Beyond the 'War on Terror'

A study of criminal justice responses to terrorism in the Maghreb

Jolyon Ford

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ISBN 978-1-920114-85-5

First published by the Institute for Security Studies,
P O Box 1787, Brooklyn Square 0075
Tshwane (Pretoria), South Africa

www.issafrica.org

Cover photograph PictureNet

Production Image Design +27 11 469 3029
Printing Remata iNathi

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Monograph 165
July 2009

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About the author

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Ford's recent publications for the ISS include: *Unable or Unwilling? Case Studies on Domestic Implementation of the ICC Statute in Selected African Countries* (Monograph Series 141, co-editor and author, March 2008), *Truth and Justice in a new Zimbabwe: Transitional Justice Options* (Occasional Paper Series, co-author, June 2008), and *Bringing Fairness to International Justice: A Handbook on the ICC for Defence Lawyers in Africa* (forthcoming 2009).

Acknowledgements and disclaimer

The author would like to thank Anton du Plessis and Anneli Botha from ICAP at the ISS for their guidance and support during the research, writing and editing of this monograph. He also appreciates the support and assistance received from the Ministry of Justice, Algeria; and the staff of the diplomatic missions to South Africa of the Republic of Algeria, the Kingdom of Morocco and the Republic of Tunisia.

Issues concerning terrorism and counter-terrorism are generally viewed with considerable sensitivity in the region under review. Any views and opinions expressed in this monograph reflect the views of the author individually; they should not be seen as representing the views of the ISS. The author, who through the ISS sought the cooperation of the countries considered, has relied primarily on publically available information, opinions and claims mainly produced by reliable institutions.

The monograph does not purport to be exhaustive and is presented as a preliminary study pointing towards further research on African counter-terrorism responses, particularly as we enter this new era of counter-terrorism as described herein. Moreover, this monograph is intended to stimulate informed and reasonable debate about the potential for improving terrorism prevention through criminal justice systems in the region and indeed in Africa as a whole. A 'note on methodology' is included at the beginning of Part II of this monograph.

Abbreviations and acronyms

ACIDH	Action contre l'impunité pour les droits humains
ACSRT	African Centre on the Study and Research of Terrorism, Algiers
AQLIM	Al-Qaeda for the Land of the Islamic Maghreb
AU	African Union
CAT	Convention Against Torture 1984
CCAT	United Nations Committee of the CAT
CTC	United Nations Security Council Counter-terrorism Committee
CTED	Counter-terrorism Executive Directorate
DGSN	General Directorate of National Security, Morocco
DGST	General Directorate of Territorial Security, Morocco
DOS	Department of State, United States Government
DRS	Department for Information and Security, Algeria
ECHR	European Convention on Human Rights
EU	European Union
FATF	Financial Action Task Force
HRW	Human Rights Watch
ICAP	International Crime in Africa Programme
ICCPR	International Covenant on Civil and Political Rights 1966
ICJ	International Commission of Jurists
ISS	Institute for Security Studies
MLA	Mutual Legal Assistance
UNGA	United Nations General Assembly
UNHRC	Human Rights Committee mechanism under the ICCPR
UNSC	United Nations Security Council
UPR	Universal Periodic Review under the UN Human Rights Council

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Executive summary

Terrorist activity constitutes a major generational threat to peace and security in Africa, and is a major distraction from other pressing development issues. In 2009, as a new United States administration signals, at one level, a departure from the 'war on terror,' what opportunities exist to examine and re-evaluate terrorism prevention strategies on the continent? While a criminal justice-based approach to preventing and combating terrorism is at the heart of the global institutional response, what level of uptake and implementation has there been in African countries? Are we entering a new era of counter-terrorism on the continent?

Few studies exist on how African criminal justice systems have fared in relation to the particular manifestation of the perceived terrorist threat (and of responses to it). This study, although preliminary and exploratory in nature, considers the criminal justice measures taken by the governments of Algeria, Morocco and Tunisia to meet their international counter-terrorism obligations. These Maghreb countries have more counter-terrorism experience than most other African countries. Research-driven policy and legal reform is needed to ensure appropriate, proactive and preventative counter-terrorism action in Africa.

The global counter-terrorism effort is premised upon *national-level* lawful actions to prevent and prosecute terrorist activity. Although counter-terrorism strategies are complex and multidimensional, this study considers one significant element: a preventative, criminal justice-based response. This approach requires national-level legal and institutional measures in place to investigate, prevent, prosecute and punish terrorism-related activity according to internationally acceptable laws and procedures. The overall objective of the universal counter-terrorism scheme informing this approach is to harmonise all national laws to create a seamless web of preventative, punitive and international cooperative

legal measures. The criminal justice system can be a primary resource in wider counter-terrorism strategies.

The various merits and features of a criminal justice approach are considered in this monograph, as background to an assessment of the three countries, which has been undertaken using open-source materials. The focus is on justice systems as a mechanism for bringing terrorists and their supporters to formal justice by prosecuting or otherwise lawfully disrupting their conduct *before* it culminates in an overt, violent 'terrorist act'. The author argues that the criminal justice system model of counter-terrorism is adequate and able to combat terrorism fairly and effectively.

The country studies reveal a need for the Maghreb countries to further enhance national counter-terrorism responses through their criminal justice systems. This includes the development of further legal reforms, but the more significant challenge is to reduce the gap between existing laws and actual practice. This will require capacity building and training, as well as leadership on changing institutional cultures, mindsets and habits in law enforcement agencies and the justice system. Although regional and international coordination and cooperation in criminal matters is improving, states need to reduce jurisdictional and bureaucratic handicaps while retaining procedural, rule of law and human rights safeguards.

The study notes that, in Algeria, overall progress is certainly discernable but the response is hampered by the legal climate and institutional culture sustained by the existence of a longstanding state of emergency. In addition, the primary role of military intelligence in the national counter-terrorism strategy undermines the strengthening of the justice system. Although Morocco deserves credit for its more narrowly targeted and transparent prosecutions and enhanced international cooperation, a number of challenges remain. In Tunisia, the principal issue remains the wide scope of conduct that is dealt with as 'terrorist' conduct, the unclear role of military justice in counter-terrorism prosecutions, and bringing law enforcement and judicial practice more in line with laws that are now in place.

The studies and wider trends also reveal opportunities in Africa to address justice system capacity and crime prevention in general, simultaneously with counter-terrorism strategies. The particular countries also raise the question of the degree of departure from a predominantly militarised counter-terrorism paradigm to a policing-justice paradigm. No good reasons have been given

why military courts are superior forums for prosecuting terrorist offences. One danger noted is that, as specialised counter-terrorism mechanisms are set up, justice officials may come to see themselves as part of the state's counter-terrorism machinery and lose their independence. A military-based counter-terrorism strategy can have unintended consequences, enabling terrorists to cast themselves as 'warriors' rather than criminals. History and experience point away from sidelining a transparent, prosecutions-based strategy: a pure 'security' approach to combating terrorism is destined to fail.

Throughout the monograph the point is made that the touchstone of 'success' in counter-terrorism in the Maghreb ought to be whether the authorities can, within a largely ordinary civil policing and criminal justice paradigm, lawfully and formally prevent and deal with terrorist threats, while complying with constitutional and international standards – that is, a 'strong' or 'effective' criminal justice system is measured not only by the *quantity* of arrests or convictions, but by the *quality* of the laws, procedures, trials and practices in place.

The monograph also reflects on the balance between flexibility of response and maintaining measurable standards. In principle, there is no reason why a state's counter-terrorism response cannot remain flexible while complying with the rule of law and upholding basic human rights. Maintaining these standards in the face of terrorist threats is a form of societal 'grace under fire' and vital to preserving the democratic order and strengthening the social contract between a state and its citizenry.

The monograph reveals that criminal justice systems can be strategic assets in counter-terrorism policy and practice. However, law enforcement that ignores certain standards can itself become a factor that contributes to escalating violence. It has become axiomatic that taking 'short cuts' on human rights and legal procedures tends, over time, to undermine the state's authority rather than enforce it, to alienate the wider community and increase levels of distrust and non-cooperation, to weaken the morale and legitimacy of officials, and to provide a propaganda victory for the other side. However, challenges remain to increase understanding and awareness of these strategic issues among justice officials and law enforcement agencies.

In the years after 2001 the core original 'criminal justice response' message of the UN Security Council's resolutions became somewhat distorted. The tone of the US-led 'war on terror' may have contributed to a somewhat permissive

overall climate, and the steady expansion of executive power seen as justifiable in the face of a long-term, rather open-ended struggle against a largely opaque enemy. Broadly termed legislation on counter-terrorism in Africa enabled some governments to draw on the new legitimacy given to countering terrorism in order to deal with other domestic political issues. The author argues that the change in tone over the 'war on terror' may perhaps allow internal African realities and priorities to shape counter-terrorism responses in Africa, albeit within the global normative and policy framework.

The country studies are intended to draw out reflections on how to use national criminal justice systems to deal formally, fairly and effectively with those who use terror and violence as a tactic. A criminal justice-based counter-terrorism approach can help to put such actors in their place: by dealing with terrorists as mere criminals, those who use indiscriminate violence are denied public space and attention. A better justice-based counter-terrorism response can enable African governments, and the people they serve, to concentrate on other pressing national priorities.

Introduction

This monograph is a preliminary study of the extent to which three North African countries – Algeria, Morocco and Tunisia – have successfully implemented legal and institutional measures to address the threat of terrorism primarily through their national criminal justice systems, pursuant to internationally and regionally agreed obligations and in accordance with internationally accepted standards.

This study is part of the multi-year project, 'Strengthening the criminal justice capacity of African states to investigate, prosecute and adjudicate cases of terrorism', which started in 2008. The project is being implemented by the International Crime in Africa Programme (ICAP) of the Institute for Security Studies (ISS). One important ICAP objective is to lay the empirical and conceptual groundwork for legal and policy reform, awareness and capacity building, debate and consensus on international and transnational crime issues in African countries. The country studies in this monograph, informed by analysis and consideration of the significance of national criminal justice systems in preventing and countering terrorism, are intended to stimulate further research, advocacy, understanding and discussion on improving counter-terrorism responses in Africa. In this way the study seeks to contribute

to the core of the ISS mission as an applied policy research institute for the African continent: conceptualising, informing and enhancing security debates in Africa.

A number of general preliminary remarks are necessary before explaining the structure of this monograph.

Terrorism is a crime, and a particularly serious form of human rights violation. Terrorist activity constitutes a major generational threat to peace and security in Africa. It moreover represents a threat to – and major distraction from – vital human and economic development in African societies: it is a distraction from the consolidation of democracy in Africa and open, responsive, inclusive governments, and in some respects the perceived threat of terrorism ironically creates national political environments that stifle the realisation of these ideals. From an African perspective, therefore, terrorism must be prevented and terrorists overcome not only for principled and security-related reasons, but because the bulk of Africa's people require governmental and international attention to a range of other problems and possibilities.

The logical strategy for overcoming the destruction and distraction of terrorism is for African states – individually and in partnership – to counter terrorism more effectively. This entails comprehensive, long-term, multifaceted and adaptable political, legal, developmental, social, economic and cultural strategies and initiatives that address what might be understood as both the 'supply' and 'demand' dimensions of this constantly evolving problem. On the one hand, deliberate law enforcement actions are needed – for example, to create adequate offences in national laws, to regulate the movement of funds, people, arms and explosives, to build institutional capacities, and to increase information sharing between agencies and countries. On the other hand, and in parallel, authorities need to undertake long-term policy initiatives to improve tolerance, inclusivity and equitable participation in society and to reduce social indicators that might be conducive to the spread of terrorism or contribute to the radicalisation of some individuals or groups by extremist elements.

Conscious of the profound importance of this wider, multidimensional approach to dealing with terrorism, this monograph deals only with one significant element of an effective counter-terrorism strategy – a preventative, criminal justice-based response. This study's focus is therefore not on wider counter-terrorism strategies as a whole, but the core of a criminal justice component of strategy.

The 'why' and 'how' of a justice-based approach are described in detail in the first part of this monograph. At this stage it is sufficient to note that the international community agrees that terrorism is a crime.[1] However, the primary responsibility for acting on this global consensus does not lie with any international organisation, but with states themselves. Through the UN system in particular, the international community has jointly framed binding duties on states to take action. There are no international tribunals that deal systematically with terrorism in the way that the International Criminal Court (ICC) and other bodies can adjudicate genocide, war crimes and crimes against humanity.[2] Instead, the global counter-terrorism effort is inherently premised upon *national-level* lawful actions to prevent and punish terrorist activity.

Thus, while national actions take their shape and stimulus from globally applicable agreements, the success or failure of the global strategy against terrorism will depend on the state implementation of global frameworks and on the capacity of national justice systems. At the heart of this issue, and shaped by global and regional legal-policy frameworks, is the capability of the criminal justice system (its codes and procedures, institutions, resources and networks) to detect, investigate, prevent and prosecute terrorist attacks, while maintaining the rule of law and respect for human rights standards. Justice systems need to be able to coordinate preventative and disruptive legal measures at home and across jurisdictions. Following appropriate investigatory procedures, national legal systems need to be able and willing either to competently and properly prosecute terrorist activity, or to extradite suspects to other appropriate jurisdictions.

The above refrain (that 'terrorism is a crime') on its own merely represents a statement of principle, but what is required, in a 'real world' sense, is *criminalisation* to ensure that valid legal 'hooks' exist upon which to pin terrorist conduct, and *operationalisation* of these measures in the sense that they have life and practical effect beyond the statute book. Careful and deliberate measures need to be taken by authorities to ensure that acts of terror – and related preparatory conduct – are indeed provided for as punishable crimes in their national laws. Moreover, since the ideal is to *prevent* acts of terror before injury and loss of life and property occur, the acceptance that 'terrorism is a crime' must not result in a reactive, after-the-fact approach. It must not obscure the need for the legislative and institutional means to bring to justice those intent on committing acts of terror, by prosecuting or otherwise lawfully disrupting

their conduct *before* it culminates in what most people would label a 'terrorist act'.

As discussed in Part 1 of this monograph, this may require measures to ensure that preparatory conduct such as incitement to terrorism, recruitment, conspiracy, financing and attempted acts are proscribed as crimes, and so given the same preventative law enforcement resources as traditional 'criminal investigations' that follow the commission of the main or overt act or event. As emphasised in this monograph, the regulation of formal and informal financial activity is a particularly significant crime (terrorism) prevention strategy. The statement 'terrorism is a crime' would therefore ideally be a descriptive statement, representing the objective that all states had fully implemented their obligations to take national legal measures to enable them to prevent and punish terrorist activity by reference to valid and legitimate laws.

Why does this monograph focus on the Maghreb countries? First, this study, while preliminary, follows on from and complements a very comprehensive ISS monograph by Anneli Botha assessing the perceived or claimed transnationalisation of domestic terrorism across these three countries, which only incidentally examined the criminal justice systems of the countries.[3] Second, since national-level responses are at the heart of the global effort against terrorism, it is important to descend from generalisation to examine particular responses. Third, Algeria and Morocco – and to a lesser extent Tunisia – have experienced a level of terrorist activity and threat (and a concomitant level of official response) that most other African countries have not. They have also to some extent taken a lead (historically and more recently) in energising Africa-specific responses to the phenomenon of terrorism, through summitry, advocacy and establishment of forums for policy work. Finally, and related to the preceding point, other African countries (with both civil law and common law legacies) may stand to learn from the experience of these three countries.

One point of this monograph that is worth flagging at the outset is that when one talks about 'success' in counter-terrorism, or working to make criminal justice systems and responses 'work better' or be 'more effective', the essence of success is not simply short-term gains in the number of suspects killed or captured or the number of terrorist cells 'disrupted'. It is whether the authorities can, within a largely ordinary civil-policing paradigm, prevent and deal with

terrorist threats according to laws and legal procedures, while complying with constitutional and international standards of behaviour.

Thus, policy and capacity building discourses often talk of the need to 'strengthen' justice systems, and this is certainly true in many respects. But as this monograph shows, in some ways the systems (at least in these three countries) need to be loosened, opened or relaxed in order to meet the criteria for 'effective' or 'successful'. A 'strengthened' justice system is often part of the problem, because it is disproportionately empowered and so operates in a manner contrary to what a long-term counter-terrorism response indicates is needed for success. National responses that are 'too strong' (over-broad definitions of crimes, unreviewable conduct of officials, minimal safeguards) are likely only to weaken the rule of law and respect for the law in the society at large, further isolate the government from its population over time, and perhaps provide a grievance issue for terrorist organisations to mobilise around, including for recruitment purposes. A 'strong' or 'effective' criminal justice system is measured not only by the *quantity* of arrests or convictions, but by the *quality* of the laws, procedures and practices in place. This measure of value includes criteria such as transparency, responsiveness and the degree of compliance with international human rights safeguards. Throughout this monograph, it is this understanding of 'effective' or 'strong' that is used in evaluating justice systems.

A militarised response – not simply operationally, but the use of military laws and courts and security services – tends over time and in the public mind to lessen the perception of terrorist actors as criminals: it can have the effect of ascribing to them more significance and legitimacy by enabling a more ready resort to the vocabulary of 'armed struggle' rather than the ordinary, appropriate discourse of crime.

Although Algeria faced an extraordinary (and perhaps under-appreciated) challenge in the 1990s, and while constant vigilance against escalation is understandable, in none of the three countries under study is the threat level objectively high enough to warrant extraordinary measures. And, although border control in particular is a complex issue, certainly there seems to be no good reason in the three subject countries why a mainly covert, quasi-military counter-terrorism response is required across society at large.

Laws and lawfulness as a strategic counter-terrorism resource

Although the temptation may be to descend to unlawful methods to combat unlawful terrorists, a truly 'strong' justice system has inbuilt human rights and rule of law limitations that act as a social moral compass and provide the moral superiority vital to disciplined, high-morale law enforcement, community support and long-term success. The law is not 'enforced' when it is substantially bypassed. And it makes no sense for the state to attempt to stop crime simply by committing a crime itself.

Despite the fact that the criminal justice response to terrorism rests inescapably on national laws and legal systems, these laws and their practical application must comply with various aspects of international law. Thus the point ought to be made that these standards (compliance with which improves 'effectiveness') are the same whether viewed through the lens of Arab, African or international instruments and frameworks: there is an unarguable consensus on the importance of a rule of law and human rights-based response to terrorism. Although every country perceives its challenges differently, and different problems arise in particular contexts, there are ultimately no grounds for diverting the debate about standards into discussions of national contingencies and circumstances.

Since all African states stand to gain by pursuing the accepted global strategy, the challenge is rather to raise awareness among officials, judges and law enforcement agencies of the merits of these approaches for any successful long-term counter-terrorism strategy; to implement and strengthen measures and/or provide technical assistance and political support in moving towards 'effective' national systems; and to monitor progress to the extent appropriate and possible, including through the legitimate activities of local and international civil society actors.

Finally, in using studies such as this to stimulate further research and understanding in the near future, it is important to focus on the many opportunities that now exist to reorient counter-terrorism and security debates, discourses and policies in the Maghreb region and in Africa as a whole, beyond

the simplistic notion of a 'war on terror' and as we approach the end of the first decade after 9/11. These might include:

- To ensure the state acts and is perceived as responsive, inclusive and as the legitimate authority in society, by protecting its citizens and dependants without resort to unnecessary force.
- For the state to earn public trust and cooperation and so enrol the wider public in concerted, coherent, community-based terrorism-prevention strategies at national levels.
- For African states to improve national counter-terrorism responses through the criminal justice system, including further legal reforms, but more significantly to reduce the gap between existing laws ('the law as it looks on the books') and actual practice ('the law as it is in fact'). This includes not only capacity building and training, but leadership and changing institutional culture, mindsets and habits in law enforcement agencies and the justice system.
- To improve regional and international coordination and cooperation.
- Simultaneously with counter-terrorism strategies, to address organised and transnational crime, including the arms and conflict-related trade, money laundering and corruption, whether or not these have a link to terrorism (as they sometimes do).[4]
- Simultaneously with counter-terrorism strategies, to improve generic criminal justice in African countries so that these systems better serve their communities in relation to crime prevention in general.
- Importantly for Africa to move away from a predominantly military-intelligence paradigm of counter-terrorism towards an intelligence-to-evidence, policing-justice paradigm. This is not so that entire national police and justice systems then become themselves engulfed and subverted into opaque, self-justifying 'national security' discourses; instead, it is so that those who use terror and violence as a medium can be put in their place – dealt with as mere criminals, and denied the public space and attention in which they have delighted in the last decade. In this way, a better justice system-based counter-terrorism response can enable African governments, and the people they serve, to concentrate on other national priorities.

STRUCTURE OF THIS MONOGRAPH

Part I of this study sets the global and continental context for an examination of criminal justice systems in the Maghreb region. It considers the wider context in which discussion of counter-terrorism strategy in Africa takes place in 2009, including the possible significance and symbolism of the recent change in government in the US, whose previous administration had shaped much of the counter-terrorism policy and discourse in the last decade. Since it informs and underpins national approaches – or ought to – the legal and policy counter-terrorism framework that exists at the global level is briefly set out. It also discusses the imperatives and advantages of a justice-based approach, and the features or components of such an approach. It considers the special significance of criminal law measures to counter financing of terrorist activity, and concludes with a consideration of the special significance of national measures and policies for international legal, operational and technical cooperation. These sections lay the foundation for the research questions underlying the country-specific studies in Part II.

Part II provides an analysis of relevant normative and institutional aspects of the national criminal justice systems of Algeria, Morocco and Tunisia. In describing some of the criminal justice-related steps these countries have taken to implement counter-terrorism measures in keeping with international obligations, it notes some of the progress achieved to date, as well as challenges that remain. A range of issues are addressed, on which further research would be merited:

- What is the local historical context of the national counter-terrorism response?
- What laws do these countries now have in place to criminalise terrorist acts and related conduct, including financing of terrorism and international legal cooperation – and where are the legislative gaps?
- How effective are the agencies and courts that administer these laws?
- Whatever the actual laws in place, what happens in practice in particular countries?
- To what extent is the national counter-terrorism response directed through means other than the formal civilian criminal justice system?

- How independent and impartial are the courts, and what is the status and role of the legal profession and civil society?
- What safeguards are in place to curb official power deployed in the name of countering terrorism?
- How does the justice system look when viewed through a lens of concern for human rights safeguards, and to what extent is neglect and abuse of these safeguards undermining the national counter-terrorism strategy or the reputation of the country's justice system?
- How effective are mechanisms and relationships for international cooperation, including on legal aspects of counter-terrorism issues?
- What opportunities exist for improvement?

A brief explanatory note on case study selection and research methodology is included since the production of this monograph involved mainly desk-based, open-source work and for certain reasons lacked the benefit of substantial direct in-country research. This part of the monograph does not purport to be a comprehensive review; instead, it envisages further study, consultation and dialogue, and outreach, including along some of the proposed action points and lines of thought developed in Part III.

Part III draws together the first two parts in order to offer some observations about, and recommendations for, the way forward for further research, advocacy and action on this issue in the Maghreb region and, indeed, across Africa. Since a key objective of the ISS and the ICAP is to stimulate discussion, awareness and understanding of criminal justice systems in Africa as part of a coherent counter-terrorism strategy, one purpose of this monograph is to explore the key perceived policy shifts that may accompany a new US administration to catalyse further examination of this subject matter in the Maghreb countries and beyond.

Part I: The context

RECENT DEVELOPMENTS AND CURRENT DEBATES

A new counter-terrorism paradigm for Africa: an end to the 'war on terror'?

The timing of this monograph in 2009 is significant since it is now possible to perceive the basis for a fundamental shift, globally and in Africa, in the entire counter-terrorism effort. The suggestion is of an increasingly evident trend towards the pursuit of national counter-terrorism strategies through the criminal justice system and using traditional (if somewhat specialised) crime prevention and law enforcement techniques and institutions.[5] This approach was, of course, the thrust of the UN Security Council regime since 2001 that has required states to act in their national contexts and legal systems.[6] However, in the years after 2001 the core original 'criminal justice response' message became somewhat distorted.

The US has led and shaped much of the global counter-terrorism effort since 2001, and one pervading element of this effort was the partial characterisation of the struggle in military terms, with military solutions, including the use of

special tribunals and other legal mechanisms. The tone of the US-led 'war on terror' may have contributed to a somewhat permissive overall climate, and the steady expansion of executive power seen as justifiable in the face of a long-term, rather open-ended struggle against a largely opaque enemy. Close examination will show that the US itself pursued a criminal justice-based response and encouraged others to do so, and that some military actions were necessary, but it remains the case that the overall impression given to states following this lead was one that undermined a more restrained justice-based response.

Although some of the operational contexts have required a military response, and accepting that neat legal categorisations of participants is not often straightforward, the abiding impression was of an overall strategy that occupied a grey area with a non-judicial character, notwithstanding the criminal justice focus of the UN-led global response (see below). It may not be going too far to say that such was the mobilising and focusing power of the 9/11 reaction in the US that the entire picture of at least US development assistance and foreign policy engagement towards Africa, in particular fragile and post-conflict African states, became coloured by the application of a counter-terrorism lens, irrespective of the objective reality.

In African terms, one consequence of the new vocabulary of a 'war on terror' after 2001, and the prevailing encouragement towards strong actions by states, has been a miscasting of the campaign in many situations. As noted, the discourse around a global 'war on terror' perhaps contributed to a climate of permissiveness. Combined with UN Security Council mandates that lacked detail, this message had a certain political usefulness in many situations. The result has often been the promulgation of very broadly termed legislation on counter-terrorism in Africa, which has also enabled some governments to abuse the international campaign so as to deal with domestic issues: casting a range of political opponents in the frame of 'terrorists' so as to draw on the new legitimacy given to countering terrorism.[7]

Although African states predominantly feature as victims of terrorism (and, in the Maghreb countries, as consistently calling for stronger action), and while many have portrayed African states as mainly passive recipients of Western demands in 'their war', it is undeniable that in other respects state actors in Africa, particularly intelligence services, have been quite active *participants* in that process.[8] To some extent there was an external push, but to some extent

this has been a case of local actors pursuing a range of mainly local interests, in the name of the global 'war'.

Militarisation of a counter-terrorism response can be tempting in such contexts, since inherently there is more deference to national security discourses than to policing-justice ones, and military paradigms are less amenable or prone to scrutiny and institutional checks and balances. Even in situations where states *bona fide* sought to deal with an objective threat, one significant feature of the environment created by the vocabulary and manifestations of the 'war on terror' has been that many African countries have moved away from the balanced criminal justice approach at the heart of the universal legal framework and the UN Security Council regimes, and pursued policies framed in hard military-security terms, rather than policing-justice terms; or in unclear, ambiguous, intelligence-based terms that on the one hand appear understandable (due to the nature of counter-terrorism), but on the other simply obscure a prosecutions-led effort. Along with very wide powers invoked in terms of global obligations, the above phenomenon perhaps manifested in Africa in a strong reliance on the following:

- The military institutions of state (military intelligence, special tribunals of military justice, non-judicial detention centres, often within military compounds).
- The use of blunt military force, with a focus on 'eliminating' terrorist threats (rather than prevention through prosecution and conviction).
- Extra-judicial cooperation strategies such as disguised extraditions, deportations and extraordinary renditions.

The change of administration in the US in January 2009 makes it possible now to speak of the 'war on terror' having, in one sense, ended. This is not to say that the threat has diminished, but that the means of responding to the threat will be viewed differently. Of course, from 2001-08 the US certainly pursued suspects through ordinary criminal prosecutions as well as *ad hoc* mechanisms.[9] However, the Obama administration has acknowledged more explicitly that a holistic approach is to be followed, one that integrates human rights, due process and the rule of law. This approach is more in line with recent developments at the UN, most notably the Global Counter-terrorism Strategy that was adopted by the General Assembly in September 2006.

Thus, as the US tries to regain moral authority, there is likely to be – and ought to be – a greater emphasis on a criminal justice-based response, both within the US and in its global outreach. This includes a reduced use of preventive detention, with more attention to the use of offences aimed at interdicting terrorism-related conduct before attacks are carried out. As has recently been pointed out by Joanne Mariner, the director on terrorism and counter-terrorism at Human Rights Watch, the criminal justice system is adequate for this purpose and able to combat terrorism fairly and effectively.[10]

This situation provides an opportunity to re-examine and reorient counter-terrorism efforts in Africa. The new US administration's policies on counter-terrorism may lead to new opportunities for constructive engagement, not just on counter-terrorism issues but on a broad range of issues beyond counter-terrorism cooperation. That is, the perception of a counter-terrorism-security focus that (often unreasonably) was seen as being about non-African issues has served to create defensiveness in some quarters. It may have led to a perception that actors were interested in *their* interests and priorities in Africa, not *Africans'* interests. Thus the new dispensation may allow for better channels of communication. In relation to counter-terrorism itself, the new attitude may perhaps allow internal African realities and priorities to shape counter-terrorism responses in Africa, albeit within the global normative and policy framework, while conceivably enabling better cooperation and responsiveness, including in implementing legal requirements.[11]

A new counter-terrorism dispensation?

> '…Fighting terrorists will no longer fall within the primary domain of spies and the military. Criminal justice responses to terrorism will become increasingly important, with law enforcement and justice officials becoming key players in the new model. This approach will correctly treat terrorism as a crime… Due process, rule of law and human rights protections will become more important.'
>
> A du Plessis, 'A Timely End to the 'War on Terror',
> *ISS Today,* Pretoria, 7 February 2009

In framing the 'post-war on terror' context in this way, it must be observed that it is possible to discern a distinction within the wider UN system between a criminal law/policing strategy for combating terrorism, and an international security or war-fighting paradigm. Well before 2001, the UN General Assembly categorised international terrorism by reference to a criminal justice model as a serious crime, whereas since Resolution 1368 on 12 September 2001 the Security Council perhaps applied a security model, under which criminal justice avenues are less significant.[13]

However, it is possible to exaggerate this distinction: the Security Council's finding that transnational terror networks were a threat to international peace and security was a function of the objective situation as well as a threshold finding necessary to enliven its Chapter VII powers to impose mandatory response obligations on states. Nor could one suggest that a criminal justice model was the only justifiable response in 2001: part of the post-2001 effort required a military paradigm since it involved invasion of Afghanistan to remove a safe haven or state sponsor of terrorism. Moreover, even if functioning within a 'security' paradigm, the message of the Security Council response after 2001 was (as discussed below) strongly focused on national justice system responses. In any event, the 'criminal justice' and law enforcement model has, especially by 2009, become the paramount approach, both for reasons of legitimacy and all-round effectiveness. The Security Council has, in particular through resolutions 1267 (1999), 1373 (2001) and 1624 (2004), 'put unprecedented obligations on Member States to implement its decisions through their national criminal justice systems'.[14]

In terms of the context for this monograph, the issue is therefore not *whether* a criminal justice response is mandated. Instead the issue facing states is *how* to implement Security Council obligations in their national setting.[15] Having said that, one of the principal recommendations of this monograph is that there remains much work to be done to persuade state security institutions of the merits of such a strategy – the *why* question – since there are limits to the utility and effectiveness of simply reiterating that a criminal justice system-based response is obligatory.

Finally in terms of context, and before proceeding to the international legal framework, it is to be noted that this monograph does not review counter-terrorism strategies in the Maghreb generally; it is not a 'best practices' guide or handbook on criminal justice responses to counter-terrorism; nor is it a

study in historical developments or the nature or level of current threats in the region – it has not considered radicalisation or drivers of extremism or violence. Also, it is worth repeating what was said in the last ISS monograph dealing with terrorism in the Maghreb countries, which is, that terrorism on the African continent is a complex and emotional topic, one which is difficult to assess in historic isolation or divorced from particular national circumstances and their link to the terrorism dynamic.[16] This monograph does not attempt such a comprehensive overview.

THE INTERNATIONAL AND REGIONAL COUNTER-TERRORISM POLICY, LEGAL AND HUMAN RIGHTS FRAMEWORKS

Before considering the merits and features of a criminal justice-based counter-terrorism strategy, it is useful to outline the context for the case studies by sketching briefly the international and regional policy and legal frameworks (including human rights frameworks) that govern the obligatory, permissible and preferable choices on a national level. A number of policy and legal instruments guide the development of domestic counter-terrorism criminal justice responses in Africa, and in the three countries under study.

Global and regional policy frameworks

The UN Global Counter-terrorism Strategy

Upon the request of world heads of state at the 2005 World Summit, the UN General Assembly unanimously adopted the Global Counter-terrorism Strategy as a resolution promoting comprehensive and coordinated responses to international terrorism.[17] The strategy reaffirms the international community's firm resolve to strengthen the global response to terrorism, and is premised on the following four pillars:

- Measures to address the conditions conducive to the spread of terrorism.
- Measures to prevent and combat terrorism.

- Measures to build states' capacity to prevent and combat terrorism and to strengthen the role of the UN system in this regard.
- Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism. Particularly evident in the strategy is acceptance by the international community that successful counter-terrorism responses are built from within an internal commitment to the values of a rule of law and human rights framework (rather than simply seeking formal compliance with these standards).

Nationally based justice responses are expressly at the heart of the Global Strategy, with UN members agreeing to:

> …make every effort to develop and maintain an effective and rule of law-based national criminal justice system that can ensure, in accordance with our obligations under international law, that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in support of terrorist acts is brought to justice, on the basis of the principle to extradite or prosecute, with due respect for human rights and fundamental freedoms, and that such terrorist acts are established as serious criminal offences in domestic laws and regulations...[18]

The African Union (AU) Plan of Action on the Prevention and Combating of Terrorism

The AU's reinauguration in July 2002 took place in the glow of 9/11 and the UN Security Council's response. The process towards the 1999 Algiers Convention (below) and the elevated consciousness of international terrorism – already evident in Africa after the 1998 US embassy bombings in Kenya and Tanzania, and the problem of state sponsors of terrorism – meant that counter-terrorism became a key part of the AU's peace and security architecture from the outset.

At a meeting in Algiers in September 2002, the AU publically endorsed the universal legal instruments against terrorism and adopted the AU Plan of Action on the Prevention and Combating of Terrorism.[19] This would come to include a counter-terrorism-related policy role for the AU's Peace and Security Council (PSC) once it came into being in 2004. One focus of the AU's counter-

terrorism effort has been the establishment of the African Centre for the Study and Research of Terrorism (ACSRT), conceived as an independent research centre of excellence and expertise for cooperation, capacity building and consensus on counter-terrorism issues in the AU.[20]

The Arab League

The Arab League is also a very important regional policy forum through which some African countries' counter-terrorism policies have continued to take shape and be refined, in particular since the landmark April 1998 accord accompanying the Arab Convention (below), by which ministers of the interior of over 20 League countries agreed to coordinate their efforts against terrorism and extremism. The League continues to provide a forum for greater coordination, communication and consensus on national counter-terrorism measures among its member countries.

Global counter-terrorism legal regime

Of particular importance in framing national justice system responses are the raft of *16 international legal instruments* (in the form of various conventions, protocols and related amendments adopted at various points since the 1960s) which, when taken together with significant *UN Security Council resolutions* that have been adopted under Chapter VII of the UN Charter, constitute a *universal legal regime* for counter-terrorism.[21]

The overall objective of the universal scheme is to harmonise all national laws to create a seamless web of preventative, punitive and cooperative legal measures that can constitute the primary resource or asset in counter-terrorism strategies. Underlying the universal legal regime is the basic notion that the state should bring terrorist suspects to criminal trial, or should be able and willing to extradite the suspects lawfully to another state (with jurisdiction over the offences) that will try them. This 'extradite or prosecute' *(aut dedere, aut judicare)* principle is intended to deprive those intent on engaging in, financing or supporting terrorist conduct of any safe haven in the world. Again, however, the scheme requires national-level measures and actions in order to fulfil this objective.

The 16 universal instruments against terrorism

International terrorism is not a new phenomenon, and from the outset international responses have highlighted the role of concerted national-level measures. Since 1963, through the UN and its various specialised agencies international agencies, the international community has promulgated a comprehensive set of universal legal instruments (there are now 16 conventions, treaties or protocols) to provide a legal basis for all states who become parties to them to act to prevent and prosecute terrorist acts.

Developed over time and often in response to particular manifestations of terrorism, the 16 instruments cover the following terrorist acts:

- Acts of aircraft hijacking
- Acts of aviation sabotage
- Acts of violence at airports
- Acts against the safety of maritime navigation
- Acts against the safety of fixed platforms located on the continental shelf
- Acts against internationally protected persons
- Acts of unlawfully taking and possessing nuclear material
- Acts of hostage taking
- Terrorist bombings
- Acts of funding of the commission of terrorist acts and terrorist organisations
- Acts of nuclear terrorism

Table 1 below provides an overview of the key elements of the universal instruments against terrorism.

Universal instruments against terrorism at a glance	
1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft (Aircraft Convention)	• Applies to acts affecting in-flight safety • Authorises the aircraft commander to impose reasonable measures, including restraint, on any person he or she has reason to believe has committed or is about to commit such an act, where necessary to protect the safety of the aircraft, and • Requires contracting States to take custody of offenders and to return control of the aircraft to the lawful commander

Universal instruments against terrorism at a glance continued	
1970 Convention for the Suppression of Unlawful Seizure of Aircraft (Unlawful Seizure Convention)	• Makes it an offence for any person on board an aircraft in flight to 'unlawfully, by force or threat thereof, or any other form of intimidation, [to] seize or exercise control of that aircraft' or to attempt to do so • Requires parties to the convention to make hijackings punishable by 'severe penalties' • Requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution, and • Requires parties to assist each other in connection with criminal proceedings brought under the Convention
1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Civil Aviation Convention)	• Makes it an offence for any person unlawfully and intentionally to perform an act of violence against a person on board an aircraft in flight, if that act is likely to endanger the safety of the aircraft; to place an explosive device on an aircraft; to attempt such acts; or to be an accomplice of a person who performs or attempts to perform such acts • Requires parties to the Convention to make offences punishable by 'severe penalties', and • Requires parties that have custody of offenders to either extradite the offender or submit the case for prosecution
1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (Diplomatic Agents Convention)	• Defines an 'internationally protected person' as a Head of State, Minister for Foreign Affairs, representative or official of a State or international organisation who is entitled to special protection in a foreign State, and his or her family, and • Requires parties to criminalise and make punishable 'by appropriate penalties which take into account their grave nature' the intentional murder, kidnapping or other attack upon the person or liberty of an internationally protected person, a violent attack upon the official premises, the private accommodations, or the means of transport of such person; a threat or attempt to commit such an attack; and an act 'constituting participation as an accomplice.'
1979 International Convention against the Taking of Hostages (Hostages Convention)	• Provides that any person 'who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organisation, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostage within the meaning of this Convention.'

Universal instruments against terrorism at a glance continued	
1980 Convention on the Physical Protection of Nuclear Material (Nuclear Materials Convention)	• Criminalises the unlawful possession, use, transfer or theft of nuclear material and threats to use nuclear material to cause death, serious injury or substantial property damage • Amendments to the Convention on the Physical Protection of Nuclear Material add the following: – Makes it legally binding for States parties to protect nuclear facilities and material in peaceful domestic use, storage as well as transport, and – Provides for expanded cooperation between and among States regarding rapid measures to locate and recover stolen or smuggled nuclear material, mitigate any radiological consequences or sabotage, and prevent and combat related offences
1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Airport Protocol)	• Extends the provisions of the Montreal Convention to encompass terrorist acts at airports serving international civil aviation
1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (Maritime Convention)	• Establishes a legal regime applicable to acts against international maritime navigation that is similar to the regimes established for international aviation, and • Makes it an offence for a person unlawfully and intentionally to seize or exercise control over a ship by force, threat, or intimidation; to perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of the ship; to place a destructive device or substance aboard a ship; and other acts against the safety of ships • The 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation: – Criminalises the use of a ship to further an act of terrorism – Criminalises the transport of various materials knowing or intending that they be used to cause death or serious injury or damage – Criminalises the transporting on board a ship of persons who have committed an act of terrorism
1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed	• Establishes a legal regime applicable to acts against fixed platforms on the continental shelf that is similar to the regimes established against international aviation

Universal instruments against terrorism at a glance continued	
Platforms Located on the Continental Shelf (Fixed Platform Protocol)	(The 2005 Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf adapted the changes to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation to the context of fixed platforms located on the continental shelf)
1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection (Plastic Explosives Convention)	• Designed to control and limit the use of unmarked and undetectable plastic explosives (negotiated in the aftermath of the 1988 Pan Am Flight 103 bombing) • Parties are obligated in their respective territories to ensure effective control over 'unmarked plastic explosives'
1997 International Convention for the Suppression of Terrorist Bombings (Terrorist Bombing Convention)	• Creates a regime of expanded jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into, or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place
1999 International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention)	• Requires parties to take steps to prevent and counteract the financing of terrorists, whether direct or indirect • Commits States to hold those who finance terrorism criminally, civilly or administratively liable for such acts, and • Provides for the identification, freezing and seizure of funds allocated for terrorist activities, as well as for the sharing of the forfeited funds with other States on a case-by-case basis. Bank secrecy is no longer an adequate justification for refusing to cooperate
2005 International Convention for the Suppression of Acts of Nuclear Terrorism (Nuclear Terrorism Convention)	• Covers a broad range of acts and possible targets, including nuclear power plants and nuclear reactors • Covers threats and attempts to commit such crimes or to participate in them as an accomplice • Stipulates that offenders shall be either extradited or prosecuted • Encourages States to cooperate in preventing terrorist attacks by sharing information and assisting each other in connection with criminal investigations and extradition proceedings, and • Deals with both crisis situations (assisting States to solve the situation) and post-crisis situations (rendering nuclear material safe through the IAEA)

The instruments, which overlap in a number of respects, function to create international legal obligations for states parties to adopt, in their own laws, substantive criminal and procedural criminal law measures to lawfully counter various forms of conduct, to exercise jurisdiction, and to provide for international cooperation mechanisms that enable states parties to either prosecute or extradite alleged offenders. The conventions therefore provide the basis for national-level criminal justice initiatives, in keeping with the understanding that global problems require each country to ensure its own 'house' is in order and it is capable of preventing terrorist acts and dealing with terrorism suspects on a sure legal footing. Some of the instruments in particular have been critical to building legal consensus on acceptable (not too wide) definitions of 'terrorism'. The three countries under study are each party to more than ten of the instruments.

UN Security Council resolutions relating to terrorism

The criminal justice system focus of the universal legal regime is given particular impetus through a series of Security Council resolutions over the last decade, in particular resolutions 1267 (1999), 1373 (2001) and 1540 (2004). The adoption of these resolutions under Chapter VII of the UN Charter has the effect that they are legally binding on all UN member states.

The criminal justice basis to the Security Council element of the framework is captured in Resolution 1373 of 2001, adopted in the aftermath of the 11 September 2001 attacks on the US. This was a particularly significant instrument, being open-ended (not time limited) and universal in application, while imposing significant legal obligations on states. In particular it envisaged that the principal response should be a national-based, preventative one aimed at bringing suspects formally to justice, stating that all states shall:

> Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.[22]

Resolution 1373 (2001) also created the Counter-terrorism Committee (CTC) of the Security Council to better coordinate the Council's engagement on counter-terrorism issues. Through Resolution 1535 (2004), the Security Council established the Counter-terrorism Committee Executive Directorate (CTED) to support the work of the CTC. Before 2001, Resolution 1267 of 1999 had dealt with the particular issue of sanctions against the Taliban and Al-Qaeda, and this issue has been the subject of further resolutions.[23]

Since 2001 a number of significant Security Council resolutions have been passed, including resolutions 1456 (2003), 1535 (2004), 1540 (2004) and 1566 (2004). The effect of the resolutions was not to license states to pursue counter-terrorism measures by any means, but to create binding obligations upon states to:

- Reform their national laws, law enforcement and border-control systems, and financial systems.
- To criminalise the commission, funding, incitement to or preparation of terrorist attacks.
- To detect and freeze assets of terrorists and their supporters.
- To deny safe havens and free movement to terrorists.
- To deny terrorist access to weapons and explosives and other means.
- To cooperate with other justice systems, including through extradition and other forms of exchange of suspects or information by legal means.
- To ratify and implement the universal legal instruments.

Regional legal frameworks against terrorism

(a) **The OAU Convention on the Prevention and Combating of Terrorism (Algiers Convention)** was adopted by African heads of state in Algiers in July 1999 and came into force in December 2002 once 30 states had ratified. This was the first African instrument on preventing and combating terrorism in Africa, which provided an African definition of terrorism. Notably, that definition envisaged the creation of criminal offences in national law (the core of a criminal justice system-based response).[24] The Algiers Convention is consistent with and complementary to the international legal regime, and to the Arab Convention (below).[25]

(b) **The Arab Convention for the Suppression of Terrorism 1998:** A significant proportion of this comprehensive regional instrument – to which all three countries here are party – is directed towards taking legal measures on a national basis for the prevention and suppression of terrorism, for judicial delegation and cooperation, and extradition, in keeping with an 'extradite or prosecute' model.

Human rights frameworks

In addition to relevant Security Council resolutions and any treaty obligations assumed by becoming party to the 16 universal counter-terrorism instruments, the counter-terrorism responses of states through the criminal justice system are also framed and circumscribed by a number of other, complementary international legal obligations, in particular international human rights, humanitarian, refugee and customary law.[26] These provide various norms which limit or constrain state conduct (reinforcing other human rights limitations which may exist in national constitutions or national laws).

The counter-terrorism response is intended to be influenced by, and integrated with, these safeguards against excessive use of state authority. Common to human rights frameworks is the notion that any security-related limits on human rights need to be necessary, the means adopted need to be proportional to the threat or risk, and the limit needs to be justifiable in an open and democratic society based upon the rule of law.

The most significant of these sources from a counter-terrorism perspective include:

- The International Covenant on Civil and Political Rights 1966.
- The Convention Against Torture 1984.
- The Refugees Convention 1951.
- The International Convention for the Protection of All Persons from Enforced Disappearances 2007.
- The body of norms around the Geneva Conventions of 1949, comprising international humanitarian law (the law of armed conflict), which have led to terrorist acts committed in war time attracting the status of international crimes.
- The African Charter on Human and People's Rights.

Briefly, it ought to be noted that there are institutional dimensions to some of these instruments, mechanisms responsible for evaluating state progress and providing constructive guidance – the Human Rights Committee, the Committee Against Torture, and so on. In recent years, the UN Human Rights Council has acted as a forum for articulating concerns about human rights dimensions of counter-terrorism responses. The Council's Universal Periodic Review process, along with a range of special thematic rapporteurs within Council process whose functions relate to counter-terrorism responses (in particular UN rapporteurs on torture, on counter-terrorism and human rights, on the independence of the judiciary and the legal profession), are intended to monitor progress and assist with continuous improvement in compliance with human rights standards. In North Africa, the European ('Strasbourg') system is also indirectly relevant since it constrains the conduct of vital counter-terrorism partners near the countries under consideration. In addition, there are the human rights-related terms and conditions in a whole web of bilateral assistance and cooperation agreements between countries.

The international consensus on the need for national counter-terrorism measures to comply with international human rights law has been made clear by (among others) the UN Security Council (see below), the UN General Assembly (59/191 of 20 December 2004; 60/158 of 28 February 2006) and the UN Commission on Human Rights (Resolution 87/2004). Article 22 of the Algiers Convention clearly states that counter-terrorism measures under the Convention must be implemented in a manner consistent with the general principles of international law, international humanitarian law, and the African Charter on Human and Peoples' Rights.

> '...States must ensure that any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law...'
>
> UN Security Council Resolution 1456 of 2003
> Resolution 1566 (2004) and Resolution 1624 (2005)

Indeed, the repeated message from the UN Secretary General has been that respecting human rights in counter-terrorism operations and policy is not

only a legal obligation but a core component of any successful strategy. The UN Global Counter-terrorism Strategy emphasises the link between observing human rights and long-term security, a link that dates back to the preamble to the Universal Declaration on Human Rights of 1948.

Breaching human rights in countering terrorism is, according to this framework and consensus, both wrong in principle and unwise in practice. As is noted at various points in this monograph, it has become axiomatic to most counter-terrorism policy makers and strategists in Africa that counter-terrorism measures and justice systems that take 'short cuts' on human rights tend, over time, to undermine the state's authority rather than enforce it, to alienate the wider community and increase levels of distrust and non-cooperation, to weaken the morale and legitimacy of officials, and to provide a propaganda victory for terrorist supporters. However, challenges remain to increase understanding and awareness of principled and practical truth among justice officials and law enforcement agencies.

It is this framework – partly empowering and requiring state responses, and partly shaping and limiting what states ought to do – which forms the template for the country case studies in Part II. It is by reference to the empowering and the limiting elements of this global framework that one ought to judge the 'effectiveness', 'strength' and 'success' of counter-terrorism responses, including the central criminal justice system element of these. This study now turns to examine what is meant by a criminal justice system-based approach.

IMPERATIVES AND ADVANTAGES OF A CRIMINAL JUSTICE RESPONSE TO TERRORISM

What exactly is meant by a 'criminal justice' response to terrorism, and why is it important to terrorism-prevention strategies in Africa? This section seeks to situate an analysis of the acts and practices of the three Maghreb countries in the context of an understanding of the imperatives and advantages of an approach to counter-terrorism that relies on using criminalisation of various types of conduct and detection, investigation, prevention and prosecution of terrorist acts through the court system.

A short answer to the 'why' question of a criminal justice response to counter-terrorism in Africa is that it is compulsory: states' international legal

duties require it. As discussed above, through Chapter VII resolutions (binding on all member states), the UN Security Council has prescribed *mandatory obligations* on states to ensure that their national criminal laws enable them lawfully to prevent and/or prosecute, or extradite persons suspected of committing terrorist acts.

However, in addition there are also very persuasive reasons behind the criminal justice model of response:[28]

First, and very importantly, a criminal justice approach assists in the prevention of terrorist acts.

By ensuring the statute book contains offences criminalising conduct preparatory to terrorist attacks, such as conspiracy (in the Maghreb countries, *association de malfaiteurs*), incitement, recruitment and financing, prosecutions can be brought against suspected persons. This enables officials to intervene at early stages in the planning of attacks: the alternative is either after-the-fact prosecutions once the substantive or overt crime (the attack) has taken place, or hoping to catch the suspects in the attempted act (which is risky for a number of reasons), or indefinite preventative detention without charge, on the basis of suspicion or propensity. This last option is incompatible with the human rights imperative. The fact remains that criminal justice systems in many countries are geared more towards reactively responding to acts once they have taken place than towards proactively ensuring that laws and procedures exist to convict persons of incidental conduct before they are able to carry out the overt act. Proactive law enforcement emphasises preventing and interrupting crime, rather than reacting to crimes already committed.[29]

The *prevention* dimension of counter-terrorism strategy is vital, and preventing attacks ought to be the main objective of any counter-terrorism strategy.[30] The emphasis on preventing acts before they occur – by using the justice system – pervades the entire global counter-terrorism strategy. The criminal justice-preventative approach is not only tied to UN obligations, strategic-effectiveness concerns, rule of law and human rights reasons, but to perhaps the most fundamental human right: the right to life. As Jean-Paul Laborde has observed:

> '[t]o the average person, protecting the right to life means preventing its loss, not punishing those responsible for a successful or attempted deprivation. Protection by law thus demands legal measures to interrupt and

> interdict preparations for terrorist violence, not merely the identification and punishment of the perpetrators after a fatal event.'[31]

Arguably, many African countries do not make proper use of the criminal justice system for purposes of preventing terrorist attacks. Provided they are not framed too widely so as to radically restrict free societal activity criminalising acts of conspiracy, incitement and the financing of terrorism can assist in preventing terrorist attacks.

Second, an approach based on formal legal procedures has the advantage of being compliant with *human rights and due process* obligations and ideals.

By affording suspects due process in the criminal process from investigation to conviction, the state both complies with its international duties and retains the long-term strategic advantage of moral supremacy. Abandonment of human rights safeguards can lead to state officials using methods that are indistinguishable from their enemy, depriving the state of legitimacy and elevating the claims of terrorists groups to some further degree of moral equivalency.

It follows that ensuring that human rights standards associated with ordinary criminal justice systems are met is both right in principle (states must comply) and effective in practice (it is in the state's interests to comply: the state maintains the moral high ground.) The alternative is that the state is open to accusations of brutality that give terrorist propaganda undeserved significance. As noted in the introduction, national responses that bypass constitutional and legal protections and civilian court systems and the legal profession soon become lost in a 'grey zone' without a value compass that can indicate when the state is acting irrationally, by using criminal methods (such as torture) to beat crime.

Implicit in the 2008 ISS study of terrorism in the Maghreb, was the recognition that, along with other factors influencing the type and level of terrorist threat, the counter-terrorism strategies employed could themselves become drivers of terrorist recruitment or radicalisation.[32] Counter-terrorism measures that are disproportionate or involve illegal conduct by the state can contribute to worsening the security situation.

Third, a related and very important point is that a *military-based counter-terrorism strategy can have unintended consequences,* enabling terrorists to cast themselves as 'warriors' justifiably engaged in some form of noble enterprise.

Arguably, one perverse consequence of the 'war on terror' has been to surrender to terrorist actors a great deal of airtime that they would have been deprived of if treated first and foremost as criminals. There is even a case for prosecuting such persons, where possible, with ordinary criminal offences which relate to their conduct (murder, arson, conspiracy to murder, etc.) rather than attaching the 'terrorist offence' label, which may be seen by some suspects as a form of political statement or victory.

Some African states, in seeking to keep abreast of the 'fashionable' activity of success in counter-terrorism, may unintentionally elevate the significance of certain criminals disproportionately. Certainly, a criminal justice response deals with terrorists as criminals and not as soldiers or warriors based on a clear non-political legal foundation. In Section A it was noted how the vocabulary and practice of the 'war on terror' may have had unfortunate consequences for the longer-term ideological struggle against extremism.

Fourth, *history and experience* point away from sidelining a transparent, prosecutions-based counter-terrorism strategy. Lessons from other African countries show clearly that a 'pure security approach to combating terrorism is destined to fail'.[33]

Fifth, a criminal justice approach helps to strengthen the *social contract between the state and the community:* the basis of order in society is an understanding that citizens surrender certain freedoms to the state on trust, in return for the protection of the state. The neglect or undermining of the ordinary criminal justice system and the undisciplined pursuit of terrorists at any cost can, history shows, lead to wider disillusionment in society, mistrust of government, and even (in extreme cases of frustration with an unjust state), sympathy or collaboration with those pursuing violent terrorism.

On the other hand, a human rights-compliant strategy to law enforcement treats citizens with respect, and ensures the community is an available asset for cooperation, including as a source of vital information about possible nascent terrorist activity. Citizens can see justice being done in their national courts, even against supposedly 'undeserving' suspects. Unjust or unfair policing and prosecutions undermines this possibility.

The conduct of a transparent and public (where possible) trial affords *victims* a voice in the process, whereas secretive, non-legal channels of dealing with terrorist cases denies this to them. It also denies the possibility that offenders, faced with victims or with society as represented by the court, might denounce

their criminal past and contribute to society, including to counter-terrorism efforts.

Peaceful, accountable and legitimate counter-terrorism responses

> '...Adherence to the scheme of the universal legal regime on counter-terrorism ensures that legal definitions are not too wide, which can result in abuse of terrorism legislation against non-violent political opposition. To the extent that counter-terrorist activities are grounded in an efficient criminal justice process that respects the principles of rule of law and human rights, they can offer a *peaceful, accountable and legitimate response to terrorism*...
>
> '...This kind of criminal justice response to terrorism can help *avoid an escalation of violence* and the use of force outside the protections and procedural guarantees offered by the due process of law. It can reinforce a society's commitment to the rule of law and human rights, even when under terrorist threats...'[34]

A cautionary note

Although some of the above issues inform the global criminal justice-based approach, it ought to be noted that some argue that mainstreaming counter-terrorism strategy into the ordinary criminal justice system is ineffective, or can poison the normal criminal system. The exceptional requirements of counter-terrorism cases, it is argued, might infect normal procedural safeguards, diluting or weakening them.[35] In the face of perceived difficulties with preventatively prosecuting those planning attacks before they can succeed in doing so, some have proposed a separate system of preventative detention outside of the criminal justice system. However, the following factors need to be considered:

- First, such arguments misconceive the preventative dimension of the criminal justice system. Courts have generally been comfortable with a new generation of offences relating to preparatory acts associated by inference with planned attacks, including offences related to financing. Courts are also familiar with supposedly 'special' aspects of counter-terrorism cases,

such as secrecy and the need to protect intelligence sources: procedures developed in organised-crime cases have been adapted to counter-terrorism in a way which preserves adequate rights of the defence in having a chance to test witnesses and their evidence.[36]

- Second, in many countries with weak human rights safeguards there would be far more concern over 'special separate procedures' entirely outside the justice system, than fears of contamination. A criminal justice-based counter-terrorism response also holds out the possibility of building the generic capacity of the ordinary justice system in the process.
- Third, it is true that some human rights and rule of law issues certainly arise with the use of preventative prosecution strategies. In particular, widely drafted membership offences can result in an unjustified narrowing of freedom of association. However, the thrust of UN-sanctioned global responses to terrorism has been to privilege prevention (in view of the rights of victims and the state's duties), while building into the new provisions safeguards against vagueness and arbitrariness and other qualities likely to discredit the counter-terrorism system and the criminal justice system as a whole.
- Fourth, the move to close Guantanamo Bay, and the thrust of experiences to date, point decidedly away from preventative detention systems outside the supervision of the national courts. Indeed, in the countries under study there appears to have been a strategic acceptance of the need for a law enforcement approach, and what remains is to strengthen the institutions responsible for implementing this approach. As has been noted by one African diplomat, terrorists should not be able to hide behind a lack of jurisdiction or of requisite speed in the judicial process: 'precisely because extra-judicial punishment cannot be considered, the judicial bench must be prepared to act as necessary against terrorist threats'.[37]

Although this monograph proceeds on the basis that a criminal justice-based response has been mandated globally and is to be preferred strategically, the point must nevertheless be made that there may be problems with such an approach. Although in principle the criminal justice system of any country is adequate for dealing with terrorism issues, it may depend on the quality of the country's response, both legislative and institutional: does it have adequate offences on its statute books, and does it pursue terrorism as a matter for civil

policing and criminal prosecution, rather than as a primarily military or quasi-military-intelligence issue? Although the balance of the merits points towards channelling a state's counter-terrorism response as much as possible through the criminal justice system, in situations of weak (or excessively 'strong') governance, one ought also to be mindful of the risk that the wider national policing and justice system might become subverted into the less accountable and transparent 'national security' frameworks of the state.

By and large the three countries under review are effective in suppressing terrorist acts. However, as noted in the introduction, effectiveness and efficiency – 'results', conviction or kill ratios – are not the only measures of what constitutes a well-functioning criminal justice system, or an effective counter-terrorism response. Human rights compliance matters for its own sake, as well as because history proves repeatedly that long-term effectiveness in engaging community support and countering terrorist recruiting, sympathy and activity, depends on visible adherence to human rights and rule of law principles. Governments in the Maghreb need only think about the lessons of US excesses in Iraq and Guantanamo Bay (in terms of the escalation of violence that is seen to be related to these issues) to acknowledge the effect of bypassing the rule of law.

COMPONENTS AND FEATURES OF A CRIMINAL JUSTICE APPROACH

The essence of a criminal justice-based approach to counter-terrorism is that it relies on prosecution of suspects before fair and transparent formal court processes, on the basis of criminal offences created by laws. The emphasis, again, is on prevention through the creation of offences that allow prosecutions for preparatory and supporting acts associated with terrorist violence. The UN's CTED has explained that the intent behind UN Security Council Resolution 1373 is that states establish:

> ...a clear, complete and consistent legal framework that specifies terrorist acts as serious criminal offences, penalizes such acts according to their seriousness and helps the courts bring terrorists to justice. This framework should in turn provide the basis for the development of a domestic counter-terrorism strategy that is rooted in a legal approach, ensures due

> process of law in the prosecution of terrorists and appropriately protects human rights, while combating terrorism as effectively as possible.[38]

Of course, while there is an overarching legal and policy framework and universal validity of fundamental human rights standards, criminal justice systems naturally approach these challenges somewhat differently, depending on their legal tradition, their level of development, their relative institutional sophistication and own circumstances.[39]

Balancing flexibility and stability in the legal system

Fidelity to the rule of law requires that the laws of a country be comprehensive, clear, certain and accessible. At the heart of the framing of the main offence of 'committing terrorist acts' and related offences (funding, incitement, conspiracy, etc.), is a balance between legal utility and not creating definitions and offences so wide that almost any political activity that results in some disruption to the state can be 'lawfully' prosecuted as terrorism. For example, legitimate trade union activity and certain kinds of non-violent demonstration might fall within very broad definitions of terrorism. As this report shows, the existence of overly broad definitions of 'terrorism' is a particular problem in certain African countries – this is certainly the conclusion of a recent (2009) report on human rights aspects of counter-terrorism responses by eminent jurists.[40] Guidance as to appropriate crimes and definitions is to be found in the universal legal regime described above, and in 'best practices' legislation around the world.

The difficult balance, just referred to, between stability and flexibility in the legal system is one issue that recurs both in the particular country case studies in this monograph and in this subject area generally.[41] The nature, manifestation and *modus operandi* of transnational terrorism in particular is constantly evolving, and legal systems and procedures do require a degree of flexibility in order to remain relevant and effective. It is undeniable that terrorism is a particularly difficult form of crime to prevent, investigate and prosecute, and states often feel compelled to devise new responses in order to meet the threat.

In principle, there is no reason why a state's counter-terrorism response cannot remain flexible while complying with the rule of law and with the international frameworks outlined above. Wide definitions of 'terrorism' often

reveal that it is not terrorism but political opposition that is the true target of the legislation. In such cases the 'flexibility' is not in good faith but it is a euphemism for abusing the international consensus on counter-terrorism in order to pursue other objectives that are not related to the global counter-terrorism scheme. It would seem sensible to argue that if a criminal justice system cannot adequately deal with the terrorist threat, it ought to 'bend' so that at least the national counter-terrorism response remains channelled through the justice system (rather than being conducted 'outside' the law). What is now clear is that, through the faithful implementation of the universal legal regime on counter-terrorism and reforming the criminal justice system accordingly, the national justice system can adequately deal with terrorism without letting go of non-negotiable or deliberately inflexible human rights and rule of law standards.

Again, the idea behind the universal legal regime is that the offences it prescribes be integrated into the criminal codes of states as distinct criminal offences under national law, allowing states to try suspects (or to extradite them to be tried elsewhere). This denies legal sanctuary to terrorists, who cannot cite a lack of lawful jurisdiction, while ensuring the state need not resort to unlawful extrajudicial measures. The following components of a criminal justice-based approach will be summarised, before considering the extent to which the countries in question have taken measures to implement these features:

- Criminalisation of terrorist offences, including the creation of offences allowing for a disruptive, preventative prosecution before any overt violent act.
- Criminalisation of incitement to terrorism and related offences.
- Criminalisation of the financing of terrorist activity, including associated measures to deal lawfully with impugned assets.
- Laws and mechanisms for international legal assistance and cooperation, including laws providing for extradition to or from other states.

Criminalisation and prevention

As already noted, the international legal framework requires criminalisation (establishment of offences in national laws) in relation to various forms of conduct associated with terrorism. In addition, the rule of law principle of

legality also mandates that no one can be punished for conduct that is not formally prohibited in existing law.

In addition to criminalising violent acts of terrorism (and attempted acts), since the focus is on prevention, offences need to be created which criminalise non-violent conduct preparatory to the main offence. The principal offences here are those of 'conspiracy' and 'criminal association' *(association de malfaiteurs)* in relation to terrorist acts. In many legal systems, these familiar criminal concepts do not require the actual overt offence to be committed. The difficulty is more likely to be whether there is sufficient evidence to justify a conviction, bearing in mind that mere intelligence information about a person or group's intentions is not the same as firm evidence of the commission of the conspiracy offence. A significant preventative device is to criminalise the non-violent financial preparations that almost always precede at least major terrorist acts, as discussed below.

Related to evidential difficulties, criminalisation of preparatory conduct also raises issues concerning the right to freedom of association. In general, persons should be able to freely meet and associate with other members of society. Limitations on this right under counter-terrorism laws need to meet tests of proportionality, necessity and justifiability. While these offences can be extremely valuable in a preventative counter-terrorism prosecutions strategy, it is also easy to see how if applied widely and without judicial supervision, such provisions can be used to shut down legitimate political, religious and social activity in society.

Criminalisation of incitement to terrorism

A core element of a criminal justice response is encapsulated in UN Security Council Resolution 1624 of 2005, which requires states to prohibit in their national laws incitement to commit acts of terror, to ensure provisions exist to prevent and punish incitement and to deny safe haven to those who carry out incitement to terrorism. There is abundant best practice in existence which can assist states to avoid framing their laws in such a way as to illegitimately clamp down on religious preaching and other acts of speech or publication which, while they may offend some persons, do not constitute 'incitement' to violent acts of terror.

Criminalising the financing of terrorism

This monograph emphasises the special significance of countering financing of terrorism to any strategy for terrorism prevention in Africa. The importance in Africa of preventing terrorist groups from engaging in revenue-raising activities or from exploiting the resources of existing crime syndicates has been emphasised many times.[42] Addressing the financing of terrorist groups is a vital component of successful counter-terrorism strategies. It has received increasing recent attention at a global level, building on the earlier work of the Financial Action Task Force and associated regional bodies and the International Monetary Fund (IMF),[43] and based on the framework of the 1999 Terrorist Financing Convention.

The Terrorist Financing Convention is a versatile counter-terrorism instrument, the implementation of which can solidly found a counter-terrorism strategy for this vital area. States also have some obligations in this regard under Security Council resolutions 1267 and 1373 (see below), but the Financing Convention is a safer general basis, providing full coverage of offences and containing a safely narrow but usable definition of terrorism. It has a definite preventative objective, allowing the creation of offences to interrupt terrorist planning. It requires states to criminalise the involvement in certain financing acts and transactions where sufficient knowledge exists that these funds may be used in the preparation or commission of a terrorist act.

The CTED recently noted that countering the financing of terrorism is not necessarily a whole new and unfamiliar universe for state officials, since states are able to draw on many established legal, policy and institutional tools that either build on existing anti-money-laundering measures or were developed specifically to counter terrorist financing.[44]

It appears that most African countries do not fully implement the criminalisation provisions of the Financing of Terrorism Convention. While generic 'participation' offences may cover financing acts, having specific legislation enables officials (and courts) to more simply and precisely detect, track, freeze, seize and forfeit to the state assets associated with terrorist activity, even where the assets in question are not considered 'proceeds of crime' since the interdiction is an early-stage, preventative one. Unlike a money-laundering paradigm, the Terrorist Financing Convention scheme envisages interruption of terrorist finances even if the funds are not of illegal origin. The focus is forward

– on the intended use of the funds – rather than looking backward at the way in which the funds were generated.

Resolutions 1267 and 1373 imposed asset-freezing obligations on states in relation to persons who are members of the groups proscribed by the Security Council according to lists of terrorist suspects, or where the state entertains a reasonable belief that the person or group has committed or attempted to commit a terrorist act. This sanctions regime has been further modified over time (for example by resolutions 1333 of 2000 and 1390 of 2002). The effect of the 1267 Security Council regime on financing and asset freezing is that states are obliged to act in respect of certain assets of individuals listed by the Security Council before any national court procedure to determine the commission of a related offence.

The potential that a non-judicial body such as the Security Council can order the indefinite freezing of property of a person or group, even if that property does not represent the proceeds of criminal activity, has caused some controversy.[45] National legal systems bear a particular burden in implementing Security Council resolutions, since these tend to provide little precise guidance on the creation of specific offences in national laws. The broad asset-freezing and listing obligations imposed by the Security Council are of particular concern, and could lead to legal difficulties in national systems. The obligations imposed go well beyond traditional concepts of state freezing or seizure of assets that are used in the preparation or commission of an offence or are the proceeds of crime. Without itself defining a 'terrorist offence', Resolution 1373 placed a broad obligation on states to freeze indefinitely all assets of a person who commits or attempts such an offence. Listing obligations, such as those in Resolution 1267, have been judged, most authoritatively by the European Court of Justice in September 2008, to inadequately account for the rights of those who may be subject to the orders.[46]

Formally regulating the informal sector

> 'Measures aimed at protecting only formal financial systems will not be sufficient. It is essential to seek creative approaches that can prevent terrorists in cash-based economies from acquiring funds, whether in the form of cash, through the smuggling of goods, or through the

illicit manipulation of trade-based transactions. The non-profit sector is arguably the most vulnerable to terrorist financing and the most difficult to regulate and monitor. It also suffers from a proven vulnerability to abuse by terrorists and their supporters for the funding of terrorist acts. Most States lack the measures needed to protect non-profit organizations from intentionally or inadvertently contributing to terrorist financing.

'The challenge is to implement such measures without imposing excessive regulations that would put unacceptable constraints on the non-profit sector, which is a vital component of the world economy and of many national economies. Significant attention should therefore be devoted to protecting this sector against exploitation by terrorists, including through the development of standards and codes of practice, and the delivery of the necessary technical assistance and training...

'...States need to share financial intelligence with international counterparts and promote implementation of new initiatives for preventing terrorist financing in predominately cash-based economies...'[47]

International legal cooperation in criminal matters: extradition and mutual legal assistance

Not only are substantive offences required for prosecution of terrorist activity, but procedural mechanisms for extradition and international legal cooperation issues are a significant component of a criminal justice response to terrorism.

This is in keeping with a recognition of the globalised nature of the terrorist threat (and transnational crime generally). While terrorist groups operate without borders, bureaucratic and legal barriers between states can result in terrorist suspects evading detection, investigation and prosecution. The focus on international legal cooperation stems from the overall objective that states help by national measures to create a seamless legal mechanism that will deny terrorist suspects any jurisdictional 'safe haven'.

Indeed, effective international cooperation in criminal matters forms the cornerstone of a criminal justice response to international terrorism, reiterated in numerous international instruments and declarations. The UN

Global Counter-terrorism Strategy resonates with the recognition by states of the centrality of international cooperation to successful counter-terrorism efforts. For this reason, an important part of UN Security Council Resolution 1373 was the imperative (in paragraph [2]) for all states to afford one another 'the greatest measure of assistance' in connection with criminal investigations or criminal proceedings relating to the financing or support of terrorist acts, including assistance in obtaining evidence in their possession necessary for the proceedings.

In terms of a criminal justice response, the imperative is to ensure that sufficient legal authority exists in national laws, upon which to base informal and formal agreements for mutual legal assistance, and for extradition. Mutual legal assistance measures help with the investigation of offences with a transnational dimension, for example, enabling access to valid, admissible evidence from other jurisdictions, cooperation on witnesses and arrest warrants, and so on. Ideally, such matters are placed on a formal, legislative footing clearly authorising officials' conduct.

Extradition in many African countries is based on bilateral agreements, but accession to the universal legal instruments can provide further bases in national law for extradition, if no general legislation exists (as is ideal) for dealing with extradition issues irrespective of the existence of an agreement with a particular country. While maintaining constitutional and human rights safeguards, African states ought to explore enabling legislation for counter-terrorism related extradition in the event that a request is received or required of a country where no agreement applies.

The topic of international legal cooperation raises the issue of the possible obligations of the state in protecting those seeking asylum. Resolution 1373 called upon states to ensure that the political asylum system is not abused. The 'political offence' exception in the 1951 Refugees Convention is in the main no longer a bar to international cooperation, since Security Council resolutions (and in this region, the Arab Convention on counter-terrorism) have specifically removed its application in terrorism cases. However, while the possibility of abuse of protection systems by terrorists is to be noted, such protections are significant legal safeguards in a counter-terrorism context. In reiterating the Resolution 1373 'abuse' concern, the General Assembly nevertheless has reminded states of their solemn obligations in respect of international protections in this area.[49] Concern remains over the extent of awareness and

acceptance in counter-terrorism cases of the *non-refoulment* obligations in the Refugees Convention and the Convention Against Torture, which still apply and prohibit the extradition of a suspect to a jurisdiction where there are reasonable grounds to believe he or she may face torture or equivalent mistreatment.

The overall components of a response therefore include appropriate laws on violent terrorist acts (including attempted acts and assistance in preparing or carrying out attacks), financing and materially supporting terrorism, conspiracy and common purpose, provision of safe haven, incitement to terrorist violence and recruitment. In each case human rights safeguards must be maintained so that the limits particularly on freedom of association (membership offences) and freedom of opinion and speech (incitement) are necessary and proportional and justifiable limitations according to international human rights norms. A range of associated laws are required: the criminalisation of torture and prohibition of torture-based confessions as valid evidence; witness protection programmes and incentive schemes for informers; laws enabling effective conduct of the defence and access to counsel; and the full range of fair trial and due process rights contained in the International Covenant on Civil and Political Rights and other instruments.

Institutional and other features of a justice system approach

What are some other features of a criminal justice-based approach? In addition to having certain laws in place, a number of institutional features or components are required. These include:

- Overall policy direction and control under the supervision of appropriate (civil) authorities with powers prescribed by law, and who can guide the production of new or amended laws as required.
- Border control agencies (land and coastal) – here counter-terrorism, transnational organised crime and revenue-enforcement (customs and excise) jurisdictions, benefits and objectives overlap.
- Intelligence and law enforcement agencies – here the significant issue is the ability to convert intelligence (information) into evidence (legally relevant information making out the legal case for conviction); some problems in

Africa include non-police agencies (mainly intelligence services) going beyond information gathering and analysis, and becoming directly involved in arrest and detention in ways and places that bypass or undermine the normal justice system, and where there is a lack of clear legal authority for this conduct. The relationship between investigators and prosecutors is an area requiring more research, and lessons from both civil and common law systems on how to maintain appropriate distance so as to exercise judgment on issues.

- A competent, impartial and independent judiciary seized of the international framework for counter-terrorism.
- Financial regulatory authorities – these have a significant preventative function in detecting and preventing the financing of terrorism and money laundering, and complying with international obligations on asset freezing and forfeiture.
- International relationships – formal and informal inter-agency and inter-legal-system channels for extradition requests, exchange of evidence and information, and so on. These contacts and links can greatly speed up the prosecution process. It is remarkable that terrorist cells enjoy a relatively borderless world, whereas law enforcement agencies must deal with 'red tape' and inter-country bureaucracy in order to track terrorist activity. Unsurprisingly, a great deal of criminal justice-related capacity building goes to increasing inter-agency fluidity within and between countries.

Military tribunals and counter-terrorism: *not* the way forward

At this point it ought to be clear that practical (strategic) and principled reasons – and the global counter-terrorism framework – point away from the use of military justice systems to manage legal aspects of counter-terrorism campaigns. The experience of the US and of at least one of the study countries (Algeria) also points this way (Algeria experimented with special military/state security courts outside the justice system between 1992 and 1995). However, some countries still prosecute persons before military tribunals where ordinary (or adapted for counter-terrorism) criminal laws, procedures and institutions are quite capable of the task. Recognising there are those who question whether

a suspect bearing arms is a 'civilian', in at least the countries under study the point is that the person is 'non-military'. For this reason – and the practical reasons given above – the use of such avenues are inappropriate or counter-productive. As a recent International Commission of Jurists report notes, no good reasons have been given why military courts are superior forums for prosecuting terrorist offences.[50]

The stance of international bodies in relation to both military and special courts is quite clear. As the UN Human Rights Committee stated in 2007 in elaborating on the International Covenant on Civil and Political Rights:

> Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.[51]

That is, for the benefits of a criminal justice-based approach to be manifested, jurisdiction of military courts should be limited to offences which are strictly military in nature and which have been committed by military personnel, something repeatedly noted by the Human Rights Committee, which has also repeatedly held that the use of such tribunals against non-military persons is incompatible with fair trial rights under Article 14 of the International Covenant on Civil and Political Rights. An Eminent Jurist Panel of the International Commission of Jurists noted this year that:

> …military and special court systems easily lead to abuse: the tribunals often fail to meet the requisite standard of independence and impartiality and do not offer due process guarantees. The temptation appears to be great to extend the system to try non-terrorist offences, because of the lower safeguards which make convictions easier. *If the rationale for their use is that the ordinary criminal justice system is considered slow, inefficient or corrupt – the rationale most often proffered – it would surely be better to tackle these problems directly rather than create a parallel justice system with its own problems* [emphasis added].[52]

Here the problem is not of the use of extraordinary mechanisms in non-counter-terrorism cases, but their use in counter-terrorism cases where the ordinary courts are a more able and proper forum.

Specialisation of counter-terrorism jurisdiction

This issue of military or specialised (parallel) systems raises a final issue: that of building a specialised counter-terrorism expertise *within* the ordinary criminal justice system. The idea behind the criminal justice-based approach is that the ordinary criminal justice system is used. On the other hand, African observers have agreed that fighting terrorism requires specific skills and cannot be accomplished merely by following the traditional methods for prosecuting organised crime: financial, investigative, intelligence-gathering and legal skills need to be combined and developed.[53] Both Morocco and Tunisia (2003) and now Algeria (2008) have developed specialised counter-terrorism capabilities in their criminal justice systems, the former two countries having done so expressly under their counter-terrorism legislation. What is the significance of this for the integrity and utility of a criminal justice system as discussed above?

On this issue it is instructive to briefly consider the *French system and experience*. This is both because basic elements of this are common to all three countries under study here, and for the comparative value to readers in common-law African countries. The French legal tradition has had and perhaps continues to have enduring influence on its former colonies in North Africa.[54] Before 1981, France dealt with terrorism cases through its State Security Courts (secret proceedings with no avenue of appeal), formed in the early 1960s. Since amending its criminal procedures in 1981, France has directed its counter-terrorism efforts through the ordinary criminal justice system. However, a 1986 law[55] decreed that terrorism investigations and prosecutions are subject to exceptional procedures (police pre-charge custody is 96 hours in counter-terrorism cases), are centralised (run out of Paris), and are managed by specialised prosecutors and examining judges or *juges d'instruction* (the 'Counter-terrorism Department of the Prosecution Service' or the '14th Section'), who work in unusually close cooperation with the intelligence services as part of a 'judicial pre-emptive approach' or 'preventive judicial neutralisation'.[56]

This has built up a special cadre that handles all counter-terrorism cases, along with dedicated judges (without jury) in the Special Court of Assizes (Spain

has a very similar model). As with the experience in the Maghreb countries (see case studies in Part 2), the vast majority of counter-terrorism arrests and convictions in France are preventative ones targeting terrorist logistics and planning, well before an overt violent offence is committed, based on the rather broad charge of 'criminal association in relation to a terrorist undertaking'.[57] Local prosecutors refer counter-terrorism cases to the 14th Section in Paris. The examining judge/magistrate decides whether there is a triable case, and may enlist police assistance. The prosecutor or victims may appeal a decision not to send a case for trial. The French internal intelligence agency (DST) has a dual role in counter-terrorism as both intelligence agency and a judicial police force that can be placed under the authority of such a magistrate, with whom close working relationships exist.[58]

With this exemplar in mind, is the practice of centralisation/specialisation a good practice, in the light of the discussion above? While in the three countries under study it is already a *fait accompli*, the issue must be considered. To date the most relevant analysis in relation to France's experience highlights the following key elements:

- **The case for specialisation.** On the one hand, specialisation is to be commended – such a policy keeps counter-terrorism responses within the ordinary criminal system (with the accompanying human rights safeguards and other benefits, already noted), while revealing *flexibility* in the criminal justice system, enabling adjustments suited to the special problems and issues of counter-terrorism cases, while allowing the development of expertise among investigators, prosecutors and judges:

> The logic is that a security-cleared, specialized, and experienced judge will, on the basis of all relevant information, including sensitive intelligence material, be able to connect the dots: discern the existence of a terrorist network, even where the material acts demonstrating this existence are limited to common crimes (for example forgery of identity documents) and determine the identities of the members of the network.[59]

As a recent Human Rights Watch report noted, the lack of a major attack in France in recent years is taken as proof of the virtue of the specialised jurisdiction. Under this view, the flexibility of the French criminal justice

system has saved it from irrelevance in the national counter-terrorism struggle – it has precluded the need to resort to extrajudicial or administrative counter-terrorism measures (such as preventive detention).[60]

- **Uncertainties about the effects of specialisation.** Not all observers are persuaded that the practice is beyond reproach.[61] This would be particularly so in states where the general criminal justice system does not enjoy the checks and balances available in countries such as France or Spain (constrained by a relatively independent appellate judiciary and the European human rights mechanisms). As Human Rights Watch has noted, 'flexibility' and 'adaptability' may be critical elements in an effective counter-terrorism strategy, but 'they must not stretch the rule of law to breaking point':

> An appropriate criminal justice approach must be based on fundamental procedural guarantees ensuring the right to a fair trial, which are engaged from the outset of a criminal investigation.[62]

Considerations include the extensive powers concentrated in a small team of officials, 'equality of arms' and access to state information, and more generally the problems for defence lawyers.[63] In the longer term the risk is what the recent eminent International Commission of Jurists panel on counter-terrorism and human rights called 'case-hardening':

> ...given the constant interaction between investigators and prosecutors specialising in terrorism cases, appearing before the same judges, all involved may *gradually come to see themselves as part of the State's counter-terrorism machinery and lose their independence. Such a risk would obviously be greater in those countries where the judiciary is not effectively independent* ... the risk is high that specialised court arrangements go hand-in-hand with other procedural changes, and thereby run the real risk of contributing to a parallel criminal justice system...[64]

The International Commission of Jurists panel made particular note in this regard of Tunisia and Morocco (discussed in detail below) where the practice has led to problems of the application of special rules, minimal roles for the defence, inaccessible state evidence, and 'rushed proceedings'.[65]

The most recent CTED report (2008) seems to favour specialisation, although it restricts its comments to law enforcement (rather than the entire investigation-prosecution-adjudication system):

> States should ensure that counter-terrorism measures are managed and conducted by appropriate law enforcement agencies and should create dedicated counter-terrorism units in order to capitalize on expert capacity within their law enforcement institutions.[66]

Relevantly, the report states that:

> ...legislation should ensure that law enforcement agencies have the necessary operational flexibility and the funding, training and judicial oversight they need to enhance their professional capabilities. Agencies should collaborate with prosecutors and courts *within a framework of accountability and respect for the rule of law* in order to gain public trust and *ensure the integrity of the entire counter-terrorism effort*, from prevention through prosecution and punishment of the perpetrators of terrorist acts [emphasis added].[67]

Where a degree of specialisation has occurred (and it is common to many justice systems now in facing counter-terrorism issues), there still remains the imperative to be cautious about the long-term effect of counter-terrorism operations on independent, community-supported policing:

> In countering terrorism, the police are required to work closely with the military and intelligence services. There is a risk that this may blur the distinction between the police and the army, contribute to the militarisation of the police, and weaken civilian control and oversight of the police. Unless the integrity and independence of police is protected, the fight against terrorism may lead to the politicisation of the police which could undermine its legitimacy and credibility in the eyes of the population. For this reason, States must clearly define and circumscribe the function of the police in counter-terrorism measures.[68]

Part II: Country overviews: Algeria, Morocco and Tunisia

Part III of this monograph comprises overviews of the criminal justice systems of the three countries under consideration as they relate to counter-terrorism issues, and (as a precursor to the analysis and recommendations in Part III) concludes with a reflection on regional and thematic issues and trends.

NOTE ON METHODOLOGY

The aim of this research, which was coonceptualised as a preliminary assessment, has been to examine current issues and trends concerning the capacity of the criminal justice systems in Algeria, Morocco and Tunisia to prevent and respond to terrorism within the parameters of global and regional counter-terrorism normative frameworks and to participate in transnational cooperation efforts. Part of this is an assessment of actual counter-terrorism-readiness of the countries (ability to try or extradite), but it inevitably raises rule of law and human rights issues

The case studies do not purport to give a comprehensive description of the complex, sometimes disputed history of each of the countries, nor of current facts, events or the status of terrorism-related issues and state responses to

terrorism. In this regard, the reader is referred to Anneli Botha's thorough 2008 report for the ISS on terrorism in the Maghreb countries,[69] and other sources, some of which are referred to in the case studies. This study is not a record of incidents and certainly not, as Botha's study was, an assessment of the threat or evolution of Al-Qaeda for the Land of the Islamic Maghreb (AQLIM), issues about whether it is a 'real network' and state responses to it,[70] or issues of radicalisation. Although the author maintains that a criminal justice response to terrorism should form part of any strategic prevention response, this report does not deal with operational, military and strategic issues of improving cooperation on counter-terrorism in the Maghreb and trans-Sahara area.[71]

The author sought the cooperation of the countries considered, but has relied primarily on publicly available, open source information, opinions and claims mainly produced by reliable institutions. However, care must be noted since there may be a tendency for human rights reports to cross-cite each other, with the theoretical possibility of errors being compounded. In the absence of other sources the author is content to rely on the information provided by well-known international sources (Amnesty International, Human Rights Watch, etc.) since it is not clear to the author what reason there could be for such sources to falsify or exaggerate reports.

A systematic process of research, analysis and documentation that records African experience in legislation drafting, investigating, prosecuting and adjudicating terrorist cases, and identifies best practices and areas where national criminal justice officials need support, is still essential, including in relation to these countries. Such research should be seen as constructive and helping to improve counter-terrorism performance. There may be a role for ACSRT here.

ALGERIA

It is well known that Algeria has faced considerable peace and security challenges and tragedies in its past, that it currently manages a somewhat mutating terrorist threat that includes some transnational dimensions, and that Algerian-born extremists have been involved in terrorism-related activity abroad. It is fair to say that Algeria has in many ways led the African response to dealing with terrorism since the early 1990s; in particular it was the driving force behind the Algiers Convention and coordinating AU attention and

consensus on counter-terrorism, and has played a lead role in the establishment of ACSRT.

The country's constitutional make-up, complex historical background to security and criminal justice, as well as recent activity and actions by the government, are however covered in detail elsewhere,[72] and no attempt is made to cover these issues here. What might be noted is the relative lack, in reports of counter-terrorism in Algeria, of coverage of judicial convictions and sentences of terrorist suspects, which are issues of interest for gauging a criminal justice system response. Figures on the number of terrorist cells 'disrupted' or suspects apprehended or killed[73] do not indicate the levels of successful counter-terrorism prosecutions by legal process, and this means of reporting does not reflect a criminal justice system-based lens on counter-terrorism issues.

The criminal justice system and terrorism in Algeria

Law enforcement structures in Algeria closely follow the French system. The large national police force (DGSN) falls under the Ministry of the Interior. The *gendarmerie* (reporting to the Ministry of Defence) has a policing function in rural and remote urban areas. The military intelligence service (DRS) is the foremost intelligence service. Exercising internal security functions, it reports to the Ministry of Defence, although under the criminal procedure code it has authority to exercise the powers of the judicial police, and significantly it performs substantially civil policing functions (investigation and arrest, for example) in terrorism cases. In such cases the DRS are formally subject to civilian (judiciary or prosecutor) rather than Ministry of Defence control, although such control is often said to be ineffective in practice.[74] One DRS section appears to have a legal-judicial function, processing intelligence into information usable by a court (in relation to whether the offence is made out) while ensuring non-disclosure of sources. The relationship between DRS in their policing (path to judicial conviction) function, and the prosecutor's office, remains somewhat unclear. In some respects, there appear to be safeguards or balances. For example, in order to obtain in effect a valid warrant for Internet surveillance of terrorist suspects under the new 'cyber-crime' Act (2008), partly intended to deal with terrorism-related uses of the Internet and cyberspace, the DRS legal team must show prosecutors key words indicating that Internet use has a connection to contemplation of terrorist activity.

Algerian *judicial structures* were reorganised in the 1970s (and again in 2000 with a mass replacement of judges), but follow a typically French traditional model. The 1966 Penal Code underwent a substantial 1982 revision. Criminal cases are heard in 48 provincial courts, which have jurisdiction over more serious offences as well as appellate jurisdiction over lower courts (which have original jurisdiction for less serious offenses). The Court of Cassation (Criminal Division) serves as the supreme court of appeal. Judges are appointed by the executive branch through the High Judicial Council (chaired by the President of the Republic). The Constitution provides for an independent judiciary. A judge's term is normally 10 years, although in practice judges lack security of tenure, which leaves them open to executive influence: the Algerian judiciary is not widely considered to be fully independent and impartial, particularly in security or human rights cases.[75]

The *judicial process*, too, has a French imprint and is divided into three functions: accusation (prosecutor), investigation (investigating magistrate) and judgment (judge). Recruited ostensibly by merit examination, after three years of further study at the *Institut national de la Magistrature*, law graduates fan out across all three divisions. This pool of 'judicial officers' are seen largely as civil servants: they are subject to being moved between divisions. A judge may be shifted by the Ministry of Justice to a position as a prosecutor, a prosecutor to an investigating magistrate, and so on.

Following the example of the other Maghreb countries (and France), since at least 2008 in Algeria specialised counter-terrorism judicial procedures (see Part 1, Section D) have been created to deal with organised crime and terrorism cases. The Ministry of Justice observes that this is simply a different 'judicial list' or workload allocation, to allow specialisation and the accumulation of a core of expertise: the special judges apply the same substantive laws as the ordinary criminal courts. Some 50 judges and prosecutors were selected in 2006 to undergo specialist training in organised crime and terrorism cases. There is little information on the functioning of this special jurisdiction, and further research is certainly required.

In terms of *military courts*, Algeria maintains such courts in Oran, Blida, Constantine and Bechar for trying cases involving espionage and offenses involving military personnel. Each tribunal consists of three civilian judges and two military judges. Defence lawyers must be specially accredited and public attendance is limited and discretionary. Appeal lies directly to the Supreme

Court. There is little public information available on cases before these courts.[76] Such courts can hear cases involving 'civilians' (non-military personnel) facing security and terrorism charges, although the Algerian Ministry of Justice maintains that military courts are no longer used in counter-terrorism cases. It explains that these courts were used in earlier times whenever renegade members of the military happened to be involved in terrorist conduct. The Algerian system has had its own experience of militarised justice in terrorism cases, and (particularly with the creation now of the counter-terrorism-organised crime speciality within the ordinary criminal court system) would appear to have substantially 'moved on' from the use of military courts in counter-terrorism cases in a way that, perhaps, neighbouring Tunisia has yet to do.

Although some external observers and critics of Algeria tend to play down the past, it is impossible to analyse the Algerian counter-terrorism response in 2009 divorced from the *historical experiences* of the previous decade and, significantly, the crystallisation and then institutionalisation of the mindset adopted at that time. It is instructive to recall that under the 1991 state of emergency in Algeria (and 1992 martial law decrees), security authorities had very wide powers indeed. Algeria has openly acknowledged that it executively detained thousands of persons in remote camps without formal charges.[77]

A Special Court of State Security was established in 1992, but abolished in 1995 due, it appears, to recognition that such courts were perceived to discredit the government locally and abroad and undermine the government's campaign. Algerian judicial officers are inclined to remind observers that at that time judges faced a considerable professional dilemma: the scale of the emergency and the objective threat level were attended by evidential difficulties which rendered formal prosecutions difficult. Judges were naturally uncomfortable in this environment, since while there was no doubt of the nature of the threat, judges are trained to convict where there is particular evidence. Despite judicial instincts and habits, ordinary notions of criminal trials were perhaps untenable at that time (although judges maintain that a quarter of those detained were 'acquitted' or released in any event). In some respects, Algerian courts are used, historically, to the notion of membership-based offences as a preventative counter-terrorism strategy. In some cases at that time, judges had 80 or more accused persons before them. One consequence for a criminal justice-based response is that the Algerian judiciary tend to see terrorist activity as a very different nature of offence from crimes in general.

In some respects, then, it might be said that rather than compromising themselves in the face of this professional dilemma, the judiciary in Algeria preserved some influence during this time, by adapting rather than being sidelined entirely in the national security strategy. Had judges insisted on traditional criminal law method during the emergency in the early 1990s, it is possible that the state might have bypassed the judicial forum altogether.

The appreciation today, at least at the highest levels, appears to be that past experience, threat level, practicality and principle all point to the need for a criminal justice system-based response in Algeria (albeit within specialised practice areas). In this regard, and while concerns remain (see below), the scale of Algeria's challenge in the past must not be overlooked, and Algeria must perhaps be understood to be endeavouring to make progress, in part drawing on its own difficult experiences. However, the difficulty from a legal-technical aspect, and which has considerable influence on the tone of the criminal justice system counter-terrorism response, is that the 'emergency' legal dispensation is still in place in 2009.[78]

Terrorism criminalisation and prevention laws

In terms of *terrorism criminalisation*, the substantive counter-terrorism laws in Algeria date mainly from the emergency period (1992, with amendments).[79] Indeed, Algeria stepped away from having specialised counter-terrorism legislation in the early 1990s, in order to pursue what might be understood as a criminal justice response, by integrating terrorism offences into the penal and procedural codes. Terrorism itself is a widely defined offence under Article 87bis of the Penal Code. Article 88 equates establishment or membership or association or funding of terrorist associations with a criminal act of terrorism. Traditional concepts of criminal association exist in relation to penalising preparatory conduct. Amendments in 1995 criminalise apology or justification, encouragement or incitement and support of terrorism. Recruitment abroad of any Algerian to a terrorist organisation is punishable: Algeria has criminalised the activities of Algerians residing abroad, even in the case of offences that are not directed against Algeria.[80] Article 125 of the Criminal Procedure Code in effect grants the Algerian courts jurisdiction over transnational crimes.

The constitution provides for protection of the basic principles of personal liberty – including a 48-hour basic period for holding suspects before charge,

extendable to 72 hours with prosecutor's authorisation – and for the right to a fair trial. Judicial tradition holds that accused persons be fully aware of the charges against them. The state bears the burden of proof; the accused has the right to be present, and to appeal. Accused persons must be represented. Most criminal trials are public and do not involve a jury. It is commonly maintained that authorities do not always respect due process rights, and in security cases especially the defence is often denied access to the state's evidence relevant to their cases.[81]

In addition to the concerns mentioned in a following section, there are publicly acknowledged problems with lengthy pre-charge (investigative) and pre-trial detention,[82] described as an 'exceptional measure' in the Penal Code. The 1992 counter-terrorism law provides up to 12 days of lawful *garde à vue* (pre-charge detention, without counsel) by prosecutor's authorisation, without judicial control. There are no means to exercise the right to prompt judicial determination of the legality of continued detention, and in counter-terrorism cases persons may be held up to 20 months on the occasional (every four months) demonstration of cause before the prosecutor – in effect while further evidence is gathered.[83] Reports are that deciding officers rarely refuse requests for extended detention.[84] Meyer's 2002 observation after private conversations with prosecutors and judges was that, together with torture and disappearances, the primary problem was 'the lack of the judiciary's capacity to control the [criminal justice] process':

> …many identified the primary problem as the emasculation of the criminal justice system … the police effectively control the clock. Police can simply fail to record an arrest until a confession is received. Suspects arrested in one city are taken to another, making tracing virtually impossible. The file going to the prosecutor nonetheless reflects compliance with the law.[85]

There is no formal, law-based *witness protection programme* as such in Algeria. In practice in Algerian counter-terrorism cases, there are seldom witnesses before the court in the traditional sense. The court moves on evidence brought by the prosecutor. This intelligence/information may have come from witnesses, but their identity is not revealed and they are very seldom produced. Beneficiaries of the reconciliation process can be witnesses of a sort (they are protected and

immune from prosecution), but their assistance comes in the investigatory stage not the prosecution/court stage.

Criminalisation of terrorist financing

Algeria has fairly well-developed provisions to deal with terrorist financing, including as a preventative tool. In addition to 1995 criminalisation provisions, legislation was passed in 2005 on the prevention and combating of money laundering and the financing of terrorism, modifying the Penal Code.[86] Charities and religious organisations are regulated by law and monitored. Foreign exchange regulation infringements and informal international financial transfers are unlawful – all transactions must go through 'banks and approved intermediaries.'[87] Algeria maintains that *hawala*-type systems are 'not practised' and not favoured in Algeria, and that the officially established agencies are the ones authorised to make transfers through the Algerian banking and postal network.[88]

Algerian officials note that they are increasingly seeing a link between organised crime and terrorist groups. This may be direct (such as established criminal practices like cigarette smuggling) or indirect (protection and extortion of other criminals). Often this is petty crime such as mobile phone theft in countries such as Spain.[89] It would seem clear that criminalisation of formal transfers, even if effectively administered, is insufficient. The status of Algerian law and practice on freezing and forfeiture of assets remains somewhat unclear. Measures for freezing, provisional forfeiture and confiscation are governed by the ordinary Code. These actions are considered to be procedural matters within the competency of the relevant court if in preliminary investigations or judicial enquiries it is seen that the assets are linked to terrorist acts.[90] It is not clear whether this is limited (in law) to acts that have already occurred. In practice there would not appear to be great concern with pursuing further legislation on financing offences: these are mainly treated as 'material support' offences or subsumed as 'terrorist acts' under the Article 87 definition and prosecuted in that way. Whatever the legal position, there appears in practice to be no inability of the authorities to pre-emptively seize funds and assets in a preventative operation.

International cooperation in criminal matters: extradition and mutual legal assistance

Algeria maintains bilateral *extradition* and cooperation agreements with a range of countries, and in particular cooperates regularly and effectively with Morocco and Tunisia, both in informal and formal *mutual legal assistance* matters.[91]

Algeria continues to strongly engage in UN-related systems and receives considerable *external technical support* on counter-terrorism. While some of this support is of a military nature, a substantial proportion is being directed to strengthening the criminal justice system, including prisons. Recent examples include the UN Development Programme-sponsored visit to Canada in September 2008 of Algerian prosecutors and Ministry of Justice officials, for a workshop on combating drug trafficking, terrorism, organised crime and corruption. In October 2008 more than 60 Algerian judges and officials attended an EU seminar in Brussels. In 2008 the EU counter-terrorism coordinator was quoted as saying that Algeria (and Morocco) might 'in the near future' receive undisclosed levels of EU funding for counter-terrorism training initiatives *directed to law enforcement and justice system officials*.[92] The UNDP country office, among other actors, assists in generic capacity building in the justice system. Algeria has also been the recipient of UNODC technical assistance in the fields of legislative drafting, promoting international cooperation in criminal matters and combating the financing of terrorism.

In addition, Algeria itself hosts ACSRT, which President Bouteflika has supported with the purpose that it will become a 'centre of excellence' serving the regional and international counter-terrorism effort. For present purposes, one consequence of the hosting of the Centre may be the exposure and flow-on effect for Algeria's criminal justice system and its officials. Recently, for example, the Centre held a seminar on counter-terrorism in the North Africa region (April 2008), at which criminal justice system and mutual cooperation issues were given strong emphasis. Finally, Algeria has reported to the UN Security Council on its implementation of various resolutions from a criminal justice system perspective (the last occasion was in 2007 on Resolution 1624), and continues to interact with that system, briefing Subcommittee A of the UN CTC and CTED, most recently (11 February 2009).

Successes, challenges and opportunities

As discussed below, any assessment of counter-terrorism responses in Algeria must take historical issues into account. The overall assessment from country reports appears to be one of state commitment to continual improvement. On the positive side it is worth noting that in addition to engaging in the UN counter-terrorism system and international partners, including the Arab League, AU and EU, Algeria is a party to the International Covenant on Civil and Political Rights and the Convention Against Torture (1997). It has been elected a member of the UN Human Rights Council, and has taken a number of recent steps to improve human rights aspects of its laws and systems. The UN Human Rights Committee, along with many others, has noted Algeria's stated commitment to national reconciliation.

In February 2007 Algeria signed the new International Convention for the Protection of All Persons from Enforced Disappearances and national laws provide funds and measures for compensating victims of 'disappearances'. Torture is criminalised in Algerian Law (Constitution articles 34-5; Article 263 of the Penal Code), and 2006 amendments increase the penalty for officials engaged in torture.[93] Human rights education has been incorporated in law enforcement training. There has been a moratorium on the death penalty since 1993.[94] The National Advisory Commission for the Promotion and Protection of Human Rights was established in 2001 (although little is known about its work). Local civil society organisations operate, including Somoud, Djazairouna and the Algerian League for the Defence of Human Rights, albeit not without problems.[95]

However a range of concerns and uncertainties are commonly raised in relation to Algeria's criminal justice system in practice:

- There is still a state of emergency in operation, since 1992. The prolonged existence of this type of legal environment can only have a considerable distorting and weakening effect on the general justice system and law enforcement agencies. This legal dispensation – and the institutional mindset it may have entrenched – constitutes a serious challenge for the Algerian criminal justice system and national counter-terrorism response.[96]
- Given the primacy of the DRS (military intelligence) role, the primary coordination of counter-terrorism response remains under the Defence

department, and the DRS has an unusually powerful internal law enforcement role. The continuing delegation of judicial police functions is partly a function of the state of emergency.[97] While nominally under civilian control, the International Commission of Jurists Eminent Jurists Panel has recently noted allegations that 'in practice … the services are acting without restraint' and the DRS has been accused of involvement in torture, operating unacknowledged places of detention without judicial supervision, and de facto administrative detention in military compounds, often with 'complete impunity' notwithstanding the laws on the books.[98]

- Allegations of torture and of officials' impunity for torture remain issues of concern for a modern criminal justice system.[99] While Article 215 of the Criminal Procedural Code appears to render confessions admissible only for 'information purposes' and not as evidence, confessions extracted under torture are not explicitly prohibited and not expressly excluded in law from being used as evidence in court, and the law affords the judge excessive discretion in admitting confessions.[100] As noted, there are reports that the maximum period of remand in custody can, in practice, be 'extended repeatedly'.[101]
- The existing definition of 'terrorism' in Algerian law is criticised as particularly broad or 'rather vague'.[102] While the UN Human Rights Council has noted that Algeria has gone to some lengths to protect its national security and its citizens from terrorism, this legal issue raises concern since non-violent political action unrelated to terrorism might be proscribed.

Algeria: looking forward

In summary, the national counter-terrorism response in Algeria has been criticised on a number of human rights grounds, and retains a strong military-institutional component and emergency regulation approach, including through the continued exercise of judicial policing powers by the DRS. A military intelligence service exercising civilian powers under law is certainly preferable to it operating entirely divorced from the national criminal justice system, provided that this interaction with the DRS does not weaken the ordinary criminal justice system itself.

Challenges certainly remain around whether practice mirrors what is in principle written in the Constitution and legal codes. Moreover, much

of the country's counter-terrorism legal architecture pre-dates the key 2001 UN Security Council Resolution 1373 and its associated counter-terrorism obligations.

On the positive side, Algeria has demonstrated in a range of ways and forums, in terms of general direction, that it recognises the value of the criminal justice-based approach to countering terrorism, particularly as the nature of the threat and terrorist methods change considerably from the 1990s picture. Moreover, Algeria has explained that it is committed to a 'continuing effort to strengthen the rule of law' in counter-terrorism matters.[103]

Algeria is an active actor in regional and international processes and forums dealing with counter-terrorism issues, and has historically been behind much of the drive towards further legalisation at the regional and international level (as noted, sponsoring the 1999 Algiers Convention, ACSRT, among others). It has acted to create offences enabling it to prevent terrorist activity by legal means (financing, membership, recruitment, incitement, etc.), although this legislation mainly dates from the real emergency period in the early 1990s, whereas others' legislation dates from after Resolution 1373 (2001). Algeria does not appear to suffer from the lack of precise legislation on asset seizure and forfeiture. It has a working system for bilateral cooperation even if it lacks generic/universal mutual legal assistance and extradition legislation.

Upon reflection, while there may be some technical legal amendments, additions or qualifications indicated to the substantive laws in force, the primary issue for an effective criminal justice-based counter-terrorism response in Algeria does not lie in legal technical engineering but in an altered culture of law enforcement and counter-terrorism. The challenge is really one of changing entrenched institutional mindsets and approaches, and bringing actual practice closer to codified norms. In this regard it is important for donors and others to appreciate the deeply held view among the Algerian authorities, to the effect that Algeria's struggles with terrorist conduct were relatively neglected by the world before 2001, and that 'other regions responded only later on, when terrorism began to be discussed on the global scale'.[104]

Algeria routinely expresses grievances over other states, including partners, being 'somewhat lax' and displaying a 'permissive attitude' particularly towards Algerians abroad involved in incitement and other terrorist-related conduct.[105] Now, Western countries must of course uphold their own laws on freedom of association, speech and so on. However, in attempting to change mindsets or

to engage Algeria in capacity building or advocacy or assistance on counter-terrorism issues, including criminal justice system issues, there is a need for appreciation of the significance of this enduring Algerian perception that 'latecomers' to counter-terrorism issues do not acknowledge Algeria's past and present concerns, sacrifices and successes.

Despite its international pledges and ratifications, and without expressing undue apologia for the Algerian state, judging the Algerian justice system by reference to European Convention on Human Rights standards is unrealistic, given the context. A year after 9/11, in an essay describing American Bar Association capacity building with Algerian justice officials, William Meyer noted:

> The Algerian judiciary is emerging from nearly a half century of one-party rule, complicated by a decade of savage civil unrest. Islamic extremists viewed the courts as an instrument of State power – as did the State. The notion of the rule of law held little credence in this battle.[106]

Such matters are not turned around overnight. There are deep, entrenched structural issues that require time, leadership and encouragement, along with censure where warranted. In this respect it is too infrequently noted that Algeria had a particularly long distance to travel after the tragedies of the 1990s and the heavily militarised response that this entailed. Nor can the violent manner of Algeria's colonial management and creation as a state (the independence war with France) be discounted in shaping the 'institutional psyche' and the default of a 'security state'. In this respect its contextual factors differ considerably from Morocco and Tunisia. In addition, in assessing movement towards a civil-policing model it is worth remembering that operationally for parts of Algeria's history there was a genuinely 'green' (military counter-insurgency) element to Algeria's domestic counter-terrorism response. To some extent, in mountainous regions, this element persists, although the Algerian authorities are cognisant of the need for an intelligence-led criminal justice system-based response.

The challenge today is that the national counter-terrorism response is neither 'blue' (civil police-led), nor openly 'green' – it is coordinated by the intelligence services, in particular the DRS. While it has some judicial policing functions, the DRS continues to report to the Ministry of Defence rather than Interior or

Justice ministries, and, as in most countries, it is difficult to reform or hold such agencies to account.

In 2002 Meyer noted that the transition then underway within Algeria (after the peak of violence in the late 1990s) and the new international attention to Algeria (in a newly terrorism-conscious world) made for a 'new environment' that held out 'the possibility of meaningful progress in legal reform and the protection of human rights' where 'Algerian legal professionals uniformly felt that the door was finally open for significant change'.[107] The national counter-terrorism response was indeed changing during this period, and arguably that relatively positive environment still persists.

In terms of this view, due to concerns and the changing nature of the threat, Algeria is perhaps moving gradually to a criminal justice-based approach, whereby the intelligence services are the transitional responsible agency. The Algerian security services are seen as capable of handling a prolonged effort against internal terrorist threats.[108] This fact provides breathing space for reforms, including altering the legal atmosphere by revisiting the issue of the state of emergency. The relative stability and the view of a transitional time in Algerian counter-terrorism policy represent an opportunity to clarify and legalise the relationship between the intelligence services, investigating magistrates and prosecutors, and to put Algeria's counter-terrorism response more squarely and institutionally on a justice-system basis, with the accompanying safeguards, enhanced transparency and strategic benefits resulting from such an approach.

MOROCCO

Galvanised in particular by the experience of the May 2003 terrorist attacks in Casablanca, the constitutional monarchy of Morocco has adopted what is seen as a particularly comprehensive counter-terrorism strategy with a strong emphasis on a traditional law enforcement approach through increasingly transparent civil policing and court prosecution, along with human rights reforms, proactive international cooperation, and deliberate longer-term politico-social preventative measures aimed at rendering broader societal conditions less conducive to radicalisation of some individuals.

Again, no attempt is made here to chronicle particular incidents and developments reported elsewhere.[109] The broad pattern appears to be one of increasing precision in orienting the counter-terrorism strategy through

focused arrests and successful prosecutions, in contrast perhaps to the mass arrest and mass trial strategy attempted immediately after May 2003, which attracted criticism from some quarters.

The criminal justice system and terrorism in Morocco

The *law enforcement* apparatus comprises the national police (DGSN) under the Ministry of the Interior, responsible for internal policing and border control. The *gendarmerie* polices rural areas and reports to the Ministry of Defence. Along with some auxiliary security services, the General Directorate of Territorial Security also reports to the Interior Ministry. The main national investigative body comprises judicial police, in effect a hybrid of the DGSN and Ministry of Justice officials. Under Ministry of Justice prosecutors it investigates violations of the penal law, terrorism, organised crime and white-collar crime. There is a Department of Royal Security reporting to the monarchy. There is some overlap of agency responsibilities. An inter-ministerial counter-terrorism coordination platform now exists. The exact nature of the relationship between investigatory and prosecutorial elements of the system, including the relationship with intelligence services and the legal basis for the latter's exercise of policing powers, is unclear.

Morocco has a dual *judicial system* (religious tradition and secular) with the criminal justice system based on the French legal tradition and comprising district courts, courts of first instance, appellate courts, and a Supreme Court. In practice the appeals court hears serious matters directly. The constitution provides for an independent judiciary, although there are some concerns in 'sensitive' cases.[110] Judges are appointed by the monarch through the Supreme Council of the Judiciary. In addition to the ordinary criminal courts and at the government's discretion, serious state security charges (in practice, those relating to territorial integrity or the monarchy) may be brought against civilians before a tribunal convened by the Ministry of the Interior.[111] The June 2003 counter-terrorism laws (below) centralised and specialised the responsibility for investigation, charge and prosecution of terrorism offences with investigative judges and prosecutors working out of the Court of Appeal in Sale/Rabat. A *standing military tribunal* tries cases involving military personnel and occasionally matters pertaining to state security (mainly offences involving the unauthorised carrying of firearms).

Terrorism criminalisation and prevention laws

Morocco's primary *counter-terrorism legislation* that gives effect to its obligations under UN Security Council Resolution 1373 is Act 3-03 (2003), with substantive provisions incorporated into Chapter 3, Part 1 of the general Criminal Code.[112] In addition to the basic offence of engaging in terrorist acts, conspiracy is criminalised (Article 1-218(9) of 2003), and the Act provides for designation of organisations, creating membership offences that have been the basis of most legal actions.[113] One thousand people were prosecuted for membership offences after the May 2003 Casablanca bombings,[114] although the annual number is now closer to 100. The 2003 Act also amended the Penal Code in relation to *apologia*/incitement and a general complicity offence (Article 218 of the 2003 Act; Article 128 of the Penal Code), although the state need not prove an intention to incite violence as such.[115] Communications interception and seizure is also provided for in Article 108-3 of 2003, with time limit and renewal safeguards, although Morocco reports rather ambiguously that under its law 'recourse to any and all investigative methods is permitted for combating terrorism'.[116] Morocco has thoroughly reviewed its immigration laws, both for counter-terrorism and mass transit reasons, the latter being a particular challenge for Moroccan and Spanish authorities.

The criminalisation provisions were part of a relatively comprehensive package of social and political reforms aimed at countering radicalisation set out by Morocco in 2003, prompted in particular by the deadly attacks in Casablanca that year. In its 2004 report to the UN Security Council pursuant to Resolution 1373, Morocco noted that although the Act 'overrides ordinary law, as is justified by the seriousness of terrorist acts', it did not affect 'mandatory respect for the rights of the defence' and rather included amendments to 'strengthen the safeguards necessary to protect human rights and dignity', including limiting police detention to 48 hours, medical, legal and family notification requirements, and limited pre-trial detention.[117] It appears, however, that arrested persons in terrorism cases are held for 96 hours incommunicado in pre-charge detention *(garde à vue)*, under Article 4 of the 2003 Act (amending Article 66 of the Code). Two additional 96-hour extensions are allowed at the prosecutor's discretion (not judicial order). Detainees may be denied access to counsel for the first six days. Reports note that individuals suspected of terrorist links can spend considerable time in detention before being charged, and up

to 200 individuals remain in custody without charge after counter-terrorism operations.[118] Once charged, persons may be detained without trial for up to one full year while the investigating magistrate completes his or her work.[119] External reports note concerns with delays in notification of arrest and some problems with the practice of legal defence, including delays in access to counsel (although this was mainly an issue in mass trials after 2003) and access to prosecution-held information witnesses.[120]

Criminalisation of terrorist financing

The 2003 Act criminalised the financing of terrorism. Title IV of the 2003 Act (on the suppression of terrorist financing) is incorporated in the Code of Criminal Procedure. The kingdom ratified the International Convention for the Suppression of the Financing of Terrorism by decree on 23 July 2002, using it as a basis for amendments to the criminal code, and purporting to adopt the 'terrorism' definition therein.[121]

Article 218-4 of the Act defines a terrorist act as including 'the provision, raising or management of funds, securities or property, by whatever means, directly or indirectly, with a view to seeing them used, or in the knowledge that they will be fully or partly used, to commit a terrorist act, regardless of whether such an act occurs; and assisting or providing advice to achieve that end'. Those convicted are also subject to confiscation of all or part of their property, in analogy to a standard 'proceeds of crime' approach. The state may apply to the Procurator-General in the Court of Appeal of Rabat for an order for the freezing, seizure or confiscation of any property, not only that used or intended to be used in terrorist acts (even outside the country), but also proceeds of other criminal conduct, which become state property (articles 595-8 of the Procedure Code). Part 4 of the 2003 Act provides for asset freezing in relation to persons on UN Security Council lists, irrespective of the origin or use of such assets.

The general requirement to report any conduct that could lead to a terrorist act (Article 218-8 of the Criminal Code) extends to financing conduct. The 2003 Act amended bank secrecy laws and authorises judicial officers during any inquiry to obtain information on suspected financial transactions, and to declare a freeze on or seizure of funds and protective measures on property (Article 595-2 of the Criminal Procedure Code). The Act provided a legal basis for engaging the assistance of the Bank Almaghrib (Central Bank). A foreign

court's decision to freeze or seize funds may be implemented in Moroccan territory. Originally, the Act empowered financial supervision, supported by a notice from the Central Bank governor describing a 'duty of vigilance'. Now (under the new money laundering legislation of 2007) it also requires reporting of suspicious transactions by certain classes of persons. The Act (and so the Code) indemnifies from civil or criminal action agents or institutions involved, but also protects the information from use elsewhere (Article 595-5). There are sufficient provisions to enable the inspection, freezing and confiscation of property and money used to finance terrorism.

The Money Laundering Act is based on Financial Action Task Force recommendations. It establishes a 'financial intelligence unit' to better coordinate inter-agency work and to centralise financial preventative actions relating to counter-terrorism and organised crime generally. Both US and EU assistance provided Moroccan police, customs, central bank and government financial officials with training to recognise money-laundering methodologies. Morocco reportedly has an effective system for disseminating US and relevant UN Security Council resolutions' terrorist freeze lists to its financial sector and legal authorities, and has apparently provided timely reports to the Security Council Sanctions Committee established under Resolution 1267 (1999) resulting in freezing of some terrorist-related accounts.[122] The collection of charitable or religious donations is supervised under the country's 1971 legislation (and *dahir*/decree of 22 July 2002) and declaration of funds of foreign origin are required.[123]

Morocco has emphasised its focus and increased vigilance on terrorist financing and correctly expressed the view that 'terrorist financing has fairly specific features that differentiate it from the fight against money-laundering and financial crime in general' so that 'while adopting the usual norms and precautions against financial crimes', Morocco 'makes it a point not to limit itself to such measures',[124] indicating that a narrower 'proceeds of crime' view is not taken in relation to assets associated with terrorist actors; it is the use to which funds are intended, not the legality of their movement, which is seen as key. The emphasis on translating traced information into 'financial evidence that will be relevant ... in court'[125] indicates acknowledgement of the significance of the intelligence-to-evidence cycle under a criminal justice system-based approach, and the need for prosecution-led strategies.

International cooperation in criminal matters: extradition and mutual legal assistance

In terms of *international cooperation in criminal matters*, Moroccan legislation does not provide for proceedings in Morocco against a foreigner located in Morocco in respect of a terrorist act against nationals of other states. However, the Code criminalises the use of Moroccan territory for the planning, organisation or carrying out of terrorist crimes elsewhere, pursuant in particular to the Arab Convention; it also gives jurisdiction in relation to participatory or complicit conduct abroad, even by foreigners, if the substantial offence was committed in Morocco. Articles 748-756 of the Code of Penal Procedure gives Moroccan courts jurisdiction over Moroccan nationals who have allegedly committed terrorist acts abroad.[126]

Extradition and mutual legal assistance primarily take place on the basis of bilateral agreements and appear to function effectively. The Procedure Code provides for judicial cooperation in criminal matters (Articles 713-749; 189-193) including extradition, and Part 3 of Chapter 7 of the Criminal Procedure Code provides the conditions for extradition where no bilateral agreement exists. Morocco has declared to the UN Security Council that the 1951 Refugees Convention was 'taken into consideration' during the drafting of the law against terrorism.[127]

The Ministry of Justice is not the primary contact point for international cooperation, this belonging to a department within the Interior Ministry and the Criminal Investigations Department in the DGSN. Like its regional peers, Morocco has publically expressed its commitment to the implementation of the global counter-terrorism regime and to promote cooperation in terrorism-related matters. Most recently in an address to the Security Council its representative noted that the kingdom had 'adopted an integrated legal arsenal in respect of the rule of law and in line with the international commitments to which Morocco adheres'.[128]

Morocco also contributes to consensus building and regional cooperation on counter-terrorism, for example, hosting, with the support of the UNODC, the Fifth Conference of Justice Ministers of French-Speaking Countries, one aim of which was to promote the implementation of the universal counter-terrorism instruments. It is a significant recipient of development assistance, in particular from the EU, which recently voted to extend to Morocco a form of

advanced status in the EU's 'neighbourhood' policy, while expressing views on the need for some reforms. Along with Algeria, Morocco stands to benefit from 'undisclosed levels of EU funding for counter-terrorism training initiatives directed to law enforcement and justice system officials'.[129]

Successes, challenges and opportunities

A thorough assessment of a country's criminal justice system in relation to counter-terrorism must include both its ability to prevent and prosecute terrorist activity through legal measures and institutions, and whether its law and practice complies with rule of law and human rights safeguards. Morocco's implementation of counter-terrorism laws and their active policy of relatively open prosecution through the courts display the basis of an effective criminal justice-based response. Morocco has received encouragement and praise for complementing this strategy with advances in human rights. In particular:

- Morocco is a party to the International Covenenant on Civil and Political Rights and the Convention Against Torture, and the process towards ratification of Optional Protocol 1 to the Covenant and the Operational Protocol to the Convention is under way. In relation to taking deliberate, public and institutional steps regarding past state excesses and neglect before political reforms in 1999, it has received praise.[130] Authorities generally tolerate the work of the many human rights organisations active in Rabat and Casablanca, and are considered mainly responsive to foreign human rights and media organisations visiting Morocco.[131] Morocco has given 'unprecedented access' to human rights observers in relation to those incarcerated for terrorism offences.[132] In contrast to the position of other regional actors, for example, the government agreed in 2002 to a 10-year human rights education programme by Amnesty International, including for criminal justice system officials. The *Conseil Consultatif des Droits de l'Homme* (CCDH) operates as a form of national human rights body. The media is relatively robust in reporting on criminal justice system issues, although it can face intimidation on some topics. Law enforcement officials apparently now focus arrests more narrowly (compared to the mass arrests after the 2003 Casablanca attacks).[133] The government in practice provides some protection against *refoulement* in asylum cases.[134]

- Torture is an offence, and in March 2006, by implementing the Convention Against Torture, Morocco enacted a law requiring judges to refer a detainee to a forensic medicine expert if asked to do so or if judges noticed signs of torture. The government maintains that at least 15 cases were referred in 2008, one case of which warranted further investigation, and there are reports of prosecutions of officials for violations including torture.[135] The Moroccan criminal justice system is relatively responsive, as illustrated by action to change operational procedures relating to policing the border with Spain at Melilla so as to reduce the likelihood of lethal force, despite an appeal court ruling that a 2005 shooting of illegal immigrants by border guards had not been unlawful.[136] Morocco was recently examined under the UN Human Rights Council's Universal Periodic Review.[137]

However, certain observers have commented that Morocco 'continues to present a mixed picture' on human rights,[138] in ways that compromise a more positive assessment of the overall effectiveness of the criminal justice system in relation to counter-terrorism. The following specific concerns have emerged:

- A significant issue would appear to be the precise role and powers of the intelligence agencies in the investigation-prosecution continuum. The legal basis giving authority for the intelligence services (DGST) to detain and interrogate suspects is unclear.[139] In a recent report, government representatives denied that the detention and interrogation of terrorism suspects occur outside the ordinary framework of law enforcement detention, maintaining that intelligence agents can provide assistance to law enforcement operations, and certain officers have a dual role.[140]
- One particular concern has been the alleged operation of an unacknowledged detention centre near Rabat (Temara) run by the DGST, and operating outside the normal criminal justice system process, resulting in officials operating unsupervised by the judicial system and not controlled by the civil authority, incommunicado detention beyond the limits of the counter-terrorism laws, and torture with minimal appearances of accountability.[141]
- The courts are accused of excessive reliance on police statements as the sole basis for convictions, and of convicting defendants on the basis of apparently coerced confessions despite judicial duties under the 2006 anti-torture laws, and rules mandating the exclusion of evidence obtained under duress.[142]

In 2004 Human Rights Watch was more critical, saying that 'the [human rights] problems in Morocco run deeper than any one piece of legislation', that 'human rights advances in Morocco have largely bypassed the courts' and that 'detainees are on a fast-track to conviction because prosecutors and judges show little interest in how the police obtained their statements'.[143]

Morocco: looking forward

Although there remain some uncertainties (particularly in relation to the precise role of the intelligence services in Morocco's criminal justice response to terrorism, after allegations of extrajudicial arrest and detention), Morocco's counter-terrorism strategy has a fairly solid legislative and due process footing, including in relation to implemented safeguards (such as the 2006 anti-torture law) and international cooperation arrangements with neighbouring Algeria, Spain, France and others. This represents a rather public emphasis on human rights measures in Morocco in recent years, reflected best perhaps in the increased transparency of the government on criminal justice issues and the relative ease with which local and foreign civil society can operate to enquire about the system.

However, as with other Maghreb countries – and many on the continent – there remain challenges in relation to bringing practice more in line with the newer legal measures. The impression given by a range of reports is summed up in one that notes that counter-terrorism investigations and arrests appear to be more narrowly focused than previous 'dragnet' approaches to trials and arrests, so that the criminal justice system response is 'better targeted and legal proceedings more transparent' as time goes on.[144]

TUNISIA

Although the domestic terrorism threat level in Tunisia is considered lower than, in particular, Algeria, by all accounts the Tunisian government acts robustly – and if certain values are discounted, largely effectively – to prevent incidents and forestall the formation of terrorist groups inside the country, including by prohibiting the formation of religious-based political parties and groups that are believed to pose a terrorist threat. It is reported that the numbers of persons

detained, charged, and/or convicted under Tunisia's 2003 legislation and other laws is in the 'hundreds'[145] or 'scores' per year.[146]

There has only been one recent fatal terrorist attack in Tunisia (April 2002), and one major military-style encounter.[147] Tunisian nationals have noticeably been involved in terrorist activities abroad, including in Algeria, Italy, Iraq and Lebanon, and some suspects have been returned to Tunisia by foreign governments.[148] Nearly all convictions under counter-terrorism laws in recent years in Tunisia were for membership-based offences. Some stood accused of planning to join jihadist groups abroad or inciting others to join, rather than of having planned or committed specific acts of violence.[149]

As with the other studies, however, this report does not attempt to chronicle information on recent terrorist and counter-terrorist acts and activity in Tunisia.[150] The 2008 ISS report on transnationalisation of domestic terrorism in the Maghreb notes the commendable socioeconomic policies or progress considered, by that author, to be related to an effective long-term strategy against radicalisation. The present report does not purport to comment on domestic political dynamics: international human rights organisations and others have repeatedly made serious allegations about the severe restrictions on freedom of political activity, association and expression in Tunisia, including the mistreatment of political prisoners. The government is accused of misusing the threat of terrorism and religious extremism as a pretext to crack down on non-violent peaceful opponents.[151] This monograph does not seek to comment on these issues. While there is always a risk, in many parts of the world, that broadly defined 'terrorism' offences might be used against substantially peaceful political activity (thus also undermining a wider counter-terrorism response), the focus here is on the criminal justice system in Tunisia and its use in respect of persons and groups said to be involved in local or transnational terrorism and violence.

The criminal justice system and terrorism in Tunisia

The Ministry of the Interior controls several *law enforcement agencies*: the national police, the National Guard (border security and policing rural and smaller urban areas) and the state security services having intelligence and monitoring roles. Investigating magistrates and prosecutors fall under the Ministry of Justice. The precise nature of the relationship between investigatory

and prosecutorial elements of the system, between intelligence agencies and the judicial process, including the legal and practical relationship with the military justice system, remains unclear. In keeping with a deliberate, expressed policy of '*specialisation*', the 2003 counter-terrorism legislation (see below) has centralised in Tunis the investigation and prosecution of terrorist activities by 'judicial police commissioners and judicial bodies' for reasons of 'the experience and know-how gained by these agencies by virtue of the volume and variety of cases ... and ... the human and material resources available to them'.[152]

The intention of the 2003 legislation was to create an exceptional regime, albeit within the framework of the normal criminal justice system. Tunisia's most recent UN Security Council Resolution 1373 report notes that 'police commissioners, district attorneys and examining magistrates can resort to extraordinary powers relating to detention, search and questioning when they attend to terrorism-related cases and are thus capable ... of the effective responses that this sort of organized crime requires, while respecting the fundamental principles of human rights'.[153] Further collaboration and research may be needed to explore how this specialisation is assisting in achieving these purposes.

Ordinary criminal law and practice remains heavily influenced by the French system. There is a unified (secular) judicial system. Tunisia's Constitution provides for an independent judiciary, in principle, with presidential appointments on the advice of the Supreme Judicial Council. However, the judiciary is considered by observers to be susceptible to executive influence.[154] There are roughly 50 cantonal or district courts, half as many courts of first instance (appeals from district courts and with original jurisdiction in more serious cases, including counter-terrorism cases), and three courts of appeal.

The Court of Cassation (or Supreme Court) serves as the final court of appeals. A High Court can be specially convened for treason, an administrative tribunal exists for non-binding remedies in relation to official conduct, and the Constitution provides for the President to wield certain emergency powers in exceptional circumstances. The independent legal profession in Tunisia is perhaps becoming increasingly robust. In October 2008, a training institute for lawyers created by law in 2006 became operational. This had been opposed at first by the Tunisian Bar Association for fear of governmental control of Bar admissions. The Association is now part of the management of the training institute.[155] However, the 2003 counter-terrorism law undermines the defence

Bar by criminalising the failure 'even where bound by professional secrecy' to notify the authorities of any acts, information or instructions which may have emerged concerning the commission of a terrorist offence (Article 22).[156] Amnesty International alleges that defence lawyers in counter-terrorism cases have been harassed and in some cases assaulted by police.[157]

As with many countries, the law provides for *military tribunals*. In Tunisia, these are used in some counter-terrorism cases. It is not clear which authority in practice decides – and on what criteria – whether a case goes before a military tribunal or a civilian or mixed court.[158] By law these courts have jurisdiction in cases involving military personnel, although non-military personnel may come before these courts. Since at least 1993 the jurisdiction is available in relation to terrorism offences.[159] Since the later 2003 law granted jurisdiction over terrorism offences to the civilian court of first instance for Tunis, the need for military tribunals in counter-terrorism cases is unclear. The tribunals appear to be mainly used for trying Tunisians charged with serving a terrorist organisation that operates abroad, under Article 123 of the 1957 Military Justice Code, which provides for this. In 2007 at least 15 non-military persons were reported to have been convicted (mostly of links to transnational terrorist organisations) and sentenced to prison terms of up to 10 years after trial before the military court in Tunis.[160]

Recently, in a formal submission to the UN Human Rights Committee, the International Commission of Jurists argued that the constitutive and procedural provisions of the Tunisian military criminal justice system are in violation of its obligations under the International Covenant on Civil and Political Rights.[161] The International Commission of Jurists submission concerns the exceptionally wide powers given to the Ministry of Defence in procedural matters; the very wide jurisdiction of the military courts; the executive appointment of the judicial authorities; and control over the duration of their tenure.

Of the three countries under study, Tunisia has (on one view) perhaps shown the greatest degree of ambivalence in terms of a criminal justice-based response, with continuing reliance on military tribunals in relation to some terrorist offences. This may be a technical matter, since Article 123 of the Military Code gives those courts jurisdiction over terrorist-related activities abroad. However, given, firstly, the message sent by the use of secretive military tribunals (undermining the merits of a criminal justice system response, as explained in Part I), secondly, the ease with which jurisdiction could be vested

in civilian courts for extraterritorial acts of Tunisian nationals, and, thirdly, given the evident capability of the civilian courts to try terrorism cases, there would appear to be no reason for Tunisia to continue into the future to use military tribunals in relation to terrorist offences wherever committed.

Criminalisation of terrorism and prevention laws

Tunisia's principle *counter-terrorism criminal legislation* is Act 75 of 2003.[162] Enacted expressly to comply with UN Security Council Resolution 1373 obligations on criminalisation and to criminalise money laundering and terrorist financing, it criminalises terrorist acts according to a broad definition of 'terrorism' that the UN Human Rights Committee recently (March 2008) observed suffers from a 'lack of precision'.[163] The Act also criminalises acts of incitement and equates such acts with terrorist acts.[164] A significant preventative tool is Article 11 of the Act, which provides that in addition to incitement, anyone who conspires or intends to commit a terrorist act 'where that intention is accompanied by any act preparatory to the commission of such an offence' shall be guilty of a terrorist offence. As noted, the most common legal basis for counter-terrorism action is around membership offences under the Act, which are equated with the primarily criminalised offence of committing terrorist acts. Financing offences are discussed below.

Criminalisation of terrorist financing

Tunisia's 2003 legislation deals with financial aspects of terrorism, essentially through a money-laundering paradigm, on the basis of the authorities' publically stated conviction that 'terrorist groups are established and develop only in the presence of financial networks that support them'.[165] Expressly for 'preventative' rather than deterrent reasons, the 2003 Act also established the Financial Analysis Committee (within the Central Bank) for the tracing and investigation of suspicious transactions, with agreements in place for international cooperation.

However, the money-laundering framework may be inadequate for lawfully detecting, investigating and prosecuting conduct related to the financing of terrorism that does not involve a money-laundering activity. Also, the extent of progress in the formal regulation of informal transactions and dual-purpose

organisations remains unclear from state reports. It is not clear whether Tunisian counter-terrorism law provides, in terms, for preventative asset seizure and forfeiture, since generic criminal procedural options appear to be seen as adequate. A special unit exists within the counter-terrorism architecture to deal with organised crime.[166]

International cooperation in criminal matter: extradition and mutual legal assistance

There is little publicly available information on Tunisia's practice in *extradition and mutual legal assistance*, which have not been the subject of reports to the UN Security Council. In addition to bilateral agreements, which are the basis of extradition in this part of the world, Tunisia appears to have strong working legal cooperation relationships with, in particular, counterparts in North African and Middle Eastern countries, France, Italy and other European countries, and the US. Tunisia has provided for a residual extradition jurisdiction (unrelated to bilateral agreements) in relation to terrorist offences committed outside of Tunisia, against foreign interests, by a non-Tunisian found on Tunisian territory: Article 60 of the 2003 Act (linking in articles 308ff of the Criminal Procedure Code). Article 17 of the Tunisian Constitution recognises the right of asylum and prohibits the extradition of political refugees.

Tunisia has been relatively proactive in terms of wider international cooperation, It regularly convenes regional and Arab League meetings on the subject of counter-terrorism (for example, a pan-Arab summit on socio-economic aspects of long-term counter-terrorism in November 2007, and more recent meetings for Arab League Ministries of the Interior to review regional counter-terrorism efforts and cooperation), and has been consistent in calling for standardisation of global responses.[167] Tunisia maintains that certain (mainly European) countries have not responded to Tunisia's 'repeated efforts ... to convince them of the terrorist nature of the Al-Nahdha movement' and that it should be a Security Council Resolution 1267 (1999) proscribed organisation after 'its military wing, the Tunisian Combatant Group, was included during October 2002' on relevant lists.

This, together with Tunisia's perception of some countries' failure to coordinate with Tunisia and to 'heed its opinion in consideration of requests for political asylum from Tunisian extremists',[168] provide some part of the relevant

context in relation to Tunisia's responsiveness to international demands in relation to certain perceived faults in the Tunisian system and practice. To state this is not to make a claim either way for the correctness of the Tunisian position. Instead, while making objective assessments of organisations within the principled framework of global counter-terrorism, and while this grievance might not give rise to the same level of empathy as Algeria's long-standing complaints, the point is that partners seeking progress by Tunisia ought to consider the existence of this apparent grievance in relation to finding ways in which to encourage further strengthening of the criminal justice system in Tunisia.

Unlike its neighbour Algeria, the 2003 Tunisian law does provide special procedures for *witness protection* in counter-terrorism cases. The defence may request disclosure of the witness's identity, but this must be refused (whatever the prejudice to the accused) if there are fears for the witness's safety: articles 49 to 52. Protection extends to the identity of police and judicial officials working on terrorism cases. Under the Act, all data relating to the identity of informers, witnesses and investigation participants must be kept in an independent location or file, supervised by the Deputy Prosecutor in Tunis. The same legislation creates a process to encourage informing, which can result in reduction of penalties for informants who assist in prevention or arrest in terrorism cases.[169]

Successes, challenges and opportunities

Tunisia has the ability under national laws to prevent and prosecute terrorist activity. Through its 2003 counter-terrorism laws, Tunisia has adopted principally a criminal justice-based response, whereby it has criminalised a range of types of conduct in a manner that enable preventative legal action to be taken, including in relation to terrorist financing. Its extradition and international cooperation legal frameworks appear to be adequate for the basic purpose of enabling a legal basis to movement of suspects.

In addition, there have been some measures to reinforce rule of law and human rights safeguards in Tunisia. The country is a party to the International Covenant on Civil and Political Rights, and now also party to the the Convention Against Torture, which it has partly implemented in legislation. Article 5 of the Constitution guarantees fundamental criminal procedural freedoms and human rights. The 'Higher Committee on Human Rights and Fundamental

Freedoms was established in 1999 by decree and was strengthened by July 2007 decree (although it fails at this time to meet the UN's Paris Principles for independent national human rights institutions).[170] An internal mechanism now exists in the Interior Ministry to oversee human rights standards among law enforcement officers, although no information is available on its operation.[171] The government permitted observers and foreign journalists to monitor some trials.[172] In March 2008 Tunisia announced it would 'in future' invite visits by the UN special rapporteurs on torture and on the promotion and protection of human rights while countering terrorism, as well as prison visits by Human Rights Watch.[173] Both in 2007 and 2008, as an apparent gesture of good will, groups of prisoners belonging to banned groups and held since the 1990s were released by presidential decree.

However, Amnesty International's 2008 report alleged that while 'Tunisia's good economic performance and positive legal reforms' enhanced its international reputation, 'this masked a darker reality in which legal safeguards were often violated'.[174] This reflects a situation reported uniformly by most sources in relation to human rights in Tunisia's criminal justice system. Specific concerns include:

- While a recent country report notes that law enforcement groups are 'disciplined, organised, and effective', it also noted that they operate 'with impunity sanctioned by high-ranking officials'.[175] The problem of impunity for official excesses, including torture to obtain statements from suspects in custody, is continuously reiterated in a range of other recent reports.[176]
- Tunisia has ratified the Contention Against Torture and has criminalised acts of torture, although no state agent appears to have been pursued for torture to date despite a range of complaints from defendants convicted under counter-terrorism laws.[177] International human rights groups allege that trial judges convict defendants solely or predominantly on the basis of coerced confessions, or on the testimony of witnesses whom the defendant does not have the opportunity to confront in court.[178] Despite the criminalisation of torture in Article 101 of the Code, confessions obtained by torture are not in law excluded as evidence.[179]
- The criminal offence of terrorism in Tunisia is 'particularly broad',[180] and in many ways exceeds the sort of conduct contemplated by the universal and regional counter-terrorism instruments.

- The judiciary is reported to be susceptible to influence from the executive branch in 'sensitive' cases, including counter-terrorism cases, with a number of organisations alleging unfair trials despite the laws in place.[181] Human Rights Watch alleges that 'suspects arrested in the context of the counter-terrorism law commonly face a range of procedural abuses' despite legal codes.[182]
- While Tunisia has correctly maintains that the 2003 Act did not establish special courts, and that the ordinary courts retain jurisdiction over terrorist offences (Security Council 2006), such state reporting to the Security Council omits to mention the role of military tribunals in dealing with terrorism cases, in particular the perceived necessity of military tribunals for terrorist offences by Tunisians, wherever committed.
- Tunisia maintains that under the 2003 counter-terrorism law, periods of custody and preventive detention have not been increased in counter-terrorism cases, and that the rights of the defence are guaranteed.[183] However, pre-charge detention (without supervision or counsel) is in practice longer in counter-terrorism cases and reportedly may be extended without giving grounds as is required in ordinary cases under Article 13 of the Criminal Procedure Code. The recent International Commission of Jurists report expressed the view that no satisfactory reason had been offered for these lengthy periods,[184] and long pre-trial detention in counter-terrorism cases attracts criticism in many reports.[185]
- Human Rights Watch alleges that 'authorities have refused to grant legal recognition to every truly independent human rights organization that has applied over the past decade',[186] which makes it difficult for the criminal justice system to be assessed, while Amnesty International alleges a 'climate of intimidation' of the media over reporting on counter-terrorism cases and the International Commission of Jurists reports legal ambiguities which deter journalists from writing about terrorism cases.[187]

Tunisia: looking forward

In its latest available report to the UN Security Council on Resolution 1373, Tunisia appeared to expressly acknowledge (and adhere to) an integrated criminal justice response, referring repeatedly to 'terrorist crime' and noting that it pursued 'effective responses to terrorist crime, which does not conceal

the necessity of coordination with the Tunisian legal system or respect for the principles of human rights'.[188]

While some legislative gaps remain (for example, to expressly prohibit confessions obtained under torture from constituting valid evidence), Tunisia has taken a range of steps, which in principle, are geared towards systemic safeguards against abuse of state power within the investigative-judicial process, particularly during prolonged pre-trial incommunicado detention. The challenge remains how to bring institutional/agency practice in line with the effort so far made to amend legal structures. The various strategic and operational benefits derived from successful civil prosecutions of terrorist suspects are undermined by the enduring perception of impunity for official excesses, and the stain of allegations of torture obscures real progress in the criminal justice system response to counter-terrorism. It is moreover entirely appropriate for outsiders to comment on these matters (and possible to do so with discussion of domestic political issues in Tunisia), since counter-terrorism prosecutions are undertaken within the framework of Tunisia's public commitment to global counter-terrorism strategies.

Finally, in relation to its criminal justice system, Tunisia does not have the burden of turning around slowly an enduring, entrenched military legacy, as perhaps Algerian society does. Unlike Algeria, it obtained independence peacefully more than 50 years ago. Given the threat profile, the Tunisian commitment to a criminal justice system-based response, and the ability of the normal (but specialised) courts to handle counter-terrorism cases, the continued reliance on military tribunals (in relation mainly to Tunisians returned by other countries) seems unnecessary. Military tribunals lack many of the safeguards that are nominally applicable to the civil court system, and create an impression that points away from the direction of a criminal justice system-based response to counter-terrorism. If all that is required is legislative amendment to grant civil courts jurisdiction for Tunisians involved in terrorist conduct abroad, it would seem unnecessary for a country in Tunisia's position in 2009 to rely on military justice in counter-terrorism cases.

Part III: Analysis and recommendations

SUMMARY OF CRIMINAL JUSTICE RESPONSES TO TERRORISM IN THE MAGHREB

Of the various assessments that might be made about terrorism prevention in the Maghreb through the criminal justice system, perhaps the first one to mention is that further cooperative research, by country and comparatively, is required. It must not be forgotten that a form of objective assessment takes place already in the region, through the UN Security Council CTC and state reports thereto, and through the assessments of the CTED. The most recent (2008) regional CTED assessment is both revealing and unhelpful, since it does not single out countries.[189] Nevertheless, in the context of the issues in Part I of this monograph, the desk-based case studies outlined in Part II above are sufficient to form the basis of forward-looking suggestions and observations. Many of these trends are highlighted in the recent CTED regional report. Key among them include:

Criminalisation and prevention

- The three countries in question have all taken *steps in their national laws to criminalise* not only terrorist acts but a range of related conduct, including financing, enabling a preventative, prosecution-based strategy to be pursued. Incidental measures such as *witness protection* programmes require attention. All three states are party to the International Covenant on Civil and Political Rights and the Convention Against Torture, and while some notable gaps remain in legislative implementation, the elements of a human rights-compliant system are present, at least 'on paper'. The CTED report encapsulates the issue by noting that legislation in the region – and in the three countries under study – 'lacks the requisite specificity, comprehensiveness and complementarity'.
- One significant issue, also noted as a regional issue in the CTED report, is not only this partial incorporation but the gap between 'what the law says' and 'what actually happens' (or, in CTED terms, 'it is not clear how well these measures have been implemented').[190] The International Commission of Jurists comments regionally that appropriate safeguards are built into the law but ignored in practice, leading to suspected terrorists being detained incommunicado for prolonged periods.[191]
- In addition to serious problems of torture and impunity, confession-based convictions, prolonged detention, impaired due process and fair trial rights, a singular concern is of *vague or overbroad legal definitions* of terrorist acts or groups, carrying the potential that non-violent comment, opinion, expression or association may be prosecuted in the name of a global system that does not contemplate such use of counter-terrorism laws. The recent International Commission of Jurists report noted particular concern about broad legal definitions and the lack of an independent judiciary in the three countries under study.[192]
- Prolonged, judicially unsupervised detention before charge is seen as a particular problem in the Maghreb countries, with an accompanying heightened risk of torture and abuse.[193]

Moving away from a military paradigm

- In terms of the move from *military* to civil responses, the overall trend would appear to suggest some level of acceptance of the merits of a criminal

justice-based response. Some institutional concerns remain about the centrality of national intelligence services to the core policing–judicial functions of the system, although this may simply reflect the French model (without the accompanying oversight). Concerns include the exact role of, or need for, military tribunals (Tunisia), military intelligence at the heart of the criminal justice system but answerable to the Ministry of Defence, not Justice or the Interior (Algeria), and unclear legal bases for intelligence officers carrying out policing and law enforcement functions (Morocco). In some cases, particularly Algeria, the situation reflects long-entrenched ways of operating that might not be turned around rapidly.[194] The success of the *speciality* jurisdiction is something to be assessed in future, given the pros and cons of such an approach in such contexts.

Countering the financing of terrorism

- All three states have counter-terrorism *financing and anti-money-laundering laws* in place. The CTED thematic report for 2008 notes that effective *implementation* of counter-terrorism financing frameworks remains 'elusive' and 'uneven', although Maghreb region countries all have legislation in place.[195]
- There appears to be a high level of awareness at least at the highest level of the significance of detecting, monitoring and disrupting financial activity, formal and informal, related to terrorism. However, the general view is that more ought to be done on this issue. The CTED noted that there is limited regulation of informal remittance systems and that 'no State in the subregion implements adequate measures to protect non-profit organisations from terrorist financing' although some measures are in place in all states. The CTED report noted that 'in view of the high levels of worker-remittance transfers in the subregion, and regional patterns of reliance on informal, non-bank transfer mechanisms, action to regulate alternative remittance systems and prevent the abuse of non-profit organizations is of priority importance' along with currency and instrument exchanges.[196] There is a capacity, albeit limited, to summarily freeze or delay funds transfers and assets.[197] No apparent perception of gaps exists among officials in relation to legal measures to deal with asset freezing or forfeiture.

International legal cooperation in criminal matters

- The countries' *extradition and mutual legal assistance* systems appear to function well, but in order to ensure no lack of future jurisdiction, and as the CTED also noted, there is a need 'to move towards comprehensive domestic provision for mutual legal assistance and extradition that is not reliant upon the existence of bilateral treaties'.[198] It is not evident that *non-refoulement* obligations have attained their due significance, and this may be partly a feature of relatively weak legal-profession capability in defending counter-terrorism suspects, for a range of reasons.

Engagement in regional and global counter-terrorism efforts

- All three countries are heavily engaged in *international and regional efforts* to enhance cooperation and consensus building, with Algeria in particular having taken a lead historically (the 1999 Algiers Convention) and now (hosting ACSRT, although with funding shortages the institution is still to gain momentum and imprint). All three countries play active roles in various forums, including AU processes, and continue to seek Arab cooperation agreements on issues of counter-terrorism.[199]

International cooperation is indispensable to functional global legal strategies to deal with terror, and worth pausing upon here. As noted in the reports, there appear to be certain perceptions and historical factors which operate to hinder full understanding and cooperation with foreign partners. Some of these intangible relationship issues – for example, the complex but intricate relations with the former colonial power France – are beyond the expertise or surmise of this author. Some of these, it is submitted, appear to relate to a perhaps understandable perception, especially in Algeria, that Western partners have under-appreciated their long and bitter experience in counter-terrorism matters, the historical legacy that has found its way into the bloodstream of security institutions, and also the efforts to turn parts of the system towards compliance with universal counter-terrorism and human rights frameworks.

Although this line of thought may sound like an excessive apology, it is rather intended as a call to examine where certain issues giving rise to defensiveness

and non-cooperation can be dealt with. For example, in their criticism of the UK government's policy of seeking 'diplomatic assurances' from Algeria in relation to returned suspects, Human Rights Watch have arguably underestimated two things: first, the utility of assurances as one practical, longer-term way to help orient the system outwards somewhat towards compliance with certain standards; and, second, on this issue, the unsurprising sensitivity of a state such as Algeria to the notion of external supervision of its conduct.[200]

- The nature and extent of 'capacity building' programmes for law and justice officials on counter-terrorism might itself be an issue. *Donor proliferation* and cooperation is a problem throughout Africa, and counter-terrorism has received substantial attention. It is an issue in this region, with US, EU and individual European countries all involved in programming. The Maghreb countries display a need to balance receipt of external training support with actual conduct of affairs. One observation has been that most of the training is from Europe, but there is nothing by way of exchanges between justice officials and judges in the three Maghreb countries, something, judges argue, that would be very useful to understand the challenges counterparts face or the measures they take.

Thus, before one even gets to donor issues, a significant issue for criminal justice system reform and capacity building is what is often spoken of in these countries as a *communication breakdown or vacuum between ministries and agencies*, and between government, academia, the judiciary and think tanks. This is what one judge described as 'a lack of systematic conversation and institutional learning', noting that 'this makes for an inefficient system *compared to the enemy which consults widely and learns and adapts*'. This hugely significant point is something for both Maghreb governments and donors to consider. For donors and partners, the question ought to be asked whether a succession of justice system capacity building projects (often in Europe itself) result in plenty of outward-looking conversations across the Mediterranean, but few between the Maghreb professionals, and within their respective agencies. There is a role here for ACSRT to facilitate such conversations regionally.[201]

TERRORISM PREVENTION IN AFRICA: BEYOND THE WAR ON TERROR

As noted in Part 1, Section A, the January 2009 change in administration in the US (which had been the primary state driver of counter-terrorism responses globally in the last decade) provides an opportunity to re-examine the direction of counter-terrorism strategies in Africa, including to examine them anew from an *African* perspective – in what ways, if at all, has the 'war on terror' discourse distorted criminal justice-based initiatives and responses to counter-terrorism issues in Africa? To what extent and in which situations was that distortion enabled by local actors with other agendas, and to what extent was it a function of an inability to resist the demands and priorities of donors?

Were the impacts indeed as significant as has been suggested in some quarters, or did Africans mediate the strong external message and manage to continue with their own strategies? To what extent were other objectively significant priorities – for the terrorism threat is not uniform across Africa – subsumed within a security-related discourse, and by elevating the significance of certain branches of the security sector, what effects has that had not only on the viability of truly civilian-controlled government but on how countries in Africa assess and deal with security threats? Apart from areas of significant threat, has the 'war on terror' largely been a distraction from African development needs?

What opportunities, therefore, are there now for research and reflection, and possible reorientation, including through an AU dialogue, sub-regionally, and with donors and the UN counter-terrorism and human rights systems?[202]

Progress here can ensure that Africa really has what Professor Gambari has described as 'a dual role' in combating terrorism: an active contributor to the strategy as well as a beneficiary.[203] This may prove to be a period where the attempted African imprint on counter-terrorism on the continent, through the AU Plan of Action, can be reassessed.[204] As noted in the introductory sections, this period might deprive some actors of the convenient shield of supposedly pursuing global counter-terrorism targets while focusing on political opposition, and present a range of opportunities related to reform of the criminal justice system. To reiterate what was noted in the introduction, a significant part of the effort is:

> …to move in Africa away from a predominantly military-intelligence paradigm of counter-terrorism towards an intelligence-to-evidence, policing-justice paradigm. This is not so that entire national police and justice systems then become themselves engulfed and subverted into opaque, self-justifying 'national security' discourses. Instead it is so that those who use terror and violence as a medium can be put in their place: dealt with as mere criminals, and denied the public space and attention in which they have delighted in the last decade. In this way, a better justice system-based counter-terrorism response can enable African governments, and the people they serve, to concentrate on other priorities.

In some of these respects, the Maghreb countries' experience offers a degree of insight for the rest of Africa, although the diverse, complex and evolving nature of the threat in the Maghreb and its partial intersection with terrorist attempts on Europe weaken the analogies available for sub-Saharan African countries.

By and large the three countries under review are effective in suppressing terrorist acts. However, effectiveness and efficiency – 'results', conviction or kill ratios – are not the only measures of what constitutes a well-functioning criminal justice system, or a well-done counter-terrorism response. In the countries under study, the issues are not of weak or so-called 'failed' or post-conflict states in Africa. The issue recently in these states has not been whether the state is too weak to implement an effective criminal justice-based law enforcement strategy to prevent and counter terrorist activity. Instead it is whether the state may be or perceive itself to be too strong – albeit in a brittle sense – to fully embrace the merits of a thoroughly criminal justice-based approach.

RECOMMENDATIONS

The obligatory nature and the evident merits of a criminal justice-based approach to counter-terrorism have been covered extensively in the monograph. These ten recommendations, therefore, relate mainly to seeking a way forward for further research, dialogue, advocacy and policy action in the Maghreb countries and in Africa generally. While the country overviews revealed a number of legal gaps, institutional weaknesses and some serious concerns, the

author does not proffer recommendations in relation to the Maghreb countries individually.

1. Further *dialogue and advocacy* is needed to reinforce, among national political leadership and relevant national officials in the Maghreb countries (and Africa-wide), the merits and mandatory nature of a preventative, criminal justice-based counter-terrorism strategy based on existing international and regional frameworks.
2. There is an opportunity, post-Bush administration, for the *re-engineering of counter-terrorism strategies in Africa in line with African priorities*, while simultaneously giving further impetus to implementation of existing global and regional counter-terrorism strategies. The AU ought to lead a timely reassessment of progress and opportunities in relation to counter-terrorism and criminal justice systems in Africa.
3. The reassessment of counter-terrorism in Africa will provide opportunities to simultaneously examine *capacity and reform issues in criminal justice systems and crime prevention generally*, outside of the counter-terrorism context.
4. *Donor coordination in counter-terrorism capacity building* for justice systems in the Maghreb countries can still be improved. In addition to exposure to foreign systems and practice, there ought to be a greater emphasis on providing forums for national agencies to communicate internally and with neighbouring country agencies. Between the Maghreb countries there exists a particular opportunity for improved communication, coordination and lesson sharing. With donor support, ACSRT may have a role in acting as one forum for regional sharing.
5. Resistance to external pressure on reform to the criminal justice systems in the Maghreb countries may be the result of *perceived neglect of issues of particular concern to these countries*. Without compromising standards, progress on reform targets might result from attention to longstanding perceptions of neglect of Maghreb countries' priorities.
6. While there is an appreciation of the *significance of addressing terrorist financing in African countries*, awareness of the international framework in this regard is relatively low, and greater effort is needed to ensure that legal measures are in place to give effect to counter-terrorism financing obligations.

7. In terms of improved international legal cooperation in criminal matters, one specific recommendation is that the Maghreb countries ought to be encouraged to *move towards comprehensive domestic provision for mutual legal assistance and extradition* that is not reliant upon the existence of bilateral treaties.
8. There is a need for advocacy and dialogue efforts to focus on Maghreb countries *reassessing the division of functions between intelligence, policing and military* agencies, so as to bring the national counter-terrorism response, over time, more within the sphere of a policing-justice model.
9. A number of gaps exist in the laws of the countries studied. However, the greater challenge is to *bring practice more in line with existing laws*. There is a need for further awareness raising and capacity building within Maghreb justice systems in order to alter the culture of justice and law enforcement agencies, in a way that results in commitment to the advantages of a successful justice-based counter-terrorism strategy implementing international standards.
10. More *applied, empirical policy research is needed*, in the Maghreb countries and across the continent, to determine the extent to which states have successfully implemented – in letter and spirit – the universal legal regime for countering and preventing terrorism through the national justice system. Authorities ought to be persuaded to cooperate with African research institutions in enabling such research, with its obvious benefits for counter-terrorism strategies.

Notes

1 It is appropriate to note in dealing with a criminal justice-based response to terrorism that there is no universally accepted comprehensive legal definition of what constitutes 'terrorism'. UN member states continue to negotiate a comprehensive terrorism convention to complement the existing legal framework. This builds on past efforts. The 1994 UN General Assembly Declaration on Measures to Eliminate Terrorism states that terrorist acts are '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', and that such acts are always unjustifiable. A decade later, UN Security Council Resolution 1566 reached for elements of a definition:

> …criminal acts, including against civilians, committed with the intent to cause death of serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or abstain from doing any act...

The lack of a single universal definition is not a problem for national criminal justice system responses. In any event, the universal legal instruments (discussed in this Part) cover almost every conceivable kind of terrorist act. Relevantly, both the Algiers Convention (article 1(3)) and the Arab Convention (articles 1 and 2) (see below) offer definitions of terrorist acts.

2 Note that some observers are inclined to describe the recently created UN Tribunal for Lebanon (UN Security Council resolutions 1664 of 2006 and 1757 of 2007) as the first international tribunal for the prosecution of terrorist offences. Even if this is an accurate description, the Lebanon tribunal is an *ad hoc* institution with a limited mandate.

3 Botha 2008. The term 'Maghreb' is used for the purposes of consistency with Botha's monograph, and for the historical-geographic reasons given therein.

4 Paragraph 4 of UN Security Council Resolution 1373 (2001) noted with concern the '...close connection between international terrorism and transnational organized crime, illicit drugs, money laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials...'.

5 The momentum for such a shift is well conveyed in the support for the merits of a criminal justice-based response to counter-terrorism given in a comprehensive report of the Eminent Jurists Panel of the International Commission of Jurists (2009).

6 In particular, UN Security Council Resolution 1373 of 2001.

7 An obvious and crude example in recent years has been the designation, in November 2008, of political parties in Swaziland as 'terrorist organisations'. In the absence of any objective threat of terrorism, and certainly no threat of transnational terror, the Swazi authorities relied on the national Suppression of Terrorism Act, explicitly enacted to fulfil Swaziland's obligations under the UN counter-terrorism framework, in order to proscribe a range of pro-democracy groups. See generally International Commission of Jurists 2009.

8 Hutton 2008.

9 An often-overlooked example of the significance given to prosecution strategies in the US reaction to 9/11 was that federal investigators accompanied military teams in Afghanistan in order to obtain evidence for use in criminal investigations and prosecutions in the US itself.

10 Mariner 2008. While Mariner's comments related to the US, they are of global application. See also Human Rights Watch 2008.

11 See du Plessis 2009.

12 Declaration on Measures to Eliminate International Terrorism, UN General Assembly Resolution 49/60, 9 December 1994 (Annex), and various subsequent 6th Committee General Assembly resolutions.

13 Laborde 2006.

14 Ibid.

15 Ibid. Laborde remarks that '[t]aking into account that UNSC resolutions are usually not written by international criminal law specialists, it leaves States under a heavy burden of finding their own ways to live up to their commitments under the UN Charter'.

16 Botha 2008, executive summary: viii.

17 UN General Assembly Resolution 60/288 of 2006.

18 Part IV, Para [4] of UN General Assembly Resolution 60/288 of 2006.

19 For an overview of the AU's involvement in counter-terrorism issues, see online at www.africa-union.org/root/AU/AUC/Departments/PSC/Counter_Terrorism.htm.

20 See www.caert.org.dz. The African Centre for the Study and Research of Terrorism was constituted under Section H, paragraphs 19 to 21 of the AU Plan of Action on the Prevention and Combating of Terrorism. It was inaugurated during the Second High-Level Inter-Governmental Meeting on the Prevention and Combating of Terrorism in Africa held in Algiers in October 2004. The purpose of the Centre is to contribute to and strengthen the capacity of the AU through the Peace and Security Council in the prevention and combating

of terrorism in Africa, with the ultimate objective of eliminating the threat posed by terrorism to peace, security, stability and development in Africa. To this end, the Centre will collect and centralise information, studies and analyses on terrorism and terrorist groups and develop training programs by organising, with the assistance of international partners, training schedules, meetings and symposia.

21 For a recent and comprehensive overview, see du Plessis et al. (2009).

22 UN Security Council Resolution 1373 of 2001, para [2].

23 See UN Security Council resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006) and 1822 (2008).

24 Under Article 1(3), a terrorist act is any act or threat which, among other things, *is in violation of the criminal law of the member state,* thus emphasising the need for criminalisation of offences in national law.

25 Both the Algiers Convention and the Arab Convention aim to provide the basis to criminalise acts of international terrorism as contained in the universal legal instruments against terrorism; condemn terrorism in all forms regardless of religious, ideological or political motives; introduce the required mandatory and optional grounds of jurisdiction; provide for enhanced international and regional cooperation in counter-terrorism; and reject the political offence exemption as a reason to refuse extradition.

26 Some elements of the 16 global counter-terrorism instruments contain human rights-related safeguards.

27 For an overview, see Flynn 2005.

28 For more conceptual analysis, see also (related to the US debate but of wider application) Lafree and Hendrickson 2007: 781; see also the official statement on US policy here, which is relevant given its lead to date in counter-terrorism strategy globally: www.ojp.usdoj.gov/nij/topics/crime/terrorism/welcome.htm.

29 Laborde 2006.

30 UN Office on Drugs and Crime, July 2009. See also UNODC 2006.

31 Laborde 2006.

32 Botha 2008: 3, 194.

33 Malgas 2006.

34 United Nations Office on Drugs and Crime.

35 See, for example, Farmer 2008. Participating in a national debate at that time in the US, Farmer argued that the general criminal justice system could be damaged by extending it to fit the exceptional requirements of countering terrorism. Farmer's concern was 'whether a case about an attack that never actually happened can be tried in the criminal courts without transforming the nature of that system itself … by … extending the reach of criminal

statutes to conduct that has never before been punishable as a crime'. Farmer's other concern – reflecting a range of commentators – was this: 'When terrorism cases are treated as ordinary criminal prosecutions, the principles of law that they come to embody will guide law-enforcement conduct and be cited by the government not just in terrorism cases but in other criminal contexts.'

36 See also Mariner 2008.

37 Malgas 2006.

38 CTED 2008.

39 UN Office on Drugs and Crime 2009: 6.

40 International Commission of Jurists 2009.

41 UN Office on Drugs and Crime 2009: 32.

42 Africa-America Institute 2006.

43 UN Office on Drugs and Crime 2009.

44 CTED 2008.

45 See generally the discussion in UN Office on Drugs and Crime 2009. A strong example of unease with the listing and freezing regime is the report of the Council of Europe, 'European Convention on Human Rights, Due Process and United Nations Security Council Counter-terrorism Sanctions' (2006).

46 *Yassin Abdullah Kadi and Al Barakaat International Foundation* v *Council and Commission* (Judgment of the European Court of Justice, Joined Cases C-402/05 P and C-415/05 P), 3 September 2008.

47 CTED 2008.

48 UN Office on Drugs and Crime 2009.

49 UN General Assembly Resolution 60/158 of 2006. See United Nations High Commissioner for Refugees 2001. The UNHRC has also issued guidelines on the application of exclusion clauses under the 1951 Convention: Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees, UN Doc. HCR/GIP/03/05 (2003).

50 International Commission of Jurists 2009: 139.

51 General Comment No. 32, at [22] Article 14: Right to equality before courts and tribunals and to a fair trial (Geneva, 23 August 2007) UN Doc. CCPR/C/GC/32.

52 International Commission of Jurists 2009.

53 Malgas 2006.

54 A significant difference is that the French system is subject to the more rigorous oversight of the European Court of Human Rights/Strasbourg human rights system, which makes simple transmissions of laws and practices to Maghreb countries something to be studied.

55 Law Number 86-1020, 9 September 1986; later amended Law 96-647 of 22 July 1996, and see 2006-64, 23 January 2006, and other post-2001 measures relating to intercepts, terrorist financing, etc: Human Rights Without Frontiers 2008. Acts of terrorism per se are criminalised in Arts. 421ff of the Penal Code.

56 Human Rights Watch 2008a.

57 That is, *association de malfaiteurs en relation avec une entreprise terroriste*: Law 96-647 of July 22, 1996. The offence is defined as 'the participation in any group formed or association established with a view to the preparation, marked by one or more material actions, of any of the acts of terrorism provided for under the previous articles'; Criminal Code, Art. 421-2-1; Human Rights Watch 2008.

58 United Kingdom Foreign & Commonwealth Office 2005: 25.

59 Shapiro and Suzan 2003: 78, cited in Human Rights Watch 2008a.

60 In an interview with Human Rights Watch, Jean-Louis Bruguière, France's most famous and controversial counter-terrorism judge (now retired), stated that 'the common law system is too rigid ... the civil law system is more flexible and can react faster...' (Human Rights Watch 2008a).

61 International Commission of Jurists 2009.

62 Human Rights Watch 2008a.

63 Other issues are listed in detail in Human Rights Watch 2008a.

64 International Commission of Jurists 2009: 142.

65 Ibid. 143.

66 CTED 2008: 153.

67 Ibid. 155.

68 UN Office on Drugs and Crime 2009.

69 Botha 2008.

70 For example, see Economist 2008. For a study on the challenges in the North African region, in addition to the extensive references in Botha (2008), see also Obinyan 2008; see also (which includes Libya and Mauritania in the regional definition) Echeverria 2004; US Department of State 2008.

71 Compare reports dealing with these operational issues, such as US Government Accountability Office 2008.

72 Botha 2008, especially 23-41; see US Department of State 2008a; US Department of State 2008b; US Department of State 2009; and Human Rights Watch 2009.

73 For example, this is often the phraseology used in US State Department reports cited above.

74 International Commission of Jurists 2009.

75 US Department of State 2008b; US Department of State 2009.

76 US Department of State 2009.

77 US Department of State 2008b; US Department of State 2009.

78 Note that the mere presence of a terrorist threat does not necessarily establish a 'public emergency' as required by the International Covenant on Civil and Political Rights: see generally UN Economic and Social Council 1984. Note that UN General Assembly Resolution 60/158 of 2006 reaffirmed the obligation of states, in accordance with Article 4 of the Covenant, to respect certain rights as non-derogable in any circumstances.

79 Decree No. 92-03, 30 September 1992 with No. 93-05, 9 April 1993 on combating terrorism and subversion. By Ordinance 95-11 of 25 February 1995, these decrees are integrated into the Penal Code 1966, so that Article 1 of the 1992 Decree (definition of terrorism) is integrated as a criminal offence in Article 87bis of the Code. Act No. 01–8 of 26 June 2001 provides the necessary changes to the procedural code. See generally UN Security Council 2001.

80 UN Security Council 2007. Article 87-4, Ordinance 95-11, 25 February 1995: apology for, and/or encouragement of terrorist or subversive acts; and prohibit reproduction or dissemination of documents, publications or recordings which condone terrorist or subversive acts. Article 87-6 of the Penal Code states that 'any Algerian who is active or enrolled in a terrorist or subversive association, group or organization abroad, whatever its structure or name, even if its activities are not directed against Algeria, shall be subject to 10 to 20 years' imprisonment [and a fine]' (UN Security Council 2001; UN Security Council 2007).

81 US Department of State 2009.

82 Ibid.

83 Article 125bis (Act 01-08, 26 June 2001) provides that the examining magistrate in counter-terrorism cases may 'through submission of reasoned order' and where necessary request the prosecutor to extend pre-trial detention five times, that is five times four month periods (UN Security Council 2007). The total length of pre-trial detention is thus 20 months, although in transnational cases, 11 four-month extensions can be granted (UN Security Council 2001).

84 US Department of State 2009.

85 Meyer 2002: 4.

86 UN Security Council 2005. Act No. 05-01 (Official Gazette No. 11, 9 February 2005). Algeria was one of the first countries to criminalise the financing of terrorism (Ordinance 95-11, 25

February 1995). While such Acts modify the Penal Code and so are incorporated therein by reference, in practice judges will often refer to the Act provisions rather than the Code.

87 Order No. 03-11 of 26 August 2003; also Order No. 96-22 of 9 July 1996. Liability extends to entities (corporations, etc.). In relation to financial offences it may be noted that Algeria announced (in April 2008) a comprehensive offensive against cybercrime underpinned by special legislation, and cross-ministry cooperation. One dimension of this is related to counter-terrorism and economic crimes that may be linked. Specialists have visited Algeria to offer guidance, and some Algerian magistrates have undergone training in the US to learn how to detect and prevent international cybercrime: Magharebia, 30 June 2008.

88 UN Security Council 2005.

89 Strict regulation of mobile telephony in Algeria has a direct counter-terrorism basis, given the experience of Algeria with the use of mobile phones as detonators for explosive devices.

90 UN Security Council 2001.

91 Ibid.

92 See respectively the following news reports: El Khabar/Maghrebia, 10 September 2008; Maghrebia, 28 October 2008; Maghrebia, 12 September 2008.

93 US Department of State 2008b.

94 UN Human Rights Committee 2007.

95 US Department of State 2008b.

96 The UN Human Rights Committee noted in 2007 that it was 'also concerned that the state of emergency declared in 1992 has been extended, despite information provided by the State party itself showing significant improvement in the security situation' (UN Human Rights Committee 2007). The Committee also commented on the difficulty under the Charter of Reconciliation 2005 of establishing liability of the state for past human rights abuses (see also International Commission of Jurists 2009: 77). Although they relate to discussions on impunity, the entire amnesty accord is a complex national issue and perhaps beyond the scope of the present study.

97 UN Human Rights Committee 2007.

98 See International Commission of Jurists 2009; see also UN Committee Against Torture 2008; Human Rights Watch 2009; see in particular Amnesty International 2006.

99 US Department of State 2008b; UN Human Rights Committee 2007; International Commission of Jurists 2009.

100 UN Human Rights Committee 2007.

101 Ibid.

102 UN Human Rights Committee 2007; also noted in Human Rights Watch 2009. The unduly wide elements of the definition includes (Article 87bis of 1995) reference to terrorism constituting any action that impedes 'the functioning of institutions' and 'the activities of public authorities' or obstructing the implementation of laws and regulations. It is not difficult to appreciate that a great many acts which are not acts of terrorism might fall into this definition. The definition is heavily influenced by the security problems experienced in the 1990s. This problem is one reason why Algeria's counter-terrorism laws pre-dating the 2001 UN Security Council regime creates problems for compliance with that regime, including human rights compliance.

103 UN Security Council 2007.

104 Africa-America Institute 2006.

105 UN Security Council 2007.

106 Meyer 2002.

107 Meyer 2002: 2, 4.

108 US Department of State 2008a.

109 See in particular Botha 2008; Human Rights Watch 2009; US Department of State 2008c; US Department of State 2009a; also US Department of State 2008d. While the threat has evolved somewhat towards suicide bombings, detained persons are routinely brought forward for prosecutions, notable instances including the successful conviction of eight persons in early 2007 for planning attacks in Morocco as well as France and Italy. A handful of trials continue in relation to the 2003 bombings, and since July 2007 a large trial of more than 50 persons (the 'Al Mahdi/El Mehdi' cell) has proceeded through the system despite the unwieldiness of this scale of prosecution, resulting in convictions in February 2008 (US Department of State 2008d; US Department of State 2009a). In 2008 police disrupted six suspected terrorist cells during the year and arrested more than 100 individuals (US Department of State 2009a). Proceedings toward trial of the 'Belliraj' transnational cell disrupted in February 2008 commenced in October 2008 (El Khabar 15 September 2008), while Belgium acted on an international warrant from Morocco to arrest Moroccan and other suspects on 27 November 2008 alleged to be part of the same cell. Morocco has been active in issuing warrants for the arrest and extradition of other suspects abroad (US Department of State 2008d).

110 US Department of State 2009a.

111 US Department of State 2008c; US Department of State 2009a.

112 UN Security Council 2003. The laws cited are as published in No. 5112 of the Official Bulletin of the Kingdom of Morocco, 29 May 2003, in force 1 October 2003.

113 UN Security Council 2004.

114 Ibid.

115 UN Security Council 2006a.

116 UN Security Council 2004.

117 Ibid. However, the legislation extends incommunicado (pre-appearance) detention to 12 days, and 10 days before legal counsel may be consulted (Human Rights Watch 2004).

118 US Department of State 2008c, US Department of State 2009a.

119 US Department of State 2009a.

120 Ibid.

121 The Act defines 'terrorism' as 'any crime committed intentionally in relation to an individual or collective activity with the goal of causing serious disruption of public order by intimidation, terror or violence' (UN Security Council 2004).

122 US Department of State 2008d.

123 UN Security Council 2004.

124 Morocco also observes in the same report that its policy is 'particularly justified in the specific context of combating Islamist-linked terrorism, where keeping track of financing is significantly complicated by the peculiar features of Islamic finance' (UN Security Council 2004).

125 Ibid.

126 The Code appears to create a reverse onus on an accused person in such a situation to prove that they have been the subject of valid court proceedings elsewhere in relation to the same conduct.

127 UN Security Council 2003.

128 Hon. Mohamed Loulichki, Ambassador of the Kingdom of Morocco, Statement to the UNSC, New York, 11 December 2008.

129 Maghrebia, 12 September 2008.

130 Human Rights Watch 2009; also US Department of State 2009a. In 2006 the Justice and Reconciliation Authority (IER), formed to investigate forced, long-term disappearances of opponents of the government between independence in 1956 and 1999, issued a final report. The report stated that 742 disappearances had been resolved, but that 66 remained for investigation by a successor organisation, the Conseil Consultatif des Droits de l'Homme. There are some complaints that other disappearances remain unresolved from that era, not covered in the report (US Department of State 2009a). In November 2007 the Conseil Consultatif des Droits de l'Homme stated that it had completed the bulk of the compensation and identification process for Morocco and Western Sahara (approximately 2 000 cases). The government announced it had issued benefits to thousands of families, and extended million-dollar initiatives in 2007 towards previous marginalised regions.

131 Human Rights Watch 2009.

132 US Department of State 2008d.

133 Ibid; US Department of State 2009a; see also Human Rights Watch 2009.

134 US Department of State 2008c.

135 Ibid; US Department of State 2009a.

136 US Department of State 2008c.

137 UN Human Rights Council 2008.

138 Human Rights Watch 2009.

139 International Commission of Jurists 2009: 77.

140 International Commission of Jurists 2009.

141 Ibid.: 77; Human Rights Watch 2009; US Department of State 2009a; UN Human Rights Committee 2004.

142 Human Rights Watch 2009.

143 Human Rights Watch 2004

144 US Department of State 2008d; see also Human Rights Watch 2009; US Department of State 2009a.

145 US Department of State 2008e.

146 Human Rights Watch 2009.

147 Botha 2008. Security forces in late 2006/early 2007 engaged a group of armed militants, some of whom had entered from Algeria. Twelve members of the group were killed, 15 captured, and some 30 persons allegedly associated with the cell were convicted of various terrorism-related charges by the Tunis Court of First Instance. Lawyers have appealed their cases, which included the death penalty for two accused and life imprisonment for eight accused (US Department of State 2008); see also Amnesty International 2008. By the end of 2007, 10 Tunisians were held by the US authorities in Guantánamo Bay, with two returned to Tunisia in June 2007, one of whom was in October 2007 convicted of associating with a terrorist organisation operating abroad and sentenced to three years' imprisonment. The other was retried before a military court in Tunis after challenging his trial in absentia in 1995, convicted in November 2007 of membership of a terrorist organisation abroad, and sentenced to seven years. Other groups of Tunisians were returned by authorities in Egypt, France, Italy and other countries, some of which remained in detention without trial (Amnesty International 2008).

148 Botha 2008.

149 Human Rights Watch 2009.

150 Botha 2008; Human Rights Watch 2009; US Department of State 2008e; US Department of State 2008f; US Department of State 2009b.

151 Amnesty International 2008; Human Rights Watch 2009; also US Department of State 2009b.

152 UN Security Council 2005a.

153 Ibid.

154 US Department of State 2008f; US Department of State 2009b; Human Rights Watch 2009.

155 US Department of State 2009b.

156 Human Rights Watch 2009.

157 Amnesty International 2008.

158 The military criminal jurisdiction includes both the Permanent Military Tribunal (administered by the Ministry of Defence) and the Military Court of Cassation, which is a section of the ordinary Court of Cassation, including military officers appointed by the Ministry of Defence: 1957 Code of Military Justice, as subsequently amended, also Decree 79/735 of 22 August 1979. The military tribunal's decisions may be appealed to the Court of Cassation: Article 29: International Commission of Jurists 2008; but see International Commission of Jurists 2009: 164, reporting that decisions of the military courts can only be appealed on procedural issues, before a higher military court, and within a time-limit of three days).

159 Article 52bis of the Criminal Code, included in 1993. Civilians can come before the tribunals in cases deemed to involve issues of national security, for ordinary criminal offences in which the military is involved, and for offences in relation to military premises or property: Articles 5 and 8(G), Code of Military Justice 1957. Article 123, Code of Military Justice 1957 provides for military jurisdiction in relation to the service or cooperation of a Tunisian citizen with a foreign army or external terrorist organisation. Tribunals can have jurisdiction over offences assigned to their competence by 'special laws or regulations': Article 5(4), Code of Military Justice 1957; see International Commission of Jurists 2008.

160 Amnesty International 2008; US Department of State 2009b.

161 International Commission of Jurists 2008; see also International Commission of Jurists 2009 on Tunisia in this respect.

162 The Act is the International Efforts to Fight Terrorism and the Repression of Money Laundering Act 10 December 2003.

163 UN Human Rights Committee 2008.

164 Article 6; also Article 59 of the Criminal Code; see UN Security Council 2006.

165 UN Security Council 2005a.

166 Ibid.

167 Ibid.

168 Ibid.

169 Ibid.

170 Principles Relating to the Status of National Human Rights Institutions, UN General Assembly Resolution 48/134 of 1993.

171 US Department of State 2009b.

172 Ibid.

173 Human Rights Watch 2009.

174 Amnesty International 2008.

175 US Department of State 2009b. In its most recent report, Human Rights Watch (2009) notes that 'the United States enjoys good relations with Tunisia and praises it as a counter-terrorism ally, while urging human rights progress there more vocally than it does in most other countries in the region.

176 For example, see Human Rights Watch 2009; 'notably in the State Security Department': Amnesty International 2008; 'serious and substantiated' reports of torture: UN Human Rights Committee 2008; see also International Commission of Jurists 2009.

177 Human Rights Watch 2009; see also US Department of State 2008f, US Department of State 2009b. The European Court of Human Rights' acceptance recently that there was sufficient evidence of torture and ill-treatment in Tunisian detention facilities was behind the decision in Saadi v. Italy (challenging a deportation): European Court of Human Rights, 28 February 2008 (Application No. 37201/06) esp. at [138].

178 Human Rights Watch 2009; Amnesty International 2008.

179 UN Human Rights Committee 2008.

180 UN Human Rights Committee 2008.

181 US Department of State 2009b; Human Rights Watch 2009; also UN Human Rights Committee 2008; Amnesty International 2008; see too UN Human Rights Council 2008a.

182 Human Rights Watch 2009.

183 UN Security Council 2006.

184 International Commission of Jurists 2009: 145-6.

185 For example, Human Rights Watch 2009; see also US Department of State 2009b.

186 Human Rights Watch 2009.

187 Amnesty International 2008 (and including Article 6 of the Act: International Commission of Jurists 2009: 132).

188 UN Security Council 2005a.

189 CTED 2008.

190 The reports also deal with immigration, entry, customs, aviation, marine and maritime security measures, and regulation of arms and explosives, beyond the scope of this paper.

191 International Commission of Jurists 2009.

192 Ibid.: 130.

193 Ibid.: 147.

194 Although Botha (2008: viii) has stated that all three countries here under review were 'confronted with similar challenges after independence', it is only in relation to Algeria that there are strong grounds for explaining justice system problems in terms of colonial legacy. As argued in the balance of her monograph, Tunisia and Morocco became independent peacefully, whereas Algeria's independence involved a full-scale military insurgency, which can be seen to have created a certain pervasive legacy in the approach to national security (23-4).

195 CTED 2008.

196 Ibid.

197 Ibid.

198 Ibid.

199 As most recently discussed at the Council of Arab Justice Ministers, Beirut, November 2008; also the 11th Arab Anti-Terrorism Conference held in June 2008 in Tunis, in tandem with the Council of Arab Interior Ministers which convened the 6th meeting of the Arab Anti-terrorism Panel. The Panel called on Arab states to follow the UN-sponsored strategy for capacity building and technical assistance in counter-terrorism. Attendees also urged Arab states to enact or develop national legislation to combat terrorists' use of the Internet (*Magharebia* 30 June 2008).

200 Human Rights Watch 2008b.

201 In addition to meetings under Arab League forums, recent examples of Africa-specific workshops include the ACSRT Seminar on Counter-terrorism in North Africa Region held in Algiers in April 2008, and the ISS Seminar Assessing Effective Counter-terrorism Strategies and Measures in Africa held in Nairobi in October 2008.

202 Compare Davis 2007: to what extent are the analyses in this volume subject to reconsideration in 2009 and beyond?

203 Remarks, Africa-America Institute 2006.

204 Compare the remarks in Sturman 2002: 103 at 108.

205 Compare, for example, Dempsey 2006.

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The US-led 'War on Terror' is coming to a timely end. As a result, Africa is entering a new era of counter-terrorism, one shaped by African realities and priorities and less reliant on pure intelligence-driven and military responses. Criminal justice responses that uphold human rights and ensure due process are likely to become more widespread and should be a key element of broader societal counter-terrorism strategies.

This important and timely study is a preliminary assessment of the extent to which three African countries – Algeria, Morocco and Tunisia – have attempted to effectively and appropriately address terrorism threats through their national criminal justice systems. Despite good progress in certain areas, the monograph highlights that there remains a large gap between law, policy and actual practice. Greater awareness is needed about the merits of prosecution-led prevention strategies, and of how human rights safeguards are a source of long-term social strength. 'Success' in counter-terrorism in the Maghreb – and in Africa as a whole – depends on whether authorities can prevent and deal with terrorist threats without operating outside the law.

The monograph concludes with a summary of key findings and a series of practical recommendations on how to enhance rule of law-based criminal justice responses to terrorism in the countries under review, and in Africa more broadly.

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ISS Monograph No 165
Price R30,00
ISBN 978-1-920114-85-5

This publication was made possible through funding provided by the Governments of the Netherlands and Norway. In addition, general Institute funding is provided by the Governments of Denmark, the Netherlands, Norway and Sweden.

Buitenlandse Zaken

NORWEGIAN MINISTRY OF FOREIGN AFFAIRS