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公民权利和政治权利，包括以下问题：
司法机构的独立性、司法和法不治罪问题

法官和律师独立性问题特别报告员
达图·帕拉姆·库马拉斯瓦米先生
根据人权委员会第 2002/43 号决议提交的报告

增 编*

对沙特阿拉伯王国的访问报告
(2002 年 10 月 20 日至 27 日)

* 本报告的内容提要以所有正式语文分发。内容提要附件中所附的报告本身则以原文和阿拉伯文印发。

内容提要

本报告叙述了法官和律师独立性问题特别报告员对沙特阿拉伯王国的实况调查访问。访问于 2002 年 10 月 20 至 27 日举行，并以首都利雅得为基点。访问探讨了司法机构、诉讼程序和法律专业是否遵从享有公平审判权方面的国际标准和刑事诉讼程序的问题。特别报告员会晤了与司法有关的人员，包括政府、司法机构、检察部门和司法专业代表等各类人员。

法律体制一直是过去十年来为确保公正实行重大改革的主体。政府建立了一个独立的检察部门，最近颁布了有关刑事诉讼法和法律行业的新法律。同时，政府还批准了若干国际人权条约，并正在考虑批准《公民权利和政治权利国际公约》和《经济、社会、文化权利国际公约》。

政府和司法机构把司法机构的独立性置于高度的优先地位，而且这在沙特阿拉伯法律中得到了普遍的体现。然而，存在着某些结构上的情况，有可能潜在地有损于这种独立性。关于司法部对法官公务员地位实行的控制，特别报告员感到关注，尽管规定这样做须符合法官的独立性。特别报告员建议，赋予法官特殊的地位，以承认法官职能的独特性质。此外，政府应确保任命女性法官，以使司法机构更具代表性。

建立独立的检察部门是保证检控程序不偏不倚的一个重要步骤。然而，仍由负责执法的内务部长监督检控程序，会减损检控机构与执法机构分工的好处。特别报告员建议，检控程序应归司法部长监督。

随着政府对所有律师实行登记和颁发开业许可的程序，法律专业正在实现重大的变革。对于在法律程序中律师发挥的重要作用，也有日趋增强的意识。特别报告员鼓励政府加快登记进程，以便法律专业人员致力于建立自行管理的法律协会。此外，由于伊斯兰教教法或法律毕业生中女性占 50%，特别报告员鼓励政府采取步骤促使更多的女性从事法律业务。

最后，颁布《刑事诉讼程序法》是一个令人欢迎的步骤，有助于澄清刑事诉讼程序和被告权利的问题。司法体制的合法性在于其运作的清晰度和公开性。特别报告员尤其欢迎禁止酷刑和法律代理权受到了重视。然而，法律允许可实行长达六个月的监禁，而不必将当事个人送交法庭。对此，特别报告员感到，严重依赖供述证据的做法，恶化了长期监禁的风险。特别报告员建议，一俟被告被逮捕或

监禁，就应及时送交法庭。对于法律制度的透明度，各方也表示关注。特别报告员感到，部份原因可能是对沙特阿拉伯的法律制度缺乏了解。然而，原因也在于未能提供充分的情况，向被告、被告律师及其他所涉当事方阐明连续的法律诉讼程序。特别报告员建议，以公开或私下的方式向所涉各当事方提供更多的情况，阐明法律程序。

Annex

**REPORT OF THE SPECIAL RAPPORTEUR ON THE INDEPENDENCE
OF JUDGES AND LAWYERS, DATO' PARAM CUMARASWAMY,
SUBMITTED IN ACCORDANCE WITH COMMISSION ON HUMAN
RIGHTS RESOLUTION 2002/43: REPORT ON THE MISSION TO THE
KINGDOM OF SAUDI ARABIA
(20-27 October 2002)**

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Introduction

1. The present report concerns a fact-finding mission to the Kingdom of Saudi Arabia from 20 to 27 October 2002 by the Special Rapporteur on the independence of judges and lawyers, pursuant to the mandate created by Commission on Human Rights resolution 1994/41 of 4 March 1994, as renewed by resolution 2000/42 of 20 April 2000.
2. The Special Rapporteur had received, on several occasions, information of a general nature expressing concerns about the operation of the judicial system in Saudi Arabia. The information related to allegedly unfair trials, access to lawyers and an apparent lack of transparency in the judicial process. The Special Rapporteur was also of the opinion that a mission to Saudi Arabia was an important opportunity to look into the operation of a legal system based on Islamic law. As a result of this, the Special Rapporteur requested permission to conduct a mission to Saudi Arabia, which was accepted by the Government.
3. The mission was based in Riyadh, where the Special Rapporteur met with representatives of the Government, the Consultative Council (*Majlis Al-Shoura*), the Board of Senior Religious Scholars (*Majlis Kibar Al-Uema*), the Bureau of Investigation and Prosecution (*Hay'at Al-Tahkik Wal Idia'a Al A'm*), the judiciary, and the prison service. The Special Rapporteur also met with lawyers and representatives of several bodies that undertake activities in the field of legal education. During the mission, at the Special Rapporteur's request, a visit to Al-Haer prison was scheduled. The Special Rapporteur also met with the United Nations country team and several other actors in the international community. Regrettably, the Special Rapporteur did not meet any women's groups.
4. The Special Rapporteur would like to thank the Permanent Mission of the Kingdom of Saudi Arabia to the United Nations Office at Geneva for its assistance in organizing the mission and the Government for facilitating the mission and for the open and cooperative atmosphere in which the mission took place. The Special Rapporteur would also like to thank the UNDP office in Riyadh for its provision of logistical support and for organizing the press conference at the completion of the mission.

I. GENERAL BACKGROUND

5. The Arabian peninsula was unified as a single Kingdom in 1932 under Abdul Aziz bin Abdul Rahman Al Saud (Ibn Saud), the first King of Saudi Arabia. It has a population of approximately 22 million persons, a substantial number of those being foreign nationals.
6. A central tenet of the formation of the new State was adherence to Islam and its guidance in all aspects of life in Saudi Arabia. This stemmed in part from an agreement made between the Saud family and Imam Muhammad bin Abdul Wahhab in 1774, to bring what they regarded as a pure form of Islam to the Arabian peninsula. The King of Saudi Arabia is also custodian of the two Holy Mosques, the most holy sites in Islam.
7. In 1992, the Basic Law was promulgated setting out the basic structures and principles of Government. It provides that the Kingdom of Saudi Arabia is a sovereign Arab Islamic State with the Koran and the *sunna* (traditions) of the Prophet Muhammad as its Constitution. The

system of Government is monarchical and article 8 of the Basic Law states that it is established on the foundation of justice, *shoura* (consultation), and equality in compliance with the Shariah (Islamic Law).

8. This law also sets out some basic rights and duties requiring the State to protect human rights in accordance with the Shariah. In the field of the administration of justice, the Basic Law provides that no one shall be detained or imprisoned except under the provisions of the law and restricts punishment to the actual offender for crimes that were established judicially or legally prior to the commission of the act that constituted the offence. Both citizens and foreign residents have an equal right to litigation.

9. Article 44 of the Basic Law provides that the powers of the State comprise the judicial power, the executive power and the organizational power and places an obligation on them to cooperate in performing their duties according to this law and other regulations. The King is the ultimate source of all these powers. The King is responsible for ruling the country in accordance with the rulings of Islam, for supervising the application of the Shariah, the regulations and the general policy of the State. The King, who is also Prime Minister, is assisted in his duties by a Council of Ministers, the members of which can be appointed and removed from their positions by royal order.

10. The organizational power is responsible for the drawing up of regulations and by-laws to safeguard public interests or eliminate corruption in the affairs of State. It is required to exercise its powers in compliance with the Basic Law and the laws governing the operations of the Council of Ministers and the Consultative Council.

11. In accordance with article 15 of the Consultative Council Establishment Act, the Council is responsible for issuing opinions on the general policy of the State. It is also empowered to, *inter alia*, study international laws, charters, treaties and agreements and to make appropriate suggestions regarding them and interpret laws. It also has the power to initiate the drafting of legislation. Members of the Consultative Council are appointed by the King.

12. Saudi Arabia has ratified the Convention on the Rights of the Child, the International Convention for the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Government indicated to the Special Rapporteur that they were considering the ratification of the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights.

II. LEGAL SOURCES

13. In the Shariah there are four sources (*usul al-fiqh*) of legal norms. Firstly, the Koran, which is seen by Muslims as the divine word of God as revealed to the Prophet Muhammad, and therefore unchangeable. Secondly, the *sunna* of the Prophet Muhammad, which are records of the Prophet's actions during his lifetime. The Prophet's actions in applying Koranic verse to situations of everyday life in the early Islamic community are seen as an important supplement to the Koran in situations where the Koranic verses are unclear or lack specificity. There is

substantial debate over the validity of some of the *hadiths* (individual traditions) contained in the *sunna* of the Prophet Muhammad and there is a significant amount of work undertaken to authenticate each *hadith* and its chain of transmission by scholars. The third source of Islamic jurisprudence is *ijma* (consensus), which is the unanimous opinion of the community on a matter. It is used in situations where the Koran or the *sunna* do not provide an answer to a specific question. The fourth source of law is *qiyas* (analogy). *Qiyas* involves determining the purpose of a legal prescription contained in the Koran or the *sunna*, and applying it to other similar situations not otherwise provided for. *Qiyas* is achieved through the process of *ijtihad*.

14. *Ijtihad* is the process by which law is derived from the Islamic legal sources. Shariah operates on the principle that while all law is contained in the sources, many of the rules have not been precisely stated and therefore must be derived or discovered through human endeavour. It is the judge's role to perform *ijtihad* in the Islamic legal system.

15. In Saudi Arabia, an interpretation of the *Hanbali* school of the *Sunni* Islamic tradition is mainly followed, which is often referred to as Wahabbism after its originator. This interpretation places emphasis on reliance on the Koran and the *sunna* as the main sources of Shariah, with less reliance on *ijma* and *qiyas* as sources of law. The Government asserts that judges are not restricted to the opinion of any specific school in the exercise of their adjudicative function but must issue their rulings based upon the Koran and the *sunna*.

16. There is no doctrine of precedent in Saudi Arabia, and therefore each judge is able to decide a case without being bound by how other judges have decided similar cases on previous occasions. However, article 14 of the Law of the Judiciary (*Nidham Al-Kadha'a*) provides that where one panel of the Appellate Court deems it necessary to depart from an interpretation adopted previously by one of the panels of the Appellate Court, the case must be referred to the General Panel of the Appellate Court, which consists of all the judges of the court. The General Panel must give authority for the departure by a two-thirds majority of its members. If the panel does not so render its decision the matter is referred to the Supreme Judicial Council (SJC). The Special Rapporteur has been informed that this review process has been undermined by the existence of two separate appellate courts, in Riyadh and Mecca, and the absence of any systematic publishing of judgements. These processes also result in delays.

17. A similar provision is contained in article 40 of the Rules of Pleadings of the Board of Grievances, which requires a court at the appellate level to refer a case to the general assembly of the Board, which consists of all the judges of the appellate level court and three judges of the first instance court, to consider the abandoning of a precedent or a principle. The Special Rapporteur has been informed that the first instance courts in the Board of Grievances have been reluctant to follow any form of the doctrine of precedent and the failure to classify and publish the judgements of the Board annually in accordance with article 47 of the Law on the Board of Grievances.

18. Judgements of the courts have not been systematically published, although the Special Rapporteur was informed that for short periods of time in the past, selected judgements of the specific courts have been issued. The Special Rapporteur was also informed that recently the Council of Ministers had issued a resolution requiring the publishing of selected judgements by the Shariah courts, after the removal of the names of the parties, and the Board of Grievances.

19. Whilst the primary source of law in Saudi Arabia is the Shariah, many other laws have been issued by royal order or decree or ministerial decree. These laws are commonly referred to as regulations or other similar legal terminology, with the term law being generally used only in the context of divine law. Man-made law is subordinate to the Shariah. In the last 15 years the Government has issued several fundamental laws governing the operation of the Government and the legal system.

III. THE COURT SYSTEM

20. The court system in Saudi Arabia consists of the Shariah courts, the Board of Grievances and the system for the settlement of labour disputes.

21. The Shariah court system consists of the summary and general courts, which are the courts of first instance, the Appellate Court and the SJC. The General Court is a court of general jurisdiction in which cases are decided by one judge, except in cases where the sentence may be death, stoning, amputation or *qisas* (retaliation or equalization of harm) not involving death, where the case is heard by a panel of three judges. The decision in the case is on the basis of a majority, with the opinion of the dissenting judge included in the final judgement. The Appellate Court, reviews the judgements of the lower court on the application of one of the parties, or automatically with respect to cases involving sentences of death, amputation, stoning, or *qisas* not involving death. If the court disagrees with the decision of the lower court, it is sent back to the lower court for reconsideration. If the lower court judge agrees with the opinion of the Appellate Court, he rescinds the judgement and rehears the case. If he disagrees he must inform the Appellate Court, which can then agree with the judge or set aside the decision and refer the case back to the lower court for consideration by a new judge.

22. The General Panel of the Appellate Court is responsible for the organization, formation and jurisdiction of the panels of the Appellate Court and for authorizing deviations from the legal interpretations adopted by the court. The decisions of the General Panel only become final when approved by the Minister of Justice, and if he disagrees with the decision he shall request that the General Panel consider it further. If the General Panel still does not come to a decision acceptable to the Minister of Justice, the matter is referred to the SJC for final determination.

23. The SJC is the highest body in the judiciary. It has several duties but in terms of the appellate process it is responsible for the final review of cases involving the sentences of death, amputation or stoning or *qisas* not involving death. Review of these cases follows the same procedure as at the appellate level with the case being sent back to the court of first instance for review in line with the opinion of the SJC. Cases involving imposition of death, amputation or stoning sentences are not considered complete until the SJC has reviewed the decision of the first instance court. The SJC also prepares general statements of Shariah principles on the request of the Minister of Justice and provide opinions on other issues as requested by the King or the Minister of Justice.

24. The Board of Grievances was originally established as an administrative court, to hear matters involving the State. However, its jurisdiction has been progressively expanded, to include the hearing of commercial cases, and criminal cases involving bribery, misappropriation, mishandling of funds or falsification. The BOG has two tiers, first instance and appellate.

25. The Labour Commissions for the Settlement of Disputes hear cases relating to labour disputes, workplace injuries and disputes relating to the termination of services in the public sector.

IV. THE JUDICIARY

26. The Basic Law provides that the judicial authority is independent and that in the discharge of judicial duties the judges bow to no authority other than that of the Shariah. Article 1 of the Law of the Judiciary also provides that no one can interfere with the judiciary.

27. The Government emphasized the importance that the independence of the judiciary is given in the Shariah. Also, of the judges we met, none cited an occasion where an attempt had been made to interfere with a decision of the court. Emphasis was also placed upon the belief that judges are performing an important religious duty, and are directly accountable to God when adjudicating cases, and therefore have a duty to decide cases solely in accordance with the Shariah.

28. According to article 53 of the Law on the Judiciary, judges are appointed by royal order based upon a decision of the SJC. To become a judge you must be: a Saudi national, of good character and conduct, meet the requirements to be a judge outlined in the Shariah, and hold a degree in Shariah from a college in Saudi Arabia, or an equivalent certificate. In the latter case, the individual must also pass a special examination prepared by the Ministry of Justice. Only males are permitted to become judges. Judges are appointed for a one-year probationary period, following which they are appointed for life if their competence has been proven. There is a compulsory retirement age of 70.

29. The Special Rapporteur was informed by a member of the Board of Senior Religious Scholars (*Majlis Kibar Al-Uema*) that in Islamic jurisprudence there is no definite opinion that states that women cannot become judges. There are several schools of thought in Islam, some of which permit women to be judges in matters concerning women. The differences occur because Islamic jurisprudence is very wide and takes into consideration the circumstances in which people are living. The *Hanbali* school, which is followed in Saudi Arabia, does not permit women judges based upon an example from the time of the Prophet Muhammad, where a woman who was considered to be very wise and to possess all the qualifications to become a judge was not permitted to do so. It was also believed that women were unlike men physically, emotionally and in thought and that only a small number of women had shown the intellectual maturity to become a judge. Further, that although recently more women are attaining the high level of intellectual maturity required, society was not ready to accept the change. The Special Rapporteur was informed that a decision to change practice on this matter could only be made by the King, as he was capable of seeing the whole picture and any potential damages that could occur from this event.

30. The work of judges, in terms of their efficiency and the performance of official duties, is evaluated by the Department of Judicial Inspection at the Ministry of Justice. The Department consists of judges selected from among the Appellate Court and the courts of first instance. The inspection is carried out one to two times a year by a judge of higher rank than the judge being evaluated. The judge is provided with copies of the observations made upon his work and has

the right to appeal a proficiency rating of below average to the SJC. If a judge receives a below average rating in three consecutive proficiency reports he is compulsorily retired on the basis of a decision by the SJC.

31. Judges are promoted in accordance with seniority in service by the SJC. In the case of equal periods of service, the decision will be based upon proficiency reports. Article 55 states that judges can only be transferred or assigned to another position within the judiciary by a decision of the SJC. Judges are entitled to the rights and guarantees contained in the Civil Service Law and are subject to its duties except so far as inconsistent with judicial office.

32. The Minister of Justice has administrative and financial responsibility for the courts and other judicial panels.

33. Chapter V of the Law on the Judiciary sets out the disciplinary process for judges. The chapter provides that the Minister of Justice, without prejudice to the independence and impartiality of the judiciary, has the right to supervise all courts and judges. The disciplinary process then takes place in two steps. Firstly, at the level of the committee of the appellate level and thereafter by the SJC.

34. Judicial training is undertaken by the Higher Institute of the Judiciary at the Iman Muhammad bin Saud Islamic University. Since 2000, a graduate who desires to become a judge has been required to complete a course conducted by the Institute. There is no requirement to take a programme of continuing legal education. However, the institute organizes voluntary training programmes for judges intermittently throughout the year.

V. LEGAL PROFESSION

35. The legal profession in Saudi Arabia is in a relatively embryonic phase. Although the Shariah and the law have been studied for many years, most law graduates did not go into legal practice as there was no culture of legal representation in the court system. The traditional practice was to have someone represent a party in court if he or she desired, for example a friend or a family member, who had potentially more knowledge of the Shariah or was trusted to represent one's interests, but not necessarily qualified professionally.

36. The Special Rapporteur was informed on many occasions that lawyers in the past were not considered to be a necessary part of the administration of justice. This perception was slowly changing. The Special Rapporteur was informed that one aspect of this was that judges in the Islamic system were considered to have a much more active role to play in the case than in other legal systems. In circumstances where an individual was not represented by a lawyer, the judge would ensure the proceedings were fair to the accused. Judges also play a role in discussing the case with the prosecutor and questioning the witnesses. It was also felt by judges that a direct interaction between themselves and the accused was the best way of achieving the most appropriate resolution of the case. Reference was also made to the tradition of an individual being able to directly approach the King to resolve a problem.

37. Judges and other interlocutors also considered lawyers as a hindrance in reaching the truth in the determination of the case. It was believed that lawyers often focused on side issues that were not directly relevant to resolution of the case or engaged in tactics that detracted from the achievement of justice.

38. In November 2001, the Code of Law Practice (*Nidham Al-Muhamat*) was issued. Article 1 of the Code defines law practice as the representation of third parties before the Shariah courts, the Board of Grievances and all other committees established to consider cases, and the provision of consultancy services based on the principles of Shariah and the rule of law. The Code requires the Ministry of Justice to prepare a list of practicing and non-practicing lawyers. The Ministry has begun preparation. As of 27 October 2002, 81 licences were issued to practise law. The Code also provides for the requirements for qualification to practise.

39. The Code does not provide for the establishment of an independent bar association or legal association. The Special Rapporteur was informed that a small committee of lawyers existed in the Chamber of Commerce which met intermittently to discuss matters relating to the practice of law and to consider making recommendations for reform to the Ministry of Justice.

40. The Special Rapporteur also addressed the issue of the ability of a woman to practise as a lawyer. The Special Rapporteur was informed by several lawyers that there were no women lawyers, except for those who practise as consultants and who are not allowed to appear before the courts. However, the Special Rapporteur was informed by several judges that there was no restriction on a woman becoming a lawyer and that many women lawyers had appeared before them in the courts. One judge referred to the fact that a lawyer was just someone who defends or represents someone else. The Code on the Law Practice does not explicitly refer to a gender requirement to become a lawyer. The Special Rapporteur was also informed that non-Muslim lawyers could appear before the courts when they had the same religion as their client.

41. The Special Rapporteur was not informed about any programme of legal aid or office of public defenders.

VI. THE BUREAU OF INVESTIGATION AND PROSECUTION

42. The law creating the Bureau of Investigation and Prosecution (BIP) was issued in 1989. The Special Rapporteur was informed that BIP was established in 1995; it began prosecution functions in 1997 and investigation functions in approximately May 2001.

43. BIP plays a significant role throughout the criminal process. Firstly, it is responsible for authorizing the commencement of, or the taking control of (if commenced by another body), an investigation. Secondly, it carries out further investigations if required and decides on detention and the initiation of prosecution. Thirdly, it supervises the enforcement of the judgements of the court. Fourthly, it is responsible for ensuring that all detained or imprisoned persons are being treated in accordance with the law. This latter task is referred to as BIP's control function.

44. The Special Rapporteur was informed that BIP is completely independent of the Ministry of the Interior for its investigation and prosecution decisions. Further, members of BIP are not allowed to undertake any other work that would compromise BIP's independence.

45. The Special Rapporteur noted a common perception amongst various interlocutors that prosecutors, because of the provisions concerning their independence and similar qualification requirements as a judge, were part of the judiciary or the same as judges. One interlocutor described them as mobile judges.

VII. LEGAL PROCEDURE

46. Prior to the mission the Special Rapporteur had received many expressions of concern about the criminal justice system in Saudi Arabia. These related to apparently unfair trials due to lack of access to a lawyer, lengthy detentions, use of confessional evidence, secret trials, or concerns related to the lack of transparency of the legal procedure. As a result, the Special Rapporteur spent a significant portion of time during the mission discussing these issues.

47. In November 2001, the Law of Criminal Procedure (the "Law") was issued, and in accordance with article 225, it entered into force in May 2002, 180 days after its publication. The Special Rapporteur was particularly concerned to note that, amongst various individuals he met during the mission, there was not a high degree of awareness of the precise date of entry into force of such an important piece of legislation.

48. Article 1 sets out two basic provisions that regulate the operation of the Law. Firstly, the courts are obliged to apply the Shariah and other laws promulgated by the State that do not contradict with the Shariah and to comply with the procedure set forth in the Law. Secondly, that the provisions of the Law shall apply to criminal cases that have not been decided and to proceedings that have not been completed prior to the implementation thereof.

49. The Law is quite extensive and it is out of the scope of this report to examine it in detail. Therefore, just some themes will be addressed.

A. Pre-trial detention

50. The search for, and the arrest of, offenders and the collection of evidence for the purposes of investigation and indictment are carried out by criminal investigation officers under the supervision of BIP. Members of BIP, the police, security forces, heads of counties and chiefs of districts and heads of centres of the Bureau for the Promotion of Virtue and the Prevention of Vice can be criminal investigation officers. The Special Rapporteur was informed that BIP was progressively taking responsibility for investigations.

51. Where a person is caught committing a crime or shortly thereafter, the criminal investigation officer can place the person under arrest and detain them for 24 hours. If they fail to establish their innocence, they must be transferred to an investigator who is obliged to interrogate them within 24 hours and order their continuing detention or release. In all other circumstances an arrest warrant must be issued by the competent authority, which the Special Rapporteur was informed was BIP. The Special Rapporteur was also informed that usually a suspect is first summoned to appear before BIP for questioning, before an order for arrest is issued.

52. The investigator is responsible for the conduct of the investigation, including deciding whether there are grounds for continuing, personally conducting interrogations, deciding on the admissibility of claims of private rights of action, appointing experts, crime scene management and investigation, search and seizure and the taking of witness statements. Further, the permission of the investigator is required if a public authority officer wishes to communicate with the accused. Investigators can seek the direct assistance of the security forces wherever necessary.

53. Article 119 states, "In all cases, the Investigator shall order that the accused may not communicate with any other prisoner or detainee, and that he not be visited by anyone for a period not exceeding 60 days if the interest of the investigation so requires, without prejudice to the right of the accused to communicate with his representative or attorney."

54. Subsequent to this initial period, the detention period can be extended if it appears that there is sufficient evidence of the commission of a major crime or if the interest of the investigation requires detention, to prevent the accused fleeing or affecting the proceedings of the investigation. The Special Rapporteur was informed that major crimes are those such as murder, robbery, assault, kidnapping or terrorism.

55. The investigator can authorize the extension of the detention for a period not exceeding five days from the date of arrest. Subsequent to that, the investigator can request the Chairman of BIP in the relevant province to authorize a further extension for a period or successive periods not exceeding in their aggregate 40 days from the date of arrest. If further periods are required, they must be authorized by the Director of BIP. The director can authorize a period or successive periods which shall not exceed 30 days or an aggregate of 6 months from the date of arrest of the accused. After that, the accused must be released or transferred to the court.

56. The Special Rapporteur discussed this issue with several interlocutors and was informed that, it should be necessary for the period of detention to be extended in order to facilitate the gathering of evidence for an investigation. A case could not be presented to the court until all the evidence was gathered, which was unlikely with a short period of time. It was also impossible to have a situation where the judiciary monitored the investigation, as these functions must be separate. Further, the accused has the right to challenge any aspect of their detention when the case is brought before the court by the investigator. It may be of interest to note that an inquiry was made of the Special Rapporteur, with respect to this issue, about detention procedures in Guantánamo Bay.

57. The Special Rapporteur expressed his concern about the ability of BIP to detain an individual for periods that could potentially reach six months without having to bring the individual before the court. The Special Rapporteur indicated that an accused must be brought before the court promptly in order for the court to review the continuing detention, to ensure that the accused has had access to a lawyer and to enable the accused to exercise his right to challenge the lawfulness of his continuing detention.

B. Access to a lawyer

58. Article 4 provides that any accused person has the right to seek the assistance of a lawyer or representative to defend himself during the investigation and trial stages. That right is also supported by articles 35 and 64. Article 116 allows an individual who is arrested or detained to communicate with any person of his choice, to inform him of his arrest or detention provided that the communication is under the supervision of the criminal investigation officer.

59. Article 69 provides that, in respect of a private action, the investigator may conduct the investigation in the absence of the accused representatives or lawyers whenever it is deemed necessary for determining the truth. Immediately after the necessity has finished, they shall be permitted to review the investigation.

60. Article 84 provides that an investigator may not seize any piece of paper or document that has been delivered by the accused to his representative or attorney in connection with the performance of the service entrusted to him, nor the correspondence exchanged between them in the case.

61. The Special Rapporteur was informed that the courts usually provide sufficient time for lawyers or representatives to prepare their defence.

C. Confessional evidence

62. Article 162 of the Law of Criminal Procedure provides that, if the accused confesses at any time to the offence with which he is charged, the court is required to hear his statement and examine the accused. If the court is satisfied as to the truth of the confession and sees no need for further evidence, it shall decide the case.

63. Throughout the mission substantial emphasis was placed upon the importance of confessional evidence. The confession of an accused along with witness testimony, are the two main sources of evidence in the Shariah, and the making of a confession is encouraged as a sign of repentance for transgressing a provision in the Shariah.

64. According to the Shariah, confessions must be given freely and willingly. The Special Rapporteur was informed that an accused person has the right to retract his confession at any time and after that the confession would no longer be valid. This right existed both prior and subsequent to the judgement of the court. An example was provided to the Special Rapporteur whereby, if the accused withdrew his confession just prior to the execution of a death sentence, it would not be permissible to carry out the sentence.

65. The Special Rapporteur was informed that crimes in the Shariah have strict requirements of proof. For example, an individual cannot be convicted for the crime of adultery unless the actual act of adultery was witnessed by four persons, or if the accused confessed. Due to the difficulty in obtaining four witnesses in these cases, the importance of obtaining a confession is magnified.

D. Transparency

66. Article 155 provides that court hearings are to be public but may be exceptionally closed, or partly closed if it is deemed necessary for determining the truth. Further certain classes of people can be prohibited from attending for security reasons or for the maintenance of public morality. Article 33 of the Law on the Judiciary provides that court hearings can be closed in deference to morals or the sanctity of the family, or for the maintenance of public order. The judgement of the court must be announced publicly, even if the hearing of the case was closed.

67. During the mission the Special Rapporteur visited the General Court in Riyadh. He visited several courtrooms, all of which, although small, were equipped with seating areas for public viewing. The Special Rapporteur was permitted to see several cases in progress.

68. The Special Rapporteur was informed by some interlocutors that, although cases are public, there is no public, accessible registry of cases. In their opinion the court registrar would be unlikely to release information about the hearing of a case unless the individual could show some connection to it. Further, access to each courtroom is controlled by a policeman who would be unlikely to permit entry unless some connection to the case could be shown.

69. Concern was also expressed to the Special Rapporteur by several individuals over the apparent lack of transparency of the judicial system. This resulted mainly from the lack of information about the legal processes and evidence against the accused that was being provided to the participants involved in the case, including the accused, their lawyers, families and consulates, where relevant. This was further exacerbated by a lack of publicly available information about ongoing cases, and led to a high level of mistrust by some about the judicial system's operation. This was particularly a problem for foreign nationals who were substantially ignorant of their rights and the operation of the legal system.

E. Juveniles

70. Article 13 provides that the investigation and trial of offences committed by juvenile offenders shall be conducted in accordance with the relevant law and regulations. The Special Rapporteur was informed that cases involving juveniles are heard in special juvenile courts and they are entitled to be represented by a lawyer. Individuals between the ages of 12 and 18 are not held in adult detention facilities, either pre- or post-trial, but in special juvenile homes. They are provided with education and offered activities to help them back into society. A juvenile can be visited by his parents twice a week.

71. The Special Rapporteur was informed that the punishment that can be imposed on juveniles was within the discretion of the judge concerned. They are usually sentenced to periods of several months' imprisonment, but could be given a sentence of flogging of around 20 to 40 lashes, administered in a manner not to harm, or potentially to kill, but the Special Rapporteur was informed that usually the age of the offender was taken into consideration in these situations.

F. Other issues

72. Article 172 provides that if the litigants or witnesses do not understand Arabic the court may seek the assistance of interpreters. The law does not specifically provide for access to interpreters during the pre-trial phase if the accused does not speak Arabic, but the Special Rapporteur was informed that interpreters are provided in these circumstances.

73. In cases involving *tazir* (discretionary punishment), article 129 requires a first instance court to be unanimous, if it seeks to impose a death sentence. However, in circumstances where the court is unable to reach unanimity, the Minister of Justice is required to appoint two other judges, who then decide with the three judges who heard the case, either unanimously or by majority vote, whether to impose a death sentence.

VIII. CASES

74. During the mission the Special Rapporteur examined the case of several British detainees, who had been arrested for a series of bombings that took place in 2000 and 2001. The Special Rapporteur discussed this case with the lawyers of several of the individuals, representatives of BIP and the Ministry of the Interior and met with four of the individuals - Peter Brandon, James Cottle, Alexander Mitchell and Les Walker - who were being held in the Al-Haer prison on the outskirts of Riyadh.

75. The Special Rapporteur was informed during the mission that the case is still pending on appeal before the SJC.

76. The individuals were arrested at varying times in late 2000 or 2001. The Special Rapporteur was informed that after their arrest they were taken to a detention centre where they were interrogated for periods between one to two weeks, after which they confessed. During that period they were not represented by a lawyer, nor were they permitted to contact family members or to seek consular assistance. It is during this time that they allege they were tortured. The descriptions provided to the Special Rapporteur concerning methods and instruments used were consistent. The Government stated that it had investigated the allegations of torture and there was not sufficient evidence that torture had taken place. A case has been lodged in the United Kingdom by Ron Jones, who was also detained in connection with the series of bombings but subsequently released. Mr. Jones is seeking compensation for injuries suffered during his detention which he alleges occurred as a result of torture.

77. Subsequent to their confession, the individuals were taken before a court and asked to affirm the confession. At this stage, they were not represented by lawyers and the Special Rapporteur was informed that, in several cases, access to a lawyer was expressly denied. On subsequent occasions they were also brought before a court without legal representation. The Special Rapporteur was informed that little information about the legal process was provided to the accused individuals and that none of them were aware that, when they appeared before the court, they were being tried. At least one of them, to this day, is not certain of whether he has been sentenced. A representative of the Ministry of the Interior stated that as far as he was aware, the individuals have not been sentenced.

78. The individuals have been kept in detention since their arrest. Several have spent long periods in solitary confinement.

79. The Special Rapporteur was informed that, since being given access to legal counsel, the accused have only been able to meet with their lawyers in private on one or two occasions, with other meetings being monitored. A questionnaire filled out by the accused upon the request of their legal representatives was confiscated, and has not been returned. Further, the Special Rapporteur was informed that whilst the lawyers have been permitted to see the judgement in the case, they have not been provided with a copy nor were they permitted to take notes on the judgement. Further, other information about the legal procedure, such as the date of the initial hearing before the court and other material evidence pertaining to the case has not been provided to the lawyers.

IX. CONCLUSIONS AND RECOMMENDATIONS

A. Conclusions

80. The Special Rapporteur wishes to thank the Government for the open and cooperative manner in which the mission took place. The Government facilitated all the Special Rapporteur's requests and was committed to engaging in a constructive dialogue with the Special Rapporteur.

81. The Special Rapporteur welcomes the Government's ratification of several international human rights treaties and its consideration of the ratification of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Further, the Special Rapporteur is encouraged by the Government's intention to establish a national human rights institution and its expressed interest in promoting a greater understanding of international human rights principles within Saudi Arabia. The Special Rapporteur encourages the Government to continue its engagement with the international community on human rights issues.

82. The Government has shown a high level of commitment towards the progressive development and improvement of its judicial institutions to better achieve the aim of justice. The Special Rapporteur welcomes the establishment of a separate prosecutorial service and the promulgation of new laws regarding legal practice and criminal procedure. The new Law on Criminal Procedure is an important step in clarifying the rights of the accused in the criminal process in Saudi Arabia. The Special Rapporteur is concerned to note, however, the lack of knowledge amongst many participants in the legal system as to the precise date of entry into force of this new law.

83. The Special Rapporteur is also concerned about the long implementation process for some laws, particularly the law creating the Bureau of Investigation and Prosecution. While the law was promulgated in 1989, the office was not established until 1995 and still has not assumed its full powers. The Special Rapporteur understands that time is required to ensure that the institution is capable of adequately exercising its functions, but he feels it may create a feeling of injustice when people find out that they do not have the benefits of

the new law. The Special Rapporteur is also concerned that a staggered implementation phase may result in unequal treatment of cases and the denial of the benefits of impartiality in the prosecution of some cases.

84. Government officials emphasized the importance of the independence of the judiciary and the importance that it is given in the Shariah. The independence of the judiciary is also emphasized in the Basic Law on Government. The Special Rapporteur met several judges, none of whom could cite an instance where an attempt had been made to influence their decision-making. The Special Rapporteur welcomes the Government's commitment to the independence of the judiciary.

85. The Minister of Justice is able to request the General Panel of the Appellate Court, which decides on the organization and jurisdiction of the court and on the principles of law to be applied by the court, to reconsider its decision and, if still not acceptable, refer it to the SJC for consideration. This represents a significant pressure on the independence of the panel's decision-making power as the panel. Also, in accordance with article 120 of the Law on Criminal Procedure, the Minister of Justice is required to appoint more judges in cases where a unanimous decision to impose a death sentence could not be reached. The Special Rapporteur is concerned that this appears to allow direct interference in the judicial process. If a unanimous decision cannot be reached by three judges to impose the death sentence, as is required by law, the sentence cannot be imposed.

86. Judges are required to perform duties enumerated in the civil service rules, with the proviso that it cannot be inconsistent with the nature of judicial office. The Special Rapporteur has found in many other countries that the treatment of judges by the same rules as other non-independent civil servants, leads to the development of a mentality not consistent with judicial office.

87. The Special Rapporteur, taking note of the divergent opinions in the Shariah on this issue, finds that the Government needs to do more to ensure the selection and appointment of women judges. Principle 10 of the Basic Principles on the Independence of the Judiciary requires that in the selection and appointment of judges there be no discrimination on the basis of sex. In this regard the Special Rapporteur refers the Government to the judgement of the Pakistan Federal Shariah Court in *Ansar Burney v. Fed. of Pakistan* (1983) (PLD, p. 73).

88. Consistency in judicial decisions in similar cases is an essential aspect of a legal system based upon the principle of equality. Without similar cases being treated in an equal manner, a legal system becomes arbitrary in its application of law. The development of a clear body of law and principle that is known and publicly available, such as through the publication of laws and judgements, is an essential part in this process. Although the law in Saudi Arabia provides for the development of binding interpretations, little seems to have been done to ensure that previous interpretations are followed. The Special Rapporteur welcomes the steps taken recently to ensure the systematic publication of the judgements of the courts.

89. Prosecutors play a fundamental role in the protection of human rights in any criminal justice system and are required to perform their duties fairly, consistently and expeditiously, thereby contributing to the achievement of due process. They act in the service of the criminal justice system and are called upon to perform their duties as impartially as possible. In this respect, the establishment of the Bureau of Investigation and Prosecution with legislated independence in the exercise of its prosecutorial functions is an important and welcome step.

90. The Ministry of the Interior is responsible for law enforcement, which places the police and security forces and the prosecution under its administration and control. The Minister of the Interior can also request review of matters relating to investigation and prosecution. The vesting of responsibility for law enforcement and the prosecution of crime in the same ministry undermines the prosecution's ability to perform its role impartially and it will not be seen to be doing so, even with its independent status.

91. The absence of a culture of legal representation, and the perception by many judges that the presence of a lawyer is inimical to the achievement of a truthful outcome in a given case has undermined the protective function of legal representation. Although this culture is changing slowly, more needs to be done to ensure that the accused is given access to a lawyer at all stages of the legal process.

92. In accordance with principle 9 of the Basic Principles on the Role of Lawyers, Governments must ensure that lawyers have appropriate education and training. This is to ensure that lawyers can perform the rights and duties as set out in principles 12 to 15, which is primarily to advise and protect the rights of the client and to uphold the cause of justice. Adequate representation cannot be provided by an individual who has not received the same level of education and training as a professional lawyer and who does not have the depth of knowledge obtained through regular practice of law. Nor can the disadvantage created by the absence of a lawyer for the accused be fully compensated by a judge in the exercise of his powers to ensure a fair trial.

93. The Special Rapporteur welcomes the steps taken so far to regulate the practice of law and the initial steps that have been taken by some lawyers to establish a self-governing professional association. The establishment of such an organization is essential to ensure the quality and integrity of the provision of legal services and to represent the interests of lawyers. The Special Rapporteur encourages the Government to take steps to speed up the registration process to facilitate the development of the legal profession.

94. The Special Rapporteur sees no reason why women cannot practise as lawyers. Despite the confusion over whether they currently were able to appear before the court as practising lawyers, the Special Rapporteur feels that the fact that approximately 50 per cent of graduates in the Shariah or in law are women, and that women are able to represent the interests of others before the court clearly illustrates their ability to engage in legal practice. The Special Rapporteur draws the attention of the Government to principle 10 of the Basic Principles on the Role of Lawyers.

95. **Important changes are occurring in Saudi Arabia that impact the legal system, particularly the issuance of new legislation and the ratification of international human rights treaties. It is important that judges, prosecutors and lawyers keep abreast of these changes and other developments in the law both within Saudi Arabia and in other jurisdictions. The Special Rapporteur also notes the comments made to him by several interlocutors that there is a lack of knowledge in general about international and human rights law within Saudi Arabia. In this respect, the Special Rapporteur feels that it would be useful if courses in these subjects are made a compulsory requirement for all persons who want to practise law, whether as lawyers, judges or prosecutors.**

96. **The Special Rapporteur welcomes the issuance of the Law on Criminal Procedure and particularly the inclusion of provisions prohibiting torture and other cruel, inhuman or degrading treatment, and guaranteeing the right to have access to a lawyer at all stages of the legal process. In general the Special Rapporteur is concerned that sometimes the provisions of the code favour the interests of an investigation over the rights of the accused. As was stated to the Special Rapporteur by one government interlocutor, with which he strongly agrees, it is better to have 100 accused persons go free than to jail one innocent man.**

97. **The provisions contained in the Law on Criminal Procedure allowing for periods of detention of up to six months are of great concern. International law requires that persons deprived of their liberty by arrest or detention be brought promptly before a judge or other officer authorized by law to exercise judicial power. They shall be entitled to trial within a reasonable time. The initial bringing of the detainee before the court is not for the purposes of trial, as preparations for this may take longer. The right to be brought before a court enables the accused to challenge the lawfulness of his continuing detention, and for the court to ensure that the accused's rights have been respected, including that of access to a lawyer. The accused in Saudi Arabia has the right to challenge his detention when he appears for trial, but the Special Rapporteur fails to see how this right can have any value if the accused can only exercise it after a long period of detention.**

98. **The Special Rapporteur was informed that because of their statutorily guaranteed independence it was appropriate for prosecutors to be invested with the power to extend detention. Principle 10 of the Guidelines on the Role of Prosecutors requires the office of prosecutors to be kept strictly separate from judicial functions. The determination of the rights of the accused and the legality of the exercise of prosecutorial discretion is clearly a judicial function. In any event, the Special Rapporteur cannot see how a body can be entrusted with assessing its own compliance with the law.**

99. **Experience has shown in other countries that prolonged detention, particularly where it is incommunicado, provides the conditions for the violation of a detained individual's rights. In such circumstances, even where the rights of the accused are not violated, the absence of transparency in the process leads to the perception that irregularities have occurred. In this connection, the Special Rapporteur is concerned about the power of the investigator to order that a detainee may not communicate with anyone except his lawyer for a period of up to 60 days, if the investigator believes that the**

interest of the investigation warrants it. Even with access to a lawyer, other individuals, particularly family or consular officials, are an important safeguard for the well-being and the rights of the accused.

100. Reliance on confessional evidence exacerbates the problems of prolonged detention, placing pressure on the investigator to obtain a confession from the accused. The Special Rapporteur was informed that prosecutors undergo training in criminal forensics and other sciences and that material evidence is collected in the investigation of cases, although that was somewhat contradicted by other interlocutors.

101. Access to a lawyer is a fundamental and essential safeguard of the accused's rights and the Special Rapporteur welcomes the overall importance given to this right in the Code on Criminal Procedure. The right to legal representation is the right of the individual and cannot be taken away by anyone, including the prosecutor and the judge. The Special Rapporteur did not discuss the scope of article 69 of the Code on Criminal Procedure during the mission and therefore has not sought the clarification of the Government. The Special Rapporteur would like to refer to the overriding requirements of equality and the right to be represented by a lawyer at all times which cannot be removed in the interests of the investigation.

102. The concerns relating to transparency may result in part from a lack of knowledge of the legal system. Although, in the case examined by the Special Rapporteur there was a substantial lack of transparency. The Special Rapporteur concludes that more should be done to inform both the accused, their lawyer and other directly concerned parties, such as families or consular officials, about the legal procedures in the case and to facilitate access of the public to the courts.

103. The public nature of court hearings is essential for a fair trial and for ensuring the democratic accountability of the legal system. The Special Rapporteur is concerned that the ability to close court hearings in circumstances where it is deemed necessary for determining the truth, as specified in article 155 in the Code on Criminal Procedure, is too broad in scope and undermines the transparency of the court system.

104. Article 37 of the Convention on the Rights of the Child prohibits the imposition of capital punishment upon a person under the age of 18 years and in this respect the Special Rapporteur is concerned about a judge's discretionary power to impose capital or corporal punishment on such persons. The Special Rapporteur refers to paragraph 33 of the concluding observations of the Committee on the Rights of the Child on this matter (CRC/C/15/Add.148).

105. The Special Rapporteur will not comment extensively on the case involving the five British detainees met during the mission, as it is still before the court. The Special Rapporteur finds that there have been substantial procedural irregularities in the case that must throw doubt upon the validity of the accused's confessions, which have in any event been retracted. The Special Rapporteur urges the prosecution to cooperate more fully with the legal representatives of the accused, particularly with respect to the provision of information concerning the past legal processes in the case. The Special Rapporteur would

also like to reiterate that communications between the accused and their legal representatives are private and confidential and can only be within sight, but not within hearing, of law enforcement officials. Any documentation exchanged between counsel and client is also subject to the requirement of confidentiality.

B. Recommendations

106. The Special Rapporteur recommends that OHCHR discuss with the Government the provision of technical assistance in the field of human rights. The Government was specifically interested in holding expert-level discussions on the extent that its laws and procedures are inconsistent with international human rights law and standards and the provision of expert advice and help with respect to its process of treaty ratification. In order to increase knowledge and awareness of human rights issues the Special Rapporteur encourages the offering of training on human rights law to government officials.

107. With respect to the judiciary:

(a) A separate status should be established for judges outside of the civil service rules, one which recognizes the unique characteristics of judicial office and emphasizes the importance of independence, impartiality and service to the law;

(b) Article 20 of the Law on the Judiciary should be amended. Substantive decisions of the General Panel should only be appealed through the regular appeals process;

(c) The power of the Minister of Justice to appoint extra judges under article 120 of the Law on Criminal Procedure should be abolished; and

(d) The Government should ensure the appointment of women judges.

108. With respect to the prosecution:

(a) The responsibility for the Bureau of Investigation and Prosecution should be transferred to the Ministry of Justice; and

(b) The Bureau of Investigation and Prosecution is encouraged to establish contacts with international partners, such as the International Association of Prosecutors.

109. With respect to the legal profession:

(a) The Government should consider examining ways of speeding up the registration process without compromising its integrity;

(b) All lawyers, both registered and those yet to be registered, should discuss the formation of a self-governing bar association. Issues relating to the structure of the organization, the rights and duties of its members, including disciplinary provisions, and continuing legal education should be addressed;

(c) The Government should take steps to encourage more women to practise law; and

(d) The Government should take steps to ensure the provision of legal representation to those that do not have access to it. This can be achieved, for example, through the creation of an office of public defenders, or the establishment of a referral system for lawyers who are willing to provide representation without charge, or the provision of financial resources to enable the securing of legal services.

110. With respect to legal education:

(a) Judges, prosecutors and lawyers should be required to take legal education on a continuing basis throughout their legal career in order to be able to keep abreast of the latest developments in law and procedure and developments in other jurisdictions; and

(b) Consideration should be given to including compulsory courses in international law and international human rights law in university curricula.

111. With respect to legal procedures:

(a) The law should be amended to ensure that accused persons are promptly brought before a court after their arrest or detention with any subsequent periods of detention being authorized by the court;

(b) Individuals who are in detention and who have not been brought before a court should have their detention reviewed by a court;

(c) When an accused person is arrested, he should be informed of his rights and provided with an opportunity to contact a lawyer. In the case of a foreign national, he should be informed of his right to seek consular assistance and provided with an opportunity to do so;

(d) A provision safeguarding the confidentiality of verbal and written communications between the accused and his lawyers should be included in the Code of Criminal Procedure;

(e) The Government should require the tape or video recording of all interrogations in their entirety;

(f) The Law on Criminal Procedure should be amended so that the right to be provided with an interpreter is explicitly guaranteed at all phases of the criminal process;

(g) A list of cases, and the courts that they will be heard in, should be placed on display in the entrances of court buildings and outside each court to facilitate access to interested members of the public;

(h) Derogations from the public nature of the court hearings should only be permitted in the circumstances outlined in article 14 of the International Covenant on Civil and Political Rights; and

(i) Punishments imposed on individuals under the age of 18 years should not involve capital or corporal punishment.

112. With respect to the case involving the British detainees:

(a) The lawyers must be provided access to information, files and documents within the control of the competent authorities, specifically concerning the evidence against the accused;

(b) The questionnaire filled out by the accused upon the request of their lawyers must be returned to the possession of their lawyers; and

(c) The details of the investigation into the allegations of torture should be provided to the lawyers of the accused.
