of them is called 'to bring hearts together'.⁶³⁵ People who fell into this category were given

⁶³⁵ Surat At-Taubah, Ayat.60, (Zakah expenditures are only for the poor and for the needy and for those employed to collect [Zakah] and for bringing hearts together [for Islam] and for freeing captives [or slaves] and for those in debt and for the cause of Allah and for the [stranded] traveller - an obligation [imposed] by Allah. And Allah is Knowing and Wise).

monetary compensation during the time of Prophet Muhammad. However, when the Prophet passed away, his senior companion, Umar Ibn Al-Khattab, decided to remove this category from the list, as he claimed that the reason for which the money was given to those people (that Islam was still weak at the time) had disappeared as Islam was not weak anymore. This decision was approved by Caliph Abu Bakr. As another example, in the era of the succession of Umar, he stopped enforcing the penalty for theft due to the widespread poverty at the time, the reason being that some people had to steal so they could survive.⁶³⁶ In this example, Caliph Umar used the criterion of ‘Maslaha’ – public interest – which leads to justice. The use of this criterion to make rules has played an essential role in the development of Islamic jurisprudence, which was adopted as a response to the continuous development of life’s needs.

In addition, with the death penalty, there is no opportunity to reform terrorists, which is one of the most important policies in countering terrorism. Those who are influenced by beliefs and ideologies cannot be deterred by such a penalty, as the given terrorist would consider such a penalty a reward and gate for him to enter paradise. In practice, statistics show that the termination of the death penalty does not increase crime. For example, in Canada, the murder rate dropped for every 10000 people from 3.09 in 1975 (the year that preceded the year in which the death penalty was eliminated) to 1.73 in 2003. This was the lowest rate for three decades.⁶³⁷

5.4.2.2 Right to Privacy

Counter-terrorism often takes place through different means. Some of these means may require intervention in the right of people to privacy, when attempting to arrest terrorists, searching for evidence, or taking proactive measures to prevent the occurrence of terrorism. This requires collecting information and taking special measures that are different to the ones

⁶³⁶ *Ibid.*

⁶³⁷ International Court of Justice, Doc. 550/006/2005.

set for normal crimes. For example, the need to collect information in the context of a terrorist crime does not require a justification that should reach the level of evidence or suspicion against some people. In addition, collecting information or evidence may take a short or longer time. Solove states that it is very difficult nowadays to live without being recorded. Monitoring has been widely and socially accepted. However, people are not just being recorded, these records are usually stored. This may give rise to the issue of the right to privacy, even when this step is taken through good will to protect society. Therefore, there is a need to understand the meaning of privacy in the context of protecting society and when there should be restrictions placed on this right.

Definition of Privacy

Privacy is not a new concept. It has been through several developments and its concept has changed over time.⁶³⁸ The new meaning of the concept of privacy appeared for the first time in a study conducted by Louis Brandeis and Samuel Warren in 1890.⁶³⁹ They determined the meaning of privacy as ‘the right to be let alone’. Since that time, privacy has been considered as a right and one of the most essential rights of human beings. Despite the fact that legal systems guarantee the right to privacy, however, there is still disagreement about what exactly should be protected? There are several jurists who sought to create a definition for the term, but because of its incomprehensibility, the on-going changes of the components belonging to the private medium of the individual, the greater part of these definitions just cover a part of it. For example, privacy was defined as ‘the claim of an individual to determine what information about himself or herself should be known to others. Further, Fried defined privacy as the control over information about ourselves.’⁶⁴⁰

⁶³⁸ Konvitz M. ‘Privacy and the Law: a Philosophical Prelude’, *Law and Contemporary Problems*, Vol. 31, No. 2. (1966), P. 272.

⁶³⁹ Shapiro F. ‘The Most-Cited Law Review Articles’, *California Law Review*, Vol. 73, No. 5 (1985), P. 1545.

⁶⁴⁰ Fried C, Privacy, 77 YALE L.J. 475,482 (1968).

Despite these attempts to define privacy, there is no unified and global definition of the term due to the diversity of the religious, cultural, economic, and political characterisations of different societies. The question, therefore, that can be raised in this regard is how can this right be legally protected if the determination of the content of privacy is still disputed?

Counter-Terrorism and the Right to Privacy

It can be noted that most member states of the European Union have enacted special legislation in relation to the right to collect personal data for national security and counter-terrorism-related issues.⁶⁴¹ In addition, some of these states increased the power of electronic mentoring, in particular after the events of 11th September, as they extended this power to cover the new forms of technological communication. For example, the European Court of Human Rights ruled that the European conventions accept the use of electronic surveillance to protect the public interest in the fight against terrorism.⁶⁴² The American administration also increased its investment in counter-terrorism initiatives based on mentoring communication means, mining data, and mixing data. Also, the Patriot Act allows the use of electronic surveillance of random people.

The Kingdom of Saudi Arabia did not enact any special legislation for the collection of information, as it only depends on the Basic Law of Governance, which makes reference to the protection of privacy in accommodation, communication, and correspondence; and prohibits its confiscation, watching them, or hearing them except in situations where the law authorises it.⁶⁴³ In addition, the Law of 2017 authorises the Public Prosecutor to restrict the right to privacy, where he can issue permission to enter and investigate any buildings during the time stated by the prosecutor in relation to any crimes mentioned in the law. The Law of 2017, in

⁶⁴¹ Sottiaux S. *'Terrorism and the Limitation of Rights: The ECHR and the US Constitution'* (Oxford and Portland, Oregon, 2008), P.283.

⁶⁴² See the case of *Klass and Others v. Germany*, Series A No. 28, (1978).

⁶⁴³ *Ibid*, Articles 37 and 40.

the event of necessity, allows buildings to be entered without permission of the Public Prosecutor, however with the condition of reporting the reasons for entrance and urgency to the Prosecutor within 24 hours.⁶⁴⁴ The Law of 2017 refers the determination of the aforementioned necessity to the special regulations of this law, which have not been issued at the time of writing of this thesis.

Moreover, the Law of 2017 states that the Public Prosecutor should make a decision to authorise the surveillance and collect evidence, data, records, and messages, including the means of communication and information, stored in the electronic systems that are related to the crimes referred to in this law.⁶⁴⁵ Although the law places some restrictions on the right to privacy, however, the special courts of terrorist crimes do not consider the information obtained through electronic surveillance as evidence, but rather presumption. This researcher thinks that this type of information should be considered as evidence, because the special investigative techniques are an essential part of the preventive strategy of counter-terrorism. In addition, there are a number of developed countries which regard such information as evidence, such as the UK in the case of *Regina v. Khyam* in 2000, and Muhammad Hamid and a number of his associates in 2008.⁶⁴⁶

Although the issue of national security is very important, there should be a balance between this issue and the right to privacy. This researcher thinks that such a balance cannot be achieved without the existence of special legislation on the collection of information and electronic surveillance which contains the following aspects:

⁶⁴⁴ *Ibid*, Article 7.

⁶⁴⁵ *Ibid*, Article 8.

⁶⁴⁶ UNODC, Digest of Terrorist Cases, (2010), 214.

1. A flexible interpretation that can determine the content of privacy in accordance with the current developments and the special Saudi characterisations of religion, culture, and society.
2. A determination of the body which has the right to obtain such information, and the purpose for which this information is to be used.
3. The creation of a central body which conducts the act of surveillance either via cameras or the Internet, with the oversight of the Public Prosecutor.
4. Society should trust the national legislation, having ensured those people that such legislations would not be used in any way that might undermine an individual's privacy.
5. The recognition of the information obtained through electronic surveillance as sufficient evidence, as long as the legal procedures are respected.
6. Declaration of the responsibility of a corporate entity in relation to the data that it holds on its customers and an assurance that this data will not be publicised or violated.

5.4.2.3 Commitment to Investigation of Terrorism Crimes

In terrorism cases, investigations go through a number of challenges, which are mostly complex because these missions require collecting evidence which involves dealing with human remains, collecting and analysing explosive remnants, and cooperating with a large team of forensic medicine experts. Normally, such investigations are very slow due to the destruction of the evidence and the camouflage techniques carried out by experienced terrorists; or the lack of experience of the forensic experts or unified procedures of the administration of the criminal scene. Moreover, the organised nature of terrorist crimes may

slow down the pace of the investigation as a number of new relations and activities may be uncovered during the investigation that puts the real perpetrators of the terrorist acts away from the scene(s) of the crime. For example, in the case of *Al-Muhajirun* in Italy which lasted for six years, the investigations were initially conducted in relation to the issue of stealing and forging documents which contained information about recruiting fighters from Chechnya to Italy. However, these investigations resulted in detecting attacks planned to be executed in France and Germany and other cases.⁶⁴⁷

The investigation of terrorist crimes becomes more complex when national and external intelligence cooperation or legal assistance are needed. The requested states may reject or accept the cooperation for several reasons, such as the confidentiality of the information that if disclosed may threaten their national security or interests. This problem occurred in the German courts in the case of Mounir Al-Moutassadeq, who was affiliated with the Hamburg cell that executed the events of 11th September. In this case, the defendant requested one prisoner, detained at a US prison to witness his innocence. The US rejected this request and the case took a long time until the problem was solved when summaries of interrogations of this witness were sent to Germany.⁶⁴⁸ What can be noted here is that the procedures of investigations in terrorism cases usually take a long time to process for a variety of reasons, as such crimes have a special nature compared to other ones.

Recognition and Witnesses

Some terrorists recognise their acts voluntarily and sometimes with a feeling of pride of conducting or inciting these terrorist acts, as they believe that they have done something which is valid and legitimate. The bombing of the USA Embassy in Nairobi, Kenya is a good example. The instigator of this attack declared his involvement in this act, with the condition

⁶⁴⁷ UNODC, *Digest of Terrorist Cases*, (2010), 210.

⁶⁴⁸ UNODC, *Digest of Terrorist Cases*, (2010), 196.

he be tried in the enemy country, the USA, as he believed that the US was his enemy, but not Kenya.⁶⁴⁹ Another example is the 2002 case of Richard Reid, who tried to blow up an aircraft that was flying from Paris to the USA. Within 8 hours, he admitted that he had tried to do so, stating that ‘I don’t care. I’m a follower of Usamah Bin Laden. I’m an enemy of your country and I don’t care’.⁶⁵⁰

However, it is mostly uncommon that terrorists admit to their actions. Therefore, some legal systems may issue legislation that may motivate terrorists to cooperate with the respective authorities. This sense of cooperation may even result in exempting or mitigating the proposed punishment for the given suspects. For example, the Law of 2017, authorises the Public Prosecutor to cease criminal proceedings against suspects who inform the relevant authorities, either before, or after, the occurrence of a terrorist act, and cooperate with them to arrest other terrorists who were involved in the incident or direct the authorities to other terrorists who are planning to carry out another terrorist attack. Further, the same law also states that the court also has the right to mitigate the proposed punishment stated in the law, albeit it no more than half of the whole duration of the punishment,⁶⁵¹ for those terrorists who provide the respective authorities with important information that cannot be obtained through any other means.⁶⁵²

The testimony of cooperating witnesses has proven to be very useful in the context of the investigation of terrorism cases. Therefore, this requires a witness protection programme to maintain the safety of witnesses and their families, and that such a programme should have a legal basis. The Law of 2017 asserts the importance in providing protection for these people and also for judges, prosecutors, and lawyers, in cases where there are reasons to believe that

⁶⁴⁹ In *Terrorism of U.S: Embassies in East Africa*, 552 F. 3rd 93 (2nd Cir: 2008), West Publishing Company.

⁶⁵⁰ UNODC, *Digest of Terrorist Cases*, 2010, 224.

⁶⁵¹ Saudi Criminal Procedures Law, Article 11.

⁶⁵² Saudi Criminal Procedures Law, Article 56.

their safety is in danger. The proposed Regulations of this law will determine the mechanism of this programme once they are issued.⁶⁵³

Period of Detention

The legal rules for a period of detention are wide-ranging. For example, in the aftermath of the events of September 11th, new legislation issued in the UK authorized the arrest and detention of foreign nationals for an extended period of time, without being formally charged, on the basis of a testimony of the UK minister, stating that the given person is an international terrorist.⁶⁵⁴ For instance, in the case of A and others, the detainees remained in administrative detention for three years and six months.⁶⁵⁵ The European Court concluded that the detainees were in a position that prevented them to appeal the decision of detention and that their right to appeal against the detention was violated. However, this is different from the UK law of counter-terrorism. The period of detention has been increased from 7 to 14 days. The UK Government, in particular when the risk of terrorism increased, tried to extend this duration to 90 days. However, the House of Commons rejected the British government's proposal and decided to fix the duration at 28 days, under the law of 2006.⁶⁵⁶

In Canada, the criminal legal system is also different. Detention without accusation last for only 3 days. This is followed by referring the case to the relevant judge if the given detainee is required to stay in detention for a longer time. The judge, however, can release the detainee if the police officer fails to provide a reasonable basis for detention. If the judge finds that there is a reasonable basis for such a request, he can order the detention of the suspect for a period

⁶⁵³ Saudi Criminal Procedures Law, Article 85.

⁶⁵⁴ Mitchell A. 'A 28 day Time Limit on Immigration Detention would Save Money and Make the System More Just', the Home of Conservatism, (Jun. 5. 2018), at [<https://www.conservativehome.com/platform/2018/06/andrew-mitchell-a-28-day-time-limit-on-immigration-detention-would-save-money-and-make-the-system-more-just.html>].

⁶⁵⁵ The Case of A. and Others v. the United Kingdom, The European Court of Human Rights, Application no. 3455/05, (19 February 2009).

⁶⁵⁶ Terrorism Detention Powers, Presented to Parliament by the Secretary of State for the Home Department by Command of Her Majesty September 2006, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/272333/6906.pdf.

not exceeding 12 months.⁶⁵⁷ Further, there are some terrorist cases that are covered by Canadian Immigration Law. For example, and in relation to the case of *Ahani v. Canada*, after he had been granted refugee status, the Solicitor-General of Canada and the Minister of Employment & Immigration, received information which showed that Mr Ahani had been trained by security agencies in his home country of Iran to be an assassin. On this basis, the Minister of Employment & Immigration filed a security certificate stating that there are reasonable grounds to believe that Ahani might conduct terrorist acts. Based on this testimony, Ahani was detained for nine years without any charges levelled against him for any crime he had committed.⁶⁵⁸

The legal system of detention in the Kingdom of Saudi Arabia is different to the aforementioned ones. On the basis of the Law of 2017, the Public Prosecutor's Office is in charge of investigating terrorist crimes⁶⁵⁹ and making decisions on the detention of anyone suspected of committing a terrorist crime for one or more subsequent periods of time, which does not exceed each of those periods 30 days and 12 months as a whole. In cases requiring a longer detention time, a request should be sent to a judge who can authorise it.⁶⁶⁰

As previously discussed, the crimes of terrorism require special investigative procedures that may take a long time. As noted, according to Saudi terrorism law, the period of detention of suspects might extend to 12 months without a need for court authorization. This researcher believes that this period is too long and should be a maximum of one or two months and that a request should be made to the court for a longer time. The judicial oversight over the period of detention is an important matter when it comes to terrorist crimes to ensure that there

⁶⁵⁷ Counter-Terrorism Legislation and Practice: A Survey of Selected Countries, Secretary of State for Foreign and Commonwealth Affairs, (October 2005), p.6.

⁶⁵⁸ Source: Human Rights Committee, *Ahani v. Canada*, Communication No. 1051/2002 (CCPR/C/80/D/1051/2002), (15 June 2004).

⁶⁵⁹ Law of Combating Terrorist Crimes and its Financing (2017), Article 18.

⁶⁶⁰ Law of Combating Terrorist Crimes and its Financing (2017), Article 19.

are reasonable reasons for detention. The court should obtain maximum information about the case so a judge can make a decision in this regard. Further, the suspect should have the opportunity to attend the court session so the court can ensure the health and safety of the suspect and that his rights are not violated. This requires the judge to have extensive experience to make such decisions due to the exceptional and dangerous nature of terrorist crimes. In the UK for example, a compulsory hearing session must be held for all crimes of terrorism. Such a session provides the opportunity for a quick decision and submission of an immediate appeal in relation to the disputed legal issues and settling all related issues regarding the detention of suspects.⁶⁶¹

⁶⁶¹ UNODC, *Digest of Terrorist Cases*, 2010, 214.

CONCLUSIONS

Every so often in history, there is an event that alters the course of history by bringing new issues to the fore and changing the outlook of society towards the subject in focus. The attacks of 11th September, 2001, constituted a pivotal moment on several fronts, which raised to prominence in the minds of the public the association of the religion of Islam and terrorism, which had adverse effects on both Muslims and non-Muslims. More importantly, the attacks were a precursor that heralded a change in the method adopted for the fight against terrorism. This was followed by UNSC Resolution 1373, which charted a radically different course of action for the war against terrorism on the international front. The attempts of individual states to comply with the new Resolution involved great complexity. As a result, this thesis used the case study of the Kingdom of Saudi Arabia to highlight the practical difficulties that emerged in the course of such implementation, which required nations to develop local anti-terrorism laws within the context of the aforementioned resolution.

This thesis sought to explore and analyse the potential tension between international law and obligations, as stipulated in UNSC Resolution 1373, and Saudi Arabian national law, as laid down in the Law of Combating Terrorist Crimes and its Financing (2017). It used the policy-oriented (New Haven) approach to make this analysis and meet the goals set out in the introduction of this thesis. The latter founded several outcomes resulting from the relationship between international law and national law in the view of the policy-orientation and in the context of the war on terrorism in the Kingdom.

It drew on the policy-oriented approach particularly developed by Dame Rosalyn Higgins, in the conceptualization of the means for implementation of UNSC Resolution 1373 by the Kingdom of Saudi Arabia. It is evident that there is a clear disparity in culture, since the Saudi Arabian law is anchored strongly and inextricably in Islamic Shariah Law. This is one

of the perceived facilitators of terrorism in the world and could be in conflict with the international law on multiple levels. However, it appears that the Saudi Arabian visualization of its own national legal system does take a policy-oriented approach to fighting terror, in that its legislation is led by clear objectives. Nevertheless, as has been pointed out there is a tension between the objectives of Islamic law and those of a liberal world order, as implied by the policy-oriented approach to international law. Thus, while Saudi Arabia has prioritized the objective of countering terrorism as its ultimate goal it has difficulties in accommodating its national legal system within its international obligation due to Shariah Law. However, taking Higgins' approach, the kingdom has managed to make laws that take account of its socio-political circumstances (extra-legal considerations). For example, Saudi Arabia has chosen to undertake rehabilitation of radicalized terrorists as a respite for the due to the perceived misinterpretation of Shariah Law by extremists. As a result, the relationship between the objectives of the liberal world order and Islamic values need not always be at odds.

Another example of its accommodation of extra-legal considerations can be seen in the solution found by Higgins in relation to the tension between states calling for an end to the death penalty and accusing the Islamic countries that apply this punishment of the crime of apostasy. She stated that state practices and social factors should be more considered. She argued that there are a number of international law scholars who use the rulings of apostasy under Shariah Law, to say that international human rights laws cannot be applicable to countries that have strict punishments for apostasy. They added that the differences in applying the international laws of human rights between the West and the Middle East emphasises the fact that these human rights laws are weak. Higgins, however, opined that the effectiveness of international law does not depend on analysing the practices and the consequences of breaching international law, but on the general practices of states who are members to a certain treaty. Higgins found that most states who apply the punishment of apostasy are members to a number

of international human rights conventions and that these countries have various religious and cultural backgrounds and yet are members to these conventions. This means that the laws of human rights are still applicable in these countries, though they have the right of reservation and withdrawals.

Another example of the possible elisions between policy orientation and the Islamic Shariah, which is the main source of the Saudi laws, is the philosophy of Islamic scholar Al-Ghazali. The latter adopted the organised approach, which provides a way to look at issues from a realistic point of view. This is another way to understand the Islamic system in the current context of the society, taking into consideration the continuous and emerging social circumstances and changes. This view of Al-Ghazali is reflected in the Saudi government's approach towards countering terrorism and reducing any tension between this effort on the national level with the requirements of UNSC Resolution 1373.

This thesis also concluded that the Kingdom was already affected by terrorism even before 9/11. The Kingdom was in the middle of important regional events, including the Soviet invasion of Afghanistan and the conflict in Chechnya, where in a large number of Saudi nationals were involved, resulting in several international, regional and local repercussions within the Kingdom. The return of these militants to Saudi Arabia contributed to the establishment of Al-Qa'idah in the country, which in turn carried out many terrorist attacks within the Kingdom and beyond. The research found that the motivation of most of the fighters who went to Afghanistan for Jihad was their fervent desire to assist their Muslims brothers in other countries, believing that should they die in this fight, that this would be a religious matter, and not a political one.

The thesis also found that the idea of terrorism is not inherent to the Kingdom, whether be it Sunni or Shiite. The Saudi Shiites adopted terrorist thoughts first as a result of the Iranian

revolution in 1979. On the other hand, the Saudi Sunnis also adopted terrorist thoughts having joined Al-Qa'idah in Afghanistan, and because of their participation in terrorist activities, both at local and international levels, such as the events of September 11th where 15 of the 19 perpetrators were Saudi nationals. 9/11 in particular had severe consequences for the Kingdom.

However, the Kingdom started to adopt a comprehensive legal strategy in the fight against terrorism, responding, in particular, to the requirements of UNSC Resolution 1373. As this thesis has shown, the implementation of this legal strategy was a reaction to terrorist acts, whether local, regional, or international.

This strategy, to a large extent, succeeded in the fight against terrorism, as it made a considerable contribution in eliminating Al-Qa'idah in the Kingdom. However, there were some initial difficulties in conforming to Resolution 1373, as Saudi law-makers did not deal with terrorism as a separate crime, rather they categorised the act of terrorism as a crime of *Hirābah* according to Islamic Shariah Law, with a possible sentence of the death penalty. In addition, Saudi law-makers considered terrorism financing as a part of money laundering, which was also covered by Shariah Law.

This thesis has presented, analysed, and investigated the development of the legal and policy systems in the Kingdom of Saudi Arabia, with a particular focus on how the policies implemented in Saudi have started to combat terrorism. This is a new study which has looked at both the legal and policy systems in one line of argument. The thesis found that the Saudi legal strategy of counter-terrorism made attempts to harmonise with Resolution 1373 gradually, as it finally dealt with acts of terrorism as terrorism crimes as such, including terrorism financing. This was seen in the Law of 2013, which was in conformity with Shariah Law. This law also created a special court to deal with the crimes of terrorism, appointing qualified judges to this court. This was a strong sign shown by Saudi law-makers to ensure

conformity between the Saudi laws of counter-terrorism and the Resolution. The next important development in Saudi Arabia's fight against terrorism, that this thesis explored, was the replacement of the Law of 2013 with the Law of 2017, officially known as The Law of Combating Terrorist Crimes and its Financing. The latter made considerable progress both in the content of the legislations in relation to counter-terrorism; and in the creation of new specialised bodies to combat terrorism. For example, a special body, called the Public Prosecution (previously known as the Body of Investigation), is now under the oversight of the judiciary, instead of the executive, as it used to be in the past.

In view of the Saudi Arabian case study, it is evident that UNSC Resolution 1373 is positioned to yield success in the fight against terrorism. The recently enacted Law of Combating Terrorist Crimes and its Financing (2017), formed the backbone for the implementation of the aforementioned UNSC Resolution. It formalized cooperation and provided the framework for further action in the war against terror. This is evident because the integration of the law into the national legal framework has manifested verifiable results in the war against terror. For instance, the thwarted terrorism attacks intended for Europe were only detected and acted upon following collaborative efforts between the Kingdom and other participants. Saudi Arabia's acceptance of taking a position against terrorism financing is also a very important factor in preventing the flow of funds to terrorists, given that the Kingdom had been a hub for money laundering for the same purpose. The potential impact that this may have had is unfathomable. It is vital to note that the Law of 2017 is fairly new, and the full magnitude of its ramifications is yet to be realized. Therefore, there are grounds to suggest that it may further streamline the war against terror. As time moves on, it may be of interest to scholars to investigate the full impact it would have had in practice. Be that as it may, it is quite successful as of now. Therefore, this thesis concludes that the willing embrace of international law makes for a better implementation and more useful outcomes. As such, this amounts to a

vote of confidence for Higgins' view of the policy-oriented approach. International legislators may want to consider taking a similar view to international laws and encourage member states to implement them, accordingly.

Further to this, the conformity of this policy with the practice of Saudi law-makers can be seen in the suggestion of Saudi law-makers to the Arab Council of Ministers of Justice regarding modifying Article 69, of the Riyadh Arab Agreement for Judicial Cooperation (1985), which reads, after the modification as follows '[i]n the event that the provisions of this Convention conflict with the provisions of any special agreement, the Convention shall be applied to the extradition of accused and convicted persons and the achievement of security and judicial cooperation in other areas'.

What the thesis found interesting is that policy-makers in the Kingdom had a strong inclination to expand intelligence cooperation with other states. For example, the American administration thanked the Kingdom for its efforts to provide them with intelligence, which helped to discover a shipment of explosives, coming from Yemen via an Emirates airplane. This shipment aimed to destroy a place of Jewish worship. In 2018, the British Prime Minister also mentioned that cooperation with the Kingdom had contributed to saving a lot of innocent lives. Further to this and what supports this policy of openness to cooperate with other states is the agreement of the Kingdom of Saudi Arabia to the policy of engagement in international and regional coalitions to combat terrorism. One of the main bases of these coalitions is the speed in the exchange of information. This reflects the desire of the Kingdom to respond to the requirements of UNSC Resolution 1373.

While analysing Resolution 1373, it was found that it did not attempt to define terrorism, and allowed states to deal with this matter, despite asking them to criminalise acts of terrorism through their respective national legislations. It further asks states to join

international conventions of counter-terrorism proposed by the international community to prevent acts of terrorism, which in turn, was under the oversight of the UN and its competent agencies and the International Atomic Energy Agency. On this basis and in consideration of the opinions of a number of international jurists, this thesis adopted the definition of terrorism as stipulated in Article 3, of UNSC Resolution 1566. These jurists also considered that Resolution 1373 adopted this definition implicitly. Based on the comparison between the definition of terrorism as stipulated in the Law of Combating Terrorist Crimes and its Financing in 2017 and the definition of Resolution 1566, it appeared that the Saudi definition of terrorism is broader and includes all crimes mentioned in this resolution and also other acts of terrorism. This thesis found that the Saudi legislature has approached a broad definition in order to be more flexible so as to encompass all developing acts of terrorism in the future. A number of international experts mentioned that this expansion is not contradictory with the provisions of UNSC Resolution 1566, as it does not explicitly, nor implicitly, prevent states from expanding it in identifying acts of terrorism.

The thesis also adopted the idea that terrorism is a harmful contemporary phenomenon that raises complex legal issues on the national level. The term ‘terrorism’ is not of legal importance as much as it is a description for terrorist activities conducted by individuals, entities or states, where the methods used in these activities or the hidden objectives behind them are illegal. This opinion is in conformity with the views of Higgins on the definition of terrorism.⁶⁶² In analysing Resolution 1373, which called upon the member states to counter terrorism and undertake several important steps at the national level, including security and financial measures, this thesis found that the Kingdom has taken these steps and built a financial strategy to counter terrorism after the events of September 11th, cooperating with the United States Department of Treasury. It made a series of changes to its legal and financial

⁶⁶² Higgins R, & Flory M, *supra* n. 90, P. 28.

systems, including the creation of the Riyadh-Based Terrorist Financing Targeting Center in 2017. The Kingdom, further, complied with the recommendations of the FATF, and the Kingdom's legal system of counter-terrorism and its financing was assessed by FATF three times. The last assessment, carried out in 2018, showed that the Kingdom's legal system is in conformity with the forty recommendations of the FATF. As a consequence, in June 2019, the FATF accepted the Kingdom of Saudi Arabia as a member state instead of being an observer. This showed the extent to which the Kingdom has been committed to the requirements of Resolution 1373.

In analysing Resolution 1373, it was found that the resolution made a brief reference to the question of human rights (in refugee cases). The Chair of the UNSC Counter-Terrorism Committee stated in 2002, that assessing the compliance of states with human rights standards when combating terrorism is beyond its competence. This might be the reason why some member states disregarded human rights concerns in their fight against terrorism. This, however, forced the SC to issue Resolution 1456, in 2003, calling upon all member states to take all necessary measures to combat terrorism, while respecting their international legal obligations, in particular human rights laws. This required the Committee to ask all states to comply to the human rights standards. Further to this step, the Committee also assigned a special rapporteur, whose mission is to promote the protection of human rights in the context of combating terrorism.

Although the Kingdom is a party to United Nations Human Rights declarations, and has made significant progress in relation to human rights, as the Special Rapporteur of the Council has confirmed, this thesis found tension, in terms of legality, between the Saudi strategy of combating terrorism and Resolution 1373 in particular, and the international law of human rights in general. This tension, as the study found, can be attributed to controversial measures taken by the Kingdom, such as the detention of a suspect for an extended period, at

times up to one year, without referring the suspect to a court. The other reason for the tension lies not in the policies of the Kingdom, but rather, in the understanding of international legal norms and their interpretations. The dependence of the legal system in the Kingdom on Shariah Law as the main source of law, in some cases, may require the Kingdom to criminalise an act that might not be so in the legal systems of other states. Such matters can be in opposition to the international law of human rights, which does not often consider religion, culture and traditions of some countries (especially Islamic nations) while formulating laws. The death penalty is a classic example in this regard, as the Kingdom carries out this sentence for a number of crimes under Shariah Law. Other countries consider such a sentence to be in violation of provisions of international human rights laws. Hence, in this regard, UNSC Resolution 1373, is at variance with the policy of the Kingdom due to cultural and religious differences. This point constitutes a challenge which the CTC should take into consideration.

Jihad, like terrorism, is a term that is mired in controversy and misunderstanding. It is of foundational importance to Islam, as its origins are traceable to the Qur'an and the sayings and established example, or Sunnah, of the Prophet Muhammad. In the purist sense, the definition of Jihad is on two levels. Greater Jihad is the struggle that a believer experiences within themselves on a spiritual level. Lesser Jihad, on the other hand, describes the armed struggle that believers undertake to defend themselves and their property. Therefore, the only aspect of Jihad that invokes violence is from a defensive perspective. However, Jihad is not explicitly defined in any of the Holy Scriptures. Therefore, its understanding in the contemporary setting is left to the interpretation of jurists, many of whom have personal interests in altering the definition. For instance, many terrorist organizations have used Jihad as the basis for launching attacks on their enemies in pursuit of power and bloodshed.

In view of the Saudi Arabian case study, it is evident that the Kingdom has made considerable progress in committing to the provisions of UNSC Resolution 1373. It is also

important to note that the Law of 2017 is distinguished from its previous attempts, though all its outcomes have not yet been fully revealed. Therefore, the law might make further progress in relation to the commitment of the Kingdom of Saudi Arabia to the implementation of Resolution 1373. This thesis, therefore, recommends future studies shed more light on the progress of the Law of 2017 to verify its effects in relation to the fight against terrorism. Notwithstanding, it can be taken into consideration at this stage that the Saudi Arabian legal system has positioned itself to be a formidable partner in ensuring the compliance of its national regulations international law.

As the thesis has established that the text of the Law of 2017 is essentially in harmony with international law (in particular Resolution 1373) in relation to the fight against terrorism, this thesis, then, has a fundamental importance in terrorism studies, as it investigated the effects of the law and the future changes that it will have on the vision of the Kingdom to combat terrorism. Therefore, future studies can draw on this thesis, which is the first of its kind, and has investigated all of the Kingdom's domestic laws, regulations, and policies on combating terrorism in one study. Future researchers will also be able to assess the performance of the Kingdom, having received membership with the FATF in 2019, in combating money laundering and terrorism financing.

Further to this, as the thesis established, the Kingdom is undergoing a qualitative leap in many areas and that a number of policies have been changed, resulting in a decrease in religious extremism. It also forced the Kingdom to keep changing laws and regulations in accordance with national and regional changes. For example, soon there will be a new law of counter-terrorism that is related to the security of the state. This may affect the Law of 2017 in one way or another. As this law defined terrorism using a wide approach, the new law may create a new definition of the crime of terrorism. Future researchers may, therefore, analyse this new law, drawing on this thesis. In addition, the future researchers may investigate the

extent of the effect of this leap and changes in the policies of the Kingdom on human-rights-related issues, in particular the challenges that this thesis has raised.

The thesis will also enable future researchers to benefit from this paper through conducting studies about the implications of integrating international law and national legal systems, on the regional level, in the aforementioned context of combating terrorism. The Saudi Arabian case study has made significant advances in the implementation of international standards of counter-terrorism, while concurrently respecting core Islamic values that define the image of the Kingdom. This work may make it easier to figure out any positive or negative issues that may arise from future legislations on counter-terrorism in the Kingdom of Saudi Arabia.

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4 August 2016

Dear Fahad,

Project Title:	Mapping a Legal Strategy for Counter-Terrorism for the Kingdom of the Saudi Arabia in the Light of United Nations Security Council Resolution 1373.
Principal Investigator:	Professor John Strawson
Researcher:	Fahad Binjummah
Reference Number:	UREC 1516 129

I am writing to confirm the outcome of your application to the University Research Ethics Committee (UREC), which was considered by UREC **on Wednesday 18 May 2016**.

The decision made by members of the Committee is **Approved**. The Committee's response is based on the protocol described in the application form and supporting documentation. Your study has received ethical approval from the date of this letter.

Should you wish to make any changes in connection with your research project, this must be reported immediately to UREC. A Notification of Amendment form should be submitted for approval, accompanied by any additional or amended documents:

<http://www.uel.ac.uk/wwwmedia/schools/graduate/documents/Notification-of-Amendment-to-Approved-Ethics-App-150115.doc>

Any adverse events that occur in connection with this research project must be reported immediately to UREC.

Approved Research Site

I am pleased to confirm that the approval of the proposed research applies to the following research site.

Research Site	Principal Investigator / Local Collaborator
Saudi Arabia	Professor John Strawson



Approved Documents

The final list of documents reviewed and approved by the Committee is as follows:

Document	Version	Date
UREC application form	3.0	3 August 2016
Participant Information Sheet	2.0	28 July 2016
Consent Form	1.0	9 May 2016
Translated Information Sheet	1.0	9 May 2016
Translated Consent Form	1.0	9 May 2016
Interview questions	1.0	9 May 2016

Approval is given on the understanding that the [UEL Code of Practice in Research](#) is adhered to.

The University will periodically audit a random sample of applications for ethical approval, to ensure that the research study is conducted in compliance with the consent given by the ethics Committee and to the highest standards of rigour and integrity.

Please note, it is your responsibility to retain this letter for your records.

With the Committee's best wishes for the success of this project.

Yours sincerely,

Catherine Fieulleateau
Research Integrity and Ethics Manager
University Research Ethics Committee (UREC)
Email: researchethics@uel.ac.uk