
Rocks, hard places and human rights: anti-terrorism law and policy in Arab states

LYNN WELCHMAN

1. Introduction

This chapter provides an overview of legislative developments in Arab states following the passage of Security Council Resolution 1373, focusing on definitions of ‘terrorism’ and ‘terrorist offences’. It considers the Arab Convention for the Suppression of Terrorism before proceeding to review the responses of a number of individual states. Moves at the beginning of the century towards political reform and the opening of public space for dissent and criticism are challenged by the exigencies of the ‘war on terror’. Certain practices in violation of human rights in Arab states have apparently been endorsed by the US alongside a stated policy focus on ‘democratisation’ in the region. Dissonance between law-related word and deed of the states leading the global counter-terrorism effort – particularly the United States, but also the United Kingdom – sustains the arguments of those who seek to undermine the discourse of rights and rule of law, complicates the considerable challenges posed to local and regional human rights groups, and seriously undermines the credibility of international law in the region; the efficacy of all of which in the ‘global war on terrorism’ must surely be open to question.

2. Regional context

The US overview of Patterns of Global Terrorism for 2003 confirmed that ‘[t]he Middle East continued to be the region of greatest concern in the global war on terrorism’.¹ At the same time, it is the lives and freedoms of the populations of Arab states in the region that are among the most

¹ Office of the Coordinator of Counter-Terrorism, *Patterns of Global Terrorism – 2003*, Washington, DC, 29 April 2004, p. 58, available at www.state.gov.

directly affected by the anti-terrorism laws and policies being implemented and promoted by the United States since 9/11. Uncounted thousands of non-combatants were killed by US-led forces in Iraq. Hundreds of Arabs of different nationalities were held in Guantánamo Bay (and some are still there), and Arab men have been major targets of various domestic 'counter-terrorism' arrest and detention procedures in the United States which have been roundly criticised.² In the region, thousands have been arrested in Arab states, many held for prolonged periods without trial and others sentenced after trials that failed to meet international standards of due process.

Nationals from different states in the region have been implicated in attacks attributed to or claimed by al-Qaeda and various groups associated with it, both before and after 9/11. Since 2001, the Arab region has seen major bombings and other fatal armed attacks in states such as Egypt, Jordan, Algeria, Tunisia, Saudi Arabia and Morocco, with scores of dead and injured. Previous decades also saw considerable 'domestic' political violence, with thousands of lives lost. Arab states have underlined their prolonged exposure to terrorism and promoted the ways in which they have sought to deal with it as potential models which others in the international community might do well to follow. The then Egyptian Prime Minister, Hosni Mubarak, said that 'maybe Western countries should begin to think of Egypt's own fight against terror as their new model', and Syria's President Bashar al-Asad pressed the United States to 'take advantage of Syria's successful experiences'.³ As a regional grouping, 'Arab states were among the first to reach an anti-terrorism agreement' and were 'the first to warn against the danger of terrorism and the importance of taking collective measures to combat it'.⁴ All twenty-two state members of the Arab League have signed up to the 1998 Arab Convention on the Suppression of Terrorism.

² See, e.g., Human Rights Watch, *United States: Abuses Plague September 11 Prosecutions*, (15 August 2002); and *United States: Ensure Protection for Foreign Detainee*, (1 December 2001); Neil Hicks, 'The impact of the September 11 attacks on civil rights in the United States', in Ashild Kjøk (ed.), *Terrorism and Human Rights after September 11* (Cairo Institute for Human Rights Studies, 2002), pp. 55–64.

³ Joe Stork, 'The human rights crisis in the Middle East in the aftermath of September 11', in Kjøk, *Terrorism and Human Rights*, pp. 43, 45.

⁴ Respectively, the Secretary-General of the League of Arab States 'Amr Mousa, in Kjøk, *Terrorism and Human Rights*, p. 21 and the Saudi Arabian Interior Minister quoted after the May 2003 Riyadh bombings in the *Kingdom of Saudi Arabia* (Newsletter, London Embassy), 28 July 2003.

Implicit in these statements are rebukes to states now seen to be leading the global counter-terrorism effort for their past criticisms of the Arab states; both Syria and Egypt have been heavily criticised for human rights abuses involved in precisely the approaches that they have presented as potential models of efficacy. There is also reproach for a less than vigorous engagement with the 'terrorist threat' until the attacks of 9/11. In its first report to the Counter-Terrorism Committee (CTC), Algeria opened:

Having long suffered the ravages of terrorism often in the face of indifference and occasional complaisance on the part of certain sectors of the international community, Algeria welcomes the adoption of the resolution [1373] insofar as it reflects a welcome acknowledgement by the international community of the potential threats both to national stability and to international peace and security represented by the scourge of terrorism. On 11 September, the world paid the price of underestimating the dangers posed by the terrorist threat and its potential for destruction. ... As a victim of terrorism, Algeria urges the international community to firmly commit itself to definitively abandoning erroneous and selective perceptions surrounding the phenomenon of terrorism.⁵

A particular concern voiced by Algeria, shared by other states in the region, concerns a feature of most new anti-terrorism legislation which criminalises 'supporting actions abroad which satisfy the definition of terrorism'.⁶ As the Algerian government put it, '[t]he need for rigorous counter-terrorism efforts concerns first and foremost the countries whose territories are known to harbour support networks and to be used by terrorist groups as staging areas'.⁷ States such as Algeria and Egypt had long been objecting to the activities of dissident Algerians and Egyptians in the United Kingdom, urging the introduction of measures finally realised in the UK's Terrorism Act 2000 – according to Roach, 'something of a gold standard after September 11' in Commonwealth countries.⁸ Considerable scepticism has been voiced as to whether the critical distinction between 'dissident/opposition/resistance' and 'terrorism' is adequately preserved in new anti-terrorism legislation; practice (not only judicial but executive and security practice) rather than textual analysis alone is likely to be the

⁵ First Report of Algeria to the Counter-Terrorism Committee: UN Doc. S/2001/1280 (27 December 2001), p. 4.

⁶ Kent Roach, 'The world wide expansion of anti-terrorism laws after September 11', (2004) CXVI (III Serie. LIII) Fasc 3. *Studi Senesi* 492. I am grateful to Kent Roach for providing me with this text.

⁷ UN Doc. S/2001/1280, 27 December 2001, p. 4

⁸ Roach, 'World wide expansion', 491

key. Algeria went on to propose a 'series of concrete proposals' for a global counter-terrorism strategy.⁹

US officials have on various occasions indicated that they are listening. In 2004, the deputy commander of the US European command noted that 'we think we have a lot to learn from the Algerians'.¹⁰ The then US Secretary of State, Colin Powell, agreed that Egypt was 'really ahead of us on this issue' and that the US had 'much to learn' from Egypt's anti-terrorist tactics, although Joe Stork of Human Rights Watch points out that such tactics 'have been used against non-violent critics as well'.¹¹ At the end of 2002, it was reported that CIA agents in Bagram and Diego Garcia were 'contracting out their interrogation to foreign intelligence agencies known to routinely use torture'; specifically, it was reported that 'low-level suspects have been handed over to Jordanian, Egyptian and Moroccan agencies [...] with a list of questions from the CIA'.¹² As the decade drew on and more information came out about the CIA's 'extraordinary rendition' and secret detention practices, it was established that a number of Middle Eastern states had been collaborating: a 2010 report by four UN experts found that 'the consistency of many of the detailed allegations provided separately by detainees adds weight to the inclusion' of Jordan, Egypt, Morocco and the Syrian Arab Republic 'as proxy detention facilities where detainees have been held on behalf of the CIA'.¹³ For its part, the UK government has concluded agreements with four

⁹ UN Doc. S/2001/1280, Appendix 1: Aide-mémoire.

¹⁰ Giles Tremlett, 'US sends special forces into north Africa,' *The Guardian*, 15 March 2004. Tremlett observes that '[s]tates previously shunned by the international community, such as Algeria, are being provided with arms and military training and may become a cornerstone of US military interests in the region'. On plans by US Defense Secretary Donald Rumsfeld to 'thrust special forces into the lead role in the war on terrorism, by using them for covert operations around the world', see Jennifer D. Kibbe, 'The rise of the shadow warriors' (2004) 83(2) *Foreign Affairs* 102–15.

¹¹ Stork, 'The human rights crisis', p. 45.

¹² Suzanne Goldenberg, 'CIA accused of torture at Bagram base: some captives handed to brutal foreign agencies', *The Guardian*, 27 December 2002. Original Washington Post report 'US denies abuse but defends interrogations', 26 December 2002; see Human Rights Watch press release and intervention, 'United States: reports of torture of al-Qaeda suspects', 27 December 2002.

¹³ A/HRC/13/42 19 February 2010, 'Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the Working Group on arbitrary detention represented by its vice-chair, Shaheen Sardar Ali; and the Working Group on enforced or involuntary disappearances represented by its chair, Jeremy Sarkin', [143].

Arab states – Jordan, Libya, Lebanon and Algeria – by way of a ‘policy of obtaining assurances as a means of facilitating deportations in national security cases’.¹⁴ Such arrangements have been criticised in human rights circles, while the Foreign and Commonwealth Office author of a response to the criticisms notes that ‘[t]he States with which the UK has negotiated assurances are inevitably those whose human rights records have been criticized’.¹⁵

These developments indicate particular challenges for the Arab human rights movement. Implicit in Arab states’ reports to the CTC is a vindication of existing draconian legislation and practice, in defiance of sustained criticism by domestic and regional human rights groups as well as by international human rights organisations and the dedicated UN mechanisms. The threat perceived to human rights in the counter-terrorism effort is of course not limited to the Middle East. Irene Khan, then Secretary General of Amnesty International, has said that ‘[i]n a world engaged in the so-called “war on terrorism”, human rights were seen as an obstacle to ensuring victory and human rights defenders as defenders of “terrorists”’.¹⁶ As mass arrests began after the Casablanca bombings in May 2003, the official Moroccan discourse accused human rights activists of being ‘soft on terrorism’ by indulging in ‘knee-jerk criticism of the security services’.¹⁷ In Egypt just after 9/11, the Prime Minister took the human rights movement to task for its long-standing campaigns against torture and unfair trials, criticising groups for ‘calling on us to give these terrorists their “human rights”’.¹⁸ And in Yemen, Amnesty International reported a climate of fear in the period directly following 9/11 that stifled internal dissent to an unprecedented degree – fear of a possible US military attack or economic sanctions.¹⁹

This last example illustrates one of the specificities of the Arab world: a fear of being ‘next on the list’. Another is the long-standing and profound grievance in the region at the treatment of the Israel/Palestine dispute

¹⁴ Kate Jones, ‘Deportations with assurances: addressing key criticisms’ (2008) 57(1) *International and Comparative Law Quarterly* 183–94, 184. See also Colin Harvey, Chapter 9, this volume.

¹⁵ Jones, ‘Deportations with assurances’, 188.

¹⁶ Irene Khan, ‘Human rights challenges following the events of September 11 and their impact on universality and the human rights movement’, in Kjøk, *Terrorism and Human Rights*, p. 35.

¹⁷ Eileen Byrne, ‘Escaping from the chains of history’, *Financial Times*, 16 April 2004.

¹⁸ Stork, ‘The human rights crisis’, p. 44.

¹⁹ Amnesty International, ‘Yemen: the rule of law sidelined in the name of security’, AI Index: MDE 31/006/2003 (24 September 2003).

by the major Western powers: specifically, the failure to hold Israel, as the Occupying Power, to its established duties under international law over the decades, including Israel's ever-expanding settlements (colonies) in the Occupied Palestinian Territories (including East Jerusalem) and, most recently, the attack on Gaza 2008/9 (Israel's Operation Cast Lead) and the 2010 attack on the international civilian flotilla carrying humanitarian supplies for Gaza.²⁰ The Director of the Cairo Institute for Human Rights Studies, Bahey el-Din Hassan, outlines the impact of such actions in producing an 'accumulated feeling of injustice' which: 'undermines the credibility of international human rights law and international humanitarian law and increases the reservation of many people in the Arab and Islamic worlds as to the universality of human rights principles and values.'²¹ The Iraq war increased these reservations, particularly the conduct of US troops towards Iraqi detainees, and the situation of detainees in Guantánamo Bay was a further exacerbating factor. Governments of Arab states were likely to feel less pressure in regard to their own abusive practices. Domestic actors seeking socio-political reform were considerably constrained by the resulting dynamics.

3. Legislative themes

A regional overview of the Arab states presents a varied picture. It will clearly be important to have detailed country studies on a number of states in the region in order to meaningfully inform a 'global' comparative process and to integrate the Arab experience into the development of mainstream paradigms in this emerging area of study.

With this caveat, certain legislative themes can be identified across the region. All Arab states are party to the Arab Convention on the Suppression of Terrorism and to a growing number of related international conventions. All are party to two or more of the UN human rights treaties, although some are not yet party to the ICCPR or the ICESCR²² and others have not yet signed up to the Convention against Torture.²³

²⁰ See respectively, Human Rights Council, 'United Nations fact finding mission on the Gaza conflict', A/HRC/12/48 (15 September 2009); and 'Report of the international fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance', A/HRC/15/21 (27 September 2010).

²¹ Bahey el-Din Hassan, 'Opening remarks', in Kjøk, *Terrorism and Human Rights*, p. 15.

²² These include Oman, Qatar, Saudi Arabia and the United Arab Emirates.

²³ Oman and the United Arab Emirates.

Most Arab states have yet to ratify the Statute of the International Criminal Court.²⁴ A number of Arab states are party to the African Charter on Human and Peoples' Rights. A regional human rights instrument, the Arab Charter on Human Rights, was criticised by international human rights groups for serious flaws and gaps upon its adoption in 1994 by members of the League of Arab States. The Charter failed to secure any ratifications in the years following.²⁵ In 2003 a process of review for the 'modernisation' of its contents was initiated in the Arab League, matching a number of governmental initiatives on human rights 'institutionalisation'. A revised text was opened for signature in 2004, and the new text came into force in 2008. Mervat Rishmawi describes the document as 'among the remnants of the wave of reform that is said to have hit the Arab world earlier in this decade'.²⁶

Domestically, individuals are rarely able to realise human rights protections by directly invoking international human rights instruments in national courts. Weak and unempowered national judiciaries are usually unable to assert their independence against the executive to secure judicial protection of human rights, even though the rights enshrined in international instruments are also guaranteed in most of the constitutions of the region. The prospect of a 'dialogue' between courts and legislatures on the limits being set to rights and freedoms, particularly on 'security' issues, is minimal. Moreover, state security courts or other 'special tribunals' – including military courts – are often assigned jurisdiction over perpetrators accused of offences against state security. Such courts have fewer procedural protections than the ordinary court system. Unfair trials that fail to meet the standards set by international law or required in domestic law have been documented across the region well before 9/11.²⁷ Political opponents and non-violent critics have been the targets of such procedures, including alleged or suspected Islamists and Communists, human rights defenders, journalists, newspaper editors and bloggers. There are widespread reports of torture by police and security services, and all Arab states retain the death penalty, although it is used more commonly in certain states and some are de facto abolitionist.

²⁴ Those that have are currently Jordan, the Comoros and Djibouti. Tunisia also ratified in June 2011.

²⁵ See Mona Rishmawi, 'The Arab Charter on Human Rights: a comment' (1996) 10 *INTERRIGHTS Bulletin*.

²⁶ Mervat Rishmawi, 'The Arab Charter on Human Rights', *Arab Reform Bulletin*, 6 October 2009.

²⁷ See Amnesty International, 'State injustice: unfair trials in the Middle East and North Africa', AI Index: MDE 01/002/1998 (16 April 1998).

Some states have semi-permanent 'states of emergency' in force, and several face the threat of serious political violence from groups included in the 'proscribed' or 'terrorist' organisations listed by the United States or the EU. Tempering this picture in the early years of the century were a set of developments indicating moves towards political and social reform with greater space for debate and dissent; later in the decade this space was closing tight in a number of states – hence Rishmawi's reference to 'the remnants of reform'. The events of early 2011 in Tunisia and Egypt have opened a new chapter.

Legislatures in the region have generally acceded to the executives' determination of the exigencies of security in matters of new or amended legislation; civil society groups have been more critical. Some states already had extensive and explicit anti-terrorism legislation, such as Egypt and Algeria; others introduced amendments to their Penal Codes addressing the issue of terrorism, such as Jordan, which later issued a separate anti-terrorism law following triple hotel bombings in Amman in 2005. Tunisia, which already exercised particularly tight political control through its criminal legislation and press law, promulgated a new Law Against Terrorism and Money Laundering. Syria at first gave the impression of not being in need of amending its laws or regulations, satisfied that its existing penal code already met the requirements of Security Council Resolution 1373, but subsequently promulgated a law on money laundering, as did Egypt.

This examination focuses on the definition of terrorism in legislative instruments, as well as measures taken that would not appear critical to the anti-terrorism mandate, but that have the potential to considerably restrict the scope for non-violent political dissent. It is unlikely that the Arab states present an exception; as Harding has observed, it is 'in the interest of governments to take advantage of any opportunities for extending the scope of their measures of legal control when political circumstances are conducive to such developments'.²⁸

Legislative responses of Arab states match those of the Anglo-American systems examined by Roach:²⁹ the expansion of the definition of terrorism; the introduction of new offences, particularly regarding funding and financing activities, that apply 'long before an act of terror is committed'; the expansion of crimes of 'association'; and the expansion

²⁸ Christopher Harding, 'International terrorism: the British response,' [2002] *Singapore Journal of Legal Studies* 16–29, 18.

²⁹ Roach, 'The world wide expansion', 492.

of police powers, in particular the extension of pre-arraignment detention (*garde à vue*) with counsel excluded. There are detailed listings of potential offences, frequently with 'catch-all' phrases, and an increase in penalties where 'ordinary crimes' are classified as 'terrorist offences'. Terrorism is not defined by identification of the act or threat with advancing a 'political, religious or ideological cause'; indeed, the phrase 'whatever the motives' may be added, to emphasise that the accused's possible political or ideological motive is not an element in the offence. In certain cases, the definition of 'terrorism' appears to be dissociated also from the 'much less controversial'³⁰ purpose of intimidation or causing fear to the public as well as from seeking to influence the actions of government or public bodies. The acts through which terrorism is established do not, in some cases, appear to have to be of particular severity or danger. There is a fairly standard exemption or reduction in penalty for those who inform the appropriate authorities of the preparation of an act of terrorism. In none of the legislation reviewed in this chapter is there an exemption such as Roach notes to be contained in Canadian and Australian laws for certain acts of 'advocacy, protest, dissent or stoppage of work'.³¹ Ramraj observes that 'in jurisdictions where political opposition is otherwise minimally restricted, a broadly worded definition of terrorism may well have a chilling effect'.³² In the Arab states, where political opposition is considerably restricted, such definitions may be more than chilling. On the other hand, they may be met with resilience by non-violent opponents and critics as 'more of the same', stronger tools in harder times, which may or may not be off-set by the discourse of democratisation running parallel. Their 'effectiveness' in relation to actual or would-be violent groups or individuals is open to question.³³

4. The Arab Convention for the Suppression of Terrorism

The Arab Convention for the Suppression of Terrorism, adopted by member states of the Arab League in 1998, came into force in 1999. It is pointed to by Arab states in their reports to the CTC as evidence of forward-thinking and responsible action by governments in the region. The Convention defines 'terrorism' in art. 1(2) as:

³⁰ Ibid. ³¹ Ibid., 493–4.

³² Victor V. Ramraj, 'Terrorism, security and rights: a new dialogue' [2002] *Singapore Journal of Legal Studies* 1–15, 4.

³³ Ibid.

Any act of violence or threat thereof, whatever its motives or purposes, that occurs in execution of an individual or collective criminal undertaking, and is aimed at sowing fear among people, or causing fear by harming them or exposing their lives, liberty or security to danger, or causing damage to the environment or to a public or private installation or property, or occupying or taking over the later, or exposing a national resource to danger.

This definition requires the element of violence or threat thereof, together with an undertaking that is criminal under national legislation and aimed at one of the list of purposes or actions. The phrasing in Arabic does not seem to require that the element of ‘sowing fear among people’ or ‘causing fear’ condition the remainder of the purposes, which potentially renders many ordinary criminal activities acts of terrorism. However, if the intention is in fact that the clauses following the word ‘danger’ are to be read as conditioned by a necessary element of causing fear, the definition is still extremely broad.

At the time of the Convention’s promulgation, an Amnesty International report held that the definition was so broad that it ‘does not satisfy the definition of legality in international human rights law’ and that it could be read as posing a threat to the freedoms of association and of expression.³⁴ The definition could be applied to certain forms of attack not prohibited by international humanitarian law regulating non-international armed conflict, and that if it were indeed to render such conduct ‘terrorism’, ‘armed political groups will lose an important incentive to comply with international humanitarian law’.³⁵ Three elements have been identified by the UN’s Office of the High Commissioner for Human Rights that could be included in a definition of terrorism: ‘criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes’.³⁶ In the Arab Convention’s definition, the only definite overlap is with the first element of ‘criminal acts’, although it adds the element of violence or threat thereof.

A ‘terrorist offence’ is defined in art. 1(3) as:

Any offence or attempted offence committed for a terrorist purpose in any of the Contracting states, or against their nationals, property or interests,

³⁴ Amnesty International, ‘The Arab Convention for the Suppression of Terrorism; a serious threat to human rights’, AI Index: MDE 01/002/2002 (21 January 2002), 8.

³⁵ Ibid.

³⁶ OHCHR, *Digest of Jurisprudence of the UN and Regional Organizations on the Protection of Human Rights while Countering Terrorism*, Geneva, undated, p. 3, citing the Declaration on Measures to Eliminate International Terrorism annexed to GA Res. 49/60.

that is punishable by their domestic law. The offences stipulated in the following conventions shall be considered terrorist offences unless such offences have been excepted by the legislation of the Contracting State or the state has not ratified the said convention.

The ‘terrorist purpose’ here presumably relates to the definition of ‘terrorism’ in the preceding clause, and there follows a list of international terrorism-related conventions.³⁷ In art. 2(a) comes a clarification and a caveat:

Cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for the sake of liberation and self-determination, in accordance with the principles of international law, shall not be considered an offence. Such cases shall not include any act prejudicing the territorial integrity of any Arab state.

This clause reflects the concern to exclude from the definition acts done in the Palestinian struggle for self-determination, while at the same time not to exclude acts committed in any self-determination struggle against any existing Arab state – implicitly even if such claims were recognised ‘in accordance with the principles of international law’. This caveat clearly sits uneasily with the prior invocation of the general principle of self-determination.

The insistence on the distinction of resistance to occupation and aggression from terrorism, with the question of Palestine as central, is a cornerstone of the Arab states’ promotion of a definition of international terrorism. The CTC asked Saudi Arabia a follow-up question:

The CTC would welcome an indication of how Saudi Arabia would deal with a request by a state that is not party to that [Arab] Convention for the extradition of a person accused of an offence against, say, the International Convention for the Suppression of Terrorist Bombings committed in circumstances of the kind attracting the above-mentioned special exception.³⁸

Saudi Arabia’s response was to deny that there was such a thing as an exception, since struggles against foreign occupation and aggression

³⁷ A proposed amendment to this list is noted by Egypt in its 6th report to the CTC, reporting that the Egyptian legislature had approved a Presidential decision (no 235/2005) to approve an amendment to art. 1(3). The new provision ‘conforms to security council resolution 1624, which calls on all states to “prohibit by law incitement to commit a terrorist act or acts” and condemns “attempts at the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts”’ S/2006/351 (31 May 2006), [2.1].

³⁸ UN Doc. S/2003/583 (third report of Saudi Arabia to the CTC), p. 13.

are in accordance with the principles of international law as reaffirmed by the United Nations, and ‘inasmuch as what is involved is the right of peoples to engage in armed struggle for self-determination’.³⁹ Stork critically observes in this regard that without any conditioning language on the framework of international humanitarian law, the affirmation of ‘any means of armed struggle ... politically represents merely a mirror image of the Israeli contention that all forms of militant struggle, and certainly armed struggle, are indistinguishable from terrorism’.⁴⁰

The Convention then proceeds to the concept of political offences, which would clearly be excluded from the provisions on extradition and rogatory procedures with which much of the remainder of the text deals. Anything already defined as a ‘terrorist offence’ is not to be considered a political offence, along with a list of other specific offences which are also not to be so considered ‘even if they are politically motivated’ (art. 2(b)). Offences excluded from the ‘political offence exception’ for purposes of extradition include ‘attacks’ on the kings and heads of contracting states, their rulers, wives (sic), ascendants or descendants, crown princes, deputy heads of state or government ministers, and persons enjoying ‘international protection’ including ambassadors and diplomats (art. 2(b) (i)-(iii)). Also excluded are ‘intentional murder and theft accompanied by force against individuals, or the authorities, or means of transport and communications’; ‘acts of sabotage and destruction of public property assigned to a public service, even if owned by another Contracting State’, and offences related to weapons, munitions or explosives or other items ‘that may be used to commit terrorist offences’. In the first three clauses, the word used for ‘attack’ (*ta’adda `ala*) is unqualified; that is, it is not necessarily restricted to physical attacks, or attacks on the lives or liberty of such persons. Some Contracting States have legislation criminalising the ‘defamation’ or lampooning or otherwise ‘undermining’ of their leaders.

There is much to comment on in the remainder of the text, including particular concerns over the lack of guarantees of fair trial or rights of detainees, extended surveillance authorities threatening the right to privacy, and an absence of reference to international law standards on any of these or other issues.⁴¹ Despite the urging by Arab

³⁹ Ibid. Compare Jordan’s response to a similar question by the CTC, reproducing the government’s statement on ratifying the International Convention for the Suppression of the Financing of Terrorism (S/2006/212, [I.14]).

⁴⁰ Stork, ‘The human rights crisis’, p. 49. ⁴¹ See above note 34.

states that an international definition of torture include a definition of state terrorism, the Arab Convention includes no such text, and fails to clarify that state officials or other agents of the state are capable of committing the crimes defined therein as 'terrorist offences'.⁴² Some state parties however provide in their domestic legislation for increased penalties if terrorist offences are committed by agents of the state, notably members of the police or armed forces. The focus of such provisions appears to be hostile activities against the state by such individuals or groups, rather than state accountability for actions of its agents as 'state terrorism'.

5. State responses

A. Egypt

The definition of terrorism in the Arab Convention is taken almost word for word from pre-existing (1992) Egyptian legislation.⁴³ Egypt tends to play a leading role in legislative matters in the region, and politically is one of the 'big three' (along with Saudi Arabia and Syria) in the Arab League. Egypt has officially been in a state of emergency since 1981, when President Anwar Sadat was assassinated, and has since suffered other attacks by domestic armed groups. Concern at 'the effects on the human rights situation' caused by this prolonged state of emergency and various 'security' measures associated therewith has been voiced by the UN Human Rights Committee.⁴⁴ The Committee had similar concerns when the Egyptian government legislated Law no. 97 of 1992 in direct response to 'the emergence of the phenomenon of terrorism'.⁴⁵ It declared:

The definition of terrorism contained in that law is so broad that it encompasses a wide range of acts of differing gravity. The Committee is of the opinion that the definition in question should be reviewed by the Egyptian authorities and stated more precisely especially in view of the

⁴² Amr Mousa, Secretary-General of the League of Arab States, told the Cairo meeting on terrorism and human rights that the UN should draft a convention 'including a definite definition of terrorism that discerns between terrorism and peoples' legitimate right to combat occupation and aggression and a definition of state terrorism' (in Kjøk, *Terrorism and Human Rights*, p. 23). See also Amnesty International, above note 34, p. 16.

⁴³ Egypt's first report to the CTC: UN Doc. S/2001/1237 (29 May 2002), p. 13.

⁴⁴ CCPR/10/76/EGY 2002, [16]. See also UN Doc. CCPR/C/79/Add.23 of 9 August 1993, [7], [9].

⁴⁵ UN Doc. S/2001/1237 (29 May 2002), p. 3.

fact that it enlarges the number of offences which are punishable with the death penalty...⁴⁶

Law no. 97 of 1992 introduced amendments to a number of laws.⁴⁷ It introduced the following definition of 'terrorism' as art. 86 of the Egyptian Penal Code:

In application of the provisions of this law, terrorism shall mean any use of force or violence or threat or intimidation resorted to by the perpetrator in implementation of an individual or collective criminal undertaking aimed at disturbing⁴⁸ public order or jeopardizing the safety and security of society, which is of such nature as to harm persons or sow fear among them or imperil their lives, liberty or security; or [of such a nature as] to damage the environment, or to damage, occupy or take over communications, transport, property, buildings or public or private realty (*amlak*); or to prevent or impede the exercise of their functions by public authorities or places of worship or institutions of learning; or to thwart the application of the Constitution or the laws or regulations.

The similarities with the definition adopted by the Arab Convention are evident, but certain revisions were made. In the Arab Convention, causing fear or terror to persons is not an element of the definition, but in Egypt, the aim of violating public order or endangering public safety and security is. The first of these, violation of public order, is extremely wide. In contrast to the Convention, in the Egyptian text, a 'threat' is not necessarily of use of force or violence. The list of possible prohibited acts is similar but rather longer and considerably wider, in particular the final two clauses which are absent from the Arab Convention. The definition of terrorism cited in Egypt's first report to the CTC is a summary of the relevant article rather than the full text.⁴⁹

Law no. 97 of 1992 set out a series of offences as ordinary crimes, with increased penalties (including the death penalty and hard labour for life) if 'terrorism' is among the means used. For example:

The penalty shall be prison for whosoever establishes, founds, organizes or directs, in violation of the law, an association or body or organization or group or gang the purpose of which is to call [*da' wa*] by any means for

⁴⁶ UN Doc. CCPR/C/79/Add.23 (9 August 1992), [8].

⁴⁷ Law no. 97 of 1992, *Official Gazette* No. 29bis of 18 July 1992. The legislation amended by the provisions of law no. 97 of 1992 included Penal Code and Code of Criminal Procedure, Law No. 105 of 1980 regarding the Establishment of State Security Courts, Law no. 205 of 1990 regarding the Confidentiality of Bank Accounts and Law no. 394 of 1954 regarding Weapons and Explosives.

⁴⁸ Or 'violating': *ikhlat bi*. ⁴⁹ UN Doc. S/2001/1237, pp. 3–4.

thwarting the provisions of the Constitution or the laws or preventing one of the government institutions or public authorities from exercising its functions, or attacking the personal freedom of the citizen or other public rights and freedoms guaranteed by the Constitution and the law, or injuring national unity or social safety. The penalty shall be temporary hard labour for whosoever, with knowledge of the purpose for which it calls, holds any kind of leadership within it, or supplies it with material or financial provisions.

The penalty shall be prison for a period of not more than five years for whosoever, with knowledge of its purpose, joins one of the associations, bodies, organizations, groups or gangs set out in the previous paragraph, or participates in it in any manner.⁵⁰

This article already renders illegal mere membership in associations that have no necessary link with violence, let alone with terrorism, and poses a considerable risk to freedom of expression and association. The following article (art. 86*bis* (a)) stipulates that for offenders covered by the first paragraph of the previous article, the penalty shall be death or hard labour for life 'if terrorism is one of the means used in the realisation or implementation of the purposes called for' by the association. For offenders under the second paragraph of art. 86*bis*, the penalty in such circumstances becomes a sentence of hard labour if terrorism is among the means used.⁵¹ There is further a prison sentence of up to ten years for anyone disseminating the purposes of such associations in any way or possessing materials for such dissemination, if terrorism is one of the means used by the association.⁵² The accusation of terrorism may be made on the basis of the extremely broad terms of its definition. The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, has held that the definition was so broad as to run 'the risk of including acts that do not comprise a sufficient relation to violent terrorist crimes'.⁵³

In 2004, Egypt reported amendments to its provisions on forced labour and the possible penalties at re-trial 'in order to avoid the difficulties which prevented certain countries from acceding to Egypt's requests for

⁵⁰ Article 86*bis* of the Penal Code as amended by art. 2 of Law no. 97 of 1992.

⁵¹ Article 86*bis*(a) as amended by art. 2 of Law no. 97 of 1992. Offenders under art. 86*bis* are also liable to hard labour for membership in such an association if they are members the police or armed forces.

⁵² Article 86*bis* para. 3 and Article 86*bis*(a) para. 3 as amended by Article 2 of Law no. 97 of 1992.

⁵³ Report of the Special Rapporteur, Martin Scheinin, on his Mission to Egypt: A/HRC/13/37/Add. 2 (14 October 2009), [11].

the extradition of terrorists'.⁵⁴ New legislation was introduced on money laundering.⁵⁵ Political violence hit Egypt again in the mid-2000s with a number of terrorist attacks directed at hotels in the Sinai, while at the very end of 2010 a bomb left over twenty mortalities at a Coptic church in Alexandria. In 2005, during the presidential election campaign, the Egyptian authorities announced their intention to put in place a prevention of terrorism law that would allow the lifting of the state of emergency.⁵⁶ Constitutional amendments of 2007 were presented as facilitating the introduction of the new law, but the state of emergency was renewed in 2008, to criticism from Martin Scheinin and others,⁵⁷ and again in 2010 against a background of protests.⁵⁸ The 2007 amendment to art. 179 of the Constitution was particularly criticised:

The State shall seek to safeguard public security and discipline to counter dangers of terror. The law shall, under the supervision of the judiciary, regulate special provisions related to evidence and investigation procedures stipulated in paragraph 1 of Articles 41 and 44, and paragraph 2 of Article 45 shall in no way preclude such counter-terror action.

The President may refer any terror crime to any judicial body stipulated in the Constitution or in law.⁵⁹

The listed articles protect against arbitrary arrest and detention, house searches and violations of privacy. With regard to the amended art. 179, Brown and Dunne observe that:

Some Egyptians have complained that the constitution will now enshrine what was technically a temporary (if ongoing) state of emergency as a permanent part of Egypt's political structure and wall off security practices from constitutional oversight. It is difficult to challenge this interpretation.⁶⁰

⁵⁴ S/2004/343 (23 April 2004) p. 9. The reference is to Law no. 95 of 2003; the English translation of the Penal Code supplied to UNODC shows no change to the penalties in art. 86*bis*.

⁵⁵ Law to Combat Money Laundering, Law no. 80 of 2002 (*Official Gazette* no. 20 of 22 May 2002) and Law Amending Certain Provisions of the Law to Combat Money Laundering, Law no. 78 of 2003. See Sherif Sayyid Kamil, *Mukafihat jara'im ghasal al-amwal fi al-tashri' al-misri* (Cairo: Dar al-nahda al-'arabiyya, 2002).

⁵⁶ See Nathan J. Browne and Michele Dunne, 'A textual analysis' in Nathan J. Browne, Michele Dunne and Amr Hamzawy, *Egypt's Controversial Constitutional Amendments* (Carnegie Endowment for International Peace, 23 March 2007), p. 2.

⁵⁷ Report of the Special Rapporteur on his Mission to Egypt, [6].

⁵⁸ Yolande Knell, 'Egypt opposition to emergency law' (12 May 2010), available at news.bbc.co.uk/1/hi/world/middle_east/8675301.stm.

⁵⁹ Translation from www.unodc.org/tldb/pdf/Egypt_const_1971.pdf.

⁶⁰ Brown and Dunne, 'A textual analysis', p. 2.

Special Rapporteur Martin Scheinin has agreed: ‘article 179 of the Constitution carries features of a permanent state of emergency, although under a new name’.⁶¹ In 2009, the Cairo Institute for Human Rights Studies noted that the emergency law ‘had been used against a number of political activists and bloggers’ and that the anti-terrorism law ‘will likely be used against critics and political opponents who are not accused of using violence’.⁶²

Human rights concerns have included the violent suppression of anti-war demonstrations in Cairo in the spring of 2002 and the arrest of alleged ‘ringleaders’, the arrest of bloggers and of human rights activists as well as political opponents and the continued excessive use of force and torture. In addition, Egypt’s past criticisms of other states for refusing to hand over or curtail the activities of those it accuses of offences against Egyptian security appear to be bearing fruit, giving rise in some cases to fears for the safety of those extradited or returned to Cairo. In December 2001 two Egyptian asylum-seekers were forcibly repatriated by Sweden – which took up the CIA’s offer of air transport to take them – after secret evidence was relied on to dismiss their asylum claims; they then ‘disappeared’ into the system for more than three weeks with no access to family or counsel. Human Rights Watch reported other forcible repatriations from Jordan, Canada, Bosnia and Uruguay.⁶³ The Committee against Torture subsequently found Sweden’s expulsion of Ahmad Agiza to have violated its obligations under art. 3 of the Convention against Torture, given that the Swedish authorities either knew or should have known that he was ‘at real risk’ of torture should he be returned to Egypt; the CIA involvement and treatment of Agiza by the US security personnel on Swedish territory (at the airport) should, in the Committee’s view, have confirmed that risk.⁶⁴

Egyptian human rights groups have pointed out that they were among the first to focus the attention of the international NGO community on

⁶¹ Report of the Special Rapporteur on his Mission to Egypt, [13].

⁶² Cairo Institute for Human Rights Studies, *Bastion of Impunity, Mirage of Reform. Human Rights in the Arab Region, Annual Report 2009* (Cairo Institute for Human Rights Studies), p. 112

⁶³ Stork, ‘The human rights crisis’, p. 46.

⁶⁴ *Agiza v. Sweden*, Communication No. 233/2003, CAT/C/34/D/233/2003 (20 May 2005), [13.2], [13.4]. See also A/HRC/13/42 (Joint Study on Global Practices, 2010), [222]–[225] with regard to practices of secret detention in Egypt, and to reports by a British national of Egyptian security agents facilitating his interrogation by British security officials after he was arbitrarily detained in Egypt in 2008. The cases of Ahmed Agiza and Mohammed Alzery are also reported in Dick Marty’s 2006 report to the Council of Europe (see further below) [150]–[161].

political violence by non-state actors.⁶⁵ The country has a diverse and active non-governmental human rights community, whose many activities, such as an energetic campaign against torture, rarely, if ever, receive coverage in the domestic press. On the governmental side, and in line with other 'reform-minded' moves in the region after the turn of the century, the National Council for Human Rights was established in 2003. In what was considered its first real challenge in 2004, some observers saw a setback for the Council's potential in the apparently last-minute refusal by a majority of its members to endorse a memorandum prepared by its Legal Committee requesting the government to end the long-standing state of emergency.⁶⁶ In January 2011, as thousands poured into the streets of Cairo and other Egyptian towns and cities in unprecedented protests against President Mubarak's rule, UN High Commissioner for Human Rights, Navi Pillay, made the link, stating that she believed that 'the lifting of the emergency law is long overdue and it lies at the root of much of the frustration and anger that has now boiled over into the streets'.⁶⁷

B. Syria

For the United States, Syria remains one of four designated state sponsors of terrorism, in view of 'its continuing support and safe haven for terrorist organizations'.⁶⁸ Concerns that Syria might be the next target of the 'neo-cons' for invasion and 'regime change' after the invasion of Iraq reduced over 2003–4, and Syria, for its part, made positive moves to ensure it was not aligned with the 'enemy' in the 'global war on terror'. In its 2003 report, the United States formally recognised Syrian co-operation 'against al-Qaida, the Taliban, and other terrorist organizations and individuals'⁶⁹ before announcing the imposition of sanctions against the country a fortnight later. Syria remains among the most

⁶⁵ Bahey el-din Hassan, 'Opening Remarks' 18, p. 13.

⁶⁶ *Al-Wafd*, 6 May 2004, 'Al-majlis al-qawmi li-huquq al-insan yataraji' taht al-dughut al-hukumiyya'. See further Arab Program for Human Rights Activists, Press Release of 25 May 2004, 'Egypt: the National Council for Human Rights'.

⁶⁷ OHCHR, 'United Nations High Commission for Human Rights urges government restraint and respect for human rights in Egypt,' Geneva, 28 January 2011. In August 2011, Egypt's post-Mubarak government said it planned to lift the state of emergency and the Emergency Law.

⁶⁸ US Department of State, *Country Reports on Terrorism 2009 – Background Note: Syria* (8 September 2010) available at www.state.gov/r/pa/ei/bgn/3580.htm.

⁶⁹ *Patterns of Global Terrorism 2003*, p. 85. Other states on the list in 2010 are Cuba, Iran and Sudan; Syria has been longest on the list, featuring since its inception in 1979. The 2003 report noted (at p. 93) that 'Syrian officials have publicly condemned international terrorism but continue to make a distinction between terrorism and what they consider

tightly controlled of the Arab states, and reports of discontent by Syrian Kurds in the north in March 2004, followed in April by ‘mysterious gun battles’ in Damascus, made uncommon news in the region.⁷⁰ The second half of the decade – particularly following Syria’s withdrawal of its forces from Lebanon – saw a determined closing of the limited opening of the public space to civil society actors (including bloggers and human rights activists, political opponents and Kurdish rights activists) that had been witnessed in the few previous years. The 2009 report from the Cairo Institute for Human Rights Studies calls Syria ‘a graveyard for reformers and human rights defenders’. Syria remains under a state of emergency first declared in 1963.⁷¹

The Syrian Penal Code of 1949⁷² was modelled on the Lebanese Penal Code, which was in turn inspired by French criminal law. The Syrian code contains three articles on ‘terrorism’ within the chapter on ‘crimes against internal state security’. The following definition of terrorism in art. 304 is almost unchanged since the original promulgation of the law:

Terrorist acts shall mean all deeds that aim at creating a state of panic (*dhu’r*) and which are committed by means such as explosives, weapons of war,⁷³ inflammable materials, poisonous or incendiary products or epidemic or microbe agents of a nature to cause public danger.

The Syrian definition makes the creation of fear an element in the definition of the offence, although it does not specify among whom. It does not specify any further purpose, and although the means listed tend to a high degree of potential danger and damage, they are not presented as exhaustive (‘means such as’).

to be the legitimate armed resistance of Palestinians in the Occupied Territories and of Lebanese Hizballah’.

⁷⁰ Trouble between Kurdish and Arab supporters at a football match in Qamlish, and the reported killing of some twenty persons by the security forces, were followed by clashes between Kurds and the security forces in March 2004; Amnesty International cited reports of hundreds of Syrian Kurds arrested.

⁷¹ UN Doc. CCPR/CO/71/SYR, [6]; see OHCHR Digest, pp. 18–19. The Committee referred to Legislative Decree no. 51 of 9 March 1963 declaring a state of emergency. See also Human Rights Watch, ‘Far from justice: Syria’s Supreme State Security Court’, 2009, on the measures against suspected Islamists in Syria.

⁷² Promulgated by Legislative Decree no. 148 on 22 June 1949 (*Official Gazette* no. 37 of 18 July 1949 p. 2025); with fifteen laws amending it, the latest in 1979. Text annotated by Mamduh ‘Atari, *Qanun al-‘uqubat: mu’addalan wa madubtan ‘ala’l-asl* (Damascus: Mu’assasat an-nuri, 2003).

⁷³ The phrase ‘weapons of war’ was added by Law no. 36 of 26 March 1978, ‘Atari, *Qanun al-‘uqubat*, 118.

Article 305 imposes a penalty of hard labour of between fifteen and twenty years for ‘every terrorist act’ (not further defined) and of between ten and twenty years of hard labour for conspiracy. The death penalty is mandated if such an act ‘results in the destruction – even partial – of a public building, industrial establishment, vessel or other installation or disruption of means of information, communication or transport, or if it leads to the death of a person’.

The third of the three articles in the section on terrorism deals with associations that are established ‘with the intention of changing the social or economic character of the state or the basic mores of society by one of the means set out in Article 304’. Such an association is to be dissolved and its members sentenced to hard labour, with a minimum seven-year sentence for founders and directors. This description includes a political purpose missing from the definition of terrorism. Membership in such an association is here, as in Egypt, a punishable offence even if no specific terrorist act has been planned, attempted or carried out.

In its second report to the CTC, Syria sets out legislation imposing ‘severe penalties for all acts relating to terrorism’.⁷⁴ The first provision it sets out is art. 278, which comes in a section entitled ‘crimes affecting international law’ and criminalises the violation of arrangements made to maintain neutrality in a war, and punishes ‘the author of acts, writings, or speeches for which the Government has not granted permission and which expose Syria to the risk of acts of hostility or disturb its relations with a foreign state or exposes Syrians to acts of revenge against their person or property’.⁷⁵ In an annotated copy of the Penal Code, this article is cross-referenced to art. 65 of the General Publications Law 1949,⁷⁶ which concerns the communication or publication of false news or falsified documents and imposes a criminal sentence of up to a year and/or a fine ‘if such act was ill-intentioned or disquieted the public or disturbed international relations or undermined the standing or dignity of the state’. This provision adds to the constraint of political dissent and criticism of the government. In 2010, lawyer Muhannad al-Hasani – the head of the Syrian Organisation for Human Rights – was sentenced by the State Security Court to three years in prison ‘for having reported on legal proceedings’ before the court.⁷⁷

⁷⁴ Second report of Syria to the CTC: UN Doc. S/2002/1046 (19 September 2002), p. 3.

⁷⁵ The penalty is a prison sentence.

⁷⁶ Law no. 53 of 8 October 1949; ‘Atari, *Qanun al-‘uqubat*, 111.

⁷⁷ Human Rights Watch, *World Report 2011: Syria*, available at www.hrw.org/middle-eastn-africa/syria.

Having initially taken the position that its existing legislation was sufficient to comply with Resolution 1373, Syria did subsequently promulgate a law on money laundering in 2005.⁷⁸ In addition, it has become clear that what the US State Department calls Syria's 'limited cooperation with US counter-terrorism efforts'⁷⁹ after 9/11 extended to collaboration with the extraordinary rendition and proxy detention practices of the CIA.⁸⁰ In perhaps the best known case (that of Maher Arar), Rapporteur Dick Marty's report to the Council of Europe noted that '[i]n this specific case, the transfer of Mr Arar to Syria seems to be a well established example of the "outsourcing" of torture, a practice mentioned publicly by certain American officials'.⁸¹

C. Jordan

In Jordan, an opportunistic expansion of government control was passed at the same time as legislation responding to Security Council Resolution 1373, only to be changed back again after negotiations between the executive and key civil society actors. Many provisions of Jordan's Penal Code 1960⁸² reproduce the Syrian text. This was the case in the three provisions in the Jordanian code on terrorism until their amendment in 2001; the only differences were that, in its definition, Jordan had not followed Syria's

⁷⁸ Decree no. 33 of 1 May 2005.

⁷⁹ US Department of State, *Country Reports on Terrorism 2009*.

⁸⁰ A/HRC/13/42 (Joint Study on Global Practices, 2010), [143].

⁸¹ Dick Marty, 'Alleged secret detention and unlawful inter-state transfers of detainees involving Council of Europe member states': Report to the Committee on Legal Affairs and Human Rights at the Council of Europe's Parliamentary Assembly (Doc. 10957), 12 June 2006, [179]. Maher Arar was arrested in 2002 at JFK airport and subsequently transferred (apparently via Italy and Jordan) to Syrian military intelligence; a Canadian citizen of Syrian descent, his case became the subject of a Canadian commission of enquiry. For further discussion of the Canadian response to this case see Kent Roach, Chapter 20, this volume. See also Amnesty International, 'Below the radar: secret flights to torture and "disappearance"', 5 April 2006, 17–19, on the case of Muhammad Zammar; and A/HRC/13/42 (Joint Study on Global Practices, 2010) at [127] on the case of Mustafa Setmariam Nassar.

⁸² Law no. 16 of 1960 as amended 1988, 1991, 2001, 2003; *Official Gazette* no. 1487 of 11 May 1960. This Code replaced an earlier Temporary Penal Code of 1951 (Temporary Law no. 85 of 1951, *Official Gazette* no. 1077 of 17 July 1951). On the choice made by the newly independent and sovereign state of Jordan to follow French-based models from neighbouring states rather than adopting the 1936 Criminal Code issued by the British in Palestine (and which had therefore been in force in the Palestinian West Bank, incorporated into the territory of Jordan after the war), see E.T. Mogannam, 'Developments in the legal system of Jordan' (1952) 6 *Middle East Journal* 196.

amendment of its listed means of committing terrorism to include 'weapons of war', while in the second article stipulating penalties the Jordanian text substituted life hard labour for the death penalty in one case and a slightly lighter prison sentence in another.⁸³

In October 2001, Jordan's government rushed out amendments to the Penal Code by way of a royal decree issued in accordance with a decision of cabinet, during an extended delay in convening Parliament that saw over a hundred such 'temporary laws' issued.⁸⁴ Temporary Law no. 54 of 2001⁸⁵ introduced a new definition of terrorism based on a combination of the Arab Convention and its Egyptian model. The element of 'causing panic' is no longer a necessary part of the definition of terrorism, and the 'means' listed in the above-cited Syrian art. 304 as part of the definition are transformed in the new Jordanian provision into aggravating factors at sentencing, giving rise to the death penalty when an act of terrorism under the new definition is committed.⁸⁶ The new definition of terrorism in art. 147 is as follows:

Terrorism shall mean the use of violence or threat of use thereof, whatever its motivations or purposes, occurring in implementation of an individual or collective act aimed at disturbing public order or jeopardizing the safety or security of society, where such is of a nature to spread fear among the people and frighten them or to expose their lives and security to danger, or to cause damage to the environment, or to cause damage to, occupy or take over public facilities and realty or private realty, international facilities and diplomatic missions, endangering national resources or thwarting the provisions of the Constitution and laws.

This definition adopts the broader Egyptian text in some respects (including 'disturbing public order'), while staying closer to the Arab Convention definition in others (including the threat being of the use of force). Curiously, it omits the qualification of such acts as 'criminal'.

Article 148 adds to the original text penalties of hard labour for life for terrorist offences resulting, *inter alia*, in 'damage, even partial, to a public

⁸³ Articles 147, 148, 149 of the Jordanian Penal Code 1960 before its amendment in 2001; paralleling arts. 304, 305 and 306 of the Syrian Code.

⁸⁴ Legislation issued in this manner is classified as 'temporary' and is required to be submitted for parliamentary scrutiny and decision when parliament is reconvened.

⁸⁵ Temporary Law no. 54 of 2001 amending the Penal Code of 2 October 2001, *Official Gazette* no. 4510 of 8 October 2001.

⁸⁶ Article 148(4)(c) of the Jordanian Penal Code as amended by Article 3 of Temporary Law no. 54 of 2001.

or private building⁸⁷ or ‘disabling means of communication and computer systems, or disrupting their networks, or the total or partial disabling or damaging of means of transport’. The death penalty is mandated where the act leads to death or is committed using means (such as explosives) that were previously included in the definition of terrorism.

The third of the three articles in the section on terrorism, art. 149, is also amended to show key differences from the Syrian text:

A penalty of temporary hard labour shall be imposed on whosoever embarks upon any act of a nature to destroy the system of political rule in the Kingdom, or to incite to oppose it (*munahida*), and whosoever embarks on any individual or collective act with the intention of changing the economic or social character of the state or the basic mores of society.

The original wording of this provision was a word for word reproduction of the Syrian text. The new Jordanian text no longer refers to associations but to individual or collective acts, does not require that such acts be carried out by means elsewhere identified with the definition of terrorism, and adds as new the first half of the provision regarding the destruction of the system of political rule or incitement to opposition thereof.⁸⁸

In the same temporary law, Jordan changed a text punishing ‘every writing, speech and act intended to or resulting in the provocation of sectarian or racial chauvinism or urging discord between the sects and different elements of the nation’ by a prison sentence of six months to three years plus a fine to the following:

Regardless of any other law, a prison sentence shall be imposed for any writing, speech or any act broadcast by whatever means, or publication of news in press or any publication, where such is of a nature to injure national unity or to incite commission of crimes or spread rancour and hatred and discord between individuals of the society or provoke racial or sectarian chauvinism, or injure the dignity, personal freedoms and reputation of individuals, or shake the basic foundations of society by promoting deviant behaviour or immorality or by publishing false information or rumours or incitement to agitation or vigils or the holding of public meetings in a manner contravening the applicable law, or by any other act liable to undermine the prestige, reputation or dignity of the state.⁸⁹

⁸⁷ Thus adding ‘private’ buildings to the Syrian text which stipulated ‘public’ buildings in art. 305.

⁸⁸ Subsequent clauses deal with hostage taking and with infiltration to and from the territory of the Kingdom. Articles 147(2) and (3) of the Penal Code 1960 as amended by arts. 4 of Temporary Law no. 54 of 2001.

⁸⁹ Article 150 of the Penal Code 1960 as amended by art. 5 of Temporary Law no. 54 of 2001.

The second paragraph of this article as amended provided for the punishment of the editor-in-chief and owner of any publication used in such an act, plus the temporary or permanent closure of the newspaper or press 'in accordance with a decision of the court'. International human rights groups voiced concern at the attack on the right to freedom of expression and of the press represented by the extremely sweeping terms of this amended provision. In January 2002 the editor-in-chief of a political weekly was described by Amnesty International as 'the first known victim of the amendment of Article 150' when he was charged with 'writing and publishing false information and rumours that may harm the prestige and reputation of the state and slander the integrity and reputation of its members' after publishing a piece critical of the government.⁹⁰ The Jordanian Press Association and a number of newspaper editors and owners challenged the constitutionality of the amended article but the High Court of Justice rejected the suit for lack of interest of the petitioners;⁹¹ interventions and negotiations about the role of the media and its regulation continued, with the Press Association drafting its own 'code of honour assuring objectivity and freedom of expression' and the Prime Minister promising that the article would be repealed.⁹² In another temporary law issued in June 2003, the text of art. 150 was changed back to its original reading apart from an increase in the fine that could be imposed.⁹³

In its first report to the CTC, Jordan set out in some detail examples of sentences passed by its State Security Court on persons convicted of terrorism-related offences, including the death penalty and life sentences with frequent *in absentia* judgments.⁹⁴ The State Security Court has been

⁹⁰ The case of Fahd al-Rimawi, Editor-in-Chief of *al-Majd* weekly. See Amnesty International, 'Security measures violate human rights', AI Index MDE 16/001/2002, 5 February 2002. See also Stork, 'The human rights crisis', p. 43.

⁹¹ 'High Court rejects JPA lawsuit contesting Penal Code provisions', *Jordan Times*, 17 July 2002. See further AMAN News Center (the Arab Regional Resource Center on Violence Against Women), available at www.amanjordan.org.

⁹² 'Government announces procedures to repeal Article 150', *Jordan Times*, 9 April 2003.

⁹³ Temporary Law no. 45 of 2003 amending the Penal Code, *Official Gazette* no. 4600 of 1 June 2003. The potential prison sentence of between six months to three years remains the same, while the fine rises from a maximum of 50 dinars in the original 1960 text to 500 in the new version. Another change made by Temporary Law no. 54 of 2001 however remains: this is an amendment to art. 195 of the Penal Code, which deals with insults to the King; a new clause added to the list of offences that provoke a prison sentence of from one to three years for 'whosoever gossips about His Majesty the King or commits calumny by attributing to him words or deed which the King did not say or do, or acting to broadcast such or spread it among the people'.

⁹⁴ First Report of Jordan to the CTC: UN Doc S/2002/127 (29 January 2002), pp. 9–12.

the focus of criticisms from human rights groups since it was re-introduced in 1991.⁹⁵ Already in August 2001 there had been an amendment (through a temporary law) to the Law establishing the State Security Court expanding its jurisdiction (for example to include 'any other crime related to economic security that the prime minister decides to transfer to the Court').⁹⁶ The amendment also permitted the police to detain a suspect for up to seven days before bringing him or her before the Prosecutor, as compared to the twenty-four hours permitted under the regular Code of Criminal Procedure.⁹⁷ The Jordanian Bar Association voiced particular objections to the removal of the right to appeal for those convicted of 'misdemeanours' in the State Security Court.⁹⁸

The State Security Court is a key feature of the Law on the Prevention of Terrorism promulgated in Jordan in 2006.⁹⁹ The country had suffered the bombing of its embassy in Baghdad in 2003, just weeks before the attack on the UN headquarters there. In 2005, bombings hit three hotels in Amman, carried out by Iraqi suicide bombers and claimed by the group led by Jordanian Abu Mus'ab al-Zarqawi. Reflecting on the event and its impact, the International Crisis Group asserted 'two important messages':

No security apparatus, however efficient, can prevent each and every attack by a person prepared to die as they kill others. And any security

⁹⁵ The State Security Court was first established in 1952, replaced by military martial courts from 1967–90, and re-introduced (replacing the military martial court system) in 1991.

⁹⁶ Article 3(a)(iii) of Temporary Law no. 44 of 2001 amending the Law establishing the State Security Court, *Official Gazette* no. 4503 of 28 August 2001. An examination is made in a 'Working paper on law no. 16 of 2001 amending the Code of Criminal Procedure no. 9 of 1961' (Arabic text) by Advocate Abdel Ghaffar Freihat to a workshop of the Jordanian Banks Association in Amman, 15 October 2001.

⁹⁷ Article 7 of the Law establishing State Security Courts as amended by art. 3 of Law no. 44 of 2001. Freihat, 'working paper', 10.

⁹⁸ The Bar Association took an 'unprecedented decision' to call on all its members to refrain from appearing before the Court for a week in June 2002, to protest against the 2001 amendments: Saad Hattar, *Jordan Times*, 12 June 2002.

⁹⁹ Law no. 55 of 2006, *Official Gazette* no. 4264 of 1 November 2006, p. 4790. An English translation of the text of this law is available at the Terrorism Legislation Database of the United Nations Office on Drugs and Crime (www.unodc.org/tldb). The law's definition of 'terrorist act' is given there as: 'Every intentional act, committed by any means and causing death or physical harm to a person or damage to public or private properties, or to means of transport, infrastructure, international facilities or diplomatic missions and intended to disturb public order, endanger public safety and security, cause suspension of the application of the provisions of the Constitution and laws, affect the policy of the State or the government or force them to carry out an act or refrain from the same, or disturb national security by means of threat, intimidation or violence'.

response must be complemented by a genuine opening of the political system and more equally shared economic opportunity if Jordan is to minimise the risk of further attacks and instability.¹⁰⁰

The 2006 law explicitly included in ‘terrorist acts’ financing and recruitment or mobilisation activities and provides for a range of measures against suspects including surveillance, travel ban, the search of homes and the seizure of funds suspected to be associated with the acts.¹⁰¹ A law against money laundering followed in 2007.¹⁰²

Jordan, rather like Morocco, emphasises its positioning as a ‘moderate middle course’.¹⁰³ In November 2004, King Abdullah had announced an ‘Amman Message’ insisting that ‘on religious grounds, on moral grounds, we denounce the contemporary concept of terrorism’.¹⁰⁴ Until around that time, Jordan had been actively collaborating with the CIA rendition programme, providing ‘proxy detention’ of non-nationals and transferring others to secret US custody. Human Rights Watch tracked at least fourteen non-Jordanians sent by the United States to Jordan ‘for interrogation and likely torture’ over the period 2001–4, and observes in this regard that ‘while a few other countries have received individuals rendered by the United States in recent years (that is, transferred without formal legal process), no country is known to have detained as many as Jordan’.¹⁰⁵ Of the three Yemeni men reported by Amnesty International in 2006 to have provided at that time ‘the only public testimony from those who have been held in “black sites”’ by the US, two were arrested in Jordan and transferred there to US custody.¹⁰⁶

During the second half of the decade, the institutionalisation of human rights mechanisms has proceeded apace. A National Centre of Human Rights was established in 2006,¹⁰⁷ and Jordan has gazetted a number of international human rights instruments to which it is party. On the level of practice, however, the UN Special Rapporteur on torture visited Jordan

¹⁰⁰ International Crisis Group, ‘Jordan’s 9/11: dealing with Jihadi Islamism’, 23 November 2005, p. 1.

¹⁰¹ Articles 3 and 4 of Law no. 55 of 2006. In its fifth report to the CTC, Jordan had identified these provisions as fulfilling its obligations regarding measures to prohibit incitement to terrorist acts according to Resolution 1624 (S/2006/212, 4 April 2006, [2.1]).

¹⁰² Law no. 46 of 2007, *Official Gazette* no. 4831 of 17 June 2007, p. 4130.

¹⁰³ Jordan’s first report to the CTC: UN Doc. S/2002/127 (29 January 2002), p. 3.

¹⁰⁴ S/2006/212 (4 April 2006), [2.4].

¹⁰⁵ Human Rights Watch, ‘Double jeopardy: CIA rendition to Jordan’, 2008, 1–2.

¹⁰⁶ Amnesty International, ‘Below the radar’, 9.

¹⁰⁷ Law no. 51 of 2006 (Law of the National Centre for Human Rights), *Official Gazette* no. 4787 of 16 October 2006, p. 4026.

and concluded in 2006 that ‘the practice of torture is routine’ in two security directorates: one the general Criminal Investigations Directorate and the other the General Intelligence Directorate, which is responsible for national security and counter-terrorism, and was described by Human Rights Watch as having ‘served as a proxy jailor’ for the CIA at the start of the decade.¹⁰⁸ In 2008, ‘in the first event of its kind’ in the region, Jordan hosted a Regional Seminar on Upholding Human Rights While Countering Terrorism organised by the OHCHR and the UNDP in Jordan.¹⁰⁹

D. Tunisia

Tunisia’s Law no. 2003–75 regarding Support for International Effort to Combat Terrorism and the Repression of Money Laundering¹¹⁰ had already been prepared in draft when in April 2002 a truck exploded outside a Djerba synagogue, killing twenty-one people. The Tunisian authorities have observed that they had ‘long warned of the terrorist threat’, but at the same time human rights groups voiced concern at Tunisia’s established use of the security discourse ‘as a pretext for repression of political dissent and critical discourse across the political spectrum’.¹¹¹ Thus, while the official narrative of modernity, stability and rights (including substantial emphasis on women’s rights) is fiercely promoted at home and abroad, Tunisia’s public space remained extremely restricted in relation to criticism of the president or the government throughout the decade. ‘Anyone who is critical of the Tunisian authorities’, said Amnesty International in July 2010, ‘or speaks out for human rights in Tunisia is at risk’.¹¹² In January 2011, unprecedented anti-government protests built into the people’s revolution that forced the departure of President Ben Ali.

¹⁰⁸ Report of the Special Rapporteur on his Mission to Jordan: A/HRC/4/33/Add. 4 (5 January 2007); Human Rights Watch, ‘Double jeopardy’, 1.

¹⁰⁹ OHCHR, ‘Middle East and North Africa region to discuss upholding human rights while countering terrorism’, 21 October 2008.

¹¹⁰ Law no. 2003–75 of 10 December 2003, *Journal Officiel de la République Tunisienne* no. 99 (12 December 2003), pp. 3592–601 (French translation by the Tunisian government for purposes of information). The French text is also available at www.jurisitetunisie.com/tunisie/codes/terror (under the title *Lutte contre le Terrorism et le Blanchiment d’Argent*). I do not yet have the Arabic text.

¹¹¹ Amnesty International, ‘Tunisia: new draft “anti-terrorism” law will further undermine human rights’, briefing note to the European Union, AI Index MDE 30/021/2003.

¹¹² Amnesty International, ‘Independent voices stifled in Tunisia’, AI Index: MDE 30/008/2010, July 2010, 2.

Tunisia's 2003 law reflects its official image in an aspirational opening statement:

The current law guarantees society's right to live in security and peace, far from all that is of a nature to undermine its stability, to reject all forms of deviance, violence, fanaticism, racial segregation and terrorism which menace peace and the stability of societies. It contributes, moreover, to supporting the international effort to combat all forms of terrorism, to confront sources of finance that support it and to the repression of money laundering, within the framework of international, regional and bilateral conventions ratified by the Tunisian Republic and respect for constitutional guarantees (Article 1).

This is the longest of the post-Security Council Resolution 1373 legislative instruments under consideration here, and its first immediate effect was to amend the pre-existing definition of 'terrorist offence' under the Tunisian Penal Code, as follows:

Shall be categorized as terrorist, every offence, regardless of its motives,¹¹³ related to an individual or collective undertaking liable to intimidate a person or group of persons or spread alarm among the population with the intention of influencing the policy of the state and prompting it to do or abstain from doing any action, disturbing public order or international peace and security, causing harm to persons or property, damaging the headquarters of diplomatic and consular missions and international organizations, inflicting serious harm on the environment so as to endanger the life or health of inhabitants, or damaging vital resources, the infrastructure, transport, communications, information systems or public amenities (Article 4).

In this wording, prospective intimidation of a person or group of persons or spreading fear among the population is a necessary element;¹¹⁴ also necessary is intention, but while this includes influencing state policy, it may also include 'disturbing public order', or 'causing harm to property' or 'damaging public amenities'. There is no requirement of use of violence, nor, in some phrases, of the level of damage that has to be done.

The following art. (5) provides that 'terrorist offences' in the sense of the current law shall include terrorist offences in the real sense but also 'offences dealt with under the same regime'. Article 6 then provides that '[a]cts of incitement to hatred or religious fanaticism shall also be dealt

¹¹³ '*Quels qu'en soient les mobiles*'. This phrase is not included in the translation in Tunisia's third report, which is otherwise used here from the phrase 'to intimidate' onwards.

¹¹⁴ In the French text this is not necessarily the case, but I assume the Arabic original will confirm the meaning rendered in the English text of the UN report.

with as terrorist offences, whatever the means used'.¹¹⁵ This was taken from art. 52*bis* of the Penal Code which governed the categorisation of offences as terrorist prior to Law 2003–75.¹¹⁶

Amnesty International at the time voiced particular concern over what it considers a further broadening of the definition of 'terrorist offence' in Law 2003–75 in the light of the past use of the pre-existing art. 52*bis* of the Penal Code against non-violent opponents of the Tunisian authorities. The organisation notes that 'the Tunisian authorities have been casting the net of "terrorism" charges so wide as to include prisoners of conscience. Article 52*bis* has been used to criminalize peaceful opposition activities'. The reinstatement since 1999 of the trial of civilians by military court has resulted in 'scores of civilians ... sentenced on charges of "terrorism" to heavy prison sentences after unfair trials'.¹¹⁷

A large number of accomplice offences are provided for, some of them requiring intention and some not. Membership of whatever form in any sort of group or organisation which 'even coincidentally or incidentally'¹¹⁸ has adopted terrorism as a means of achieving its goals is criminalised, as is putting any 'capabilities or expertise' at the disposal of such a group or supplying or disseminating information 'with the intention of assisting in the commission of a terrorist offence'.¹¹⁹ A prison sentence of five to twelve years can be imposed on whosoever:

procures a meeting place for members of an organization, group or persons connected with terrorist offences, helps to lodge them or hide them or helps them to escape or ensures they are not discovered or punished, or benefits from the outcome of their misdeeds.¹²⁰

¹¹⁵ In this case I am using the translation provided by the English text of Tunisia's second report to the CTC (S/2002/1024 of 13 September 2002).

¹¹⁶ Article 52*bis* of the Penal Code was abrogated by art. 103 of Law no. 2003–75.

¹¹⁷ See further Amnesty International, 'Tunisia: the cycle of injustice', AI Index MDE 30/001/2003, 9 June 2003. A particularly notorious attempt to apply art. 52 *bis* – although ultimately the conviction was not made under the 'terrorist offences' terms of this article – came in the 1999 prosecution of Radhia Nasraoui, a prominent human rights lawyer, along with twenty-one co-defendants. For details of the charges against Nasraoui and her co-defendants, and of the trial proceedings, see Amnesty International, Human Rights Watch, and the Observatory for the Protection of Human Rights Defenders, *The Administration of Justice in Tunisia: Torture, Trumped-up Charges and a Tainted Trial*, AI Index 30/04/00. March 2000 For a more recent analysis see report by Amnesty International, 'Independent Voices Stifled in Tunisia', AI Index MDE 30/008/2010 13 July 2010.

¹¹⁸ Wording from S/2003/1038, p. 11.

¹¹⁹ Articles 13 and 17. The penalty is five to twelve years in prison for the first offences and five to twenty for the second set, plus a fine of 5,000 to 50,000 dinars in both cases.

¹²⁰ Article 18 of Law no. 2003–75.

There is apparently no requirement here of knowledge or intention. In the parallel provision of the pre-existing Penal Code broadly the same list of actions is criminalised, with a maximum penalty of six years in prison for whosoever ‘knowingly and voluntarily’ commits them in relation to members of a criminal gang.¹²¹ It is an offence under Tunisian law not to give immediate notification to the relevant authorities of information regarding a terrorist offence, even where the person is bound by professional confidentiality; here, an exception is made for ascendants, descendants, brothers, sisters and spouse.¹²² Article 12 of Law no. 2003–75 provides for a penalty of five to twelve years in prison for:

whosoever, by any means, calls for the commission of terrorist offences or for joining an organization or group connected with terrorist offences, or uses a name, a term, a symbol or any other sign with the goal of condoning¹²³ a terrorist organization, one of its members or its activities.¹²⁴

In Canada, Roach notes a new offence regarding ‘knowingly participating in or contributing to any activity of a terrorist group’, and the evidential use of frequent association with members of a terrorist group and of the use of terrorist-related symbols and representations.¹²⁵ In Tunisia, such use of terrorist-related symbols itself constitutes an offence.

In its last public report to the CTC in 2005, Tunisia defended its anti-terrorism law as ‘based on precise and broad concepts of terrorist crime’ and at the same time guaranteeing ‘respect for human rights and universal freedoms including, in particular, the right to a fair trial and the presumption of innocence’.¹²⁶ Human rights organisations and international mechanisms disagree. In 2008, the UN Human Rights Committee concluded its consideration of Tunisia’s fifth periodic report with concerns regarding the treatment of allegations of torture, the lack of exclusion from evidence of confessions obtained under torture, and the exceeding of time limits on *garde à vue* detention and other violations of the rules

¹²¹ Article 133 of the Penal Code as amended by Law no. 89–23 of 27 February 1989. Article 28 of Law no. 2003–75 provides for the minimum penalty for the initial offence in the event that the perpetrators of a terrorist offence establish they were drawn into the act *inter alia* by abuse of their situation.

¹²² Article 22 of Law no. 2003–75.

¹²³ The French text is ‘*faire l’apologie de*’.

¹²⁴ The last part of this provision, from ‘or uses a name’, is not included in Tunisia’s third report to the CTC.

¹²⁵ Roach, ‘World wide expansion’, 502. See also Kent Roach, Chapter 20, this volume.

¹²⁶ Tunisia’s Fourth Report to the CTC: S/2005/194 (24 March 2005), p. 4.

of police custody.¹²⁷ It also declared itself ‘concerned at the lack of precision in the particularly broad definition of terrorist acts’.¹²⁸ The following year, Tunisia abrogated arts. 5 and 6 of Law 75–2003,¹²⁹ a move welcomed by Special Rapporteur Martin Scheinin in a statement issued at the end of his official visit to the country.¹³⁰ Nevertheless, the Special Rapporteur continued:

[T]he 2003 counter-terrorism law still contains deficiencies, which, as in many other countries, are rooted in the definition of terrorism. [...] As I have systematically emphasized, deadly or otherwise serious physical violence against members of the general population or segments of it should be a central feature of any definition of terrorism. This is clearly not the case in Tunisia where in the majority of cases since 2003 mere intentions are punished, be it in terms of ‘planning’ or in terms of ‘membership’, the latter often within vaguely defined organizations or groups.¹³¹

In January 2011, in one of its first statements after the departure of President Ben Ali, Amnesty International called on the caretaker government in Tunis to ‘review all sentences for those convicted under the controversial and much-criticised 2003 Anti-Terrorism Law’.¹³²

6. Conclusion

Reform and ‘democratisation’ in the Arab states were emphasised as a policy focus in developing US engagement with states in the region in a series of ‘initiatives’ developed in 2003 and 2004.¹³³ Considerable attention

¹²⁷ Concluding Observations of the Human Rights Committee – Tunisia: CCPR/C/TUN/CO/5 (23 April 2008), [11]–[13].

¹²⁸ *Ibid.*, [15].

¹²⁹ Another reference to ‘offences dealt with under a similar juridical regime’ was also removed from art. 2. These amendments were made by Law no. 2009–65 of 12 August 2009. Texts in French are available at www.jurisitetunisie.com.

¹³⁰ OHCHR, ‘UN expert on human rights and counter-terrorism concludes visit to Tunisia’, 26 January 2010.

¹³¹ *Ibid.* Scheinin also noted ‘the existence of serious discrepancies between the law and what was reported to me as happening in reality’, choosing to speak out in advance of a full report on issues similar to those that concerned the Human Rights Committee in 2008.

¹³² Amnesty International, ‘Release of political prisoners in Tunisia is a welcome first step’, 20 January 2011.

¹³³ The Greater Middle East Initiative was not, as originally planned, announced at the G8 Summit of June 2004, although some Arab states did attend to discuss an apparently less ambitious ‘Broader Middle East Initiative’. For a critique of the first for failing to establish ‘a basis for genuine partnership’, see Marina Ottaway and Thomas Carothers, ‘The

was paid to the findings of the set of Arab Human Development Reports by those seeking to formulate policies in the 'global war on terrorism', and in particular to extremely high levels of joblessness as well as lack of participation in social and political development. That different governments in the region (and their international allies) have not mobilised to address these serious challenges has been highlighted by the events of January 2011. Different bodies in the United Nations have considered the role of the organisation beyond the CTC in combating terrorism, including through 'norm setting, human rights and communication'.¹³⁴

In a number of Arab states, new albeit limited human rights mechanisms have been instituted by governments, and certain other moves towards social, economic and political 'opening' (or 'reform') have been noted. Nevertheless, there is clearly a tension between these developments and the threats to core 'democratic' rights posed by legislation introduced or legitimated by the 'war on terror'. Fenwick observes that '[d]emocratic governments are perfectly entitled to take extraordinary measures if faced with a threat of atrocities' and explores the tension that necessarily arises between such measures and 'democratic values', with a view to proposing that such measures 'be subjected to the most rigorous tests for proportionality'.¹³⁵ The lack of space for public dissent and criticism, especially in the second half of the decade, was a particular obstacle facing those in the Arab states who would agree with this statement, and who would seek to constrain within a similar principle of proportionality the reaction of their governments to serious domestic and international threats.

A further obstacle is the apparent endorsement of legal and extra-legal practice by the United States in particular. In Yemen, a visiting delegation from Amnesty International, bringing up the mass arbitrary arrests and detentions that had taken place there since 9/11, allegedly with FBI involvement, reported as follows:

The authorities, while recognizing that they were in breach of their international human rights obligations and their own laws, argued that this was because they had to 'fight terrorism' and avert the risks of a military

greater Middle East initiative: off to a false start', Carnegie Endowment for International Peace, Policy Brief 29, March 2004.

¹³⁴ Report of the Policy Working Group on the United Nations and Terrorism, UN Doc. A/57/273 S/2002/875.

¹³⁵ Helen Fenwick, 'Responding to 11 September: detention without trial under the Anti-Terrorism, Crime and Security Act 2001', in Lawrence Freedman, *Superterrorism: Policy Responses* (Oxford: Blackwell, 2002), pp. 100–1.

action against Yemen by the US in the wake of the 11 September events. The authorities said that they had 'no option' but to continue the practice of detention without charge or trial of those held contrary to their laws and international obligations, and that they had no plans to offer them an opportunity of access to lawyers or the judiciary to challenge the legality of their detention.¹³⁶

Amnesty International has since reported on similar statements around the detention of three Yemeni nationals returned from US custody in CIA secret detention sites in 2005: 'Yemeni officials say they were instructed by the US Embassy to keep the men in custody until their case files were transferred from Washington. No files or evidence were ever received.'¹³⁷ Such deftly frank admissions of responding to pressure cannot excuse the state actor in such cases. Nevertheless, support – or pressure – for such measures from the United States sits uneasily with public promotion of reform in the Middle East as critical in its future engagement with the region. It was also in Yemen in 2003 that a CIA-controlled drone aircraft was reported to have launched a missile killing six men in a car in a suspected extra-judicial execution. Although Amnesty International reported receiving no response to its letters raising its concerns, Yemeni ministers later confirmed that the government co-operated with the US in this operation within the 'global war on terrorism'.¹³⁸

Human rights activists in the region report an increasing perception of the hypocrisy of the international discourse of human rights and international law, in a region where it is already complicated by long-standing perceptions of selectivity, and where indeed the term 'international' is being increasingly read as meaning either US or US-driven. This is a concern not only for those who wish to see domestic reform initiatives take shape and continue rather than be interrupted or undermined. It needs no particular insight to suggest that such a development is of dubious

¹³⁶ Amnesty International, 'Yemen: united against rights', AI Index 31/011/2003, 24 September 2003. See also '200 held in Yemen to placate US', *The Guardian*, 24 September 2003.

¹³⁷ Amnesty International, 'Below the radar,' 15–16. See also Amnesty International, 'Yemen: cracking down under pressure', AI Index: MDE 31/010/2010 13 July 2010.

¹³⁸ Amnesty International, 'Yemen: the rule of law sidelined in the name of security', AI Index MDE 31/006/2003, 24 September 2003. Amnesty reported the US as arguing that such actions did not constitute extra-judicial killings but rather 'military operations against enemy combatants' and therefore as governed not by Yemeni police procedures but by 'the international law of armed conflict'. For US involvement with counter-terrorism operations in Yemen currently, see Amnesty International, 'Cracking down under pressure', 6.

efficacy in the effort to build international peace and security and to combat the phenomenon of terrorism. The protests that ousted Tunisia's President Ben Ali and shook Egypt's President Mubarak in January 2011, as well as troubling a number of other governments in the region, stand to challenge powerful Western states on what it is that they promote in the region as well as challenging Arab governments on how to address the tensions underlined by the protesters.