

**THE ROLE OF COLONIALISM AND NEO-COLONIALISM
IN SHAPING ANTI-TERRORISM LAW IN COMPARATIVE AND INTERNATIONAL
PERSPECTIVES: CASE STUDIES OF EGYPT AND TUNISIA**

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ABSTRACT

Contemporary anti-terrorism legislation has raised concerns about the global evolution of law and crime control. National and global anti-terrorism frameworks include broad definitions of terrorist crimes and exceptional measures, which risk violating the rule of law and criminal justice. While these frameworks have been broadened since 9/11, the experience of the Arab world shows that wide-sweeping anti-terrorism frameworks existed well before this time. This dissertation investigates the origin of current anti-terrorism laws and measures, arguing that colonialism and neo-colonialism contributed to the shaping of counter-terrorism law and policy in two case studies: Egypt and Tunisia. The investigation considers the counter-insurgency experience of Egypt and Tunisia under British and French colonialism. Colonial methods of crime control included militarism and exceptionalism, and these approaches are still used in post-colonial Egypt and Tunisia not only to bring criminals to justice, but also to suppress opponents in the name of national security and counter-terrorism. The neo-colonial influence, particularly in the imposition of global anti-terrorism obligations by the UN Security Council and FATF is investigated. These global obligations require the criminalization of terrorism financing and speech related to terrorism, with the establishment of an executive-like mechanism that allows blacklisting individuals and groups, freezing their funds, and restricting their travel, all of which have become part of Egypt and Tunisia's anti-terrorism frameworks. The dissertation investigates whether such neo-colonial measures also have their roots in the colonial experience and are thus an extension of the colonial rationale in the contemporary war on terror. Finally, the dissertation examines the role of authoritarian ambition in Egypt and Tunisia in developing draconian anti-terrorism laws, which empower the government but obstruct the advancement of democratic values and the protection of human rights.

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INTRODUCTION

This dissertation investigates the link between colonialism and counter-terrorism, particularly in the Arab world. This is done through showing 1) the colonial rationale in crime control in the arena of national security, and 2) the development of this logic within Egypt and Tunisia during and after colonialism. There are countless studies on the topic of terrorism as well as colonialism and neo-colonialism. Combining the two topics of (neo-)colonialism and counter-terrorism is the substance of this dissertation. To break down the correlation between these topics, the dissertation suggests that colonialism has had an impact on shaping the post-colonial legal and punitive systems, which extend to counter-terrorism. In addition, colonialism affected the neo-colonial distribution of power, in which the West, particularly through the United Nations (UN) Security Council, dominates the global war on terror by promoting the adoption of broad anti-terrorism laws without taking into account the progress of democracy or human rights within the post-colonial world.

The factor of neo-colonialism is examined through addressing the role of the major Western powers and supra-national bodies, above all the UN Security Council, in remapping the global war on terror. The dissertation argues that these powers practice their authority primarily through issuing Security Council resolutions. The Security Council has introduced measures requiring non-violent acts to be treated as terrorism-related crimes. Such acts include speech that apologizes for terrorism and funding terrorism. Terrorism financing, in particular, has become a part of most, if not all, national security laws. Other counter-terrorism measures promoted by the Security Council, such as listing and travel restrictions, are increasingly becoming part of many national security policies.

The global nature of terrorism and counter-terrorism requires a comprehensive investigation of power relations. This dissertation examines the relationship between Western influence, whether under colonialism or neo-colonialism, and law, particularly counter-terrorism law in the Arab world. This dissertation focuses on the Arab world, which is, on the one hand, a hostile producer of terrorist organizations, and on the other, a leader in countering “terrorism.” This dissertation tracks the roots and development of counter-terrorism by analysing anti-terrorism and national security legislation and measures in two cases, Egypt and Tunisia. The dynamic changes in the Arab world, particularly the so-called Arab Spring and the emergence of new and more radical terrorist organizations, suggest the failure of the Arab policies of everlasting strict anti-terror measures and national security policy.

A note on terminology

The term “colonialism” in its classical meaning refers to the European political occupation and expansion in the rest of the world that spread widely with the start of World War I. Even though similar occupations have been carried out for thousands of years, I limit the scope of this investigation to the European imperial mission of the nineteenth and twentieth centuries, with a focus on British and French colonialism. Despite the fact that other powers, like Russia, Japan, and Turkey, were all empires that expanded their land by colonizing other territories, the significance of Western imperialism is in its present impact over the globe. The colonial experience of Britain and France is complex and vast: together they controlled over 31 percent of world land, whereas the Russian Empire controlled 16 percent. One of the most important features of Western colonialism is that it successfully spread capitalism as the dominant economic system worldwide. This economic aspect remains active in the neo-colonial era.

The fading of colonialism paved the way for neo-colonialism to emerge as another form of Western hegemony. Neo-colonialism refers to political influence through the use of economic and cultural domination in influencing or controlling other countries.¹ The application of neo-colonialism allows Western empires and former European colonialists to dominate geopolitically in the developing world through globalization, capitalism, and cultural imperialism (Nkrumah 1966; Said 1993).

Even though this dissertation focuses on colonialism and neo-colonialism, it addresses “imperialism” as a system of domination that functioned through political and economic control. Imperialism dominated with and without direct colonialism. Imperial colonialism is often referred to as the Western “civilizing mission” that was carried abroad. Nonetheless, as will be examined in Chapter 1, the influence of imperialism existed well before the West colonized the world. Such influence was spread through forms of political and mostly economic pressure and control. The same tendency can be found in neo-colonialism, which indirectly dominates through political and economic pressure. In this dissertation, I use the term “imperialism” to refer to pre-colonial Western control abroad and Western control within their homelands. The dissertation does not cover all the colonial and imperial geopolitical conditions, but selects what could be relevant to the neo-colonial aspects of the war on terror. The notions of colonialism, neo-colonialism, and imperialism are discussed in detail in Chapter 1.

(Neo-)colonialism and counter-terrorism

Scholars have linked colonial counter-insurgency to the theory and practice of counter-terrorism (Hocking 1993; McCulloch & Pickering 2009). Counter-insurgency thinking combines military

¹ *The Canadian Oxford Dictionary*, 2nd ed, *sub verbo* “neo-colonialism” (Oxford: Oxford University Press, 2005).

and political methods. According to David French, an “insurgency was more than simply an armed rebellion. Insurgents commonly employed not only different kinds of force, ranging from guerrilla warfare to urban terrorism, but also different kinds of political tools to subvert the colonial state.”² In parallel, counter-insurgency was not limited to the use of force, but also included political, social and economic measures; nonetheless, coercion was a figure of the overall policy (2011, 9). Colonialism is a complex form of political domination, and the imperial powers justified its existence and its methods of control based on their one-sided idea of legitimation. Anti-colonialism was therefore seen as an evil that the colonial power countered through a wide range of politicized and militarized methods of control.

Many practices that were used to suppress insurgents in colonies were also used at some level in the colonists’ homeland. From the eighteenth to the first half of the twentieth century, the European powers, particularly the British and French empires, produced national security laws and measures to respond to revolutions, anarchist and communist movements, as well as the two World Wars. These events were considered a threat to the established Western values, which justified the use of militant principles and exceptional powers. The concept of “enemy aliens” was widely used during World War II to justify arbitrary detention of civilians (Simpson 1992; Hinsley 1979). That legacy can be linked to the contemporary concept of “enemy combatant” that justifies the Guantanamo Bay detention camp. This dissertation suggests that these measures, which were developed in the homelands of Western countries, still exist at some level in the West. The dissertation also suggests that the United Kingdom and France have transferred such measures to the Security Council anti-terrorism resolutions. Thus, there is an implicit unity between the Western and global anti-terrorism agendas.

² David French, *The British Way in Counter-insurgency: 1945–1967* (Oxford; New York: Oxford University Press, 2011) at 9.

Neo-colonialism, especially UN Security Council and the Financial Action Task Force (FATF) imposes global obligations regarding the definition of terrorism and terrorism-related crimes. These include, among other acts, terrorism financing and speech associated with terrorism. This dissertation argues that the Western culture of control has not ended with the fading of colonialism, but still dominates the global war on terror through neo-colonial forms of control. While the major players of colonialism were the United Kingdom and France, the neo-colonial powers include these two countries as well as the United States. These countries continue to control global security measures, including counter-terrorism obligations, through their influence on the UN Security Council and other supra-national bodies like the FATF.

In addition, neo-colonialism has created a post-colonial economic dependency, in which countries like Egypt and Tunisia still rely on Western financial aid. As a result, these countries have a need to comply with Western demands. Such demands go beyond economic control into military power and negotiating power, which affirm the superiority of Western powers. The dissertation examines the economic aspect and its impact on decision-making and complying with a neo-colonial agenda—if any. The Arab world, while officially politically independent, is culturally and economically neo-colonized. The dissertation questions to what extent do neo-colonial powers expect the Arab world to adhere to the Western agenda of counter-terrorism; and do the rulers in the Arab world, by satisfying the West, strengthen their authoritarian powers and maintain the status quo.

The importance of the link between counter-terrorism and Western colonial and neo-colonial culture is not to deny the responsibility of Arab states for their continual use of harsh counter-terrorism measures. Rather, it is to show that counter-insurgency and counter-terrorism depend largely on colonial exceptional and wartime strategies to deal with mostly domestic

peacetime crimes. These strategies are borrowed from the colonial past of each country and encouraged by international pressure from former colonial powers in the current era of neo-colonialism. This shows that the neo-colonial anti-terrorism policy does not necessarily serve crime control and international security, but rather to maintain the status quo of an unequal position of powers. It also serves the authoritarian ambition of Arab rulers and dominant groups within the Arab world. The current wide and exceptional anti-terrorism powers are applied to many forms of civil and political activities that are criminalized as terrorism alongside extreme violent acts (Hocking 1988; 1993).

Purpose and dissertation question

This dissertation focuses on the colonial heritage found in modern anti-terrorism laws in the Arab world. These laws have been used as strategies of oppression and entrenchment of power rather than of protection and serving the public good. A key question in this respect is whether the government rationale for the use of power in crime control is in fact new. Does it represent a development of the modern state or a return to colonial state strategies and conceptions? I argue that law and crime control in Arab countries and in the West are closely related, because the colonist not only left the roots of these strategies in the countries they had colonized, which have developed them, but also continue using them in a similar way in their homelands.

Many studies address the impact of colonialism on law in general, particularly in colonized India (e.g., Kalhan 2010; Tan 2010) and Africa (e.g., Christopher 1984; Schmidt 2013), but only a few address this relationship in the Arab world (Brown 1995; 1997; Owen 2004; Reza 2007). And while counter-terrorism has become a grown area for Western scholars, fewer writings are dedicated to this subject in the Arab world. Studies of the Arab world focus on terrorist

organizations and terrorism as a phenomenon rather than addressing anti-terrorism laws. This tendency can be found in Nachman Tal's book *Radical Islam in Egypt and Jordan* (2005) and George Joffé's book *Islamist Radicalisation in Europe and the Middle East: Reassessing the Causes of Terrorism* (2013).³ Other writings, especially those by Arab legal scholars, are descriptive, with limited valuable critique of the evolving or devolving legislation.⁴

As for the direct relationship between colonialism and counter-terrorism, a few texts have been devoted to the phenomenon of political terrorism from either a historical perspective (e.g., Laqueur 2001) or a political science perspective (e.g., Hoffman 2006). These texts adopt a descriptive approach in examining major historical events and official responses that could be useful in tracking the history of political violence; however, they do not question the legality of the countermeasures. It is only in the aftermath of September 11, 2001 (9/11) that the literature on counter-terrorism has dramatically evolved. Still, only a few of these texts examine the relationship between anti-terrorism law and colonialism and neo-colonialism (Hocking 1993; McCulloch & Pickering 2005; 2009).

The topic of counter-terrorism, however, can be connected to national security measures. These measures include the use of martial law, emergency legislation and special courts, which were inherited from colonial rule (Brown 1997; Owen 2004; Reza 2007). Many scholars find a link between these military and exceptional strategies, which were carried over from the colonial power to current national security laws in post-colonial states (Tan 2010; Hussain 2003).

³ For sources in Arabic see Aḥmad M Ṣubḥī & Zāmilīa Wālī, *Judhūr al-irḥāb fī al-‘aqīdah al-Wahhābīyah* [*The Roots of Terrorism in Wahhabism*] (Beirut: Dār al-Mīzān, 2008); Aḥmad Abū al-Rūs, *al-Irḥāb wa-al-taṭarruf wa-al-‘unf fī al-duwal al-‘Arabīyah* [*Terrorism and Extremism in Arab States*] (Alexandria: al-Maktab al-Jāmi‘ī al-Ḥadīth, 2001).

⁴ See Aḥmad Maḥmūd Khalīl, *Jarā‘im amn al-dawlah al-‘Ulyā mu‘allaqan ‘alayhā bi-aḥkām Maḥkamat al-Naqdal-Miṣrīyah* [*High State Security Crimes Commentated with Judgments of the Court of Cassation*] (al-Azārīyah, al-Iskandarīyah: al-Maktab al-Jāmi‘ī al-Ḥadīth, 2009).

This dissertation relies on these publications in tracking historical evidence of the colonial influence, but it links the influence of colonialism to the development of counter-terrorism in the Arab world, which has received little scrutiny (see, however, Roach 2011; Welchman 2012). No studies have yet covered the complexity of the Arab legislation and colonial history. To this extent, this dissertation aims to bridge a gap between Western and Arab thought on counter-terrorism.

Most of the studies in the field of counter-terrorism focus on the West. Thus, there is a need to investigate this topic within the Arab region, particularly at the theoretical level. A good reason for studying counter-terrorism in the Arab world is because the experience in Western democracies and in authoritarian regimes, like those in the Arab world, suggests that similar phenomena exist within both legal systems. It is wrong to see authoritarian regimes such as those in the Arab world as totally alien to the Western experience and understanding of law and crime control, or to deny Western encouragement to Arab regimes.

Tom Ginsburg and Tamir Moustafa argue that, post-9/11, we are witnessing a convergence between the ruling strategies of authoritarian and democratic governments.⁵ This convergence is seen in the preventive measures taken and control orders given with regard to counter-terrorism. In the last century, preventive detentions without charge or trial have not typically been common in Western democracies as they have been in authoritarian regimes.⁶ However, post-9/11 these practices are seen to be justified in both systems. For example, former Egyptian president Hosni Mubarak claimed that the shifts in American counter-terrorism policy post-9/11 prove that Egypt was “right from the beginning in using all means, including military tribunals, to combat

⁵ Tom Ginsburg & Tamir Moustafa, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008) at 3.

⁶ *Idem*.

terrorism.”⁷ However, the use of anti-terrorism laws as they were used under Mubarak’s regime threatens the development of the criminal legal system and the development of society as a whole.

Case studies: Egypt and Tunisia

Egypt and Tunisia were selected for this study for several reasons. They both are republics, witnessed recent uprisings that led to regime changes, and are former colonies. However, Egypt was primarily under the British administration (1882–1952) and earlier under the French (1798–1801), while Tunisia was only a French colony (1881–1956). Both countries are politically unstable due to crimes like assassinations and “terrorism,” and both are combining legal and extra-legal measures to counter this instability. Furthermore, in both countries, while several legal amendments are taking place, the colonial heritage seems deeply rooted. Further explanation on choosing these countries is provided in the methodology section, below.

In 2014, both Egypt and Tunisia adopted new constitutions. The problem is that in Arab countries constitutions can be mere façade documents or hollow promises that while they reflect people’s aspirations, they leave them unfulfilled. In both the old and the new constitutions of Egypt and Tunisia, rights are guaranteed, yet can be limited by law, for public safety, or during emergencies. This is an example of how constitutions are designed in “flexible” language that allows the authority to limit constitutionalism and the rule of law through adopting arbitrary and subjective laws. For instance, all the common civil and political rights and freedoms, like freedom of expression and association, are granted in the 2014 Tunisian constitutions; however, Article 49 undermines the value of these rights by stating that:

⁷ Quoted in Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (New York: Cambridge University Press, 2011) at 80.

The law shall determine the limitations related to the rights and freedoms that are guaranteed by this Constitution and their exercise, on the condition that it does not compromise their essence. These limitations can only be put in place where necessary in a civil democratic state, with the aim of protecting the rights of others or based on the requirements of public order, national defense, public health or public morals.⁸

While terms like “public safety” are not defined, the constitution does not state any rights that must not be violated under any circumstance. This makes the constitution a tool of governing that expresses the state’s authority without limiting it. It ensures the security of the state without protecting people from the state’s abuse of power. Nathan Brown observes that in the Arab world, constitutions are not systematically violated; in fact, they are well respected and largely followed, yet their vague clauses are problematic (2002, 7).

Vague clauses, like the one mentioned above, have been added to many of the post-2011 revolution reforms in Egypt and Tunisia. The fact that authorities remain centralized and legal principles and human rights are mostly neglected mean that these reforms are not promising. Yet it is too soon to evaluate the outcomes of the post-revolution constitutional experience, since it requires some time to test the effectiveness of new constitutions. This is especially true of Tunisia. Unlike Egypt, which is still clinging to the military style of rule, Tunisia is still developing its method of governance. If Tunisia is able to keep its commitment to decentralize power, there is hope for a balanced legal system, and thus a balanced counter-terrorism law.

⁸ Article 49 of the 2014 Tunisian Constitution. The 2014 Egyptian Constitution included similar restrictions in Articles 56, 85, 62, 64 and 73.

Methodology

The methods used in this dissertation are historical and comparative. A historical approach is used in which the different types of Western forms of control are examined. These include imperialism, colonialism, and neo-colonialism. This method is chosen in order to understand the role of colonialism and imperialism in shaping national security before examining the laws in the post-colonial countries under study and the neo-colonial influence. The historical approach provides a theoretical basis for the main argument of this dissertation.

This dissertation, however, is primarily a comparative legal study. The cross-boundary nature of terrorism and counter-terrorism makes the comparative approach essential. Despite the increasing number of international obligations in counter-terrorism, most domestic laws reflect national interests. Uniting national efforts in crime control in international treaties may neglect the special geopolitical conditions of each nation and each region. However, common as well as contrasting features can be drawn from the various national laws, which can help enhance global anti-terrorism efforts. A comparative analysis of anti-terrorism laws in the two case studies—Egypt and Tunisia—is selected with the aim of sketching an Arab collective approach to counter-terrorism. This approach is then compared to Western and global approaches to counter-terrorism.

The comparative legal study cannot be isolated from history, in which the development of national legislation is linked to historical and socio-political changes. Acknowledging that terrorism appears in waves, counter-terrorism responses are uniquely designed—consciously or unconsciously—in accordance with these terrorist waves. This also applies to other forms of political crime control, such as colonial counter-insurgency and the war on communism. Patterns from the past are thus not separated from the present unless they are associated with a choice to act differently. The aim of the historical approach is to highlight the unwanted patterns of extensive

political control that drag the state into a circle of violence, in order to consciously replace them with wise patterns that can assure national and international security.

The historical approach

The historical approach is applied in the first chapter but also to a lesser extent in the following chapters. The history of the nations under study is discussed with critical analysis. Every event is part of a larger set of socio-political changes. Law and policymaking are therefore not isolated from the dynamic historical conditions from which they emerged.

Chapter 1 provides an overview of the meanings and applications of colonialism, neo-colonialism, and imperialism. These three forms of Western domination, while different from each other, share common features. The dissertation suggests four features: the economic aspect, centralization, militarism, and exceptionalism. These features are considered throughout the chapters as the drive behind adopting legal or extra-legal reforms in the war on terror.

The historical approach is used in examining the colonial experience in the two case studies. The history of colonial and post-colonial Egypt and Tunisia is provided, with a focus on Western influence on the development of the legal systems of these countries as a whole. The dissertation in Chapter 2 tracks the development of international attempts to define terrorism. It examines the UN General Assembly and the Arab world's positions on defining terrorism during the fading of colonialism. It also explores the international shifts in the neo-colonial era that appeared in the 1990s with the collapse of the Soviet Union and other major historical events. The event of 9/11 is addressed as the peak of neo-colonial domination in the war on terror.

The historical approach is also used to show major terrorist attacks and political events that had a direct impact on shaping anti-terrorism and national security laws. The timeframe is from

the 1800s until 2015. The reason for this wide range is to track any colonial legacy. The laws adopted post-9/11 are examined in order to explore whether neo-colonial influence has been a factor in shaping contemporary anti-terrorism laws in the Arab world. Finally, by applying a historical approach, we aim to predict how global, regional, and national anti-terrorism legislation and measures can develop in the future.

The comparative legal approach

The comparative legal approach is chosen to draw out common themes in national and global responses to terrorism. The objective of comparing countries is to provide a contextual description of the major historical events and cultural aspects that have shaped the ways in which Arab states understand terrorism, especially the role of colonialism. This is done through analysing the secondary literature written by historians⁹ and political scientists.¹⁰

This dissertation primarily focuses on anti-terrorism laws in two Arab countries, but it also compares these laws to their colonial roots. The dissertation does not just compare Egypt and Tunisia, or these two countries now and under colonial rule, but also puts legislation in Egypt and Tunisia in the context of the wider Arab world and relates the legislation in these two countries to Western legislative responses to terrorism and to international anti-terror legislation.

The influence of colonialism can be seen in the adoption of emergency and emergency-like powers. For instance, Egypt has been under a state of emergency since 1981 when President

⁹ William L Cleveland & Martin P Bunton, *A History of the Modern Middle East* (Boulder: Westview Press, 2013); Congressional Quarterly, inc. *The Middle East*, 10th ed (Washington: CQ Press, 2005); Afaf Lutfi SayyIdem-Marsot, *A Short History of Modern Egypt* (Cambridge; New York: Cambridge University Press, 1985); Glen Balfour-Paul, *The End of Empire in the Middle East: Britain's Relinquishment of Power in Her Last Three Arab Dependencies* (Cambridge; New York: Cambridge University Press, 1991).

¹⁰ Roger Owen, *State, Power and Politics in the Making of the Modern Middle East* (London; New York: Routledge, 2004); Anthony Tirado Chase, *Human Rights, Revolution, and Reform in the Muslim World* (Boulder: Lynne Rienner Publishers, 2012).

Anwar Sadat was assassinated by Islamist militants.¹¹ The state of emergency has been endlessly renewed under the pretext of counter-terrorism.¹² The use of special courts in terrorist cases is also widely used in the two countries under study. In the Arab world, colonial strategies are often used to counter internal threats to the political order by using militarized methods. Such methods include special courts, engaging the army in putting down strikes, and allowing security forces to shoot to kill even when protesters are unarmed. Imposing discipline through military strategies in Arab counter-terrorism policy has its roots in the colonial legacy. The events of 9/11 has been used as another excuse to extend anti-terrorism laws and measures.

A comparative study is ideal for understanding the current global shift in anti-terrorism law and other related fields like human rights and international humanitarian law. This dissertation does not cover in depth these two latter fields, but some discussion of these topics cannot be avoided with the increased reliance on extra-legal measures by both Arab and Western states. The United States' war on Afghanistan and its Guantanamo Bay prison are examples of acting outside the scope of international humanitarian law and human rights law. Furthermore, the United States war on terror has implicit global influence, in which countries with poor human rights records like Egypt find it acceptable to continue carrying out practices like detention without trial and torture.

Materials

The historical facts addressed in this dissertation are mainly collected from credible secondary sources: books and articles by historians and political scientists. Chapter 1 starts by examining the colonial rationale as it emerged in the former colonies as well as within Western states. I rely on secondary sources that show the history of colonialism. I start with the British invention of the

¹¹ Sadiq Reza, "Endless Emergency: The Case of Egypt" (2007) 10:4 New Criminal L Rev 532 at 537.

¹² *Idem*.

executive and emergency powers that emerged in Ireland and were then carried out in Britain during World War II. Particularly useful in this respect are A. W. Brian Simpson's "Detention without Trial in the Second World War: Comparing the British and American Experience" (1988) and his book *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (1992). Simpson provides a detailed history of the expansion of the executive power, in particular in detention without trial, in Britain during the Second World War. The importance of these studies is that they show the similarity between the British doctrine during warfare (e.g., in Britain during World War II) and its doctrine during peacetime (e.g., Northern Ireland and former colonies). I link Simpson's analysis to the current British approach to counter-terrorism.

The primary sources on British policy and legislation are limited. This is because the general rule in Britain is that official documents in the Public Records Office become open to the public after 30 years, and other files can be closed for a longer time.¹³ This limited access to information required me to rely heavily on secondary sources that examine the partial but important documents. There are, however, authorized studies, such as Christopher M. Andrew's book *Defend the Realm: The Authorized History of MI5* (2010). Andrew claims to have unlimited access to the documents of Military Intelligence Section 5 (MI5). This filled some of the gaps in British national security history in Britain and its former colonies. By 2011, David French had enriched the study of the British colonial state in his book *The British Way in Counter-insurgency: 1945–1967*, which examined a large number of documents from the British National Archive. By connecting the information provided by these three authors, we notice that the importance of the history of British experience in Britain during World War II is that it later presented a precedent

¹³ See AW Brian Simpson, "Detention without Trial in the Second World War: Comparing the British and American Experiences" (1988) 16:2 Florida State University L Rev 225 at 228.

for the colonial governors, and as a result the measures introduced in Britain during wartime continued to be carried out in the colonies.

Information on contemporary historical events is collected from both secondary and primary sources. Primary sources include the public inquiry reports and bulletins of the International Commission of Jurists, which has a monthly bulletin about terrorism and counter-terrorism, as well as reports by Amnesty International, Human Rights Watch (HRW), and the Egyptian Organization for Human Rights. The latter publishes an annual report that always dedicates a section to extra-legal measures taken against terrorists as well as statistics on the number of terrorist cases and other related issues, such as the number of detainees in Egypt.

National security and anti-terrorism laws and measures are examined from their primary sources. Arabic texts of the laws and decrees cited herein are available via each state's Ministry of Justice website and the Official Gazette.¹⁴ I also included recent constitutional amendments that were adopted or considered by these countries after the so-called Arab Spring; these amendments could reshape the policy of criminal law, in particular in relation to counter-terrorism.¹⁵

Egypt's and Tunisia's reports to the UN Counter-Terrorism Committee (CTC) are also examined. Each country provided the CTC with four to six reports between 2001 and 2006; the CTC stopped publishing reports after 2006 for no obvious reason.¹⁶ The importance of these reports is that they provide the official view of the national policy of counter-terrorism in each

¹⁴ Egypt Official Gazette, online: <www.alamiria.com/a/index.html>; Tunisian Official Gazette, online: <www.iort.gov.tn>.

¹⁵ For instance, in March 2011 Egypt abolished Article 179 of the constitution, which is related to combating terrorism. The article states that: "The State shall seek to safeguard public security to counter dangers of terror. The law shall, under the supervision of the judiciary, regulate special provisions related to evidence and investigation procedures required to counter those dangers. The procedure stipulated in paragraph 1 of Articles 41 and 44 and paragraph 2 of Article 45 of the constitution shall in no way preclude such counter-terror action."

¹⁶ The website of the CTC publishes reports dated from 2001 through 2006, but states, without providing reasoning, that "a decision was made not to make public subsequent reports on resolution 1373 (2001)." *Counter Terrorism Committee*, online: <www.un.org/en/sc/ctc/resources/countryreports.html>.

Arab country, as well as the CTC view of international security and the values that have priority of protection. These are good sources demonstrating the neo-colonial influence on countries that justify repressive laws to satisfy an outside power.

In addition to the above sources, in order to better understand the law and its function and to aid in interpreting the definition of terrorism, the argument is supported with judicial decisions on terrorist cases. It should be noted that judicial decisions from their primary sources are difficult to get in the Arab world, partially because terrorist cases are seen by closed military courts as they were in Egypt during the rule of Gamal Abdel Nasser, Sadat, and Mubarak. In addition, final judicial decisions in other Arab states are not necessarily posted by the government. Egypt, for instance, publishes some but not all judicial decisions on the Ministry of Justice website. Another source is the Arab Legal Portal sponsored by the United Nations Development Programme (UNDP),¹⁷ which also provides limited cases, depending on what information each country provides. To cover this gap, there are a few private Arab legal websites that provide legislation and judicial decisions. However, not all court decisions are available, especially those related to terrorism and national security, since, as a manager of one of the websites claims, publishing them is prohibited by orders from the government.¹⁸ Due to this limitation, the dissertation does not seek a balanced account in viewing the terrorist cases in the two case studies, but rather gives an idea of how the judicial system functions in an authoritarian system.

At the regional level, the Arab Convention for the Suppression of Terrorism is examined. The importance of this convention is that it represents the collective overview of national security policy in the Arab world and the regional role of Egypt in imposing its view on other Arab states.

¹⁷ The Arab Legal Portal, sponsored by the United Nations Development Programme [UNDP], online: <www.arablegalportal.org/criminal-laws/>.

¹⁸ *Salah Al-Jasem Systems*, online: <<http://www.saljas.com>>; *East Laws Network*, online: <www.eastlaws.com>; *Arab Lawyers Network*, online: <www.mohamoon-ju.net>.

As we will see, the definition of terrorism in the Arab Convention has a very similar wording to the Egyptian definition. Both Egypt and Tunisia have issued new anti-terrorism law in 2015. Nonetheless, the laws still include overly broad definitions and draconian penalties and measures. This suggests that the uprisings in these two countries that changed the presidents did not change the system.

Within international and comparative law, the relevant UN documents—treaties, resolutions, and FATF reports—are examined. The major treaty that defines terrorism is the 1999 International Convention on Suppression of Terrorism Financing.¹⁹ The UN Security Council resolutions that either provide a definition for terrorism or show the lack of a definition are 1373 (2001)²⁰ and 1566 (2004).²¹ Another important resolution is UN Security Council Resolution 1624 (2005)²² in regard to regulating speech associated with terrorism. To some extent, these Security Council resolutions represent the Western, particularly the British, colonial rationale.²³

Egypt is the most studied Arab country in the Arab world and in the West, so there was less difficulty in acquiring secondary studies that examine the history of the colonial and post-colonial periods of Egypt.²⁴ As for the secondary sources that cover Tunisian history and geopolitics,²⁵ compared to Egypt there are fewer English secondary resources, which could be due to the fact that Tunisian studies are often written in French.

¹⁹ International Convention on Suppression of Terrorism Financing, United Nations in Resolution 54/109 of 9 December 1999, *United Nations Treaty Collection*, online: <untreaty.un.org>.

²⁰ UN Security Council, Security Council Resolution 1373, 2001 SC Res. 1373, UN SCOR, S/RES/1373 [Resolution 1373].

²¹ UN Security Council, Security Council Resolution 1566, 2004 SC Res. 1566, UN SCOR, S/RES/1566 [Resolution 1566].

²² UN Security Council, Security Council Resolution 1904, 2009 SC Res. 1904, UN SCOR, S/RES/1904 [Resolution 1904].

²³ Roach, *Supra* 7, at 13, 57.

²⁴ Cleveland & Bunton, *Supra* 9.

²⁵ Christopher Alexander, *Tunisia: Stability and Reform in the Modern Maghreb* (Milton Park, UK; New York: Routledge, 2010); Julia A Clancy-Smith, *Rebel and Saint: Muslim Notables, Populist Protest, Colonial Encounters (Algeria and Tunisia, 1800–1904)* (Berkeley: University of California Press, 1997).

Introductory analysis

The notion of terrorism

We cannot talk about counter-terrorism without talking about the notion of terrorism. Attempts to define terrorism tend to be highly politicized. It is difficult to distinguish a terrorist from a revolutionary, or to distinguish violent acts from peaceful opposition that could all be considered “terrorism”; terrorism cannot be defined in neutral objective language. The dilemma of the definition of terrorism is also shared with other politicized terms such as “subversion” and “insurgency,” which were used during colonialism.

This dissertation does not suggest a direct colonial influence on the current definition of terrorism. It rather links the colonial tendencies and rationale behind defining terms like “insurgency” to the definition of terrorism. In other words, the use of vague terms and broad definitions that is found in the current definitions of terrorism is derived from a colonial rationale in customizing criminal terms to opposing political movements and potential threats. The colonial rationale in criminology dealt with suspects based on a “catch-all” logic. This logic required identifying the enemy well before wrongdoing was carried out. Similarly, the war on terror justifies this logic under a “pre-emptive” approach (McCulloch & Pickering 2010). The problem is in accepting such logic as an ordinary practice, or worse, as a role of criminal law. Therefore, it is important to look at the relationship between colonialism and countering terrorism: without understanding the root of this type of control, lessons will not be learned and history will continue repeating itself. The problem with ruling within the colonial rationale has less to do with its former external origin than with the highly politicized and militarized doctrine itself. Today, this doctrine is undermining the role of the criminal law, and consequently, in the long run, security and justice.

A convergence between the West and the Arab world in countering terrorism can be seen in one respect in the tendency to define terrorism broadly. For instance, even though the definition of terrorism in the United Kingdom²⁶ differs from that in the Arab world, on both sides it is subjective and highly politicized, and the basis for distinguishing a terrorist from an innocent focus on group identity rather than criminal conduct. Part of the fundamental problem of counter-terrorism is that it is carried out according to a set of stereotypical standards (Hardin 2004, 79). For instance, the fight against radical Islamist terrorism has led to targeting the large and diverse community of Muslims in general.²⁷ As is happening today, similar biased standards were used by the colonial powers in a form of racial segregation policy (Njoh 2008, 579). The British colonial power dealt with protesters as insurgents using measures that included mass arrests and deportations.²⁸ Daily arrest, interrogation, and searching were part of counter-insurgency strategies that targeted specific groups who had not participated in violent activities.²⁹

Today, in both the West and in Arab countries, in order to identify a terrorist, focus is given to the person's ethnicity and religion. While Arabs and Muslims are the target of counter-terrorism in the West, Islamists and/or ethnic minorities are the targets in the Arab world.³⁰ Selectivity in applying the law has less to do with crime control than with ensuring discipline that strengthens the state's sense of dominance.³¹

²⁶ The British definition of terrorism, as well as the Canadian and Australian definitions, include the element of "religious, political or social motive." Many scholars have criticized the motive element for its problematic use. See Kent Roach, "Defining Terrorism: The Need for a Restrained Definition" in Craig Forcese & Nicole LaViolette, eds, *The Ottawa Principles on Human Rights and Counter-Terrorism* (Toronto: Irwin Law, 2008); CAJ Coady, *Terrorism and Innocence* (2004) 8:1 J of Ethics 37-58.

²⁷ "Preempting Justice: Counterterrorism Laws and Procedures in France" (1 July 2008) *Human Rights Watch*, online: <<https://www.hrw.org>>.

²⁸ Barbara Watson Andaya, *A History of Malaysia* (Honolulu: University of Hawai'i Press, 2001) at 271.

²⁹ *Idem*.

³⁰ For instance, before the rule of President Morsi, the Muslim Brotherhood was the major target in Egypt. In Bahrain, the Shi'ite are the potential terrorists. In other words, whoever is different to the ruling class is the potential enemy.

³¹ Lynn Welchman, "Rocks, Hard Places and Human Rights: Anti-Terrorism Law and Policy in Arab States" in Victor Ramraj, Michael Hor & Kent Roach, eds, *Global Anti-Terrorism Law and Policy* (New York: Cambridge University Press, 2012) at 621-22.

The boundaries of the meaning of terrorism are not clear, and in fact include some lawful acts. The crime of terrorism has become part of a pre-emptive approach, in which overbroad definitions are created to allow countering not only crimes but also threats and potential terrorists. The significant changes to the characteristics of terrorism, including the methods, aims, and character of the actors, make it impossible to predict future threats. This fact has led to the justification of adopting overbroad definitions of terrorism that have the capacity to include almost all predicted and unpredicted threats.³²

Colonialism is not the only influence in counter-terrorism; neo-colonialism also plays a role in this respect. Jude McCulloch and Sharon Pickering argue that colonialism left a legacy of pre-empting crimes. This was done by establishing broad definitions that targeted threats before they emerged (2010, 14). McCulloch and Pickering also argue that neo-colonialism established a set of terrorism-related crimes that also aimed to pre-empt terrorism (2005, 473–76). Roach observes that this kind of criminalization is problematic not only because of the unfair consequences that can result from pre-emptive practices like indefinite detention, but also because it is built on an assumed crime labeled “terrorism” rather than a clearly defined crime.³³ The counter-terrorism laws and measures established within this rationale have less to do with ensuring national and international security than with preserving the status quo of economic power that serves Western interests.

³² Manuel Cancio Meliá, “Terrorism and Criminal Law: The Dream of Prevention, The Nightmare of the Rule of Law” (2011) 14:1 New Crim L Rev, 108 at 108.

³³ Kent Roach, “The Criminal Law and Terrorism” in Victor Ramraj, Michael Hor & Kent Roach, eds, *Global Anti-terrorism Law and Policy* (Cambridge: Cambridge University Press, 2005) at 138.

The colonial rationale and its legacy

The phrase “imperial-colonial rationale” or, as we will refer to it, the “colonial rationale,” refers to the methods and logic that colonial powers relied on in ruling their colonies. A common characteristic of the colonial state is that it ruled through the use of militarism and a combination of an exceptional and a political doctrine. Such doctrines relied on measures like martial law and emergency powers, as well as principles like the use of minimum force, all of which were used by the British and French colonials in several colonies including Egypt, Algeria, Kenya, and Malaya.³⁴ On the surface, such practices were regulated by law, but in fact they neglected the rule of law.

I call this kind of ruling that depends widely on militarized methods and highly politicized laws the “colonial rationale” because it emerged and significantly developed during colonial imperialism. While that period had its “justifications,” it more importantly maintained the places it ruled in a state of political immaturity. The legitimization aspect of the colonial rationale allowed the colonial power the use of stability operations to maintain itself.

This dissertation argues that the colonial rationale that has been transferred to counter-terrorism includes two main aspects: exceptionalism and pre-emption of crime. First, exceptional national security laws and measures include the establishment and use of martial law, emergency legislation, indefinite detention, and military and other exceptional courts. In other words, these involve transferring the civil state into either a police state, as is the case in many Western countries, or a military state, as it is in the Arab world.

The problem with the overbroad articulation of Arab anti-terrorism law is its vagueness and the difficulty in attributing intent. This exceptionalism is not limited to authoritarian regimes

³⁴ French, *Supra* 2, at 90-91.

like those in the Arab world, but is also occurring in democratic countries in the West. This suggests a global shift of returning to the colonial rationale, particularly in countering terrorism. Extending power and over-controlling people is a major characteristic of a colony. Colonial powers sought to secure their political and economic interests through the imposition of discipline in order to create a submissive society, and this same approach is evident in today's anti-terrorism policies.

Second, the colonial rationale allowed adopting a pre-emptive approach in crime control. What I mean by a pre-emptive approach in counter-terrorism is the willingness to regulate speech and associations well before any act of terrorism has emerged or even been planned. Colonial and non-colonial regimes are subject to the overall preventive approach in criminal law. I therefore distinguish between preventive measures within the criminal law that aim to protect the public from actual harm, and other pre-emptive measures that suppress speech and association in the name of counter-terrorism. The latter being colonial in essence because of concerns about repressing self-government.

This aspect stems largely from the ambiguity of the term "terrorism," which, as Jenny Hocking observes, "blurs the precise nature of the situations in which these counter-terrorism operations may be mobilized". At the legislative level, this provides a justification for adopting laws that may be easily interpreted subjectively and that can therefore be applied based on personal and group identity rather than wrongdoings. As a result, a "presumptive terrorist" is created as the target of the "stability operations" (Hocking 1993, 25-7).

As a result of these features of the colonial rationale, the modern Arab world is faced with multiple restrictions of freedoms and political activities through unnecessary laws that allow the authority to selectively arrest and charge its enemies in the name of national security. Restricting

and prohibiting various non-violent activities such as strikes and protests in the form of political and economic pressure have become tools to suppress certain groups. Maintaining a climate of order is given as a justification for the involvement of the army in domestic political non-violent activities such as putting down strikes.

The military approach, emergency powers, and broad definitions of offences were part of the colonial policy of crime control; all are also common features of current anti-terrorism law in the Arab world. However, the relationship between colonialism and counter-terrorism is not limited to their techniques and strategies; it also includes justifying the consideration of the other as an enemy. The enemy, on this understanding, includes individuals who belong to groups that do not represent a real threat to public safety, but are viewed by the state as a source of extreme threat as a rhetorical and political strategy of oppression. An example would be Islamists in Tunisia, who adopted a moderate approach away from violence during the presidency of Habib Bourguiba and Zine El Abidine Ben Ali. Eliminating not only crimes, but also dissent and threats to the government, is what the modern state also seeks to achieve through anti-terrorism law.

Including colonial militarized measures in current counter-terrorism laws is advocated by the authorities in both Western and Arab states to simplify the laws of procedure and evidence and to justify preventive but disproportionate legislation. By including vague terms and broad definitions, current anti-terrorism law is easily manipulated to punish those who challenge state power. For instance, the Egyptian definition of terrorism includes any use of force or threat or intimidation aimed to thwart the application of the constitution or the laws or regulations.³⁵ This definition suggests that political activities by civil society organizations that oppose such arbitrary laws could be understood as terrorism.

³⁵ Article 86 of Law no. 79 of 1992 of the Egyptian Penal Code.

While criminal law in dealing with other crimes focuses primarily wrongdoing, anti-terrorism law focuses on threat. Anti-terrorism law is a system that, unlike ordinary criminal law, includes overly broad definitions and lacks due process protection. This duality in the criminal legal system, in which one system exists for ordinary criminals and the other for suspected terrorists, is not new. The anti-terrorism measures being put in place in many Arab countries today have results similar to the colonial dual legal system—one for the colonized peoples and one for the colonizers. I argue that this exceptional approach to crime control is borrowed from colonial counter-insurgency policy.

Global and national measures used in the “war on terrorism” are becoming similar to the measures for wartime and others for peacetime. As Hocking argues, “counter-terrorism has provided a domestic, peacetime adaption of strategies developed to deal with the essentially wartime exigencies of a colonial power.”³⁶ The problem with applying the colonial approach to counter-terrorism is that it is not limited to countering violent acts, but is also used to suppress other forms of nonviolent political activities and opposition. Today, methods similar to military ones that are supposed to be used against the enemy during wartime are used against opponents in domestic cases and during peacetime. The problem, then, is not colonialism or neo-colonialism per se, but the reappearance or continuance of aspects of colonialism in modern post-colonial states.

The colonial heritage of the pre-emptive approach to defining terrorism

When talking about the colonial pre-emptive approach in this dissertation, I confine it to prevention tied to speech and association as developed in counter-insurgency theory and practice. The colonial

³⁶ Jenny Hocking, *Beyond Terrorism: The Development of the Australian Security State* (St Leonards: Allen and Unwin, 1993) at 19.

use of vague definitions neither limited the manner of subversion to violent acts or criminal offences, nor excluded the aim of overthrowing government. British and French colonialism found it easy to include non-violent acts as acts of subversion, including peaceful activities for political and economic ends such as strikes and protest marches. Hocking argues that in the academic sphere, euphemisms such as “subversion,” “national security,” and “stability” give the author the power to reach ideological conclusions regarding a particular action simply by labeling this action as, for instance, “terrorism.” These conclusions indoctrinate the reader, who is bound by the exclusive usage of the terminology by classical thinkers, modern authors, and the media. The determination of theories and the usage of terminology by academia, politicians, and the media wrongly suggest that a particular, ideologically weighted, account of events is objective despite its implicit political structure. This naïve or misleading assumption of objectivity has a strong influence on the public understanding of terrorism (1993, 2–3). Along similar lines, Eqbal Ahmad argues that the exclusive usage of terminology means that “the biases of incumbents are built into the structure, images and language of contemporary Western [...] literature on the subject. We have come to accept ideologically contrived concepts and words as objective descriptions.”³⁷

In *Counter-terrorism: The Law and Policing of Pre-emption* (2010), McCulloch and Pickering examine the shift in the criminal approach that deals with terrorism. For McCulloch and Pickering, preventing violent mass attacks is indeed necessary, but pre-empting threats that have not yet become a reality is a major concern. To prevent terrorist attacks, the focus is on the prohibited criminal conduct; however, to pre-empt, the focus is on individuals who are considered a threat based on their identity or associations (2010, 14). McCulloch and Pickering reject the pre-emptive approach because, whereas legislators and policymakers assume that this approach can

³⁷ Eqbal Ahmad, “The Theory and Fallacies of Counter-insurgency” in John Leggett, *Taking State Power* (New York: Harper & Row, 1973) at 325.

reduce the terrorist threat and enhance security, there is no evidence that supports this assumption. McCulloch and Pickering argue that it is difficult to measure success in prevention because a safe environment could be due to different reasons,³⁸ including social and economic justice and stability. And even in societies where there are a number of convictions for terrorist offences, convictions are a guide to the effectiveness of law enforcement and do not necessarily show success in preventing future crimes.³⁹ This argument makes me question the effectiveness of law enforcement in the Arab world, where convictions may only reflect the overbroad definitions that make the indictment process arbitrary.

The pre-emptive approach to countering terrorism has its roots in the imperial and colonial legacy. The Defence Regulation (18B) is a regulation adopted in Britain during World War II that targeted Nazi sympathizers. In order to pre-empt threats to public safety, it criminalized mere membership in any organization associated or sympathizing with any power that is at war with Britain.⁴⁰ Further, it allowed exceptional measures like detention without trial. Similarly, in colonies enemies were not necessarily armed guerrillas; they included political opposition that sought independence or political reforms.⁴¹ Such opposition was repeatedly faced with exceptional measures like trial in special courts or exile.

In the neo-colonial era, the problem of pre-empting potential threat rather than identifying crimes can be equally found in the Arab world and Western democracies. For instance, in France, the main issue related to the pre-emptive approach is the broadly defined offense of “criminal association in relation to a terrorist undertaking” (*association de malfaiteurs en relation avec une*

³⁸ Jude McCulloch & Sharon Pickering, “Counter-terrorism: The Law and Policing of Pre-emption” in Andrew Lynch, Nicola McGarrity & George Williams, eds, *Counter-Terrorism and Beyond The Culture of Law and Justice After 9/11* (New York: Routledge, 2010) at 15.

³⁹ *Idem*, at 15-16.

⁴⁰ Article 2 of Defence Regulation 18B. Quoted in British and Irish Legal Information Institute [BALLI], online: <www.bailii.org/uk/cases/UKHL/1941/1.html>.

⁴¹ McCulloch & Pickering, *Supra* 38, at 636; French, *Supra* 2, at 72-73.

entreprise terroriste), which was established as separate offense in 1996, and allows the authorities to intervene with the aim of preventing terrorism well before a crime occurs. The pre-emptive approach, as the French authorities conceive it, represents the flexibility of the French criminal justice system, which allows the authorities to adjust legal responses to address effectively the threat of international terrorism.⁴² However, too much flexibility undermines the role of the criminal justice system as a whole. I think this is because the task of the criminal law is changed from crime control into threat control, which is often difficult to predict. And in order to create a society free from threat, a disciplined approach is needed to make sure that nothing challenges the status quo.

The neo-colonial influence in expanding terrorism-related crimes

The continuous use of law as it served colonists' political interests reveals an important connection between colonial policies in preventing, on the one hand, "crimes" that could harm the public, and on the other, "threats" that could put the colonial dominance at risk. The same tendency is evident in the West's current approach to counter-terrorism. Certainly, we have indisputable crimes of terrorism that harm people, such as hijacking and bombing. However, my concern is in the criminalization of acts that threaten the state's power but do not by themselves cause harm. An example can be found in the laws against terrorist-related activities that prohibit speech inciting terrorism and membership in a terrorist organization.⁴³ These laws are currently enacted in

⁴² Human Rights Watch, *Supra* 27.

⁴³ It is worth mentioning that the listing and de-listing of "terrorist organizations" are political decisions made by the executive, not the court. A problematic issue here is in wrongfully labelling someone a member of a terrorist organization who does not know of the organization's criminal activity. Maher Arar, a Syrian-born Canadian citizen, is an example of the subjectivity of the term "terrorism." Canadian officials had information about Arar because of his associations with targeted groups. As a result, he was apprehended by American officials and deported to Syria, where he was tortured and detained for almost a year. The collected information was not based on his actions or intentions, but rather on his association with others who were the target of a national security investigation. See Canada, Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events*

Western countries like the United Kingdom and France as well as Arab states like Egypt and Tunisia. The root of these laws can be drawn from the British experience in Britain and Northern Ireland, as will be shown in Chapter 1. The problem with these kinds of crimes is that it is not clear what the boundaries are of speech that could encourage terrorism. This problem is closely related to the bigger question of defining terrorism.

The concept of counter terrorism financing is mostly linked to 9/11, when the UN Security Council responded to 9/11 by directing states to adopt laws against terrorist financing. However, that was not the first time that the Security Council promoted measures for countering terrorism financing. In 1999, the Security Council adopted the Al-Qaeda and Taliban Sanctions Regime, which calls upon states to freeze the funds of Al-Qaeda and the Taliban. In 2015, the sanction regime was expanded and renamed “ISIL (Da’esh) and Al-Qaeda Sanctions List.”⁴⁴ These resolutions centralize global powers within supra-national bodies that blacklist individuals and groups as terrorists and freeze their financial resources. This measure may unfairly consider individuals and entities as terrorists. The resolutions regarding terrorist financing are discussed further in Chapter 2.

While the theme of counter terrorism financing is largely linked to 9/11, the usage of financing laws in crime control is argued to have its roots in the colonial experience (McCulloch & Pickering 2005). The British enforced financing regulations in Northern Ireland, aimed to weaken the financial position of opponents. This includes the Prevention of Terrorism (Temporary Provisions) Act (PTA) issued in 1974 and renewed until 1989. Part III of PTA, labeled “Financial Inimical Assistance for Terrorism,” criminalizes numerous acts regarding giving or receiving

Relating to Maher Arar: Analysis and recommendations (Ottawa: Public Works and Government Services Canada, 2006).

⁴⁴ UN Security Council, Security Council Resolution 2253, 2015 SC Res. 2253, UN SCOR, S/RES/2253.

funds “in connection with, acts of terrorism[.]” PTA can thus be considered as the direct starting point of counter terrorism financing.

French counter-insurgency officer and thinker David Galula in *Counterinsurgency Warfare: Theory and Practice* (1964) shows the French military in its colonies tracked the external financial support and managed to prevent it. For instance, “In Algeria, the French naval blockade and the sealing of the borders prevented the flow of supplies to Algeria from Tunisia and Morocco, where large rebel stocks had been accumulated”.⁴⁵ Galula also suggests that the spread of “anarchist” ideas requires two things: funds and freedom of movement. According to him, “if anarchy prevails in Country X, the insurgent will find all the facilities he needs in order to meet, to travel, to contact people, to make known his program, to find and organize the early supporters, to receive and to distribute funds, to agitate and to subvert, or to launch a widespread campaign of terrorism”.⁴⁶ This suggests that cutting funds and banning travel are rooted in the colonial counter-insurgency thoughts. These colonial patterns are carried in the neo-colonial experience of the United Kingdom and its influence over the contemporary UN Security Council resolutions. Chapter 2 shows that counter terrorism financing has become a theme in the post-9/11 attacks.

The United States appears to be another neo-colonial power that sponsors the globalization of counter terrorism financing. A report by the 9/11 Commission shows that prior to 9/11, the United States put pressure on countries that deal with the Taliban to end these relationships. This includes the efforts made by the United States between 1999 and early 2001 to encourage the United Arab Emirates (UAE) to enforce sanctions and break ties with Taliban.⁴⁷ Further examples

⁴⁵ David Galula, *Counterinsurgency Warfare: Theory and Practice* (New York: Praeger, 1964) at 30.

⁴⁶ *Idem*, at 22.

⁴⁷ National Commission on Terrorist Attacks Upon the United States (9-11 Commission) [The 9/11 Commission Report] (2004) online: National Commission on Terrorist Attacks Upon the United States <www.9-11commission.gov/report/>, at 138.

and explanations of the neo-colonial influence regarding counter terrorism financing are provided in Chapter 2.

Post-9/11, the travel ban has become another theme of anti-terrorism measures. It too has its roots in the colonial experience. The British colonial government imposed restrictions on travel to communist countries.⁴⁸ For instance, when the Chinese Communist Party became the ruling power in China in 1949, the British in Singapore did not allow those who traveled to China to return.⁴⁹ Post-9/11, restrictions on travel have been made in the name of counter-terrorism. Security Council Resolution 1373, adopted a few weeks after 9/11, calls upon states to prevent the movement of terrorists.⁵⁰ Thirteen years later, Security Council Resolution 2178 (2014) was adopted, reaffirming states' responsibility to prevent terrorist movement.⁵¹ While freedom of movement is supposed to be the standard, the increasing use of travel bans normalizes this form of the exception. Countries, including Egypt and Tunisia, either complied with this international obligation, or took it as a foundation to legitimize their even more abusive practices. This form of crime control is addressed in Chapter 2.

Another important restriction is on speech, in which incitement and encouraging of terrorism have become part of the definition of terrorism. This reform was made by UN Security Council Resolution 1624, adopted in September 2005. The resolution was sponsored by the United Kingdom as a response to the July 2005 London bombing. This resolution is discussed further in Chapter 2 but it is worth mentioning here that the historical root of speech crimes is also derived from the colonial experience. The root of such restrictions include the 1833 Act for the More

⁴⁸ Leong Weng Kam, "The Evolution of the Chinese Language" in Cheng Lian Pang, ed, *50 Years of the Chinese Community in Singapore* (World Scientific, Oct 23, 2015) at 139.

⁴⁹ *Idem.*

⁵⁰ Para 2 (g) of UN Security Council Resolution 1373 (2001).

⁵¹ Para 2 of UN Security Council Resolution 2178 (2014).

Effective Suppression of Local Disturbances and Dangerous Associations in Ireland.⁵² This Act allowed the declaration of what we now understand as state of emergency. Among the many exceptional powers granted in this Act are the powers to dissolve meetings and suppress “agitation.”⁵³ Another Act is the Prevention of Crime (Ireland) Act of 1883, which, in addition to prohibiting meetings, seized newspapers and allowed the arrest of suspects without warrant.⁵⁴ Another reform adopted before Irish independence was the Restoration of Order in Ireland Act of 1920 that targeted Irish rebels. The Act was an extension of the Defence of the Realm Act (DORA) of 1914,⁵⁵ which is discussed further in Chapter 1.

In 2006 the United Kingdom established the offence of “encouragement of terrorism” in its Terrorism Act, which is defined as:

[A] statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences.⁵⁶

The wording of this article reflects the same ambiguity and flexibility adopted earlier in the 1970 Prevention of Incitement to Hatred Act. On the other hand, UN Security Council Resolution 1624 (2005), condemns “the incitement of terrorist acts and repudiating attempts at the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts.” This resolution is discussed further in Chapter 2. However, the language used in the resolution is less broad

⁵² See John Reynolds, “The Long Shadow of Colonialism: The Origins of the Doctrine of Emergency in International Human Rights Law” (2010) 6:5 Osgoode Hall Law School CLPE 1 at 12.

⁵³ *Idem*.

⁵⁴ *Idem*, at 13; AW Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Toronto: Oxford University Press, 2001) at 80.

⁵⁵ Reynolds, *Supra* 52, at 13.

⁵⁶ *Terrorism Act 2006* (UK), s. 1(1).

compared the United Kingdom Act. The resolution uses the term “incitement”, whereas the United Kingdom Terrorism Act condemns “direct or indirect encouragement or other inducement”. While inciting a crime is more direct, the wording in the Terrorism Act is critical, taking criminalization into a different level of ambiguity. The influential role of the United Kingdom makes such broad criminalization, whether “incitement” or “inducement” acceptable and justified. As we see in Chapter 2, the criminalization of incitement and glorification of terrorism is becoming a global theme.

In May 2005 the European Union signed the Council of Europe Convention on the Prevention of Terrorism (CECPT). This regional multilateral treaty requires state parties to criminalize “public provocation to commit a terrorist offence[.]” Article 5 defines “public provocation” as:

[T]he distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.⁵⁷

This attempt to define “incitement” to terrorism is not clear and highly controversial. The clause “whether or not directly advocating terrorist offences” suggests no limitation on what can be considered speech related to terrorism. It targets speech and publication, including electronic and online sources. This broad approach of criminalization does not require that any person is encouraged by a prohibited speech,⁵⁸ or whether an actual terrorist attack has been carried out.

⁵⁷ Council of Europe Convention on the Prevention of Terrorism (CECPT), no. 196, 16 May 2005.

⁵⁸ Ben Saul, “Criminality and Terrorism” in AM Salinas de Friás, KLH Samuel & ND White, eds, *Counter-Terrorism: International Law and Practice* (Oxford: Oxford University Press, 2012) at 21.

Criminalizing “incitement” risks the right of lawful expression, especially considering the broad definitions of terrorism at the national level.

CHAPTER 1 ON IMPERIALISM, COLONIALISM AND NEO-COLONIALISM

Imperialism did not necessarily transplant European ideology or project European laws directly onto colonies or informal colonies, but by being the dominant power, empires did universalize their logic of ruling. This suggests that the current legal system in many former colonies may continue to bear the influence of the imperial cultures that colonized them. Whether these imperial cultures provided an influence that was sound, rational, and advanced enough to be sensibly integrated into legal systems that continue to function today is highly questionable. The beginnings of an answer that can be usefully applied to reshaping current legal systems can be found in a detailed critique dealing with areas of the legal system that imperialism, and later neo-colonialism, demonstrably affected for the worse, or at least failed to progress. In this chapter, I focus on the law-shaping influence of imperialism and colonialism during the nineteenth and twentieth centuries, and integrate them to the neo-colonial influence that evolved after World War II.

Imperialism and neo-colonialism were affected by the sentiments that they created in the colonies: supportive ones, as well as anti-colonial and anti-imperial discourse. I do not intend to detail nationalistic resistance to colonialism, nor to catalogue the subtle differences between different types of colonialism. The common features of imperialism, colonialism, and neo-colonialism in the language of my argument are that they function as forms of external control. I interrogate the legal and political rationale in legal systems that display an inheritance from imperialism and neo-colonialism, and analyze this within the conceptual framework of a collective culture of control.

Colonies sought independence from colonial political control, but did not similarly strive to be free from the colonial culture of control (McClintock 1990). Nasser Hussain argues that

during the nineteenth century, even though the colonist promised to spread the arts of self-government and stayed away from the seventeenth century's ambition of slavery, colonized subjects could not be regarded as completely free (2003, 25). Hussain suggests that the imperialist order of the nineteenth century "was neither despotic nor democratic,"⁵⁹ in which the organizing principles of control were not as blunt as slavery, but still involved a degree of autocratic control. While the enforcement of law is a key principle of the democratic aspect of the Western civilization, it was used flexibly in the colonies: the use of "emergency" powers was a crucial element of colonial crime and social control, and one that was continually executed in an undemocratic manner.⁶⁰ Colonies operated in a state of conquest, having been overtaken by foreign states, and were therefore at the mercy of the colonial's power and authority. As Hussain observed, in theory, these states were able to function under their own authority; however, through bodies such as those within local governmental parliaments, they were truly under the authority of the imperial power—an authority that was enforced through military means (2003, 6).

Colonial powers also instated and developed elite local bodies with judicial and legislative powers, but these powers were limited (Brown 1993; Tan 2010). The co-existence of these authorities—one internal system that had powers that were ultimately limited, and one less visible system of colonial control that had the true power—created a split legal and political unconsciousness. In India, for instance, the British developed a relatively advanced judiciary, but kept certain Acts outside the realm of the judiciary. Significantly, these Acts included Regulation

⁵⁹ Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003) at 25.

⁶⁰ *Idem*.

III of 1818 of the Bengal Code regarding the Confinement of State Prisoners, which allowed detention without trial for “reasons of state.”⁶¹

Edward W Said observes that a collective culture of control is not merely an aspect of outside control of a colony; it is a result of the interaction between the colonist and the colonies, the struggle of a colonized people, and the ambition of the local elite (1993, 9). Nathan Brown supports this observation by arguing that the collective culture of control creates synergies and conflicts between, for example, the ambition of a colonizer for economic expansion and the ambition of the elite class within a colony for power and control.⁶² This dualism of the culture of control divides the colonist from the colonial people, but it is the same aspect that divides the majority of a people from the elite or the dominant class in the post-colonial era. However, while the colonist and the elite are the dominant players in their respective periods of history, they are not necessarily equal in position and privileges.

Hierarchy plays a significant role in the distribution of authority. Hierarchy is a dualistic idea, designed to justify the subjection of a population to the power of the dominant classes. I will limit my discussion of hierarchy to its role in creating a repetitive pattern of dualism in societies, and the clear defects of this pattern in creating functional colonial and modern states. The notion “dualism” has different uses, but basically it is the existence of two opposites. P F M Fontaine defines it as “two utterly opposed conceptions, systems, principles, groups or kinds of people, or even worlds, without any intermediate terms between them.”⁶³ Fontaine argues that the

⁶¹ *Idem*, at 6; Frank Challice Constable & Matthew Henry Starling, *Indian Criminal Law and Procedure, Including the Procedure in the High Courts, as well as That in the Courts Not Established by Royal Charter* (London: Wm. H. Allen & Co, 1870) at 880.

⁶² Nathan Brown, “Retrospective: Law and Imperialism: Egypt in Comparative Perspective” (1995) 29:1 *Law & Society Rev* 103 at 105-6.

⁶³ PFM Fontaine, *The Light and the Dark: A Cultural History of Dualism*, vol XV (Amsterdam: JC Gieben, 1986) at 3.

understanding of dualism should be limited for “unbridgeable oppositions.”⁶⁴ The sharp division of the state of things into twos, such as right versus wrong, high versus low, and ordinary versus exception, is a “strict dualism,”⁶⁵ as opposed to “moderate dualism,” which is mostly used in theology and the philosophy of body and soul.⁶⁶ Our discussion is limited to strict dualism. The problem is in applying two different systems in similar cases, for instance, trying colonized civilians before a military court and European civilians before an ordinary court. In such a case, duality is a system of privileges or a system of suppression, depending on how it is applied.

Background on the notions of imperialism, colonialism, and neo-colonialism

Social and political scientists have increasingly used the term “colonialism” to refer to forms of political domination. Yet it is used in an inconsistent way (Gartrell 1986, 12). The meaning of any notion is often associated with a particular era and circumstances. Therefore, in order to distinguish one “colonial” form from another, other notions have emerged, such as “internal colonialism,” “hidden colonialism,” and “neo-colonialism.” Among the many forms, I focus on two: colonialism in its classical meaning and neo-colonialism, and their relation to imperialism.

Colonialism in its classical meaning refers to the European political occupation and expansion overseas that spread widely during the nineteenth and twentieth centuries. The British and the French colonial empires were the largest in the twentieth century. By 1922, the British colonial empire—the largest in history—held 22.6 percent of the earth’s total land, whether as colonies, protectorates, or commonwealth.⁶⁷ Together, Britain and France held roughly 30 percent

⁶⁴ *Idem*, at 5.

⁶⁵ Andrew Pyle, “Nicholas Malebranche: Insider or Outsider?” in GAJ Rogers, Tom Sorell & Jill Kraye, eds, *Insiders and Outsiders in Seventeenth-Century Philosophy* (New York: Routledge, 2009) at 127.

⁶⁶ Armin Lange, *Light against Darkness: Dualism in Ancient Mediterranean Religion and the Contemporary World* (Göttingen: Vandenhoeck & Ruprecht, 2011) at 127.

⁶⁷ Edward W Said, *Culture and Imperialism* (New York: Knopf, 1993) at 8.

of the world's land area. Said argues that this massive spread of European imperialism created a general worldwide pattern of imperial or modern "metropolitan West" culture transferred to its distant territories (1993, xi–xii).

The classical form of colonialism is thus a consequence of imperialism.⁶⁸ Direct colonialism has mostly ended primarily in armed and cultural resistance. On the other hand, imperialism—the procreator of colonialism—still exists worldwide, reflecting a combination of "metropolitan West" cultural, political, economic, and social patterns (Said 1993, 9). Said refers to imperialism as "the practice, the theory, and the attitudes of a dominating metropolitan center ruling a distant territory[.]"⁶⁹ Said uses the term "metropolitan West" to explain the extensive and dominant nature of imperialism.

Said argues that the extensiveness of imperialism is easier to identify within colonial empires; American imperialism cannot be measured with the same tool. This is due to the nature of later imperialism, or, as we will refer to it in this dissertation, "neo-colonialism," which is more concerned with cultural, economic, and political patterns than with actual settlers within specific geographical areas⁷⁰—even though we cannot ignore the impact of invasions and the establishment of military bases abroad.

The dominant nature of earlier colonial empires such as that of the Spanish and Portuguese differs from the British and French imperialism. While both kinds of empire sought territory and economic expansion, V. G. Kiernan argues that an idealistic purpose was added to the latter, which is the "civilizing mission."⁷¹ Teaching the "arts of good government" was seen from the imperial

⁶⁸ *Idem*, at 9.

⁶⁹ *Idem*.

⁷⁰ *Idem*, 9–11.

⁷¹ V. G. Kiernan, *The Lords of Human Kind: European Attitudes Towards the Outside World in the Imperial Age* (Harmondsworth, UK: Penguin Books, 1972) at 24.

standpoint as an ethical duty, or, as Kiernan describes it, a “belief of a ‘divine right’ of force[.]”⁷² He explains that Western thinking believed that imperialism had saved backward societies through teaching them self-government and pulling them out of their isolation into a global market.⁷³

Michael Mann, in “Britain’s Ideology of a ‘Moral and Material Progress’ in India” (2004), argues that while British and French imperialism aimed to uplift uncivilized nations, these empires could not do that without creating hieratical forms of supervision and control.⁷⁴ Harald Fischer-Tiné and Michael Mann show that the French, in particular, aimed to spread “universal principles” of liberty and justice derived from the French Revolution.⁷⁵ They describe this noble, yet imperfect concept by stating that:

The idea of a civilizing mission rested upon the twin fundamental assumptions of the superiority of French culture and the perceptibility of humankind. Also, it implied that colonial subjects were too backward to govern themselves and that they had to be “uplifted” [...]. However, in spite of this “enlightening agenda,” the concept of the *mission civilisatrice* was used above all for the self-legitimation of colonial rule.⁷⁶

The imperial belief, whether French or British, of the colonizer’s civilizing mission, has the goal of legitimizing the imperial order. As for advancing what the empires saw as backward nations, J A Hobson argues that the arts of self-government remained within the empires and were not truly

⁷² *Idem*, at 157.

⁷³ VG Kiernan, “Tennyson, King Arthur, and Imperialism” in VG Kiernan, ed, *Kaye, Poets, Politics, and the People* (London: Verso, 1989) at 129-51.

⁷⁴ Michael Mann, “Britain’s Ideology of a ‘Moral and Material Progress’ in India” in Harald Fischer-Tiné & Michael Mann, eds, *Colonialism as Civilizing Mission: Cultural Ideology in British India* (London: Anthem Press, 2004) at 18.

⁷⁵ It should be noted that the spirit of the French revolution is a factor that differentiates the French from British colonial tactics, as we will see in Chapters 4 and 6.

⁷⁶ Mann, *Supra* 74, at 4.

granted in most colonies, except some commonwealth territories such as Canada and Australia.⁷⁷

He describes the spreading of the skills of self-governing within the period of his study, which covers the nineteenth and early twentieth century, as an act of manipulation:

[W]ithout discussing here the excellencies or the defects of the British theory and practice of representative self-government, to assert that our “fixed rule of action” has been to educate our dependencies in this theory and practice is quite the largest misstatement of the facts of our colonial and imperial policy that is possible. Upon the vast majority of the populations throughout our Empire we have bestowed no real powers of self-government, nor have we any serious intention of doing so [...]. Of the three hundred and sixty-seven millions of British subjects outside these isles, not more than eleven millions, or one in thirty-four, have any real self-government for purposes of legislation and administration.⁷⁸

The selectivity in spreading and transplanting the arts of government guaranteed Western powers the upper hand over other nations. Said calls this imbalanced relationship a “flexible positional superiority.”⁷⁹ By keeping what imperialism viewed as backward nations where they are, there will always be a need for the knowledge and expertise of the West (Said 1994). For example, during the 1870s, while Egypt was an Ottoman province, it declared its inability to pay a debt borrowed from Europe. As a result, the Anglo-French Dual Control committee was established to supervise the Egyptian budget. This Anglo-French expert body was not only responsible for the budget, but also for practicing political pressure that resulted in replacing the ruler Isma’il Pasha

⁷⁷ JA Hobson, *Imperialism: A Study* (New York: Gordon Press, 1975) at 114-18.

⁷⁸ *Idem*, at 114.

⁷⁹ Edward W Said, *Orientalism*, 1st Vintage Books ed (New York: Vintage Books, 1979) at 7.

with Khedive Tawfiq.⁸⁰ According to Juan Cole, this kind of external intervention is called “informal imperialism.”⁸¹

Informal imperialism refers to situations in which European control is practiced without claiming sovereignty, as in the case of British control over China in the nineteenth century (Yadav 2009, 27). Unlike colonialism, informal imperialism is political and economic in nature with minimal or no military involvement. Cole, in *Colonialism and Revolution in the Middle East* (1993), argues that during the eighteenth and nineteenth centuries, particularly in the Middle East, “colonies often existed before colonialism.”⁸² This means that imperialism dominated many parts of the world politically and economically whether or not direct colonization took place (1993, 3).

In the second half of the twentieth century, the United States led global progress through globalization and cultural imperialism.⁸³ Said argues that, as a non-classical colonist, the United States views itself as a “righter of wrongs” to counter tyranny and defend freedom worldwide.⁸⁴ The Vietnam War, the Gulf War of 1990–1991, and the 2003 invasion of Iraq are examples among many of the intervention of the United States as the neo-colonial power. Similar to the empires in their imperial “civilizing mission,” the United States appears to be the hero that corrects political wrongs and spreads liberty and democracy.⁸⁵

The term “neo-colonialism” has emerged with the fading of colonialism and the growth of American imperial power. Ella Shohat argues that the term “neo-colonialism” suggests that colonialism in its classical sense is in the past, but its cultural, economic, and political effects are in the present through a repetition of the old colonial rationale, yet with new distinctive forms of

⁸⁰ Juan Cole, *Colonialism and Revolution in the Middle East: Social and Cultural Origins of Egypt's 'Urabi Movement* (Princeton: Princeton University Press, 1993) at 14-15.

⁸¹ *Idem*, at 3.

⁸² *Idem*.

⁸³ The Dictionary of Human Geography, *sub verbo* “cultural imperialism” (Malden: Blackwell, 2009) at 96.

⁸⁴ Said, *Supra* 67, at 5.

⁸⁵ *Idem*.

practice.⁸⁶ These practices include international corporation, supra-national bodies, and globalization, which, according to some, require maintaining the dependency of developing and less developed countries on highly developed countries and their corporations.⁸⁷

Neo-colonialism and post-colonialism are not the same. “Post-colonialism” refers to the theory and literature of societies affected by colonialism. Thus, no direct external pressure is practiced to maintain the past, yet the continuity of the past colonial heritage is inevitable (Said 1994, 4–6; Shohat 1992, 105–6). Declaring independence by former colonies was not enough to challenge the colonial power structures. Thus, “colonialism” remains the focal point in “post-colonialism,” yet without a need for resistance.⁸⁸ Neo-colonialism, on the other hand, implies domination and a different level of resistance than was present in colonialism.

The common features of imperialism, colonialism, and neo-colonialism

This dissertation suggests that advancing what imperialism viewed as backward nations, whether through the imperial civilizing mission or the neo-colonial arts of democracy, required four main things: economic expansion and reforms, centralization, militarism, and exceptional regulations and measures. I should mention that exceptionalism, which is the set of measures regulated by law or necessity that allow temporarily rule outside the umbrella of law, is treated in this dissertation as the most important and most complex factor. This is due to the direct link between exceptional measures and counter-terrorism. Anti-terrorism law is a combination of several disciplines including criminal law, immigration law, and financial law, but the criminal nature of anti-

⁸⁶ For an analysis of post-colonialism, see Ella Shohat, “Notes on the ‘Post-Colonial’” (1992) 31/32 *Third World and Post-Colonial Issues* 99 at 105-6.

⁸⁷ Douglas Andrew Yates, *The Rentier State in Africa: Oil Rent Dependency and Neocolonialism in the Republic of Gabon* (Trenton, NJ: Africa World Press, 1996) at 4-5.

⁸⁸ Shohat, *Supra* 86, at 107.

terrorism remains central. However, many exceptions have been added to this field, in a way that makes it closer to exceptional powers. The forms of the exception include detention without trial and even declaring states of emergency for long periods, as is the case in Egypt.

This section does not treat these factors equally, but gives each factor enough explanation while keeping in mind its relationship to the colonial and neo-colonial experience and their impact on contemporary counter-terrorism. The four above factors are at the core of an intermittent path of imperial domination rearising in the twenty-first century under neo-colonialism. This section will define these factors and show how each emerged as a colonial strategy of domination. In addition, it shows how each remained in place in former colonies after independence, but before neo-colonialism. Lastly, it explains how each continues to appear in neo-colonialism, specifically in the war on terror.

The economic aspect

Supporters of colonialism claimed that part of the imperial civilizing mission was advancing the economy of colonies.⁸⁹ Opposite to this view, a vast literature questions the intentions of colonialism, which is seen to have desires to expand its markets and control the means of production (Hobson 1975; Kiernan 1995). The economic aspect suggests that political control and economy are unseparated. The colonial power needed to introduce capitalism to colonies in order to sustain the import of raw materials to the West while establishing Western markets in colonies. Post-independence, colonial political and military presence no longer existed, but Western markets remained and expanded in the post-colonial world. The Western domination of the global economy is at the core of neo-colonialism. This section addresses the economic aspect as a driver of neo-

⁸⁹ Peter Fitzpatrick, "Custom as Imperialism," in JM Abun-Nasr & U Spellent, eds, *Law and Identity in Africa* (Hamburg: Helmut Buske: 1990) at 132.

colonial powers in the war on terror. FATF is one example of placing economic pressure on countries to adopt counter terrorism financing regulations, which we will come to in a following paragraph.

Raw materials, including agricultural and mining imports, were fuel to the Western industrial economy. Ronald H. Chilcote suggests that colonists needed not only to benefit from importing raw materials during colonialism, but also to ensure the sustainability of this importation even post-colonialism. This required establishing a global market and controlling its rules. Western colonialism introduced capitalism to colonies as a step in expanding Western markets and to pull colonies into the then-emerging pool of globalization. Asian and African colonies became the new consumers of Western products.⁹⁰

Another political reason behind transplanting capitalism in colonies was to prevent the spread of communism, which was seen as a threat to the imperial economy and markets. One need only look at the British counter-insurgency operations in Greece, Cyprus, and Malaya to recognize this fact. David French points out that in Malaya and Cyprus, Chinese and Greek-language schools were considered sympathetic to communism, and thus were treated as “the enemy.” Colonial educational funds were spent on English and Malay language schools. This was part of the British way of “winning hearts and minds.”⁹¹

Kiernan has argued that Western imperialism was different from previous empires in its universality,⁹² insofar as it established the basis of contemporary international trade and investment. This universality also differentiates Western imperialism from Russian imperialism,

⁹⁰ Ronald H Chilcote, “Globalization or Imperialism?” (2002) 29:6 *Latin American Perspectives* 80 at 81-83.

⁹¹ French, *Supra* 2, at 183.

⁹² VG Kiernan, *Imperialism and its Contradictions* (New York: Routledge, 1995) at 56-70.

the influence of which remains limited within specific regions. Mary Evelyn Townsend sees this universality in the increasing cooperation between the state and private sectors; together they shaped the industrial world and capitalism. The state protects investors, improves diplomacy, and supervises economic growth (1941, 4). The economy can thus be seen as an engine of national political and civil activities and global relationships.

In a neo-colonial era, supra-national bodies, above all the FATF, have been established as part of protecting and supervising national and global economic growth. The FATF is an inter-governmental body established in Paris in 1989 by the Group of Seven (G7). Its mandate included combating money laundering,⁹³ but was later expanded to regulate measures regarding combating terrorist financing.⁹⁴ This expansion was adopted in 2001 as a response to the 9/11 attacks. In its Special Recommendations on Terrorist Financing, the FATF called on states to implement UN Security Council Resolution 1373 and to criminalize terrorist financing.⁹⁵ Governments and bankers all around the world have responded to the FATF by adopting more regulations regarding money laundering and terrorist financing.

The influence of the FATF is not limited to imposing global regulations, but includes its growth in size from seven members to 37 members, mainly from the Organisation for Economic Co-operation and Development (OECD), and other observers and associate members. Among the associate members is the Middle East and North Africa Financial Action Task Force (MENAFATF), established in 2004. MENAFATF, as a sub-institution, is required to ensure the application of FATF recommendations and the relevant UN obligations within the MENA region.⁹⁶

⁹³ FATF Members and Observers, *FATF homepage*, online: FATF <www.fatf-gafi.org>.

⁹⁴ This mandate was expanded once more in 2011 to include proliferation financing.

⁹⁵ See the Special Recommendations on Terrorist Financing, FATF IX Special Recommendations, October 31, 2001.

⁹⁶ Middle East and North Africa Financial Action Task Force, online: MENAFATF <www.menafatf.org>.

This brings us to the financial and economic weight of the FATF. It has been argued that governments have been responding to the FATF because they “have found themselves under heavy moral, political, and economic pressure”⁹⁷ that if resisted would risk putting them on the “non-cooperative countries and territories” list and the “name and shame” list.⁹⁸ Supra-national institutions like the FATF and OECD have been accused, especially by those at risk of being listed, of adopting institutional imperialism and a neo-colonial policy.⁹⁹ J. C. Sharmen describes the FATF’s moral and economic pressure as follows:

[B]odies such as the FSF, FATF, and even the OECD operate in an environment of “institutional Darwinism,” i.e., of many close competitors operating to sustain any given regime, and member states who put increasing emphasis on getting “value for money,” creating pressure to adapt and survive. International institutions that fail to live up to members’ expectations or attract too much bad publicity may find themselves marginalized and strive of funds.¹⁰⁰

Post-colonial nations remain largely dependent on Western and supra-national financial aid. This has created a *de facto* subordination to the West, which, through economic pressure, has become able to direct political and global matters, including counter-terrorism.

⁹⁷ Tim Parkman, *Mastering Anti-Money Laundering and Counter-Terrorist Financing* (Pearson, 2012) at 154.

⁹⁸ Benn Steil & Robert E Litan, *Financial Statecraft: The Role of Financial Markets in American Foreign Policy* (New Haven: Yale University Press, 2008) at 36.

⁹⁹ George Gilligan, “Multilateral Regulatory Initiatives—A Legitimation-based Approach” in Justin O’Brien, ed, *Governing the Corporation: Regulation and Corporate Governance in an Age of Scandal and Global Markets* (Hoboken: John Wiley & Sons, 2005) at 130; Ronen Palan, Richard Murphy & Christian Chavagneux, *Tax Havens: How Globalization Really Works* (New York: Cornell University Press, 2013) at 205, 216.

¹⁰⁰ JC Sharmen, “The Agency of the Peripheral Actors: Small State Tax Havens and International Regimes as Weapons of the Weak” in John M Hobson & Leonard Seabrooke, eds, *Everyday Politics of the World Economy* (Cambridge: Cambridge University Press, 2007) at 52.

Centralization

Empires' desire for control, whether in their homeland or in colonies, has resulted in centralization. One scholar observes that: "In no part of the world has the question of administrative centralization assumed such importance as in France."¹⁰¹ This has been the case since the French monarchy, when powers were centralized within the hands of the ruler, forming a system close to authoritarianism.¹⁰² On the other hand, the British system is considered mostly localized, allowing in its homeland and in the colonies "a high degree of local independence and activity."¹⁰³ Nonetheless, since the nineteenth century there has been a tendency towards British central control regarding certain matters.¹⁰⁴ These include the police and other national security bodies. Since the British forms of centralization are mostly exceptional or emergency-related, I will address them in the next section, which is dedicated to emergency and emergency-like powers. Our focus in this section will thus be on French centralization and its colonial legacy.

Modern French centralization can be linked to the Revolution and the Napoleonic government—both have had large influence over Europe and worldwide. The historical conditions of the French Revolution required making order the priority of the new-born government. Historians show that a highly centralized government was the way to stability.¹⁰⁵ Napoleon formed an excessively central government,¹⁰⁶ successfully involving himself in financial, legal, and military plans. He consolidated authoritarian powers, titling himself the First Consul. Whenever he did not get the approval of legislative or political bodies, he bypassed them through plebiscite.

¹⁰¹ James T Young, "Administrative Centralization and Decentralization in France" (1898) 11 *Annals of the American Academy of Political and Social Science* 24 at 24.

¹⁰² William W Smithers, "The Code Napoléon" (1901) 49:3 *American Law Register* 127 at 130.

¹⁰³ James T Young, "Administrative Centralization and Decentralization in England" (1897) 10 *Annals of the American Academy of Political and Social Science* 39 at 40.

¹⁰⁴ *Idem*, at 41, 57.

¹⁰⁵ Charles B Wheeler, "The Code Napoleon and its Framers" (1924) 10:3 *American Bar Association Journal* 202 at 204.

¹⁰⁶ Young, *Supra* 101, at 287.

It was through plebiscite that he obtained the position of First Consul for life, which granted him the upper hand over many authorities within the Prefects.¹⁰⁷

A centralized administrative system was established in France by a law passed on 17 February 1800, creating the Prefectural organization. The law shows the high degree of centralization:

There shall be in each department a Prefect, a Council of Prefecture and a General Council for the Department, which shall discharge the functions now performed by the administrations and commissioners of the Department [...]. The Prefect alone shall be in charge of the administration [...]. The First Consul shall appoint the Prefects, the Councillors of Prefecture, the members of the General Council of the departments, the General Secretary for the Prefecture, the sub-prefects, the members of the district council, the mayors and deputies of the cities of more than five thousand inhabitants, the commissioners-general of police and Prefects of police in the cities in which they shall be established.¹⁰⁸

Another important era within the French experience is the Second Empire (1852–1870) under the rule of Louis Napoleon. Centralization was broadened further, allowing the emperor to dissolve the parliament and to declare a state of siege. These authorities have been amended and contained, but they still exist in most Arab constitutions, as we will show later. In colonies, centralization is directly connected to exceptional and emergency powers, primarily under the British martial law or the French state of siege, both of which will be addressed in following sections regarding exceptionalism.

¹⁰⁷ Williams Robert, “Napoleon's Administrative Army—His Prefects” *Fondation Napoléon*, online: Fondation Napoléon <www.napoleon.org>.

¹⁰⁸ *Idem*.

The connection between centralization and the post-colonial world is explained by Nathan Brown in “Law and Imperialism: Egypt in Comparative Perspective” (1995). Middle Eastern states, whether those that were colonized by Britain or those that remained independent, adopted a French legal system. This willing adoption of the French system requires us to consider the reasons for the attractiveness of this model.¹⁰⁹ As Brown observes, the French legal system was adopted because of its usefulness in centralizing the power of the dominant groups. What attracted such elites was not the Western nature of the legal systems they constructed but the increased control, centralization, and penetration they offered. It is instructive in this regard that Middle Eastern states generally turned to civil law, most often French models. This includes non-Arab states, Iran and the Ottoman Empire (1995, 116–17).

Brown suggests that the French system offered a unified law code and a nationwide hierarchy of courts to enforce it. While rulers may not have been able to influence individual decisions by courts, they would have tremendous influence over how courts would approach disputes submitted to them—much more influence than they would have had over Islamic law courts, customary courts, or a common law system (1995, 117). The French-style legal system constructed in Arab states over the past century and a half has been maintained precisely because of the benefits it provides to centralizing and reformist regimes. For example, for the Egyptians, who sought to challenge the British occupation with an equally effective tool, the French system was the ideal model to adopt.¹¹⁰ Francis Snyder and Douglas Hay explain the link between centralization and national law by observing that “the law which was exported from Europe and received in the Third World was not, however, simply metropolitan law. It comprised the most

¹⁰⁹ Brown, *Supra* 62, at 103-4; Nathan Brown, “The Precarious Life and Slow Death of the Mixed Courts of Egypt” (1993) 25:1 *International Journal of Middle East Studies* 33 at 37.

¹¹⁰ Brown, *Supra* 62, at 116-18.

authoritarian aspects of European law, from which most provisions regarding social welfare, basic rights, and other entitlements largely had been excised” (1985, 12).

Egypt, as well as the rest of the Arab world, centralize their authority primarily within the exclusive domain of the president. While Article 71 of the 2014 Tunisian constitution states that “The State shall commit to support decentralization,” a following article, Article 77, suggests otherwise. It grants the president great authority and does not differ from the 1959 constitution in centralizing the powers with the president.¹¹¹ Both in Egypt and Tunisia, centralized authorities are granted by the constitution or by law.

Another feature of centralized administration is the police and security forces. Roger Owen argues that security is a common aspect of modern states, but it was highly essential for the colonial power as the key to political power (2004, 10–12). Brown supports this argument by showing that during colonialism, there was more focus on police and security forces than on education or public health.¹¹² In colonial Palestine and in Egypt, the British created several security and intelligence bodies to monitor insurgents. These included the Palestine Police Force (PPF), the Criminal Investigation Department, military intelligence, Defence Security Officer (MI5 station) and other intelligence services.¹¹³ According to David A. Charters, in “Counter-insurgency Intelligence: The Evolution of British Theory and Practice” (2009), “The army and the PPF had access to the Egypt-based Combined Services Detailed Interrogation Centre (CSDIC).”¹¹⁴

While the colonial regimes had their own security and interests to think of, their successors followed the same path (Owen 2004, 10). This can be seen in the overlap between the civil state

¹¹¹ See Articles 44 and 45 of the 1959 Tunisian Constitution.

¹¹² Brown, *Supra* 62, at 117, Owen *Supra* 10, at 10-12.

¹¹³ David A Charters, “Counter-insurgency Intelligence: The Evolution of British Theory and Practice” (2009) 29 *Journal of Conflict Studies*, online: <<https://journals.lib.unb.ca>>.

¹¹⁴ *Idem*.

and the police-military state. Owen shows that just as the colonial power used the military to secure its occupation and its political control, modern Arab states widely depend on the police and the military to secure the political regime.¹¹⁵ The priority of the security and stability of the colonial state created a culture of ruling and resisting by force. This culture was carried into the post-colonial Arab world. After colonialism, Egypt and Tunisia established larger police forces, and Egypt expanded its army and equipped it with modern weapons.¹¹⁶ Security forces are generally centralized with the executive or the president. For instance, in both Egypt and Tunisia, the president holds the position of the Supreme Commander of the Armed Forces¹¹⁷ and is the head of the National Security Council¹¹⁸ and of the National Defense Council.¹¹⁹

Another centralized authority can be found in emergency powers, which are left to the president and are regulated within the constitution in a way that makes these powers appear to be normal rather than exceptional (Brown 2002, 12). The problem is not in regulating emergencies, but in normalizing them, as well as in the interpreting of terms like “danger” and “threat.”¹²⁰ The other problem is in declaring a state of emergency to deal with domestic crimes like terrorist offences. The exaggeration that such crimes are exceptional and that exceptional measures are required led to an endless state of emergency in Egypt. Egypt has announced that a new counter-terrorism law will be adopted to replace the state of emergency. However, this is a way to mask exceptional rules through constitutional and legal reforms. This point is addressed further in Chapter 5.

¹¹⁵ Owen supports his argument by showing the budget indicated for security compared to education and other substantial sectors. Owen, *Supra* 10, at 10-12.

¹¹⁶ *Idem*, at 24.

¹¹⁷ Article 152 of the 2014 Egyptian Constitution; Article 77 of the 2014 Tunisian Constitution.

¹¹⁸ Article 205 of the 2014 Egyptian Constitution; Article 77 of the 2014 Tunisian Constitution.

¹¹⁹ Article 203 of the 2014 Egyptian Constitution.

¹²⁰ *See* Article 80 of the 2014 Tunisian Constitution.

Global centralization

Global centralization arises in the modern context of neo-colonialism. At the international level, privileges are granted to some nations over others. For example, the United Nations functions based on equal sovereignties; this is particularly true within the General Assembly. On the other hand, this formal equality is limited by centralizing major powers within the Security Council. The domination of the Security Council in anti-terrorism policy-making reflects the actual power of its permanent members, particularly the United Kingdom, the United States, and France.

The contemporary global system, or, as we will refer to it, neo-colonialism, operates in a context of centralization in global policy- and decision-making. By establishing politically and financially powerful supra-national bodies like the UN Security Council and FATF, the influence of neo-colonialism is practiced and achieved through political pressure. These supra-national bodies have been increasingly involved in establishing international obligations regarding counter-terrorism. They are imposing the Western agenda of crime and culture control, leaving no choice to other nations except to continue complying with the system.

The UN Security Council, under Chapter VII of the UN Charter, has issued international obligations regarding criminalizing terrorism and terrorism financing, listing, travel restrictions and many other obligations. It has granted itself the absolute authority to list and de-list without sharing its reports, evidence, or reasons. Kent Roach observes that the Security Council has been acting solely without judicial and legislative checks of democracies. He argues that:

The post-9/11 dominance of the Security Council as a super-executive parallels the dominance of domestic executives over security matters. The Security Council has acted quickly and often secretly as an executive that can list terrorists and require states to comply with asset freezes and

travel ban. At the same time, the Security Council has also acted as a legislator in the sense of imposing permanent and general obligations on states.

Such broad authority as practiced by the Security Council is due to the fact the UN Charter did not set detailed limitations on the role of the Security Council. Thus, any critique is made here is in accordance with general legal principles and human rights. Chapter 2 provides further critique of the Security Council's role and its imperfect approach to counter-terrorism.

The FATF is another supra-national body that centralizes powers regarding counter terrorism financing. Its role and impact has been discussed in the previous section regarding the economic aspect of imperialism/colonialism/neo-colonialism. To avoid repetition, we limit the discussion here to the observation that the financially powerful forces tend to centralize their control, affecting the political and economic monopoly of power. Counter terrorism financing, while important, affects nations' internal governance.

Militarism

Militarism was a colonial tool that secured the imperial order (Kiernan 1995, 133). This section examines the rationale behind the colonial use of militarism, and a brief description of the colonial experience of militarism. The basis of the colonial experience of militarism is in the theory and practices of counter-insurgency. The argument in this section is that current methods of counter-terrorism are borrowed from colonial counter-insurgency. Hocking emphasizes that the importance of linking the theory of counter-insurgency to counter-terrorism is that it shows how a military approach that was used during colonial wartime is being applied during peacetime to a domestic

crime (terrorism) that includes violent and non-violent acts.¹²¹ Martial law is another colonial method that is supposed to be limited to exceptional circumstances. However, in the post-colonial world it has become an ordinary system, as will be shown later in this section. The colonial rationale that justified the use of the military to suppress nationalists in the name of protecting the legitimate colonial government is the same that is used today in counter-terrorism. Lawful acts are being criminalized in both Western democracies and authoritarian regimes in the name of protecting society and its stability.

Karl Liebknecht explains militarism as a means to an end. This means has been used in protecting the economy of empires (2011, 21). Claudio Colaguori shows that from the days of the industrial revolution, military conflicts have been tied to the economy of imperialism.¹²² The colonial economic expansion was not achievable without militarism, which secured industrial capitalism and its markets.¹²³ The logic of militarism suggests that the distinctive line between “right” and “wrong” lies in obeying commands and following the rules. This logic is commonly known as the “military spirit.”¹²⁴ Liebknecht also calls it the “patriotic spirit,”¹²⁵ which is defined as “readiness at all times to strike at the enemy at home or abroad at the word of command.”¹²⁶ According to Liebknecht, this spirit does not require much intelligence. In fact, it may require the opposite: “a lack of understanding or even hatred of all progress, of every undertaking or striving which might threaten the domination of the ruling class in power for the time being.”¹²⁷ Each

¹²¹ Hocking, *Supra* 36, at 14-16.

¹²² Claudio Colaguori, *Agon Culture: Competition, Conflict, and the Problem of Domination* (Whitby: de Sitter Publications, 2012) at 80.

¹²³ Kiernan, *Supra* 92, at 27.

¹²⁴ Karl Liebknecht, *Militarism and Anti-militarism* (Montreal: Black Rose Books, 2011) at 21.

¹²⁵ *Idem*, at 21-23.

¹²⁶ *Idem*, at 31.

¹²⁷ *Idem*, at 33.

colonial power would eventually use the patterns and tactics of militarism to control the populations of its colonies.

Civilians who disobeyed orders by the military or the curfew established by martial law were subject not only to be arrested, but also to be killed on the spot. The Amritsar massacre is an example of this “shoot to kill” mindset. In 1919, the British army opened fire on nonviolent Indian protesters who were considered outlaws for violating the regulations of martial law.¹²⁸ The event was described and justified by Colonel Reginald Edward Harry Dyer, who gave the order to fire into the crowd:

I fired and continued to fire until the crowd dispersed, and I consider this is the least amount of firing which would produce the necessary moral and widespread effect it was my duty to produce if I was to justify my action. If more troops had been at hand, the casualties would have been greater in proportion. It was no longer a question of merely dispersing the crowd, but one of producing a sufficient moral effect from a military point of view not only on those present, but more especially throughout the Punjab. There could be no question of undue severity.¹²⁹

Dyer, as well as other military officers, were convinced that his action was based on necessity.¹³⁰ On the other hand, many officials, including Winston Churchill, condemned Dyer’s extreme use of force and considered it exceptional and unacceptable.¹³¹ This debate brings us to the core problem of the conflicting outcomes of the correlation between law and force (Hussain 2003, 101).

¹²⁸ Hussain, *Supra* 59, at 100; Victoria Nolan, *Military Leadership and Counterinsurgency: The British Army and Small War Strategy Since World War II* (London: IB Tauris, 2012) at 51.

¹²⁹ Quoted in Hussain, *Supra* 59.

¹³⁰ Nigel Collett, *The Butcher of Amritsar: General Reginald Dyer* (London; New York: Hambledon & London, 2005) at 26.

¹³¹ William Manchester, *The Last Lion: Winston Spencer Churchill: Visions of Glory, 1874–1932* (Boston: Little, Brown, 1983) at 694.

Hussain argues that if the colonial power acted in accordance with the rule of law, its practices, especially within the system of martial law, suggest a lack of adherence to such a theoretical framework.¹³² The problem in colonies was in confusing the notion of ruling by law and ruling by sovereign act, which, as Hussain describes it, is a conflict between “reason and will, *ratio* and *voluntas*.”¹³³

Militarism during colonialism

The subject of militarism is wide, but we limit our study to colonial counter-insurgency as a militarized method of crime and social control. According to French, counter-insurgency was used against communism and nationalism in parts of colonies in South Asia, Southeast Asia, Africa, and Eastern Europe. In Malaya, the British model of counter-insurgency focused on political subversion and not only the guerrillas, and because of the belief of the moral rightness of the imperial mission, any opposition was unacceptable. To this end, targeting the whole ideology of communism and its believers led to justifying capturing both the guilty and the innocent. Coercion seemed effective and as a result was justified (2011, 72–73).

The British colonists, due to their commitment to the principle of “minimum use of force,” were less coercive, especially when compared with the French.¹³⁴ However, David French argues that the principle “minimum use of force” allowed using force, only not systematically.¹³⁵ Counter-insurgency thinkers saw the military approach as essential; however, they admitted that military action alone could not guarantee the objective of counter-insurgency, which is stability (Kitson 1971; Thompson 1966; Galula 1964). Therefore, suggests the British military officer Sir Robert

¹³² Hussain, *Supra* 59, at 6.

¹³³ *Idem*, at 7.

¹³⁴ French, *Supra* 2, at 75-79.

¹³⁵ *Idem*.

Thompson, in order to counter insurgency, a strong administrative structure should be established that can “keep pace with the aspirations of the people while at the same time creating an atmosphere of order and stability[.]”¹³⁶ Thompson’s suggestion consolidates centralization and executive powers.

Martial law is another militarized method of domination. Martial law has its own features, therefore is discussed in more detail in the following section on exceptionalism and emergency powers. Martial law thus combines militarism and exceptionalism. It is a system of suspending law and immunizing the military from accountability. The necessity of security justified the temporary suspension of ordinary law under colonialism. Martial law was not the only exceptional method of control. The “legality” of this system allowed the creation of an exceptional chain of colonial methods of crime control, such as detention without trial and martial-law tribunals. The justification of these tribunals can be seen in William E. Birkhimer’s argument that “Both common-law courts and martial-law tribunals have the same origin—custom approved by those who have the power to enforce their decrees.”¹³⁷ The school of thought of legal positivism suggests that the existence of a legal system depends on the governmental body that issues it, and not the substance and ideals of law. British legal theorist John Austin favors the formality of the law over its merit by stating that: “The existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry” (1832, 157).

According to Birkhimer, the rationale of martial law is that of necessity.¹³⁸ However, attempts to define “necessity” have been unable to set its limits. In fact, the circumstances that fall

¹³⁶ Robert Thompson, *Defeating Communist Insurgency: Experiences from Malaya and Vietnam* (New York: FA Praeger, 1966) at 70.

¹³⁷ William E Birkhimer, *Military Government and Martial Law* (Kansas City, Mo.: F Hudson, 1914) at 526.

¹³⁸ *Idem*, at 371.

within necessity are left to the determination of the governmental authority that has the right to invoke martial law. Whether because of a rebellion, a civil war, or a threat of an invasion, the utility of martial law is claimed to be that of maintaining order and security. When the ordinary authority is unable to secure the right to life and to protect property during emergencies, the military is authorized to take control and bring peace and order.¹³⁹ According to Hussain, by suspending ordinary law, martial law aims to reflect the “legal maxim *Salus populi suprema est lex* (safety of the people is the supreme law).”¹⁴⁰ This represents the highest law and the state of no law at once (2003, 102). Thus, lawful violence remains the tool of enforcing the supreme law. In the post-colonial world, martial law became an ordinary system. Hussain argues that the colonial legacy justified the creation of a jurisprudential doctrine that remains in India and Pakistan. Courts in these two countries have frequently used this doctrine as part of the common law to allow the executive and the military authority to take control over the civil government.¹⁴¹ Thus, martial law depends on a formalistic doctrine that allows a governmental authority to issue or permit it.

Militarism during neo-colonialism

In the aftermath of World War II and the fading of colonialism, there has been a decrease in the use of armed force. However, neo-colonial Western intervention, led primarily by the United States and its allies including the North Atlantic Treaty Organization (NATO), has affirmed the re-emergence of militarism as a political tool of control. Under the pretext of security necessity, between 1960 and 2005 France launched 46 military operations in its former African colonies.¹⁴²

¹³⁹ *Idem*, at 407.

¹⁴⁰ Hussain, *Supra* 59, at 102.

¹⁴¹ *Idem*, at 137-38.

¹⁴² Christopher Griffin, “French Military Interventions in Africa: Realism vs. Ideology in French Defense Policy and Grand Strategy” (2007) Paper prepared for the International Studies Association Annual Convention, 28 February–3 March 2007, Chicago, IL.

Other examples that are directly related to counter-terrorism are the post-9/11 reactive American military attack on the Taliban in Afghanistan and the more recent military campaigns on ISIS in Syria. These events suggest a re-emergence of a militarized colonial rationale.

This has led scholars to link the war on terrorism to the colonial war on insurgency (McCulloch & Pickering 2009; Hocking 1993). The argument by such scholars is that, in order to prevent terrorism, political movements seeking to change existing circumstances were targeted by the same military strategies as were used by colonials.¹⁴³ As Hocking argues, the new focus on counter-terrorism has led to the implementation of a “domestic, peacetime adaptation of strategies originally developed to deal with the essentially wartime exigencies of a colonial power.”¹⁴⁴ Mark Brown observes that, when looking at criminalization, we can also see that aspects of counter-terrorism in contemporary times have a direct relationship to a colonial rationale of difference.¹⁴⁵

The current war on terror appears to use some of the features of militarism. Paul Wilkinson, a member of the London-based Institute for Study of Conflict (ISC), in his book *Political Terrorism* (1974) and his article “Terrorism versus Liberal Democracy” (1976) suggests that counter-insurgency measures must be considered while countering terrorism. He argues that “it is possible to draw from the recent experience of low-intensity and counter-insurgency operations certain basic ground rules which should be followed by liberal democracies taking a tough line against terrorism.”¹⁴⁶ Against this view, Philip Schlesinger shows the contradiction between military measures and liberal values, which means that the legitimacy of the methods taken to enhance internal security becomes questionable. Connecting counter-insurgency to counter-

¹⁴³ Hocking, *Supra* 36, at 19.

¹⁴⁴ *Idem*.

¹⁴⁵ Mark Brown, “‘That Heavy Machine’: Reprising the Colonial Apparatus in 21st-Century Social Control” (2005) 32:1 *Social Justice* 41 at 44.

¹⁴⁶ Paul Wilkinson, *Terrorism versus Liberal Democracy* (London: Institute for the Study of Conflict, 1976) at 10.

terrorism, he points out that counter-insurgency thought is organically related to the interests of power-holders and is a species of service research, akin to that in other areas of state policy. For Schlesinger, counter-insurgency is an aspect of population control.¹⁴⁷ He maintains that counter-insurgency is currently part “of the domestic exercise of state power in numerous Western European states faced with ‘terrorism.’”¹⁴⁸ The correlation between militarized and politicized actions has created a set of actions under the umbrella of exceptionalism and emergency powers.

Another aspect of colonialism and neo-colonialism related to militarism is elitism; the two correlate to each other. Sabah Alnasseri, in his article “Understanding Iraq” (2007), observes that security has always represented a concern to the elite, who seek to protect their status. The elite, therefore, tend to use their influence to militarize the state through military protection and bases of both internal and external origin (80–81). Alnasseri links the need to secure the elite to the phenomenon of terror, and more importantly to the war on terror, or, as he describes it, a “war of terror.”¹⁴⁹ In the case of Iraq, he points out two factors: “the Guantánamo-isation of Iraq, and the reactivation of *colonial* forms of rule and social forces under new circumstances.”¹⁵⁰ The militarized approach of ruling that is an extension of imperial norms aims to serve the elite and their relations with imperial powers.

In addition to the above points, militarizing the police has become a growing practice in the neo-colonial period.¹⁵¹ Specialized police forces are created to deal with specific

¹⁴⁷ Philip Schlesinger, “On Scope and Shape of Counterinsurgency Thought” in Gary Littlejohn, ed, *Power and the State* (London: Croom Helm, 1978) at 98-99.

¹⁴⁸ *Idem*, at 101.

¹⁴⁹ Pepe Escobar, interview with Sabah Alnasseri, “Basra: Class Struggle, Not Civil War” (1 April 2008) online: The Real News <therealnews.com>.

¹⁵⁰ Sabah Alnasseri, “Understanding Iraq” in Leo Panitch & Colin Leys, eds, *Global Flashpoints: Reactions to Imperialism and Neoliberalism* (Wiltshire: Merlin Press, 2007) at 78.

¹⁵¹ The root of specialized security units can be found in the British experience in Northern Ireland. Britain established military counter-insurgency units such as the Auxiliary Division, as well as police counter-terrorism units, including the Royal Irish Constabulary Special Reserve, known as the Black and Tans. The utility of such units was often controversial due to their excessive use of violence. See Anna Oehmichen, *Terrorism and Anti-terrorism Legislation:*

responsibilities and crimes. The specialization of police forces on its own is not a problem. In fact, it can enhance the productivity of crime control. However, despite the “police” label on their chests, the heavy guns that are carried by these forces—and the authority granted to them to “shoot to kill” suspects even when there is no direct and immediate threat to the lives of civilians¹⁵²—shifts their civil role of protecting the society and enforcing law into a militarized role of combating the enemy.

Exceptionalism and emergency powers

Among the four characteristics of colonialism and neo-colonialism mentioned above, exceptionalism represents the main link between the past and the present—between an imperial-colonial rationale and the current war on terrorism. The reliance on emergency powers in counter-terrorism, especially post-9/11, has brought the theory and practice of the exception to the surface. Practices like establishing special courts and detention without trial have a long history in the pre-colonial state, but colonialism was a direct way of spreading and legalizing these practices.

This section starts with an examination of the colonial and imperial use of exceptionalism. It addresses the British experience followed by that of the French. The section focuses more on the British experience for three reasons: First, the available sources written in English are mostly dedicated to the British experience. Second, unlike France, which used exceptionalism at home and in its colonies, Britain created a duality in applying exceptionalism. For example, martial law was declared in British colonies but never in Britain. This leads us to the third reason, which is the complexity of the British forms of exception in comparison with the French. Because of this duality

The Terrorised Legislator? A Comparison of Counter-terrorism Legislation and Its Implications on Human Rights in the Legal Systems of the United Kingdom, Spain, Germany, and France (Antwerp; Oxford; Portland: Intersentia, 2009) at 62; Lawrence James, *The Rise and Fall of the British Empire* (New York: Abacus, 1995) at 381-84.

¹⁵² Oehmichen, *Supra* 151, at 152.

and complexity of the British experience, the section separates discussion of colonial exceptionalism as applied in colonies and imperial exceptionalism as applied in Britain. The British colonial experience includes martial law, state of emergency, and special courts. On the other hand, the imperial experience within the United Kingdom includes the Defence of the Realm Act 1914 (DORA), and the Emergency Powers (Defence) Act 1939. The purpose of examining the forms of the exception in colonies and in Britain is to show that the first has had a great influence on post-colonial counter-terrorism, whereas the second has had a neo-colonial influence over the global war on terror.

Discussion of the French experience follows. This experience included two similar exceptional systems to the British: the state of siege and the state of emergency. However, the French adopted a revolutionary doctrine in the colonies that justified the use of coercion. Such logic still exists in the post-colonial world, as we will show in Chapter 7 when examining the Tunisian post-colonial experience.

The British experience

The British experience within its colonies

The British ruled their colonies according to the rule of law (French 2011, 75), which was generally designed based on political necessity. Necessity, however, allowed the British to establish exceptional systems like martial law and state of emergency that paralyzed the rule of law. The use of martial law to bypass law for the sake of preserving legal order presents a critical issue of the legitimacy of martial law—at least outside the frame of conventional wars and invasions. This issue resonates in post-9/11 debates (Dyzenhaus 2009, 3), as discussed at the end of this chapter. But for now, this section examines martial law and state of emergency.

Martial law

Martial law, as it has been known and applied in the nineteenth century and onwards, is basically a system that suspends ordinary law and replaces it with the will of the military commander during wartime or an emergency.¹⁵³ However, in previous stages of Britain's history, when no standing army was yet established, martial law had a narrower meaning. It was exclusively applied to soldiers during wartime. In this sense, it played the role of what is currently understood as military law. This early meaning of martial law can be found in Sir Matthew Hale's (1713) description:

The kings of the realm, preparatory to an actual war, were used to impose rules and orders for the due order of their soldiers, together with certain penalties on the offenders, and this was called martial law. But touching martial law, it is to be observed that in truth and reality it is not a law, but something indulged rather than allowed as law; the necessity of good order and discipline in an army is that only which gives these laws a countenance.¹⁵⁴

Even on this narrow meaning, martial law was considered an exceptional system based on “necessity,” “order,” and “discipline.” Today, it still has the same foundation, but its application has expanded to include military order over civil life (Birkhimer 1914, 371). Birkhimer shows that before the rule of Charles I (1625–1649), the class struggle that was escalating in Britain led to a fear of rebellion. Therefore, to pre-empt such a threat, an organized army and martial law were established.¹⁵⁵ Birkhimer does not provide a clear history of the use of martial law in that era, but he suggests that during episodes of public disorder, the crown enforced martial law, and rebels were punished under its rules. When Charles I came to power, he restricted the exercise of this

¹⁵³ French, *Supra* 2, at 75.

¹⁵⁴ Quoted in Birkhimer, *Supra* 137, at 372-73.

¹⁵⁵ *Idem*, at 374.

undefined power within the parliament.¹⁵⁶ It should be noted that the British Parliament never declared martial law in Britain.

In Ireland, martial law was established by act of parliament, and the lord lieutenant or other chief governor of Ireland was allowed to invoke it. In British colonies, the authority for declaring martial law was not the parliament; martial law was regulated by the common law, and the royal governors and military commanders had the authority to declare it.¹⁵⁷ The fact that parliament did not have exclusive authority to declare martial law in colonies suggests a duality and inequality of applying legal systems.

In “Round up The Usual Suspects: The Legacy of British Colonialism and The European Convention on Human Rights” (1966), Simpson describes the arbitrariness behind martial law under British rule:

Martial law belongs to a world in which, in effect, government makes war on those who do not accept its authority and makes no bones about what it is doing. This was, for example, what happened in the case of the Indian Mutiny, and in 1865, when Governor Eyre suppressed a supposed Jamaican insurrection. These government wars are not wars of an international character. Rather, they are wars waged against persons regarded as rebels or insurgents who, if not killed in military operations or summarily punished under martial law, may be tried as traitors or criminals. In the period when the imposition of martial law was a normal response to insurrection, it was not thought that the rebels acquired the rights of combatants in a war between states. In a sense, the rebels were treated worse than combatants in regular wars or than criminals under normal conditions. (634)

¹⁵⁶ *Idem.*

¹⁵⁷ Joseph B Kelly & George A Pelletier, Jr, “Theories of Emergency Government” (1966) 11 South Dakota L Rev 42 at 47.

Newly independent former colonies adopted imperfect democratic systems. They borrowed strategies of exceptionalism, such as emergency and emergency-like powers, special courts, and detention without trial, and incorporated them in national security laws and measures. They also accepted continued control from their former colonizers through different political and economic channels, as evidenced in the machinations of industrialism, the global market, and the arms trade.

State of emergency

The gap between the colonist and the local people increased because of this reliance on the military. This led the British to limit their use of martial law; instead, they established another exceptional form of rule: the state of emergency (French 2011, 57, 103). It has been argued that the shift from martial law to emergency powers aimed to replace the military with a more political system (Neocleous 2007, 496). However, the experience in colonies shows a continuous use of exceptional measures. According to David French, during the state of emergency in Brunei, over 2,200 person was arrested within three weeks. Citizens of the colony were detained without a trial, whereas non-citizens would be deported. And during the state of emergency in Malaya, over 2,000 non-citizens who were suspects of being communists were deported to China (2011, 34-35).

The case of Malaya shows a combination of exceptional and militarized measures. For instance, in 1948, the British adopted the Enemy Regulations Ordinance to suppress the insurgency of Malayan Communist Party during the state of emergency. According to the Ordinance, the High Commissioner of the Federation of Malaya has the power to issue regulations that are “necessary or expedient for securing the public safety or for the maintenance of public order.”¹⁵⁸ We should point out that insurgency was not limited to violent crimes, but also included strikes and public

¹⁵⁸ Section 20 (1) of Enemy Regulations Ordinance 1948, quoted in Kevin Tan, *Marshall of Singapore: A Biography* (Pasir Panjang: Institute of Southeast Asian Studies, 2008) at 259.

meetings. Major-General Frank Kitson, who served in the British army in Kenya, Malaya and Northern Ireland, is one of the best-known counter-insurgency thinkers. He argues in his book *Low Intensity Operations* (1971) that pickets, street corner meetings, and mass meetings are non-violent acts by themselves, but such acts can persuade others. According to Kitson, “if they can once be got onto the streets, even in relatively small numbers, it may be possible for the extremists to goad the authorities into taking some violent action against the moderates which will at least attract the sympathy of the uncommitted part of the population, some of whom may even align themselves with them” (82-83). Repressing associations was part of the theory and practice of counter-insurgency.

Other emergency regulations that were adopted in Malaya include Emergency (Strike and Lock-outs) Regulations 1948, Emergency (Travel Restriction) Regulation 1949, Emergency (Publications—Control of Sale and Circulation) (Advisory Committee) Rules 1950, Emergency (Newspaper) Regulations 1951, and Emergency (Restriction of Movement—Johore Straits) (Singapore) Regulations 1953.¹⁵⁹ Emergency powers in Malaya allowed a wide range of restrictions, which extended to post-independent Malaysia and Singapore under the infamous Internal Security Act 1960. This Act prohibits organizations and restricts associations, imposes strict censorship, and allows preventive detention, which we discuss further in Chapter 2.

The example of Malaya and other colonies suggests that the aimed political shift was superficial. Anil Kalhan observes that in India, for instance, the army was subsequently less involved in internal matters, yet an armed police force was created, which had the form of a civilian force but with the powers of the military (2010, 117). Kalhan’s research on colonized India suggests that even though, at least at some level, the colonial state sought to move away from

¹⁵⁹ Tan, *Supra* 158, at 262.

martial law and to instate emergency powers to “establish legality,”¹⁶⁰ a purpose of this shift was to ensure “colonial executive supremacy over even the limited space established during the decades preceding independence for democratic participation” (2010, 117). This means that the colonist was aware that many colonies were inevitably headed towards self-governance and democratization, and this fact meant a retreat from a colonial position of dominance. The British, anticipating this, willingly involved the Indians in self-governance. This tendency began in the eighteenth century and gradually evolved throughout the nineteenth and twentieth centuries.¹⁶¹ In India, a transition period was established as a step towards granting independence and establishing a democracy. During this period, the British Governor’s reserved powers remained fixed. These included extremely far-reaching capacities, such as the authority to suspend the constitution and to declare a state of emergency during threats to public security.¹⁶² Reserve powers also comprised the unnamed powers the Crown held for itself or for its representative under the residual royal prerogative (Tan 2010, 154).¹⁶³ According to Justice Herbert Vere Evatt, these powers were to be understood within the principle of “responsible government” of the colonies:

The term “Responsible Government” is frequently used to describe the method of government in which executive powers are required by custom to be exercised upon the advice of Ministers controlling majority in the popularly elected House of Parliament. The term has been applied, in the main, to the British Dominions. But there are several aspects of the matter which should be distinguished. First of all, it may be that certain powers and prerogatives have not been committed

¹⁶⁰ Anil Kalhan, “Constitution and ‘Extraconstitution’: Colonial Emergency Regimes in Postcolonial India and Pakistan” in Victor V Ramraj & Arun K Thiruvengadam, eds, *Emergency Powers in Asia* (Cambridge; New York: Cambridge University Press, 2010) at 117.

¹⁶¹ *Idem.*

¹⁶² Kevin Tan, “From Myanmar to Manila” in Victor V Ramraj and Arun K Thiruvengadam, eds, *Emergency Powers in Asia: Exploring the Limits of Legality* (New York: Cambridge University Press, 2010) at 154.

¹⁶³ *Idem.*

to the Dominions at all, being reserved for Imperial control under certain conditions. Secondly, the problem may be that of determining in the Dominion how a power, admittedly within the competence of some local authority, ought to be exercised, e.g., whether the Governor General or Governor retains a sufficient reserve of discretionary authority either to act against, or to refrain from acting upon, the advice of Ministers in office.¹⁶⁴

Kevin Tan observes that the reserve powers were embedded in the post-colonial constitutions of many former British territories, including “state-of-exception” powers. He argues that:

[T]he decolonisation process, so crucial in the framing of legal institutions in new states, has resulted in a structural legacy that treats as normal the exceptional situation of emergencies. Even though leaders of nationalist movements were often quick to denounce emergency legislation that gave colonial masters wide-reaching powers of detention and quite often the right to suspend the constitution, these same leaders were also quick to accept and adopt these reserve powers as part of their own constitutions even after colonial powers had long gone[.]¹⁶⁵

Tan links this tendency of adopting the colonial rationale to the short history and limited experience of constitutional traditions in Southeast Asia, where most states achieved independence after World War II. This short history of constitutionalism contributed noticeably to the way reserve and emergency powers were transplanted in the legal sphere of most Southeast Asian states (2010, 151). Nathan Brown suggests that post-colonial Arab states adopted constitutions, which granted rulers the same exceptional powers that colonists enjoyed. According to him, the British

¹⁶⁴ HV Evatt, *The King and His Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions* (London: Oxford University Press, 1935) at 12.

¹⁶⁵ Tan, *Supra* 162, at 151-54.

transplanted emergency powers into its Arab colonies, but did not transplant constitutionalism. (1997: 72–82; 2002 4-11)

The transplanting of emergency powers led to two things: 1) pressure on colonies to adopt an imperfect democratic system, which was achieved through transplanting exceptionalism (e.g., emergency and emergency-like powers, special courts, detention) into national security laws and measures; 2) a continuity of Western control but through different political and economic channels (e.g., industrialism, the global market, arms trade). An early example can be found in British India through the establishment of and the authorities granted to the East India Company (1600–1874). Later examples can be found in the multi-national corporations that dominate the global economic system.

Another violation by law was the practice of counter-insurgency by committee, which relied on secret intelligence without providing judicial safeguards. According to David French, the model of counter-insurgency by committee was developed as an alternative way of imposing martial law. Since the civil authorities and police were not under the control of the army, as was the case under martial law, the British established centralized administrative committees that had control over political, civilian, and military powers. This led, among many things, to underestimating the role of courts. “Subversives” were tried before military courts and sentenced to death in places like Palestine and Malaya,¹⁶⁶ and trials in camera were allowed in Kenya.¹⁶⁷

Besides these examples, detention without trial was a common practice. One of the main reasons the British believed that detention without trial was necessary is because they did not want to disclose evidence and information from their secret sources. French argues that the British

¹⁶⁶ French, *Supra* 2, at 90-91.

¹⁶⁷ *Idem*.

context indicates that “many people were detained on the basis of flimsy evidence or mere suspicion” (2011, 112). The British legal justification for detaining people without trial in the colonies was simply based on previous practices carried out in Britain during World War II under Defence Regulation 18B. However, the scale of detention in the colonies significantly exceeded the numbers of detainees in Britain between 1939 and 1945.¹⁶⁸

The British experience within the United Kingdom

Britain was not immune to internal and external crisis. The eighteenth and nineteenth centuries were a starting point for the adoption of emergency statutory provisions to face potential threats of war, revolution, and economic depression. In addition, the inclusion of Northern Ireland as part of the United Kingdom produced exceptional laws and measures. Among the series of statutes adopted by the United Kingdom are the Riot Act of 1714, the Telegraph Act of 1863, and the Wireless Telegraphy Act of 1904. The latter two allowed the government “to take over the nation’s means of communications,”¹⁶⁹ making these Acts ancestors of the surveillance laws of the post-9/11 war on terror.

The United Kingdom has a long experience in developing special laws. One of the most controversial laws is the Civil Authorities (Special Powers) Act (Northern Ireland) of 1922. One scholar describes it as “the most wide-sweeping Act passed in the United Kingdom.”¹⁷⁰ The Act criminalized, among other activities, “offences against the regulations.” Article 2 paragraph 4 states that “If any person does any act of such a nature as to be calculated to be prejudicial to the preservation of the peace or maintenance of order in Northern Ireland and not specifically provided

¹⁶⁸ *Idem*, at 112.

¹⁶⁹ Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (New York, Harcourt: Brace & World, 1963) at 137.

¹⁷⁰ Oehmichen, *Supra* 151, at 137.

for in the regulations, he shall be deemed to be guilty of an offence against the regulations.”¹⁷¹ This Act was later repealed by the Northern Ireland (Emergency Provisions) Act 1973.¹⁷² The essence of these statutes was to allow the executive to take action during emergencies—justifying by law the combination of exceptionalism and centralization.

This combination of power developed more clearly with the events of World War I and the economic depression of the early 1930s.¹⁷³ I will not go through the detailed history of emergency powers in Britain, but will focus on the major emergency Acts and measures that impacted civil life, and which I will later relate them to the laws that have arisen during the current war on terror. The British laws I will look at are the Defence of the Realm Act 1914 (DORA) and the Emergency Powers (Defence) Act 1939. I will also address the consequences doled out to accused transgressors in Britain, which included detention without trial and the trial of civilians in military or special courts.

The Defence of the Realm Act, known as DORA, was passed a few days after the United Kingdom entered World War I. Clinton Rossiter suggests that DORA is the foundation of the virtual state of siege in the United Kingdom during the two World Wars.¹⁷⁴ DORA is a written declaration on the legality of transferring governmental powers to the executive. It granted the executive and the army vast powers and placed limitations over citizens’ rights.¹⁷⁵ The Act reads:

¹⁷¹ Article 2 paragraph 4 of the Civil Authorities (Special Powers) Act (Northern Ireland), 1922. *See* Conflict and Politics in Northern Ireland, online: CAIN <cairn.ulst.ac.uk/hmsos/spa1922.htm>. *See also* Oehmichen, *Supra* 151, at 137.

¹⁷² Northern Ireland (Emergency Provisions) Act 1973.

¹⁷³ A chronological account of the crisis and emergency powers adopted in England can be found in Rossiter, *Supra* 169, at 133-203.

¹⁷⁴ *Idem*, at 153.

¹⁷⁵ Giorgio Agamben, *State of Exception* (Chicago: University of Chicago Press, 2005) at 19.

(1) His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm, and as to the powers and duties for that purpose of the Admiralty and Army Council and of the members of His Majesty's forces and other persons acting in his behalf; and may by such regulations authorise the trial by courts-martial, or in the case of minor offences by courts of summary jurisdiction, and punishment of persons committing offences against the regulations and in particular against any of the provisions of such regulations designed:

- (a) to prevent persons communicating with the enemy or obtaining information for that purpose or any purpose calculated to jeopardise the success of the operations of any of His Majesty's forces or the forces of his allies or to assist the enemy; or
- (b) to secure the safety of His Majesty's forces and ships and the safety of any means of communication and of railways, ports, and harbours; or
- (c) to prevent the spread of false reports or reports likely to cause disaffection to His Majesty or to interfere with the success of His Majesty's forces by land or sea or to prejudice His Majesty's relations with foreign powers; or
- (d) to secure the navigation of vessels in accordance with directions given by or under the authority of the Admiralty; or
- (e) otherwise to prevent assistance being given to the enemy or the successful prosecution of the war being endangered.¹⁷⁶

The legal historian A. W. Brian Simpson, in his masterpiece "In the Highest Degree Odious: Detention without Trial in Wartime Britain" (1992), examines the executive detention of citizens and aliens in Britain during World War II. Likewise, F. H. Hinsley had written earlier a

¹⁷⁶ Defence of the Realm Consolidation Act as amended on 27 November 1914. See The National Archive of the United Kingdom, online: The National Archive
<www.nationalarchives.gov.uk/pathways/firstworldwar/first_world_war/p_defence.htm>.

comprehensive history of this dark period of British history, *British Intelligence in the Second World War* (1979). Both describe the detention of more than 25,000 enemy aliens, but focus primarily on the 2,000 British citizens detained without trial under Regulation 18B of the Defence (General) Regulations 1939 (18B)¹⁷⁷ and the Emergency Powers (Defence) Act 1939. Again, the parallels between the acts of detention that took place in this period and counter-terrorist measures in the modern West are striking.

Under 18B, the detention of citizens was based on the allegation that they were of “hostile origins or associations” or were “concerned in acts prejudicial to the public safety or the defence of the realm.”¹⁷⁸ The term “hostile origins or associations” indeed included former enemy citizens or citizens who were of enemy citizenship, but it also included citizens who had enemy friends or relatives.¹⁷⁹ Sir Eric Holt-Wilson, the head of MI5, defined citizenship as “not the nationality by place of birth, or by law, but nationality by blood, by racial interests, and by sympathy and friendship that is taken as the deciding factor in all classifications of possible enemy agents and dangerous persons.”¹⁸⁰ As with the term “terrorist” today, there was no official definition of the term “of hostile origin”; this was left to be determined by the facts of each particular case.¹⁸¹

Simpson shows that the executive powers used during World War II were not invented in 1939, but were used earlier in colonies. He explains that:

¹⁷⁷ Regulation 18B was intended to suppress the Fascist movement and its leaders in Britain. See AW Brian Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (Oxford: Clarendon Press; Oxford; New York: Oxford University Press, 1992) at 69.

¹⁷⁸ *Idem.*

¹⁷⁹ *Idem.*, at 15.

¹⁸⁰ Mark E Neely, “In the Highest Degree Odious: Detention without Trial in Wartime Britain by AW Brian Simpson” (1995) 13:1 Law and History Rev 177 at 177.

¹⁸¹ Simpson, *Supra* 177, at 20.

In times of crisis British governments have been unwilling to pay [the price of enhancing liberty] where the security of the state is thought to be under threat, and have always locked up supposedly dangerous citizens, particularly in the colonies, before they have committed crimes. Detention is indeed one of the milder coercive mechanisms employed in conditions of emergency, in which individuals may be shot, or clubbed, or otherwise manhandled by the police or military.¹⁸²

Simpson observed that aliens were a source of fear to the British government. While Irish nationalists were deemed to present a threat, the central perceived threat was from Germans, who could engage in sabotage and espionage in Britain. This led the British government to establish the Special Branch within its Security Service. The task of Special Branch was to prevent aliens from committing political terrorist crimes.¹⁸³

In his argument against Regulation 18B, Simpson states that:

[I]t was the assumption in Whitehall that war could only be carried on in conditions in which civil liberty had, as a matter of law, been abolished, and the executive armed with even more draconian powers than had existed in the earlier war. I do not know of any paper setting out in a coherent form argument in favour of this belief; it was simply taken for granted.¹⁸⁴

The significance of the British experience during World War II is its impact in shaping modern national security policy, including current counter-terrorism laws and measures. As the political and constitutional historian Mark E. Neely observed, in the nineteenth century “internal security was a foreign idea, and neither nation [Great Britain and the United States] was plagued as the

¹⁸² *Idem*, at 2.

¹⁸³ *Idem*, at 8.

¹⁸⁴ *Idem*, 46.

European continent was with secret police and other odious institutions familiar everywhere in the twentieth century.”¹⁸⁵ These lasting changes were shaped by the wars of the twentieth century (Neely 1995, 177).

The French experience of exceptionalism

The French, similarly to the British, regulated some forms of the exception within law that included the state of siege and state of emergency. However, unlike the British, in the colonies they adopted an overall revolutionary doctrine derived from the French Revolution: *la guerre révolutionnaire*. David French argues that this doctrine allowed the army to take control of all military and civil operations, as well as engaging in practices of “dirty wars,” such as the use of systematic torture.¹⁸⁶ The meaning of *la guerre révolutionnaire* was never clear. According to George A. Kelly, it means the “values of French nationalism” (1970, 419).

In his analysis of the Western position of communism, Kelly states that the communist nations were seen as a single entity with a revolutionary ideology that aimed to wage a universal holy war against Western values.¹⁸⁷ On the other hand, Galula defends the French way of counter-insurgency by arguing that a “local revolutionary war is part of the global war against capitalism and imperialism. Hence, a military victory against the local enemy is in fact a victory against the global enemy and contributes to his ultimate defeat[.]”¹⁸⁸ Kelly noticed that because insurgency was seen as a universally non-traditional threat, it required a similar antidissertation to that facing the revolution of communism with a parallel revolutionary countering doctrine, a *guerre contre-*

¹⁸⁵ Neely, *Supra* 180, at 177.

¹⁸⁶ French, *Supra* 2, at 138-39.

¹⁸⁷ George A Kelly, *Struggles in the State: Sources and Patterns of World Revolution* (New York: Wiley, 1970) at 419.

¹⁸⁸ Galula, *Supra* 45, at 36.

révolutionnaire.¹⁸⁹ In this respect, Schlesinger argues that the assumption of the legitimacy of the imperialist order justifies counter-insurgency. In parallel, the assumption of the illegitimacy of communism shaped counter-insurgency thinking (1978, 100–2).

While the concept of *la guerre révolutionnaire* was often justified as an antidissertation to the universal enemy of communism, it was justified against the struggle in Algeria, as Galula puts it, as “a matter of political realism and also a function of the ‘balance of terror[.]’”¹⁹⁰ Schlesinger points out that the role of revolutionary action “is performed in the context of a set of clearly formulated assumptions about the international world order” (1978, 103). Galula argues for the legitimacy of counter-insurgency in defending the colonial mission:

Although in many cases, the insurgents have been easily identifiable national groups—Indonesians, Vietnamese, Tunisians, Algerians, Congolese, Angolans today—this does not alter the strategically important fact that they were challenging a local ruling power controlling the existing administration, police, and armed forces. (1964, 3)

Such assumptions were taken for granted by many Western thinkers, and as a result, as Ahmad observes, the practice of counter-insurgency neglects the legitimacy of anti-colonialism and anti-imperialism and, instead,

involves a multi-faceted assault against organised revolutions. This euphemism is neither a product of accident nor ignorance. It serves to conceal the reality of a foreign policy dedicated to combating revolutions abroad and helps to relegate revolutionaries to the status of outlaws. The reduction of

¹⁸⁹ Kelly, *Supra* 187, at 423-25.

¹⁹⁰ Galula, *Supra* 45, at 36.

a revolution to mere insurgency also constitutes an a priori denial of its legitimacy [...] counter-insurgency and counter-revolution are, therefore, used interchangeably. (1973, 325)

Rossiter argues that France has always acknowledged the necessity of emergency government. Constitutional dictatorship was needed in the face of constant wars and revolutions. The state of siege is an emergency system that deals with the most severe crisis,¹⁹¹ whereas the state of emergency deals with less dramatic events. In contemporary history, there has been more reliance on the state of emergency, which can be declared by the president. For instance, in the aftermath of the November 2015 Paris attacks, a state of emergency was declared by President François Hollande and extended by the parliament until May 26, 2016. The long period of the state of emergency raised concerns among civil society organizations about its necessity and efficiency.¹⁹²

State of siege

The defining French state of exception occurred in the aftermath of the French Revolution, when in 1791 the French Constituent Assembly adopted a law that divided military operations into three categories, with different laws applying to each: state of peace, state of war, and state of siege.¹⁹³

Giorgio Agamben therefore suggests that “it is important not to forget that the modern state of exception is a creation of the democratic-revolutionary tradition and not the absolutist one” (2005, 5).

¹⁹¹ Rossiter, *Supra* 169, at 79, 84.

¹⁹² Chloe Farand, “Thousands March in the Paris Rain to Protest Against the State of Emergency” *Independent* (31 January 2016) online: Independent News <www.independent.co.uk>.

¹⁹³ Albert HY Chen, “Emergency Powers: Constitutionalism and Legal Transplants: the East Asian Experience” in Victor V Ramraj and Arun K Thiruvengadam, eds, *Emergency Powers in Asia: Exploring the Limits of Legality* (New York: Cambridge University Press, 2010) at 59.

As part of the civil law tradition, state of siege is framed by the constitution and defined by statute. Clinton Rossiter and William Feldman call this an “extreme legality”¹⁹⁴ of a system that denies law.¹⁹⁵ Prior to the French Revolution of 1789, state of siege was regulated by custom. It was first codified in 1791 by setting its general rules of implementation and continuation. However, an important modification was made in 1797, which allows declaring a state of siege in case of foreign invasion or rebellion. The problem was that “rebellion” was defined to include any type of domestic disturbance.¹⁹⁶ Both Napoleon I and Napoleon III targeted political opposition through this statute.¹⁹⁷

In the colonies, particularly in Algeria, the declaration of the state of siege was left to the governor of the colony.¹⁹⁸ A state of siege was declared in several colonies, including Algeria, Tunisia, and Vietnam. In France, however, according to the Law Regarding the State of Siege of 1849 and 1878, declaring a state of siege is part of the legislature’s authority.¹⁹⁹ No authority can suspend the rule of law except the one that makes it at the first place.²⁰⁰ Parliament’s supremacy was granted in a law made in 1878, to contain the earlier executive abuse of the state of siege.²⁰¹ In a state of siege, the cabinet was able to issue administrative ordinances.²⁰² The duration of a

¹⁹⁴ Rossiter, *Supra* 169, at 79; William Feldman, “Theories of Emergency Powers: A Comparative Analysis of American Martial Law and the French State of Siege” (2005) 38:3 Cornell Intl L J1021 at 1022.

¹⁹⁵ French, *Supra* 2, at 75; Max Radin, “Martial Law and the State of Siege” (1942) 30:6 California L Rev 634 at 635.

¹⁹⁶ Feldman, *Supra* 194, at 1024.

¹⁹⁷ *Idem.*

¹⁹⁸ Article 4 of Law Regarding the State of Siege (9 August 1849); Article 10 of French Decree (29 April, 1857); Article 4 of Law Regarding State of Siege of 1878. *See* Birkhimer, *Supra* 174, at 624-25; Feldman, *Supra* 194, at 1025-24.

¹⁹⁹ Article 2 of Law Regarding the State of Siege (9 August 1849) states: “The National Assembly has the sole power to declare the state of siege.” Quoted in Birkhimer, *Supra* 174, at 624. A new constitution, however, was established in 1852, which transferred the authority of declaring a state of siege from the Parliament to the head of state. This shift was part of the establishment of the Second Republic under Louis Napoleon, who transferred the Republic into an Empire. Nonetheless, the authority was granted again to the Parliament by law in 1878. Feldman, *Supra* 194, at 1025; Radin, *Supra* 195, at 638.

²⁰⁰ Rossiter, *Supra* 16, at 84.

²⁰¹ *Idem.*

²⁰² *Idem.*, at 87.

state of siege, which is considered an *acte de gouvernement* or *acte politique*, must be restricted for a limited time of weeks or months, and can be renewed by issuing a new law.²⁰³ Regulating the state of siege came in direct response to a period, beginning in 1870, when parts of France were under a state of siege for over five years with no obvious reason.²⁰⁴

In a state of siege, the powers of the police are transferred to the army. This, significantly, relates to the enforcement of criminal justice, and includes the judicial process. Any civilian who commits a crime of a public nature during the state of siege will be sent to a military court, unless the military authority agrees that the case may be seen by ordinary courts.²⁰⁵ The military found several advantages in military courts during the World War I enforcement of the state of siege, including quick procedures and rigorous penalties. Permanent army courts were established in each military district. The military tribunals looked upon cases involving civilians regarding public safety which were formerly regulated by the Penal Code; these included espionage, treason, and communicating and trading with the enemy. These tribunals also dealt with crimes that had no direct impact on public safety, as catalogued by Rossiter: “frauds in connection with the quality of provisions furnished the armed forces or in their sale, attempted robbery in a railroad station, insults to public officials engaged in their duties, the misdemeanor of *vagabondage*, the embezzlement of letters by a post-office agent[.]”²⁰⁶ As the war came to a close, the severity and broad jurisdiction of these courts were largely deemed unacceptable by the public. The legislature had to reduce the harshness of military jurisdiction by introducing the right to appeal and allowing for pardons.

²⁰³ Article 1 of Law Regarding the State of Siege of 1878.

²⁰⁴ Rossiter, *Supra* 169, at 88.

²⁰⁵ *Idem*, at 86-87.

²⁰⁶ *Idem*, at 95.

The French state of siege has been invoked in the name of maintaining public order. In its first use during the Third Republic era, on August 2, 1914, President Raymond Poincaré declared a state of siege over the entire country as a response to the threat of World War I.²⁰⁷ The reason given was the difficulty of maintaining public order while general mobilization was in progress.²⁰⁸ Following the presidential decree, the Cabinet issued a law that stated:

The state of siege which was declared by the decree of August 2, 1914 in the 86 French departments, the territory of Belfort, and the three departments of Algeria is hereby maintained for the duration of the war. A decree of the President of the Republic, issued on the advice of the Council of Ministers, can lift the state of siege and, after it has been lifted, reestablish it in part or all of this area. The present law, deliberated upon and adopted by the Senate and the Chamber of Deputies, is to be executed as a law of the State.²⁰⁹

The declaration of the state of siege did not respect the requirements of the law of 1878 in many ways, and embraced vagueness as a means of extending power, as current counter-terrorist laws do as well. While the state of siege is supposed to cover a specific area over a specific period, it covered the entire country and for an uncertain amount of time: “the duration of war.” The state of siege was meant to be declared in the face of “imminent danger,”²¹⁰ which could not be proven to exist at this time (Rossiter 1963, 92–93). Still, Parliament did not object.²¹¹ The state of siege remained active until 1919, and it affected civil liberties in France. The rights to gathering and assembly, including gathering in bistros, were generally prohibited.²¹² Censorship was in use by

²⁰⁷ *Idem*, at 91.

²⁰⁸ *Idem*.

²⁰⁹ Quoted in *Idem*, at 92.

²¹⁰ Article 1 of the French Law Regarding the State of Siege of 1878.

²¹¹ Rossiter, *Supra* 169, at 92.

²¹² *Idem*, at 98.

the government. The law of 1849 authorized the military to seize, censor or destroy forbidden publications that could disturb public order. As we will see, the concept of “public order” was later transferred to French colonies, and is still in use in our case studies.

Leaving aside the question of the necessity of these actions by the emergency government, this historical moment can provide some insights into how a wartime deployment of exceptional measures can be effective, or ineffective—insights that can then be related to the current “war on terror.” The state of siege in France was invoked during a conventional war, which had a beginning and an end. Accordingly, the state of siege was ended by the end of that war. The primary difference in dealing with the efficacy of the French state of siege in World War I as compared to the war on terror is that the war on terror cannot be said to have a defined beginning or endpoint. Even if the state of siege invoked by the French in World War I was the correct, and a justified, response to external threat, to what extent can similar reasoning be used to authorize a government activating exceptional powers in a continuous and potentially never-ending war?

In 1958, with the establishment of the Fifth Republic, a new constitution was issued that broadened centralization by strengthening the powers of the executive. Among several wide powers, it granted the president the power to take any “measures required” should the “institutions of the Republic, the independence of the nation, the integrity of its international commitments [be] gravely and immediately threatened and the regular functioning of the constitutional public authorities [be] interrupted.”²¹³ This article was invoked in 1961 when it was feared that the Algerian revolt would spread to France.²¹⁴ Under this article, President Charles de Gaulle established special military tribunals, monitored censorship, and granted the police more powers

²¹³ Article 16 of the 1958 Constitution. Quoted in Kelly & Pelletier, *Supra* 157, at 47.

²¹⁴ *Idem*.

to search and arrest suspects.²¹⁵ This amendment indicates the relationship between exceptionalism and executive powers, both of which can be used to bypass ordinary measures.

One of the important yet dangerous consequences of the use of state of siege is in the broad authorities granted to the military. The French Law Regarding the State of Siege of 1849 grants jurisdiction to military tribunals to try all persons for all crimes “against the safety of the Republic, against the Constitution, against public peace and order, whatever be the status of the principal perpetrators and their accomplices.”²¹⁶ As we will see in Chapters 5 and 7, the army and other militarized security forces are still involved in the civil life of Egypt and Tunisia. In addition, the protection of the constitution and public peace and order is found in current Arab national security and counter-terrorism laws.

State of emergency (*état d'urgence*)

Like the British, the French found the state of emergency a useful tool with less or no direct control of the military. This shift protects the civilized appearance of the state. State of emergency is regulated in France by a law adopted in 1955²¹⁷ and the constitution of 1958. It allows the president to declare a state of emergency for up to 12 days,²¹⁸ and can be extended by the parliament. State of emergency allows the use and expansion of exceptional powers, including censorship, administrative searches and seizures without judiciary review. Unlike the state of siege, state of emergency was not used in colonies.

²¹⁵ *Idem*.

²¹⁶ Article 8 of the French Law Regarding the State of Siege of 1849.

²¹⁷ Law no 55-385 of 3 April 1955.

²¹⁸ This authority granted to the president is stated in Article 12 of the French Constitution of 1958, which reads: “Le Président de la République peut, après consultation du Premier ministre et des présidents des assemblées, prononcer la dissolution de l'Assemblée nationale.”

Article 16 of the French Constitution of 1958 shows that in France, state of emergency can be declared in the following cases: “the independence of the Nation, the integrity of its territory or the fulfilment of its international commitments are under serious and immediate threat, and where the proper functioning of the constitutional public authorities is interrupted”. The wording does not include “public order”, but it includes another broad concept, which is threat on the “constitutional public authorities”. Article 16 of the constitution also gives the President right to “take measures required by these circumstances”. While the measures are addressed in the law regarding state of emergency, the above article of the constitution reflects the French “flexible” approach in national security.

The state of emergency has been declared many times in France. Among these times, we mention the one related to the Paris attacks in November 2015. The attacks left 130 persons dead and hundreds injured. President Hollande declared a state of emergency, which was extended by law for three months.²¹⁹ According to the law regarding state of emergency, any person may be placed under house arrest if “there are serious reasons to believe that a person’s behaviour constitutes a threat to security and public order[.]”²²⁰ The application of the above article shows no limits of such residence orders.²²¹ Other exceptional measures that can be taken during a state of emergency include banning meetings,²²² dissolving associations, and carrying out searches without a warrant.²²³

Practice shows that these measures have often been used arbitrarily and selectively. According to a report by Amnesty International, several mosques were shut down and other

²¹⁹ “French MPs vote to extend state of emergency after Paris attacks” (19 November 2015) online: The Guardian <<https://www.theguardian.com>>.

²²⁰ Article 6 of Law no. 55-385 of 3 April 1955 regarding the state of emergency [law regarding the state of emergency].

²²¹ Amnesty International, *Upturned Lives: The Disproportionate Impact of France’s State of Emergency*, 2016.

²²² Article 8 of law regarding the state of emergency.

²²³ Article 14-1, *idem*.

Islamic associations were dissolved without clear charges.²²⁴ Scholars argue that most of the emergency legislation and powers have been adopted as preventive systems (Feldman 2005, 1039; Kelly and Pelletier 1966, 46). Joseph B. Kelly and George A. Jr. Pelletier describe emergency policies in general and the French ones in particular as “worried only about past or already present exigencies rather than any carefully thought out long-term approach to the problem.”²²⁵ Experience shows that because no long-term plan is provided, the prediction criterion is left open to include almost all acts that the state or the military government do not feel comfortable with. As a result, emergency powers can become a weapon against the “enemy” and a tool to suppress rights and liberties.

Neo-colonial exceptionalism and the war on terror

In the example of the Paris attacks of November 2015, other external measures were taken by the army. For example, the French Air Force launched a military operation against the Islamic State.²²⁶ Since-9/11, militarism and exceptionalism have become interrelated as neo-colonial aspects of counter-terrorism.

The controversy of contemporary counter-terrorism measures, both national and international, is in the normalization of many exceptional-in-nature practices, such as martial law. Mark Neocleous, in “From Martial Law to the War on Terror” (2007), argues that there has been a “liberalization” of the principles of martial law. These principles have been normalized within the legal and political systems of liberal democracies.²²⁷ This normalization is not exclusive to

²²⁴ Amnesty International, *Supra* 221.

²²⁵ Kelly & Pelletier, *Supra* 157, at 68.

²²⁶ Ben Brumfield, Tim Lister & Nick Paton Walsh, “French Jets Bomb ISIS Stronghold of Raqqa, Syria; Few May Have Been Killed” (16 November 2015) online: CNN <edition.cnn.com>.

²²⁷ Mark Neocleous, “From Martial Law to the War on Terror” (2007) 10:4 New Criminal L Rev 489 at 490.

martial law; it also includes the use of the military internally during the state of emergency, as well as militarizing police powers outside martial law and outside emergencies. According to Neocleous, this shift of “liberalization occurred through the generation of new concepts which permitted the key practices of martial law to be carried out under a conceptual form more easily defended on liberal terms” (490).

Neocleous claims a revival of “new liberal authoritarianism”²²⁸ combines past exceptional powers with a contemporary modern system. Others justify the exception within militant democracy, in which protecting democratic values justifies violating law and liberties.²²⁹ In *The State of Exception* (2004), Agamben argues that the theory of the exception in Western democracies is “clear in principle, but hazier in fact[.]”²³⁰ He refers to the terrorist attacks of 9/11 as an event that allowed President George W. Bush to use his “presidential claim to sovereign powers[.]”²³¹ which is a form of the exception. The same approach has been taken by many other countries against ISIS.

The problem is that, unlike any conventional war or any state of emergency, the war on terrorism is endless, and this shifts the exceptional nature of such presidential powers and many other extra-legal measures into the norm (Neocleous 2004, 22). Scholars have questioned post-9/11 counter-terrorism measures and whether they should be classified as part of law or of the suspension of law.²³² Similarly to martial law, they are regulated by law, and also similarly to martial law, they justify extra-legal measures, such as detention without trial and prisons controlled by the military.²³³ However, the necessity and the (il)legitimacy of the use of emergency and

²²⁸ *Idem*.

²²⁹ Carl J Friedrich, *Constitutional Reason of State: The Survival of the Constitutional Order* (Providence, RI: Brown University Press, 1957) at 13.

²³⁰ Agamben, *Supra* 175, at 9.

²³¹ *Idem*, at 22.

²³² David Dyzenhaus, “The Puzzle of Martial Law” (2009) 59 U of Toronto L J 1 at 3.

²³³ Neocleous, *Supra* 227, at 490.

exceptional powers is not our main concern. Our concern is the continuous clinging to colonial practices that had a cultural and political foundation of coercion. In order to break the circle of violence, including terrorism, a new foundation should be established within the framework of law, but without justifying suspending law by law.

Conclusion of chapter: Unequal positions of power

A colonial culture of control comprised the basic logic and rationale of a conservative distribution of authority and centralization, as well as ruling through militarism and exceptions. This rationale gradually percolated into the colonies in the late nineteenth and early twentieth centuries. According to David Garland, the Euro-American culture of control refers to a “reconfigured complex of interlocking structures and strategies that are themselves composed of old and new elements, the old revised and reoriented by a new operation context, the newer elements modified by the continuing influence of working practices and modes of thought dating to the earlier period” (2001, 23). This has led to dynamic changes in the field of crime control, and particularly counter-terrorism. It signifies that this legal field is reflective of the relationship between the past and the present, between the colonial rationale of control and the post-colonial contention of liberties versus security.

It is crucial to pinpoint the origins and ongoing causes of these relationships, in order to understand the impact that these changes have had on the criminal system and on society as a whole. An observation is that both imperialism and colonialism set the foundation of the modern legal system in former colonies, and neo-colonialism has continued normalizing the colonial rationale. Colonial practices may not be identical to the neo-colonial experience, but the foundation of state security policy is the same. It is based on a national and global hierarchical system that

unequally distributes powers. The Western imperial and colonial powers of the nineteenth and twentieth century have become the great powers that functions at a neo-colonial level. These powers include, above all, the United Kingdom, France, and the United States, all of which operate individually through political pressure and financial aid, and collectively through supra-national bodies like UN Security Council and FATF (discussed in Chapter 2). The colonial system has thus paved the way for neo-colonialism to dominate within the same political framework.

CHAPTER 2 TERRORISM AND COUNTER-TERRORISM AT THE INTERNATIONAL LEVEL: A CHALLENGE IN THE POST-COLONIAL WORLD

The years following World War II were significant in shaping the road to international peace and security. This was done primarily through the UN Charter, which prohibits state violence. The focus of the UN was on international peace and security, with virtually no expectation of any serious threat from non-state actors.²³⁴ The Charter therefore does not incorporate the collection of acts and actors that are currently interpreted as terrorism and terrorists.²³⁵

This miscalculation synchronized with the global withdrawal of the colonial state. Liberation movements worldwide steadily increased, and anti-colonialist movements adopted tactics associated with terrorism to expel the colonizer and attract the attention of the international community to peoples exercising their right of self-determination. Without considering the legitimacy of such struggles, Israel, Cyprus, Algeria, and South Africa are examples of the success that “terrorism” could achieve.²³⁶

Today, terrorism is taken to represent a serious threat to national and international peace and security. The wave of terrorism that was associated with the right of self-determination has faded, and another wave of what is known as “Islamic terrorism” has emerged. Each wave has been met with a wave of countermeasures. Our aim is to evaluate the rationale and utility of the related national and international countermeasures, and the impact of global counter-terrorism policy on domestic policies and vice versa.

²³⁴ Victor D Comras, *Flawed Diplomacy: The United Nations and the War on Terrorism* (Dulles: Potomac Books, 2010) at 8.

²³⁵ See Chapter I: Purposes and Principles of the UN Charter.

²³⁶ Bruce Hoffman, *Inside Terrorism* (New York: Columbia University Press, 2006) at 56-65; Walter Laqueur, *The New Terrorism* (New York; Oxford: Oxford University Press, 1999) at 22-24; Oehmichen, *Supra* 151, at 65-70.

Debates of counter-terrorism are often limited to a discussion of the deterrent function of counter-terrorism measures. Equally central to a full discussion of the issue is the importance of balancing the powers granted to governments to ensure the prevention of terrorist acts with a counter-balancing check on these powers to prevent their misuse.²³⁷ Yet no basic human rights guarantees or effective crime control can be achieved without a clear definition of “terrorism.” The increasing international significance of terrorism and counter-terrorism did not bring with it a universal agreement on what terrorism is. As we will see, the lack of an international definition was a result of the imperfect policy of the UN Security Council, represented by the major neo-colonial powers, which empowered states to enact broad terrorism laws without insisting on a definition of terrorism.

This chapter addresses the problem of the lack of a unified international definition of terrorism and how this lack affects the whole war on terror. It then examines the international attempts to define terrorism in three phrases. The first is in the aftermath of World War II. That period was also the fading years of colonialism. The UN General Assembly put in serious efforts to define terrorism, yet without a result. The historical conditions of that time meant any attempt to define “terrorism” was bound by anti-colonial thought, which in practice valued the right of groups to struggle, even with the use of violence, over the need for security. This view is represented by the Arab position, which refused to consider violent attacks by Palestinians as terrorism. The chapter then addresses the 1990s as the second phase of international attempts to define terrorism. This phase represents the emergence of neo-colonialism. During this phase, the UN Security Council started to take a direct part in setting the rules of counter-terrorism. As will be shown, the Arab bloc vanished due to events like the Gulf War, which led to a *de facto* American

²³⁷ Victor Ramraj, Michael Hor & Kent Roach, eds, *Global Anti-Terrorism Law and Policy* (New York: Cambridge University Press, 2012) at 1.

presence in many Arab states through its military bases. Such states no longer dare to oppose the Americans, and thus the Security Council view on important issues like counter-terrorism. The third phase is post-9/11, which is discussed as the peak of neo-colonialism. In this phase, the UN Security Council dominated global decision-making regarding terrorism, commanding almost complete global obedience to its obligations. The chapter then examines the related Security Council resolutions, their lack of a definition for “terrorism”, and their failure to wisely counter terrorism.

The lack of a definition of “terrorism”

The lack of a definition of “terrorism” in anti-terrorism legislation is a problem that has not been solved for decades. It is also a consequence of a larger problem, which is a national and global failure to sensibly define this phenomenon. The Security Council has been issuing global anti-terrorism obligations without emphasizing the need to adopt a comprehensive definition of terrorism.

The ambiguity and broadness of national definitions of terrorism have led to the adoption of vague and wide countermeasures. Hocking argues that part of the success of current expanded security measures is due to the ambiguous nature of both terms of “terrorism” and “counter-terrorism.” She explains that the challenges of conceptualizing the complex phenomenon of terrorism are so multifaceted that, unless a definition is agreed upon, security as a whole may be risked in the long run.²³⁸ While there is not an internationally agreed definition of terrorism, there are over one hundred diverse suggested academic definitions.²³⁹ Terrorism has been defined as

²³⁸ Hocking, *Supra* 36, at 11-15.

²³⁹ Alex P Schmid, *Political Terrorism: A Research Guide to Concepts, Theories, Data Bases, and Literature* (Amsterdam: Transaction Publishers, 1984) at 11.

“the illegitimate use of force to achieve a political objective when innocent people are targeted” (Laqueur 1987, 143); it has been described as political in aims and motives, violent, or, equally serious, threatening violence; it has been said that terrorists belong to a subnational group or a non-state entity (Hoffman 2006, 41); another writer claims that “Revolutionary terrorism aims at bringing about complete change within a state” (Whittaker 2004, 2). Another definition of “terrorist” suggests that it is “not just someone with a gun or bomb, but also someone who spreads ideas that are contrary to Western and Christian civilizations.”²⁴⁰ These are among the many definitions, none of which has bridged the gap between academia and lawmaking or between theory and practice.

The ambiguity of the meaning of “terrorism” has resulted in the establishment of a political rather than a legal base for defining “terrorism.” Philip Cerny, in *France: Non-terrorism and the Politics of Repressive Tolerance*, argues that “terrorism has become the fear of the collapse of the social order itself.”²⁴¹ This suggests that, in the case of terrorism or other crimes that were created during colonialism, like subversion, criminalization is not based on objective guidance. In this regard, Hocking, in “Orthodox Theories of ‘Terrorism’: The Power of Politicised Terminology” (1984), stresses that governments and theorists alike tend to describe acts as “terrorism,”

not on the basis of the nature of those acts themselves, but on the basis of the political affiliations of those groups or regimes which enacted them. As such, incidents of political violence and dissent are constructed according to a framework of an apparent concern for political rights, which in reality reflects only a concern of military or economic expediency [...]. “Terrorism” takes its place

²⁴⁰ Former Argentinian President Jorge Rafael Videla, quoted in Noam Chomsky & Edward S Herman, *The Washington Connection and Third World Fascism* (Boston: South End Press, 1979) at 266-67.

²⁴¹ Philip Cerny, *France: Non-terrorism and the Politics of Repressive Tolerance* (New York: St. Martin's Press, 1982) at 91.

alongside such euphemisms as “subversion,” “national security,” “stability,” and “pacification” in the typically self-legitimizing language of ideological hegemony.²⁴²

This can also be seen in the frequent juxtaposition of terrorism and opposition: opponents of the government are often labeled “terrorist sympathizers.” This assumption justifies the exaggerated political response to “terrorist sympathizers,” even when no violent acts have been committed. Labels such as “terrorist sympathizer” and “fellow-traveler” were used, for example, to counter communism during the McCarthy era.²⁴³

This indicates that the tendency of media, governments and many theorists is not towards combating terrorism per se, but towards targeting specific groups. The focus is not on the nature of the acts, but on the political associations of those groups or regimes which performed them (Hocking 1984, 103). Hocking shows that “incidents of political violence and dissent are constructed according to a framework of an apparent concern for political rights, which in reality reflects only a concern for military or economic expediency.”²⁴⁴

This tendency was also part of the colonial rationale in suppressing nationalists and communists through counter-insurgency. British counter-insurgency thinker and officer Kitson, had a radical view that non-violent acts, including meetings and strikes, must be suppressed on the assumption that they might develop into violence.²⁴⁵ This view led the colonists to attempt to establish a disciplinary society through draconian counter-insurgency measures. This has also become an implicit goal of current counter-terrorism. Despite the fact that until this day there has

²⁴² Jenny Hocking, “Orthodox Theories of ‘Terrorism’: The Power of Politicised Terminology” (1984) 19:2 Australian J of Political Science 103 at 103.

²⁴³ David H Price, *Threatening Anthropology: McCarthyism and the FBI's Surveillance of Activist Anthropologists* (Durham: Duke University Press, 2004) at 38, 209.

²⁴⁴ Hocking, *Supra* 36, at 2.

²⁴⁵ Frank Kitson, *Low Intensity Operations* (London: Faber and Faber, 1971) at 49-50.

been no agreement on the meaning of “terrorism,” there have been international attempts to define it as well as obstacles that have kept it under the umbrella of politics rather than law.

International attempts to define terrorism during the fading of colonialism

In the mid-twentieth century, the understanding of the term “terrorism” was only linked to state-terrorism. This can be found in the 1954 Draft Code of Offences against the Peace and Security of Mankind²⁴⁶ framed by the UN International Law Commission. Article 2(5) defines an offence “against the peace and security of mankind” as “undertaking or encouragement by the authorities of a State of terrorist activities in another State, or the toleration by the authorities of a State of organized activities calculated to carry out terrorist acts in another State.”²⁴⁷ The wording of the article clearly indicates that the contemporary thinking around terrorism in the 1950s was related to one state’s intervention in the affairs of another state, through means of violence and associated terror. According to Victor Comras, there was no expectation that the principle of “self-determination of peoples” would be used by non-state actors as a justification for a form of terrorism that is closer to our modern idea of what terrorism is.²⁴⁸

The attempts by the UN to define terrorism escalated in the aftermath of the Munich Olympics massacre in September 1972.²⁴⁹ As a response, the General Assembly adopted Resolution 3034 (XXVII) of 1972, which includes measures to prevent international terrorism, as well as preparing a study of “the underlying causes of those forms of terrorism and acts of violence

²⁴⁶ International Law Commission, “Draft Code of Offences against the Peace and Security of Mankind” (Part I), in ILC 6th Session Report (3 Jun–28 Jul 1954), UN Doc A/2693, as requested by UNGA res 177(II) (1947).

²⁴⁷ Article 2(6), *idem*.

²⁴⁸ Comras, *Supra* 234, at 8.

²⁴⁹ In September, 1972, the Palestinian group Black September killed two and kidnapped nine other Israeli athletes, followed by blackmailing the German government to get an airplane, and demanding the release of 234 Palestinians and others held in Israel, along with two German radicals held in Germany. The incident ended with the killing of all the Israeli hostages, one German policeman, and five of the kidnappers. See Hoffman, *Supra* 237, at 31-32; Comras, *Supra* 234, at 17-18.

which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes.”²⁵⁰

The resolution does not represent an attempt to define terrorism, but rather an attempt to arrive at an understanding of terrorist acts by focusing on their causes. The clear suggestion is that these causes are largely encompassed by “colonial and racist regimes and other forms of alien domination” that undermine the right to self-determination and independence of the perpetrators of terrorist acts.²⁵¹ The resolution explicitly excludes from its definition of terrorism acts of violence undertaken in the name of the right to self-determination, which is at least partially self-contradictory, partially owing to the lack of a clear differentiation between terrorism and the type of “freedom-fighting” that would later be protected by UN Resolution 40/61 (Saul 2008, 71). The members of the Ad Hoc Committee established by the above resolution agreed on the importance of addressing the causes of terrorism, but they were unable to successfully identify these causes or evaluate their impact on international security.²⁵² In general, Western states could not successfully negotiate a method to practically explore the causes and significance of these acts.²⁵³

The Arab position on defining terrorism within the UN General Assembly

The political position of Arab states obstructed the General Assembly from agreeing on a definition of terrorism.²⁵⁴ The dominant Arab thinking defined one clear cause for acts that were

²⁵⁰ UN General Assembly Resolution 3034 (XXVII) adopted on 18 December 1972 Measures to prevent international terrorism which endangers or takes innocent human lives or jeopardizes fundamental freedoms, and study of the underlying causes of those forms of terrorism and acts of violence which lie in misery, frustration, grievance and despair and which cause some people to sacrifice human lives, including their own, in an attempt to effect radical changes.

²⁵¹ *Idem*.

²⁵² For more, see Ben Saul, *Defining Terrorism in International Law* (New York: Oxford University Press, 2008) at 71-78.

²⁵³ See *idem*, at 72.

²⁵⁴ Roach, *Supra* 7, at 25.

being interpreted as terrorism in much of the Western world: a legitimate struggle for self-determination. This view was represented most audibly by Jamil Baroody, Saudi Arabia's UN representative, who refused to consider the Munich attack as terrorism. He insisted that the Palestinians were anticolonial and national liberation actors.²⁵⁵

The approach that invoked the language of freedom-fighting and self-determination was also supported by the Soviet Union and the anti-colonial Afro-Asian bloc. These states had, at least in the international discussion, though not in many instances within their own borders, defended the right to struggle as a sacred right that must not be termed "terrorism." Nonetheless, this part of the conversation around terrorism had shifted by the early 1990s, largely due to the fall of the Soviet Union in 1991 and the division of the Republic of Yugoslavia in 1992.

The international definition of terrorism in a neo-colonial era

The shift of emphasis within the UN and Western discourse around the elimination of terrorism and the problematically overlapping right for people to struggle to achieve self-determination was shaped in the following decade. Besides the fall of the Soviet Union and the division of the Republic of Yugoslavia, the Gulf War in 1992 created new allies for the West.

The spreading impact of the Gulf War among Arab states, in particular the Arabian Peninsula states, was to greatly shape the future conversation around terrorism. These nations at this time entered into a significantly different phase of their relationship with the United States. Saudi Arabia, which continued to have great influence over Arab countries in the UN General Assembly, allowed the Bush administration to establish U.S. bases on its soil. This measure was taken in order to protect its borders during the Iraqi invasion of Kuwait. The Iraqi invasion had

²⁵⁵ Comras, *Supra* 234, at 19, 21.

divided Arab states into two categories: those who were for and those who were against waging war against Iraq. The states that favored the American action against Iraq included Egypt, Syria, and the Gulf oil countries, but the motivations of these states were not identical. Egypt was in receipt of extensive financial aid from the United States, while the Syrian president, Hafez al-Assad, was a personal enemy of Saddam Hussein. The Gulf oil countries feared that a successful expansion of Hussein's invasion could undermine their economic interests. On the other hand, Hussein had the support of Libya, Palestine Liberation Organization, and Jordan—poorer Arab countries that supported Hussein due to his promises to equalize the distribution of oil wealth among Arab people.²⁵⁶

The language of terrorism was greatly affected by the fallout of these alliances and the course of the war and its aftermath. The division of support among Arab countries for either the USA or Iraq had a direct impact on the treatment of the Palestinian-Israeli conflict. Palestine no longer receives support at the same level or validation for its status as a nation: this was due to its decision to ally with Hussein, as opposed to the American-Arab bloc. As a result, the language used in UN General Assembly resolutions has shifted: the long-supported right to struggle is now a decidedly lower priority than resolutions on the elimination of terrorism.

The impact of neo-colonial influence multiplied in the 1990s. That era witnessed a shift in global counter-terrorism policy by engaging the UN Security Council in decision-making. In October 1999, after a series of bombing attacks carried out by Al-Qaeda, the Security Council adopted Resolution 1267 as the first measure to call for sanctions against the Taliban government that hosted Al-Qaeda. The resolution established what is known as 'Al-Qaeda and Taliban sanctions regime'.²⁵⁷ It was easy for the Security Council, rather than the General Assembly, to

²⁵⁶ Congressional Quarterly, *Supra* 9, at 7, 114, 145-48.

²⁵⁷ UN Security Council, Security Council Resolution 1267, 1999 SC Res. 1267, UN SCOR, S/RES/1267.

adopt such a resolution, since Al-Qaeda represents a common enemy to both the United States and Russia.

This sanctions regime contains a series of resolutions²⁵⁸ that are described as “the most elaborate system of sanctions” set up by the Security Council.²⁵⁹ The sanctions regime requires all states to freeze the assets and implements of Al-Qaeda and the Taliban, and created a mechanism for the listing and de-listing of individuals and entities known or believed to be associating with Al-Qaeda or the Taliban. I will not go through the problematic consequences and the lack of minimum legal standards of evidence and transparency of this regime since it is not within the scope of this dissertation; however, the policy of listing in accordance with UN Security Council Resolution 1267 is based on a politically subjective standard. In other words, this process creates terrorists without defining the *actus reus* of terrorism or of being a terrorist.

By the end of the 1990s, terrorist financing had become an important theme that led the General Assembly to adopt the 1999 International Convention for the Suppression of the Financing of Terrorism.²⁶⁰ This Convention is the first that provides international guidance on the definition of terrorism. Article 2(1)(b) defines terrorism as:

[A]ct[s] intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

²⁵⁸ These include UN Security Council Resolutions 1267 (1999); 1333 (2000); 1363 (2001); 1390 (2002); 1452 (2003); 1455 (2003); 1526 (2004).

²⁵⁹ Paz Andrés Sáenz De Santa María, “Collective International Measures to Counter International Terrorism” in Pablo Antonio Fernández Sánchez, ed, *International Legal Dimension of Terrorism* (Leiden; Boston: Martinus Nijhoff, 2009) at 95.

²⁶⁰ International Convention for the Suppression of the Financing of Terrorism, Adopted by the General Assembly of the United Nations in Resolution 54/109 of 9 December 1999.

Despite the guidance provided by the above article, states did not rely on it in their domestic anti-terrorism legislation, in part because later Security Council resolutions, particularly 1373 (2001) implicitly allowed establishing broad definitions. By ignoring the importance of defining terrorism, the Security Council encourages states to adopt or continue adopting broad definitions. This passive role reflects an internal neo-colonial influence, in which no direct demands are placed; rather, states are left to their own devices yet without being fully free from the need for neo-colonial approval. The fact that the Security Council adopted resolutions with a wide range of demands over states to counter terrorism, including counter terrorism financing, restrictions on speech, and travel bans, has forced states to adopt broad definitions. This makes the passive and the active sides of the role of the Security Council integrated in forming an inescapable neo-colonial domination.

The definition of terrorism post-9/11: The peak of neo-colonialism

In the wake of the 9/11 attacks, the United States' victimization and subsequent rhetorical and militaristic responses spurred much of the global community to reach a consensus: terrorism is a serious threat that must be suppressed at all costs. While terrorists use violence to achieve their goals, the state is supposed to use the law to counter terrorism. Nonetheless, an international definition of "terrorism" as part of anti-terrorism measures remains neglected, especially by the UN Security Council.

The Security Council includes 15 members, five permanent and ten non-permanent. The five permanent members, China, France, Russia, the United Kingdom, and the United States, all have different experiences with terrorism. The United Kingdom and France have domestic and colonial experience; the United States and Russia have experience with earlier anarchists and

current Islamic extremists; China with radical Islamists and more importantly with ethnic separatism movements. This suggests that these powerful states individually and collectively share a common interest in suppressing terrorism. Thus, resolutions adopted by the Security Council represent the will of these powers that dominate within a neo-colonial framework practiced through hegemony.

Practicing neo-colonial dominance, the United States has been pushing the Security Council into embodying an active role regarding counter-terrorism (Kramer & Yetiv 2007, 426). A few weeks after 9/11, the United States took the lead by calling secretly for informal consultation with the Security Council's other permanent members, followed by proposing a draft convention on September 28, 2001. As Roach points out, the resolution was drafted in secrecy based on the United States' informal consultations with the other permanent members, approved in a five-minute meeting; no explanation was provided on the members' voting. The whole process took a little more than a 48-hour period. This makes it similar in essence to decisions made by national executive powers.²⁶¹ Such executive-like powers are what we call "global centralization" (discussed earlier in Chapter 1).

The UN Security Council, as a supra-national power, practices its global centralization under Chapter VII of the UN Charter. According to Article 39 of the Charter, "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken [...] to maintain or restore international peace and security."²⁶² The Security Council considered the terrorist attacks of 9/11 as "a threat to international peace and security." Accordingly, it approved

²⁶¹ See Roach, *Supra* 7, at 31-32.

²⁶² Article 39 of the UN Charter. Chapter VII: Action with Respect to Threat to the Peace, Breach of the Peace, or Act of Aggression.

the American draft mentioned above by issuing Resolution 1373 (2001). This resolution is discussed in detail in the following section. In this section, our aim is to explain the executive nature of the Security Council's resolutions regarding counter-terrorism as a form of neo-colonial domination.

The concept of “threat to the peace” mentioned in Article 39 of the UN Charter is not clearly defined, leaving a flexible space for the Security Council to determine it. This, however, does not mean that the Charter did not place limits on the Security Councils' legislative authority. Article 41 of the UN Charter states that:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.²⁶³

Scholars have explained the role of the Security Council to be limited to a particular issue within an actual situation.²⁶⁴ Stefan Talmon argues that the Charter does not treat the Security Council as a world legislator, but as “a single-issue legislator.”²⁶⁵ For instance, when one state invades another, the Security Council may place sanctions on the invader. However, it cannot issue general regulations that apply to all invaders.

²⁶³ Article 41, *idem*.

²⁶⁴ Stefan Talmon, “The Security Council as World Legislature” (2005) 99:1 *American J of Intl L* 175 at 182; Luis Miguel Hinojosa Martínez, “The Legislative Role of the Security Council in Its Fight against Terrorism: Legal, Political and Practical Limits” (2008) 57:2 *The Intl & Comparative L Quarterly* 333 at 334-35.

²⁶⁵ Talmon, *Supra* 264, at 182.

Post-9/11, the Security Council has replaced this conventional process of single-issue legislation.²⁶⁶ This has been done through frequently adopting general resolutions regarding counter-terrorism and placing general obligations on states to domestically criminalize terrorism and terrorism-related crimes. The general nature of these obligations and their global domain suggest that the Security Council is acting as a global executive-legislator. This shift has not been challenged by states despite its impact on sovereignty.²⁶⁷ In the contrary, states have explicitly or implicitly approved the general role of the Security Council in counter-terrorism. For instance, the representative of Spain to the UN praised the role of the Security Council by stating that “resolution 1373 (2001) is of historic significance. It establishes for the first time a series of binding measures to be applied by all States in combating terrorism, setting a deadline for each of them to provide information about provisions adopted in compliance with that resolution.”²⁶⁸ Even though his speech was given in January 2002, before more resolutions regarding counter-terrorism were adopted, he is right in his assumption that Resolution 1373 was the first among a series of resolutions that are continuously issued even more than ten years later. The series of resolutions regarding counter-terrorism have broadened global obligations in counter-terrorism, in which terrorism is no longer restricted to violent crimes like bombing and hijacking, but includes speech that apologizes for terrorism and funding terrorism. These forms of crime control have their roots in colonial history (as discussed in Chapter 1 and later in Chapter 2). The neo-colonial mindset represented by the Security Council continues clinging to such methods with limited or no willingness to learn from the colonial history that failed in providing long-term national and

²⁶⁶ For more, see Martínez, *Supra* 264; Stefan Talmon & Nico Krisch, “The Rise and Fall of Collective Security: Terrorism, US Hegemony, and the Plight of the Security Council” in Christian Walter et al, eds, *Terrorism as a Challenge for National and International Law: Security versus Liberty?* (Berlin: Springer Science & Business Media, 2004) at 879, 883.

²⁶⁷ See UN Doc. S/PV.4453, (2002).

²⁶⁸ UN Doc. S/PV.4453 (2002) (Spain).

international peace and security. The following sections explore the series of Security Council resolutions adopted post-9/11, the wide list of obligations, and the continuing limited focus on defining terrorism.

UN Security Council Resolution 1373 (2001)

Resolution 1373 is considered one of the most influential sources of post-9/11 counter-terrorism.²⁶⁹

It establishes a global counter-terrorism system that requires states to prevent the financing of terrorism, become parties to the 1999 International Convention for the Suppression of the Financing of Terrorism, deny terrorists a safe haven, update criminal laws, bring terrorists to justice, improve border controls, control arms trafficking, and cooperate and exchange information with other states. It also includes establishing a Committee of the Security Council (CTC). Despite its length, we find it important to quote the related parts of the resolution. It states that:

The Security Council [...] Acting under Chapter VII of the Charter of the United Nations,

1. *Decides* that all States shall:

- (a) Prevent and suppress the financing of terrorist acts;
- (b) Criminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts;
- (c) Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived

²⁶⁹ According to the representative of France at the UN, Resolution 1373 is “one of the most important resolutions in its history.” UN Doc. S/PV.4453, at 7 (2002) (France).

or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

(d) Prohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons;

2. *Decides also* that all States shall:

(a) Refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including by suppressing recruitment of members of terrorist groups and eliminating the supply of weapons to terrorists;

(b) Take the necessary steps to prevent the commission of terrorist acts, including by provision of early warning to other States by exchange of information;

(c) Deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens;

(d) Prevent those who finance, plan, facilitate or commit terrorist acts from using their respective territories for those purposes against other States or their citizens;

(e) 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;

(f) 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;

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

3. *Calls* upon all States to []

(d) Become parties as soon as possible to the relevant international conventions and protocols relating to terrorism, including the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999;

(e) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001); [...]

6. *Decides* to establish, in accordance with rule 28 of its provisional rules of procedure, a Committee of the Security Council, consisting of all the members of the Council, to monitor implementation of this resolution, with the assistance of appropriate expertise, and *calls upon* all States to report to the Committee, no later than 90 days from the date of adoption of this resolution and thereafter according to a timetable to be proposed by the Committee, on the steps they have taken to implement this resolution[.]

Despite the variety of obligations, the resolution focuses primarily on terrorism financing without defining terrorism.

On the definition

Resolution 1373 does not provide a definition or guidance on the meaning of “terrorist acts.” Roach suggests that this imperfect side of the resolution is a result of the quick reactive approach in criminalization. Such legislative responses often lack a comprehensive view of the multi-

dimensional aspects of the situation.²⁷⁰ Eric Rosand, United States Mission to the UN, states that the sponsors of the resolution wanted to pass it without going through the problems of the definition that could not be solved by the General Assembly for more than three decades, and which would complicate negotiations.²⁷¹ This resolution, which is globally binding in the obligation to criminalize terrorist acts under each state's domestic system, has thereby increased the complexity of the definition instead of solving it.

This imperfect international approach to issuing obligations without appending an adequate definition of terrorism had two major consequences: terrorism was defined much too broadly at the domestic level in most UN member countries, and countries with poor human rights records proudly report their anti-terrorism measures without fear of further criticism (Roach 2011, 31). Roach describes Security Council Resolution 1373 as a “panic global legislation[,]” in which the resolution came about in a climate of near-hysteria, and the Security Council enacted the resolution with limited information about 9/11.²⁷² This unsound resolution and subsequent legislation and actions built around it have led to various definitions of terrorism based on each state's national interests. These definitions may be arrived upon arbitrarily, and are frequently far too broad, encompassing lawful actions and behaviors which are subsequently criminalized.

A retrospective consideration of the events of 9/11 casts doubt on the assured notion that there was a need for a global shift in crime control. This shift manifested as a widespread drive to establish laws aimed at preventing crimes and threats. Roach argues that anti-terrorism laws were unnecessarily drafted and enacted in many states, with no time or analysis devoted to testing the full capacity of the existing criminal laws. The existing criminal codes, Roach further argues, were

²⁷⁰ Roach, *Supra* 7, at 31.

²⁷¹ Eric Rosand, “The UN Security Council's Counter-terrorism Efforts” in Roy Lee, ed, *Swords into Plowshares: Building Peace Through the United Nations* (Leiden: Martinus Nijhoff, 2006) at 74-75.

²⁷² Roach, *Supra* 7, at 31.

up to the task of dealing with a crime of the nature of 9/11. These new laws offered evidence to a fearful populace that action was being taken, thereby instilling a sense of security (2003, 22–24).

Roach suggests that:

Had the September 11 terrorists planned their crimes in Canada and had law enforcement officials been aware of their activities, the existing law would have allowed them to be charged and convicted of serious crimes before they boarded the aircraft. They would have been guilty of conspiracy to hijack the plane, conspiracy to murder, attempted hijacking, or attempted murder when they were still planning their suicide missions. Such offences already carry high maximum penalties, including life imprisonment. The failure of September 11 was one of law enforcement, not of the criminal law.²⁷³

The substance of this argument is that the criminal law, by criminalizing a wide range of specific acts, is capable of dealing with violent crimes, whether or not they are labelled terrorism. This approach of criminalizing specific acts is useful in precisely identifying crimes, their elements, and the purpose of criminalization. Clive Walker, in *Terrorism and the Law* (2011), shows in his examination of counter-terrorism in the United Kingdom that between 2001 and 2008, most terrorism prosecutions were under the ordinary law and not the Terrorism Act.²⁷⁴ This finding supports Roach's argument that the ordinary criminal law is able to deal with crimes of terrorism.

The specific approach in criminalization is not limited to the national level but is also used internationally. For instance, the early attempts to criminalize terrorism by the UN General Assembly focused on specific crimes rather than adopting a general definition. For example,

²⁷³ Kent Roach, *September 11: Consequences for Canada* (Montreal; Kingston: McGill-Queen's University Press: 2003) at 23.

²⁷⁴ Clive Walker, *Terrorism and The Law* (Oxford; New York: Oxford University Press, 2011) [5.155], [5.196].

during the 1960s and 1970s when cases of hijacking dramatically increased, the UN established the International Civil Aviation Organization (ICAO). Since 1963, the ICAO has adopted a series of conventions regarding hijacking.²⁷⁵ The UN General Assembly also adopted numerous conventions that criminalize specific terrorist acts.²⁷⁶

Even though the specific approach has developed throughout the years in a way that allows it to cover a wide range of violent acts, it has been argued that it is not sufficient for counter-terrorism and that a general definition of terrorism is needed.²⁷⁷ Scholars suggest that the political nature of terrorism requires it to be treated differently.²⁷⁸ Some writers who support the general approach argue that spreading fear is what makes terrorism distinctive. For instance, Robert Goodin argues that terrorism is a distinctive political tactic intending to instil fear, and the element of fear is what makes it morally wrong.²⁷⁹ Terrorists, through their violent actions against random or certain persons or groups, maximize the range of their victims by creating fear in every individual who is directly or indirectly related to the harmed groups. This widespread fear among people can by itself disturb the stability of a society. This fear may affect security as a whole, economic security,²⁸⁰ the legal system, public order or any unwelcomed changes. Even if the effect of an explosion is limited to one place, its psychological and social effects (fear) are globally

²⁷⁵ Tokyo Convention, 1963, Aviation Safety: Convention on Offences and Certain Other Acts Committed on Board Aircraft; Hague Convention, 1970, Aircraft Hijacking: Convention for the Suppression of Unlawful Seizure of Aircraft; Montreal Convention, 1971, Aviation Sabotage: Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Supplement to 1971 Montreal Convention on Air Safety: Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation.

²⁷⁶ For instance, 1963 Convention on Offences and Certain Other Acts Committed On Board Aircraft; 1979, International Convention against the Taking of Hostages.

²⁷⁷ Ben Golder & George Williams, "What is 'Terrorism'? Problems of Legal Definition" (2004) 27:2 UNSW L J 270 at 287; Ben Saul, "The Curious Element of Motive in Definitions of Terrorism: Essential Ingredient—Or Criminalising Thought?" in Andrew Lynch, Edwina MacDonald & George Williams, eds, *Law and Liberty in the War on Terror* (Sydney: Federation Press, 2007) 29-33.

²⁷⁸ Samuel Scheffler, "Is Terrorism Morally Distinctive?" (2006) 14:1 J of Political Philosophy 1 at 2-5; Robert Goodin, *What's Wrong with Terrorism?* (Cambridge, Malden: Polity Press, 2006) at 32-37.

²⁷⁹ Goodin, *Supra* 278, at 35-37.

²⁸⁰ Section 83.01(b)(i) of the Canadian Criminal Code.

generated among people, maximizing the spread of fear. Accordingly, Samuel Scheffler argues that terrorism is morally distinctive. Terrorism differs from other crimes that are directed against civilians insofar as, in the case of terrorism, killing and harming are committed against people (primary victims) to create fear in a large number of people (secondary victims) with the aim of disturbing social order. It is, as Scheffler describes, “a chain of intentional abuse” starting with the primary victims by causing death and injury and continuing to the secondary victims by causing terror among them, to ultimately degrade the social order.²⁸¹ While this argument is logical, other scholars exclude the “fear” element from the definition of terrorism because of its psychological nature, which makes it difficult to identify.²⁸²

Another group of scholars argues that terrorism is distinctive because of the “political, religious, or ideological” motive associated with terrorist acts.²⁸³ The motive element is found in some definitions, including the Australian and South African one. In his argument for the motive element, Ben Saul explains that when criminals commit their act with one of the above motives, they intend to harm the public or society as a whole. This large impact is not intended in other violent crimes such as homicide and assault, which are committed for private ends, including hatred, revenge, and animosity.²⁸⁴ The motive element and the compulsion of governments align with a counter-insurgency approach, which targeted ideological and political beliefs whether or not associated with violent crimes. The motive element associated with terrorism justifies additional penalties²⁸⁵ and even different procedures, as we will see in examining the current anti-terrorism laws of Egypt and Tunisia in Chapters 5 and 7.

²⁸¹ Scheffler, *Supra* 278, at 9.

²⁸² CAJ Coady, “Defining Terrorism” in Igor Primoratz, ed, *Terrorism: The Philosophical Issues* (Palgrave Macmillan, 2004) at 5.

²⁸³ Golder & Williams, *Supra* 277, at 287.

²⁸⁴ Saul, *Supra* 277, at 63.

²⁸⁵ Golder & Williams, *Supra* 277, at 287.

Another reason often claimed for adopting a general approach to defining terrorism is to include new forms of crimes that may emerge in the future and that ordinary criminal law does not cover. This concern takes into account the development of technology that may bring with it unexpected forms of terrorist acts.²⁸⁶ The significant changes to the characteristics of terrorism, including the methods, aims, and character of the actors, make it impossible to predict future threats. This fact has led to justifying adopting overbroad definitions of terrorism that have the capacity to include almost all predicted and unpredicted threats.²⁸⁷

The task of counter-terrorism, especially post-9/11, has created a need to anticipate the movement and growth of terrorist organizations in order to pre-empt their terrorist acts. To this end, the UN Security Council has established a counter-terrorism regime that aims to target terrorist organizations, primarily by weakening their financial position. As we will see in the following section, counter terrorism financing has become a global theme of crime control.

Counter terrorism financing

Resolution 1373 emphasizes the prevention of terrorism financing. As mentioned earlier, there were previous international attempts to prohibit terrorism financing, including the International Convention for the Suppression of the Financing of Terrorism. Even though this Convention was adopted in 1999, it was signed and ratified by only a few states. Resolution 1373 promotes this Convention by calling on states to become parties to it,²⁸⁸ which has been achieved through the states gradual ratification of the Convention. However, the efficiency of counter terrorism

²⁸⁶ Susan Tiefenbrun, "A Semiotic Approach to a Legal Definition of Terrorism" (2003) 9:2 Intl Students Association J of Intl & Comparative L 357 at 365.

²⁸⁷ Cancio Meliá, *Supra* 32, at 108.

²⁸⁸ UN Security Council Resolution 1373, para 3(d).

financing is worth examining, especially since the 1991 Al-Qaeda and Taliban sanctions regime mentioned earlier did not prevent the attacks of 9/11.

While great global emphasis has been placed on counter terrorism financing, this focus has shown limited efficiency. For instance, the massive attacks of 9/11 were estimated to have cost the plotters between \$400.00 and \$500.000,²⁸⁹ an amount that can be easily collected with or without financial sanctions. The focus on suppressing the financing of terrorists comes from an assumption that terrorist organizations, especially Al-Qaeda, which was led by the wealthy Osama bin Laden, have great assets and access to financial liquidity, which must be frozen. However, a report by the National Commission on Terrorist Attacks upon the United States (9-11 Commission) shows that Al-Qaeda's major source of funds was not bin Laden's personal inheritance or network of businesses as the United States and the world thought, but donations.²⁹⁰ Such donations were made by charities located in the wealthy Gulf countries, particularly Saudi Arabia.²⁹¹ It should be mentioned that not all donors were Al-Qaeda sympathizers; some did not know the final destination of their donations.²⁹² This suggests that, unlike funds coming through money laundering from organized crime, which involve large amounts of money, terrorism financing may involve small transfers that can come from legitimate sources.²⁹³

The fact that terrorism financing requires no more than limited funds makes the task of counter terrorism financing not only challenging, but also threatening to charities and NGOs (McCulloch & Pickering 2005, 471). McCulloch and Pickering note that measures for combating the financing of terrorism are focused more on targeting terrorist groups than on terrorist

²⁸⁹ The 9/11 Commission Report, *Supra* 47, at 172.

²⁹⁰ *Idem*, 169-70.

²⁹¹ *Idem*, at 170.

²⁹² *Idem*.

²⁹³ Roach, *Supra* 7, at 35.

activities.²⁹⁴ Such focus requires combining counter terrorism financing with listing suspects. Roach observes a problem with this combination, in which the process of listing depends largely on secret intelligence, which could wrongfully turn mere suspects into terrorists.²⁹⁵ Since 1997, the United States has listed dozens of organizations as Foreign Terrorist Organizations.²⁹⁶ The act of blacklisting also allowed the assets of these organizations to be frozen.²⁹⁷ The United States disregarded the fact that some of the organizations on its blacklist run hospitals and schools in Palestine and Lebanon and treated charitable assets equally to other suspicious funds.²⁹⁸

The post-9/11 counter-terrorism experience has shown the limited effectiveness of terrorism financing laws. However, states were required to update the CTC with their counter terrorism financing laws and measures.²⁹⁹ This suggests that, regardless of the efficiency of terrorism financing laws, the obligation listed in Security Council Resolution 1373 must be adhered to, and states must adopt new laws to satisfy the neo-colonial powers that dominate the Security Council. The obligations of Resolution 1373 allows controlling terrorist groups more than terrorist activities, and this in turn accords with a counter-insurgency approach, which attempts to control through politics.

²⁹⁴ Jude McCulloch & Sharon Pickering, "Suppressing the Financing of Terrorism" (2005) 45 British J of Criminology 470 at 477.

²⁹⁵ Kent Roach, "Secret Evidence and its Alternatives" in Aniceto Masferrer, ed, *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism* (Dordrecht; New York: Springer Science & Business Media, 2012) at 180.

²⁹⁶ This has been done in accordance with the American Secretary of State based on section 219 of the Immigration and Nationality Act. See "Foreign Terrorist Organizations" online: US Department of State <www.state.gov>.

²⁹⁷ *Idem*.

²⁹⁸ McCulloch & Pickering, *Supra* 294, at 475; Angela D Hardister, "Can We Buy Peace On Earth?: The Price of Freezing Terrorist Assets in a Post-September 11 World" (2003) 28:3 North Carolina J of Intl L 605 at 610.

²⁹⁹ 2006 is the year of the last published report on the CTC website.

Counter Terrorism Committee (CTC): No emphasis on the definition of terrorism

Resolution 1373 established the Counter Terrorism Committee (CTC). The CTC is comprised of all 15 Security Council members, with the assistance of appropriate expertise. Its mandate is to monitor the implementation of Resolution 1373. States should provide the CTC with reports on the steps they have taken to implement this resolution.

Resolution 1373 requires countries to report their anti-terrorism measures to the CTC within 90 days. This short period was understood by a number of countries as a deadline to adopt anti-terrorism laws. To respond to Resolution 1373, many countries, including those that already had anti-terrorism laws, rushed to expand their existing laws. In an attempt to comply with the obligations established in this resolution, many states considered the definition in the United Kingdom Terrorism Act (2000) as their guidance. Roach observes that the United Kingdom has great global influence, especially over its former colonies. Britain has a long history of dealing with combating terrorism in Northern Ireland and other colonies (2007, 228). The British Terrorism Act defines terrorism—with a focus on the motive element— as:

[...] (b) the use or threat is designed to influence the government [or an international governmental organization] or to intimidate the public or a section of the public, and

(c) the use or threat is made for the purpose of advancing a political, religious[, racial] or ideological cause.

(2) Action falls within this subsection if it—

(a) involves serious violence against a person,

(b) involves serious damage to property,

(c) endangers a person's life, other than that of the person committing the action,

(d) creates a serious risk to the health or safety of the public or a section of the public, or

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.³⁰⁰

Countries reported their broad anti-terrorism measures to the CTC without fear of being criticized. In practice, the role of the CTC was mainly to follow up on how stern domestic anti-terrorism laws and measures were, despite the fact that some laws and measures were unnecessarily broad and repressive. Roach has criticized the CTC by arguing that countries that were disapproved before 9/11 for their poor human rights records in dealing with suspected terrorists were proudly reporting their anti-terrorism measures to the CTC without fear of further criticism.³⁰¹ For instance, in its first report to the CTC, Egypt confidently reported its tough counter-terrorism penalties, including the death penalty. Egypt's report states that "the legal texts regarding terrorist acts provide severe penalties [...], the maximum penalty being death and the minimum being lifelong hard labour[.]"³⁰² Egypt also reported to the CTC the sufficiency of its Penal Code to meet the standards of Resolution 1373 by covering "all criminal acts, as well as attempted offences and complicity, including incitement, conspiracy and assistance."³⁰³ It goes further in mentioning the use of its infamous State of Emergency Law, stating that "paragraph 1 of article 3 of law no. 162 of 1958 permits the competent authorities to arrest any suspect person or persons presenting a threat to security and public order and to search them and search their homes."³⁰⁴ CTC reports in following years do not show criticism of Egypt's wide authorities under its Penal Code or State of Emergency Law.

³⁰⁰ Section 1(1) of the Terrorism Act 2000.

³⁰¹ Roach, *Supra* 7, at 3, 48-49.

³⁰² "Letter dated 20 December 2001 from the Permanent Representative of Egypt to the United Nations addressed to the Chairman of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism" S/2001/1237 [Egypt's Report to the CTC, 2001], at 11.

³⁰³ "'Letter dated 20 January 2003 from the Permanent Representative of Egypt to the United Nations addressed to the Chairman of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism" S/2003/277 [Egypt Report to the CTC, 2003], at 8.

³⁰⁴ *Idem*.

Arab states' responses to Resolution 1373

The general response of Arab states to Resolution 1373 showed no rush in adopting new anti-terrorism laws. Countries like Egypt and Syria that had already criminalized terrorism within their criminal codes did not see a need to expand their existing overly broad laws. Other countries like Bahrain and Jordan that found their criminal code and national security laws were more than adequate to fight terrorism have later adopted special anti-terrorism laws between 2005 and 2006 in a response to opponents and internal threats.

On the other hand, Tunisia responded to Resolution 1371 differently than the rest of the Arab states by adopting a new anti-terrorism law. In 2002 Tunisia reported to the CTC that a draft law on counter-terrorism was being prepared.³⁰⁵ The law was passed in December 2003 by Act no. 75 of 2003 concerning Support for International Efforts to Combat Terrorism and Prevent Money-Laundering.³⁰⁶ The Act criminalizes terrorism, terrorism financing, and money laundering in one law, an approach that is criticized by Tunisian lawyers as problematic.³⁰⁷ Tunisian lawyers have pointed out that Tunisia took advantage of the event of 9/11 to broaden its national security laws, tightening rights and liberties in the name of counter-terrorism.³⁰⁸

With the exception of Tunisia that enacted a new anti-terrorism in 2003 as a response to a terrorist attack on Djerba Island (addressed in Chapter 7), most Arab states were relatively slow in adopting new anti-terrorism laws. However, they have shown no hesitation in adopting regulations regarding financing. Among countries that have done so are Egypt (Law no. 80 of 2002 on Anti-

³⁰⁵ "Note verbale dated 30 August 2002 from the Permanent Mission of Tunisia to the United Nations addressed to the Chairman of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism", S/2002/1024 [Tunisia's Report to the CTC, 2002], at 3-4.

³⁰⁶ Tunisian Act no. 75 of 2003 concerning Support for International Efforts to Combat Terrorism and Prevent Money-Laundering.

³⁰⁷ Khawla Zatyqi, "Terrorism Law: Between the Urge to Counter the Phenomenon and Protecting Human Rights" (14 August 2014) *Attounissia*, online: <www.attounissia.com.tn/details_article.php?t=41&a=132012>.

³⁰⁸ Sameh Samear, "New 'Terrorism' Law Enhances Fascist Laws" (8 February 2014) *Mohamoon*, online: <www.mohamoon.com/montada/Default.aspx?Action=Display&ID=14904&Type=3>.

Money Laundering), Lebanon (Law no. 318 of 2001 on Combating Money Laundering), Bahrain (Law no. 4 of 2001 regarding the Prohibition and Combating of Money Laundering), Kuwait (Law no. 35 of 2002 regarding Anti-Money Laundering Operations), and UAE (Law no. 4 of 2002 regarding Criminalizing Money Laundering).³⁰⁹ These laws are primarily dedicated to money laundering, with less or even no focus on terrorism financing. Some countries, such as Egypt and Lebanon, prohibit terrorism financing as part of prohibiting money laundering.³¹⁰ Both of these countries refer to the definition of terrorism stipulated in their Penal Code. Other countries, like the UAE, also prohibit terrorism financing as part of prohibiting money laundering, but the UAE did not provide a definition of terrorism until it adopted its first anti-terrorism law in 2004.³¹¹ Kuwait did not include terrorism financing in its 2002 Anti-Money Laundering Operations Law, but amended this law in 2013 to include combating money laundering and terrorism financing.³¹² Egypt and Lebanon have longer experience with terrorism, and thus have included a definition of terrorism as part of criminalizing terrorism financing. However, as we will see in Chapter 5, Egypt in particular defines terrorism broadly, a tendency that is also carried out in the rest of the Arab states that follow the Egyptian model.³¹³

An overall observation regarding Arab states' response to Resolution 1373 is that they all rushed into adopting money-laundering laws; some immediately included terrorism financing while others did so in following years. The motive behind the collective adoption of such laws can be seen in the case of Egypt in relation to the FATF. In 2001, Egypt was listed by the FATF as a

³⁰⁹ Regional Project on Anti-Corruption and Integrity in the Arab Countries (ACIAC), *UNDP*, online: <www.undp-aciac.org/resources/ac/legal.aspx?lc=5>.

³¹⁰ Article 2 of Egyptian Law no. 80 of 2002 on Anti-Money Laundering. Article 1 of the Lebanese Law no. 318 of 2001 on Combating Money Laundering.

³¹¹ United Arab Emirates Law no. 1 of 2004 regarding Combating Terrorist Crimes.

³¹² Kuwaiti Law no. 106 of 2013 regarding Combating Money Laundering and Terrorism Financing.

³¹³ Roach, *Supra* 7, at 15.

non-cooperative country,³¹⁴ a measure that can be taken by the FATF against countries that have weak measures regarding money laundering—and terrorism financing, as added to the FATF’s mandate post-9/11. Lebanon was also blacklisted in a previous year.³¹⁵ In order for such countries to be de-listed, the FATF requires a modification of legislation that ensures the prevention and punishment of crimes regarding money laundering and terrorism financing in accordance with international standards.³¹⁶ Egypt thus modified its legislation and was de-listed in 2004. In a report to the CTC, Egypt, while demonstrating its counter-terrorism measures, also reveals its efforts to meet FATF standards. It states that:

Since June 2001, Egypt has been subject to assessment by the Financial Action Task Force (FATF) aimed at monitoring the extent of Egypt’s commitment to implementing the FATF recommendations on terrorist financing and money-laundering. Egypt had been included on the list of non-cooperative countries and territories (NCCTS), but was removed from the list in February 2004 in view of the institutional and practical changes it had introduced in that area.³¹⁷

Egypt’s experience shows that its compliance with FATF requirements, which are part of Security Council Resolution 1373 obligations, is done, whether partially or internally, in order to be removed from the FATF blacklist. In this respect, Alain Damais, Executive Secretary of the FATF, argues that the FATF’s measures have

³¹⁴ For more on Egypt, *see* Financial Action Task Force, “Review to Identify Non-cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures”, 22 June 2001, at 3, 14, 18.

³¹⁵ “Financial Action Task Force on Money Laundering 2000–2001 Report Released”, PAC/COM/NEWS(2001)58 Paris, 22 June 2001, at 1-3.

³¹⁶ *Idem*.

³¹⁷ “Note verbale dated 29 April 2005 from the Permanent Mission of Egypt to the United Nations addressed to the Chairman of the Counter-Terrorism Committee”, S/2005/288 [Egypt’s Report to the CTC, 2005], at 10.

had long-lasting effects on a much broader range of countries than the [blacklisted countries], as it has created a global incentive for countries to either create or improve [their anti-money laundering and counter terrorist financing] regime, and better cooperate at the international level. In addition, this initiative encouraged many other countries and territories to adopt and implement measures for the prevention, detection and punishment of money laundering and terrorist financing, to prevent any listing by FATF.³¹⁸

Damais's statement supports our argument that Arab states adopted counter money laundering and terrorist financing laws in order to avoid being blacklisted by the FATF. Whether or not terrorism is effectively countered, the tool of blacklisting, among other tools of financial control, has served the FATF and UN Security Council in maintaining their superior position. This position allows them to continue centralizing the global power to regulate in the name of counter-terrorism.

UN Security Council Resolution 1566 (2004): Late guidance on the definition

Resolution 1566 was adopted in October 2004 after the killing of more than 300 children and adults by Chechen rebels in the Beslan School Siege in Russia.³¹⁹ It was adopted under Chapter VII, reminding states of their responsibilities to combat terrorism. However, the resolution attempts to fill one of the gaps of Resolution 1373 by providing a general definition for "terrorism." Resolution 1566 defines terrorism as follows:

[C]riminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general

³¹⁸ Alien Damais, "The Financial Action Task Force" in Wouter H Muller, Christian H Kalin & John G Goldsworth, eds, *Anti-Money Laundering: International Law and Practice* (John Wiley & Sons, 2007) at 78.

³¹⁹ "Beslan School Siege Fast Facts" (15 August 2016) *CNN Library*, online: <www.cnn.com>.

public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism[.]³²⁰

This definition provides international guidance on the meaning of terrorism. It focuses on violent acts that physically harm the population and spread fear among the populace. It avoids the political or religious motive element required in the British and other Western definitions. Roach observes that such guidance provides a “minimal definition that focused on intentional” acts of serious harm, and that is in line with criminal law principles.³²¹ However, it is unlikely to be implemented since many countries complied with Resolution 1373 and had already adopted anti-terrorism laws that applied to a broader range or a different set of offences than those covered by the new definition.

Since 2004, countries have frequently amended their anti-terrorism laws, but with no consideration to the above definition. This suggests a duality in states’ responses to international obligations. On the one hand, they rush into broadening their anti-terrorism legislation in accordance with Resolution 1373, and on the other, they neglect the guidance provided by Resolution 1566. This duality will continue as long as the issue of the definition of terrorism is not a priority for the Security Council.

UN Security Council Resolution 1624 (2005): Speech crimes

The UN Security Council adopted non-binding Resolution 1624 in September 2005 as a response to the 2005 London bombing. The resolution emphasizes speech crimes related to terrorism.

³²⁰ UN Security Council Resolution 1566 (2004), para 3.

³²¹ Roach, *Supra* 7, at 52.

Despite the fact that this resolution is non-binding, it calls upon states to adopt measures that prohibit and prevent incitement to commit a terrorist acts. The resolution reads:

Condemning also in the strongest terms the incitement of terrorist acts and *repudiating* attempts at the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts, *Deeply concerned* that incitement of terrorist acts motivated by extremism and intolerance poses a serious and growing danger to the enjoyment of human rights, threatens the social and economic development of all States, undermines global stability and prosperity[.]³²²

Resolution 1624 does not define the terms “incitement” and “glorification” of terrorism. It leaves interpreting such acts to national jurisdictions. However, such terms are often defined vaguely or broadly in way that allow national authorities to capture those who encourage or glorify terrorism and radical ideologies without necessarily being part of inciting or planning any specific attacks. The impreciseness of the wording of the resolution broadens the capacity of speech crimes to include the use of internet and social media.³²³ It should be noted that freedom of speech is protected under international conventions, including the Convention for the Protection for Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights.

Even though freedom of speech is granted by international human rights law, it has been suggested that freedom of speech may be restricted whenever misused.³²⁴ This view represents the overall European tradition as observed from the collective European national laws and regional

³²² Resolution 1624 (2005), para 1.

³²³ “Letter dated 2 September 2015 from the Chair of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council” S/2015/683, at 4-5.

³²⁴ Daphne Barak-Erez & David Scharia, “Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law” (2011) 2 Harvard National Security J 1 at 5.

conventions.³²⁵ For example, France reported to the CTC that it prohibits incitement in its Penal Code and in its Law on the Freedom of the Press of 29 July 1881 (Press Law). Incitement is defined in Article 23 of the Press Law,

[S]peeches, shouts or threats proffered in public places or meetings, or by written words, printed matter, drawings, engravings, paintings, emblems, pictures or any other written, spoken or pictorial aid, sold or distributed, offered for sale or displayed in public places or meetings, either by posters or notices displayed for public view, or by any means of electronic communication.³²⁶

The French Press Law of 1881 can thus be viewed as the legal foundation for the restriction of freedom of expression in France and colonies as we will see in Chapter 6 and 7. France continues explaining in its report to the CTC that incitement is punishable even if no further offence is committed.³²⁷ As we will see in Chapters 5 and 6, the above Article has migrated to former French colonies, including Egypt and Tunisia.

The United Kingdom, which promoted Resolution 1624, also has a long history of legislating on speech crimes. Several laws were adopted by the United Kingdom to counter the threat of Irish “rebels”. These include the 1833 Act for the More Effective Suppression of Local Disturbances and Dangerous Associations in Ireland, the Prevention of Crime (Ireland) Act of 1883, and the Restoration of Order in Ireland Act of 1920 that targeted Irish rebels discussed in the introductory chapter. Speech crimes were further regulated in Northern Ireland. During the 1970s, the British security forces took suppressive measures against Catholics in Northern Ireland,

³²⁵ For more, *see idem*.

³²⁶ “Letter dated 14 July 2006 from the Permanent Representative of France to the United Nations addressed to the Chairman of the Counter-Terrorism Committee” S/2006/547 [France’s report to the CTC, 2006], at 3.

³²⁷ *Idem*.

which exacerbated the sense of hatred towards the British forces.³²⁸ To pre-empt Catholics from taking further angry actions, “incitement” to hatred was criminalized in the 1970 Prevention of Incitement to Hatred Act (Northern Ireland). Article 1 of the Act states that:

1. A person shall be guilty of an offence under this Act if, with intent to stir up hatred against, or arouse fear of, any section of the public in Northern Ireland—

(a) he publishes or distributes written or other matter which is threatening, abusive or insulting; or

(b) he uses in any public place or at any public meeting words which are threatening, abusive or insulting;

being matter or words likely to stir up hatred against, or arouse fear of, any section of the public in Northern Ireland on grounds of religious belief, colour, race or ethnic or national origins.³²⁹

This law is another foundation of incitement and speech crimes in the United Kingdom and its former colonies. The above regulations were adopted later in the United Kingdom by issuing the Public Order Act 1986.³³⁰ These Acts did not explicitly list incitement to terrorism, but their wording includes the arousing of fear, which can be linked to the current crimes of terror.

Another example of legislation on incitement can be drawn from the British colonial experience in India. The book *Angāre*, a collection of short stories written by a group of young Indians and published in the 1930s, criticizes in some parts Islamic traditions and in other parts colonial practices. Accordingly, the British banned and destroyed copies of the book under the

³²⁸ Robert Post, “Hate Speech and Democracy” in Ivan Hare & James Weinstein, eds, *Extreme Speech and Democracy* (New York: Oxford University Press) at 481.

³²⁹ Prevention of Incitement to Hatred Act (Northern Ireland) 1970.

³³⁰ Part III of the Public Order Act 1986.

pretext that it disturbed public order.³³¹ The British applied the Indian Penal Code, which was transplanted in India in 1924. This Penal Code condemns

[w]hoever with deliberate and malicious intention of outraging the religious feelings of any class of His Majesty's subjects by words, either spoken or written, or by visible representations insults or attempts to insult the religion or religious beliefs of that class, shall be punished with imprisonment[.]³³²

Incitement to hatred is a tool that can be applied selectively by the colonial power against its opponents. It has been argued that incitement, particularly to religious and racial hatred in India, was part of the colonial policy of divide and control.³³³ Whether or not the colonial powers were aware of their intentions behind criminalizing incitement to hatred, the colonial legacy needs a re-evaluation of the utility of this criminalization.

The British experience in Malay shows that emergency powers included restrictions on freedom of expression, including Emergency (Publications—Control of Sale and Circulation) 1950 and Emergency (Newspaper) Regulations 1951, mentioned in Chapter 1. Such restrictions are extended to contemporary laws of Singapore, particularly the Internal Security Act 1960. According to this Act, the “Minister charged with the responsibility for printing presses publications” may prohibit prints that:

- (a) contains any incitement to violence;
- (b) counsels disobedience to the law or to any lawful order;

³³¹ Maleiha Malik, “Extreme Speech and Liberalism” in Ivan Hare & James Weinstein, eds, *Extreme Speech and Democracy* (New York: Oxford University Press) at 104.

³³² Section 295A added to the Indian Penal Code in 1927. Quoted in *Idem*.

³³³ Narendra Nayak, “We and Section 295A of the IPC” (7 May 2012) *Nirmukta*, online: <nirmukta.com/2012/05/07/we-and-section-295a-of-the-ipc/>.

(c) is calculated or likely to lead to a breach of the peace, or to promote feelings of hostility between different races or classes of the population; or

(d) is prejudicial to the national interest, public order or security of Singapore,

he may by order published in the Gazette prohibit either absolutely or subject to such conditions as may be prescribed therein the printing, publication, sale, issue, circulation or possession of such document or publication.³³⁴

These examples suggest that a strong colonial legacy has been extended to national and global sets of legislation. Such legacy risks scarifying rights for security, yet without evidence of the effectiveness of such measures. In fact, the colonial history shows that coercive measures have often resulted in more social and political coercive responses. More on this point is shown in Chapter 6 when examining the Tunisian experience under the French colonialism.

Prohibiting speech that encourages or apologizes to terrorism is a direct threat to freedom of expression and the future of democracy. The UN Special Rapporteurs on counter-terrorism and freedom of expression suggest avoiding criminalizing “glorification” offences for their problematic consequences. According to their report, such offences “must be prescribed by law in precise language, including by avoiding reference to vague terms such as ‘glorifying’ or ‘promoting’ terrorism[.]”³³⁵ The ambiguity of speech crimes allows a charge of terrorism despite the absence of violent acts or a motive of encouraging violence.

³³⁴ Article 20 of the Singapore Internal Security Act 18 of 1960 as amended by Act 15 of 2010.

³³⁵ UN Human Rights Office of the High Commission, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, A/HRC/16/51, 22 December 2010, para. 31.

UN Security Council Resolution 2178 (2014): Foreign terrorist fighters

The UN Security Council adopted Resolution 2178 in September 2014 to deal with the increasing wave of foreign terrorist fighters. Under international law, foreign fighters are individuals who leave their home countries to take part in armed conflicts abroad by joining non-state armed groups.³³⁶ According to the resolution, foreign terrorist fighters are “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict.”³³⁷ While the resolution points out foreign terrorist fighters as a phenomenon, it particularly refers to the Islamic State in Iraq and Syria (ISIS) and other cells derivative of Al-Qaeda. The question of treating ISIS as a distinctive global threat has been concerning intellectuals and the international community.³³⁸ Both ISIS and Al-Qaeda carried out worldwide massive attacks. In this section, the threat of ISIS addressed, followed by the obligations imposed under Resolution 2178, their effectiveness and rationale.

The global threat of the Islamic State (ISIS)

ISIS was declared in April 2013, is a jihadist group that seeks the establishment and expansion of the Islamic Caliphate through military conquest.³³⁹ Following the Salafi-Wahhabi tradition, ISIS’s ideology is similar to that of Al-Qaeda. While ISIS is more focused on territorial control in the

³³⁶ “Foreign Fighters under International Law” (2 October 2014) 7 Geneva Academy of International Humanitarian Law and Human Rights, online: <www.geneva-academy.ch>, at 5.

³³⁷ UN Security Council Resolution 2178 (2014).

³³⁸ Jessica Stern & J. M. Berger, *ISIS: The State of Terror* (New York: Ecco Press, 2015); Michael Weiss & Hassan Hassan, *Isis: Inside the Army of Terror* (New York: Regan Arts, 2015).

³³⁹ Charles C Caris & Samuel Reynolds, “ISIS Governance in Syria” (July 2014) *Institute for the Study of War*, online: <www.understandingwar.org/report/isis-governance-syria>, at 9-10.

region of Iraq and the Levant, it also calls for violence in countries that have joined the international military campaign against it.³⁴⁰

The threat of the radical ideology of ISIS increases with its reliance on foreign fighters from all around the world, who consequently spread the culture of violence. It should be noted that the phenomenon of foreign fighters is not new. Mercenaries and terrorists have been engaging in international armed conflicts and civil wars throughout history. For instance, Arab-Afghan warriors played a major role in the Soviet War in Afghanistan (1979–1989). Other examples include the Spanish Civil War (1936–1939) and the Arab-Israeli conflict (1948–present).³⁴¹

The threat of foreign terrorist fighters to some extent differs from the threat of major terrorist groups like Al-Qaeda. While both ISIS and Al-Qaeda adopt radical ideology and carry out violent and massive attacks, ISIS differs insofar as it has a geographical existence in Iraq and Syria and an ambition to expand its territory.³⁴² A report by the UN Analytical Support and Sanctions Monitoring Team shows that, after the ousting of the Taliban regime in 2001, the survivors established new bases in countries that had no history of jihadism, above all Iraq and Syria.³⁴³ ISIS has attracted many supporters, traveling from different parts of the world to join the fight. There has been a radical increase in the number of foreign fighters from some thousands in the last decades to currently more than 25,000.³⁴⁴ In addition, in the past decade terrorist fighters came from a few countries, but now they come from over 100 countries.³⁴⁵ The spread of terrorist

³⁴⁰ Stewart Bell, “ISIS Takes Credit for Inspiring Terrorist Attacks that Killed two Canadian Soldiers” (21 November 2014) *National Post*, online: National Post <news.nationalpost.com>.

³⁴¹ *Idem*.

³⁴² Kent Roach, “Comparative Counter-terrorism Law Comes of Age” in Kent Roach, ed, *Comparative Counter-terrorism Law* (New York: Cambridge University Press, 2016) at 5; Thomas Hegghammer, “The Rise of Muslim Foreign Fighters: Islam and the Globalization of Jihad” (2010/11) 35:3 *Intl Security* 53 at 57.

³⁴³ “Letter dated 19 May 2015 from the Chair of the Security Council Committee pursuant to Resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities addressed to the President of the Security Council”, at 6.

³⁴⁴ *Idem*, at 7-8.

³⁴⁵ *Idem*.

fighters all around the world has motivated the Security Council to adopt obligations that focus on their movement and their funding.

The obligations of Resolution 2178: Counter violent extremism

Resolution 2178 is adopted under Chapter VII, emphasizing obligations from Resolution 1373 (2001), including blacklisting and financial restrictions. Roach points out that while Resolution 1373 provides a global response to Al-Qaeda, Resolution 2178 plays a similar role in setting the foundation for responding to the threat of ISIL.³⁴⁶ Resolution 2178 also emphasizes preventing the movement of terrorists through effective border controls and controls on issuing travel documents. It engages both states and airlines in providing information on listed passengers to competent authorities.³⁴⁷ As we will see in Chapter 7, countries such as Tunisia, which has many people estimated to be going to ISIS, have responded to the travel ban obligation by imposing unfair restrictions on traveling that do not respect the right to movement or the rule of law.

Resolution 2178 refers to the concept of “violent extremism”³⁴⁸ and encourages states to counter this threat. However, this is another concept that is left without a clear definition and without clear guidance on how to counter it. According to Resolution 2178, violent extremism “can be conducive to terrorism[,]”³⁴⁹ therefore, countering violent extremism must be done in order to prevent terrorism.³⁵⁰ The resolution acknowledges that military operations, law enforcement, and the use of intelligence alone are not enough to counter violent extremism and terrorism, and that a “non-violent alternative”³⁵¹ must be developed in order to resolve and prevent conflicts. The

³⁴⁶ Roach, *Supra* 342, at 14-15.

³⁴⁷ Para 9 of Resolution 2178 (2014).

³⁴⁸ Para 15-18 of Resolution 2178 (2014).

³⁴⁹ Preamble and para 15 of Resolution 2178 (2014).

³⁵⁰ *Idem.*

³⁵¹ *Idem.*

resolution encourages states to enhance their efforts in countering violent extremism by preventing radicalization,³⁵² countering incitement to terrorism or extremism, encouraging religious tolerance, and adopting economic and social solutions.³⁵³

The wide range of measures can be linked to the model of “winning hearts and minds” established within counter-insurgency thinking, which combines military and political measures.³⁵⁴ The neo-colonial regulations differ from colonial practices by being relatively less coercive; however, they are similar in adopting unfair measures. In the aftermath of the Paris attack in November 2015, the Security Council adopted Resolution 2253, which neglects the holistic approach suggested in Resolution 2178 by emphasizing blacklisting, travel bans, freezing funds, and restrictions on speech. Thus, neo-colonial measures allow restricting democratic freedoms in a similar way that counter-insurgency undermined self-government and liberties.

In addition to the above obligations, Resolution 2178 also requires complying with international human rights law. However, this obligation has been largely ignored. Democracies are responding to the threat of ISIS through exceptionalism and militarism. The United States-led war against ISIS (2014–present) has used a combination of laws of wars and exceptionalism. The basis of this war is the order of the United States President Barack Obama in August 2014. His order authorized two military operations in Iraq,³⁵⁵ followed by over 20 operations in about three years.³⁵⁶ While evaluating the il/legitimacy of this war is beyond the scope of this dissertation,³⁵⁷

³⁵² Para 15, *idem*.

³⁵³ Preamble, *idem*.

³⁵⁴ The practice and theory of this model is discussed in Chapter 1.

³⁵⁵ The White House, Office of the Press Secretary (7 August 2014) online: <<https://www.whitehouse.gov/the-press-office/2014/08/07/statement-president>>.

³⁵⁶ Justin Carissimo, “US airstrikes ‘Kill at Least 250 Isis Militants’ in Iraq” (29 June 2016) *Independent*, online: <www.independent.co.uk>.

³⁵⁷ According to international law, the kind of attacks carried out against ISIS constitute an armed conflict similar to the one that took place in Afghanistan in October 2001 between the Taliban forces backed by Al-Qaeda and the Northern Alliance forces backed by U.S. forces. Although the term “armed conflict” is not defined in the four Geneva Conventions, it is generally understood as the involvement of the use of force between two or more states. This would

it is worth pointing out that neo-colonial powers still adopt colonial counter-insurgency measures, which rely on militarism, centralization of power, and exceptionalism in the contemporary war on terror and violent extremism.

Conclusion of chapter: Neo-colonial domination of the UN Security Council and FATF

This chapter has shown that the formal and informal influence of neo-colonial powers, particularly the UN Security Council and FATF, are the major factors in directing the current global war on terror. The Security Council has emphasized in its resolutions techniques derived from the colonial and neo-colonial experiences of its permanent members, particularly the United Kingdom. These techniques include financial regulations, blacklisting, travel bans, and restrictions on speech, all of which may be unfairly taken against suspects, and all have limited effectiveness in countering terrorism.

The Security Council and FATF's focus on counter terrorism financing has led to a global shift in counter-terrorism legislation. States have adopted financial regulations regarding terrorism financing and money laundering, regardless of the actual effectiveness of such regulations. For instance, Egypt has adopted a wide range of laws and regulations in this regard even though experience shows that accessing the local banking system is low.³⁵⁸ According to a report by MENAFATF, only 20% of the Egyptian population have bank accounts, and the most common way of conducting financial transactions is with the use of cash.³⁵⁹ This observation, while it does

be international armed conflict, while violence over a certain threshold between a state and armed groups, or between armed groups within a state, would be a non-international armed conflict. While any military countermeasures taken against ISIS must be governed under international humanitarian law, the practice suggests that there has been a tendency towards normalizing the exception in the war on terror.

³⁵⁸ "Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing of Terrorism, Egypt" (19 May 2009) *MENAFATF*, at 18.

³⁵⁹ *Idem*.

not apply to all states, is also a reflection of the limited effectiveness of financial regulations in preventing the funding of terrorists and in preventing violent operations.

The Security Council, on the other hand, dominates through political centralization of what has become the norm of “global legislation.” The frequent use of Chapter VII in adopting mandatory general obligations regarding counter-terrorism creates unequal positions of power. The inequality is in granting the Security Council as a supra-national body powers that allow skipping the regular channels of legislation. In my view, the expansion of the Security Council’s authorities should be seen as a normalization of the exception. Some could argue that this expansion of the Security Council’s powers has its necessity in responding to the increasing threat of bloody terrorist attacks; however, post-9/11 measures did not reduce terrorist groups or terrorist attacks.

The problem of the Security Council’s approach to counter-terrorism is that it encourages states to adopt broad laws without insisting on a definition of terrorism that enhances national and international security. Resolution 1373 (2001) neglected addressing the definition; rather, it focused on broad measures that resulted in the expansion of the meaning of “terrorism” by including inciting and encouraging terrorist acts and financing terrorists. Although Resolution 1566 (2004) came up with guidance on the meaning of “terrorism,” it was too late. Resolution 1566 and later resolutions did not insist that states must adopt a clear definition that is in line with the guidance provided in the resolution. The definition of terrorism is the foundation of criminalizing other terrorism-related crimes, including terrorism financing and speech crimes. Without a clear and precise definition of terrorism at both the national and international level, attempts to combat terrorism and terrorism-related crimes will fail to meet basic standards of justice and fairness.

The risk of an unjust war on terror is greater in the Arab world. The problem in the Arab world is not limited to the anti-terror laws, but to the broad and flexible national security laws that were adopted well before terrorism ever emerged. The background and rationale of adopting these laws is examined in the following chapters. What is worth mentioning here is that in order to have effective crime control, we need reasonable laws rather than extensive laws—an approach that is not supported by the Security Council.

The FATF and the Security Council are not the only neo-colonial powers that direct the global war on terror. The United States and its allies are launching military interventions against terrorist cells. These interventions include the post-9/11 war in Afghanistan and the current intervention against ISIS in Syria and Iraq. What we need to emphasize is the destructive outcome of the unwise use of militarism and exceptionalism in counter-terrorism. Besides the fact that thousands of civilians have been killed in these interventions, the attack against Al-Qaeda in Afghanistan has resulted in the spread of the remaining Al-Qaeda supporters into areas that previously had no history of jihadism. Until this attack, Al-Qaeda was contained in Afghanistan; killing its members did not end the ideology; rather, the ideology re-emerged in the form of ISIS, this time more influential with more supporters and fighters carrying out more attacks worldwide.

The enormity of the threat of ISIS has led the Security Council to encourage countering “violent extremism” in order to prevent terrorism. The Security Council is not clear on the methods required to counter violent extremism. Does countering violent extremism mean the use of colonial counter-insurgency tactics? Does it mean working on a civil programme that focuses on educational, economic, and political progress? Or is it a combination of military and political tactics—winning hearts and minds? The practice shows overall approval of the United States-led

war on terror, as well as the methods of travel bans, blacklisting, and counter terrorism financing, with little or no emphasis on a gradual programme to solve the issue of radicalism and violence.

Radicalism and violence are two issues from which the Arab world has long suffered. Even though Arab states collectively and individually have long faced the threat of extremism and violence with tough national security policies, these threats remain uncontrollable. The next chapter examines the regional efforts of the Arab world in counter-terrorism and in defining terrorism.

CHAPTER 3 TERRORISM AND COUNTER-TERRORISM IN THE ARAB WORLD

Arab countries individually and collectively had broad national security laws well before the attacks of 9/11. This makes them ahead in the war on terror compared with the UN Security Council. This chapter examines the collective counter-terrorism policy and the development of the term “terrorism” in the Arab world. Two approaches are used to address this topic: the intellectual approach, and the historical-legal approach. The intellectual approach addresses the views of Arab scholars on the phenomenon of terrorism, and most importantly on the meaning of “terrorism.” The historical-legal approach examines the development of terrorism and the legal steps taken at a regional level to define and counter terrorism.

The intellectual approach examines the writings of Arab scholarship on the topic of counter-terrorism. From my observation, Arab scholars seem to perceive the topic of counter-terrorism as highly sensitive and they address it carefully, and sometimes not authentically.³⁶⁰ This is done to avoid the risk of being accused, legally or socially, of being terrorist sympathizers. If Arab scholars or human rights activists call for improved human rights, a given Arab state may see this as an attempt to overthrow the government or regime as a whole, and thus as punishable by national security or anti-terrorism law. Partly as a result, most of the anti-terrorism studies written in Arabic, particularly by Egyptian scholars, are merely descriptive. They focus on the issue of combating terrorism and on applying existing laws without questioning the laws themselves. This dissertation does not provide a detailed analysis of whether the nationality and residency of Arab authors or the place of publishers play a role in shaping the content of Arab

³⁶⁰ See for instance, Khalil, *Supra* 4; Committee of Political Scientists, supervised and introduced by Osama Ghazali Harb, *Mubārak wa-muwājahat al-irhāb* [*Mubarak and the Confrontation of Terrorism*] (Giza: Dār Nahḍat Miṣr lil-Ṭibā‘ah wa-al-Nashr wa-al-Tawzī, 2002).

publications. However, a general observation shows that Egyptian writers tend to glorify the authorities, whereas other Arab writers, including those from Lebanon³⁶¹ and Iraq,³⁶² show less hesitation in criticizing the state's approach in counter-terrorism. All Arab states have strict censorship laws inherited from the French model. In addition, many Arab states vary in their use of extra-legal measures, such as detention without trial, enforced disappearances, and torture. The experience of Egypt, in particular, suggests that freedom of expression depends on the authoritarian interests of those in power. For example, during the rule of Nasser, when Arab journalists and intellectuals criticized Nasser's oppressive policy, the authority responded by using detention, torture, and denial of employment in the public sector.³⁶³ Nonetheless, after the death of Nasser, Egyptian writers freely published dozens of books against Nasser's rule.³⁶⁴ The same tendency applies in the era of Mubarak and the era of Abdel Fattah el-Sisi—no criticism is allowed of a current authority.

The historical-legal approach tracks the development of the common threat and the legal responses in different historical phases within the Arab region. This part is divided into three sections. The first is on the war on communism in the Arab world; the second on the war on Islamic terrorism; and the third on the collective regional efforts to counter terrorism under the Arab Convention for the Suppression of Terrorism (Arab Convention) of 1997.

During the 1920s and up until the 1960s, communism spread rapidly in the Arab region. Communism, which aimed to challenge the tyranny of Arab monarchies, was soon suppressed. This section examines examples of the war on communism in the Arab world. These examples

³⁶¹ Abdul-Qadir Zuhair el-Naqozi, *Almafhoum alqanoni lijaraim alerhab adakhili wa dawli* [*The Legal Notion of Internal and International Terrorism*] (Beirut: Manshorat al-Halabi al-Huquqiya, 2008).

³⁶² Abdul-Husain Sha`ban, *Islam wa l'erhab adwli: thulathiyat athulatha adami: adien, alqanon, asiyasa* [*The Bloody Trilogy of Religion, Law, and Politics*] (London: Dar al-Hikma, 2002).

³⁶³ Muḥammad Hassan, *'abd Al-Nāṣir Al-Wajh Al-Ākhar* (Cairo: Dār al-Fikr al-Ḥadīth, 2009) at 11-20, 32, 146-47.

³⁶⁴ *Idem*; Fu'ād Zakarīyā, *'abd Al-Nāṣir Wa-Al-Yasār Al-Miṣrī* [Nasser and the Egyptian Left] (Alexandra: Dār al-Wafā' li-Dunyā al-Ṭibā'ah wa-al-Nashr, 2011).

include the case of Iraq and a brief reference to Egypt and Tunisia. The aim of this examination is to determine to what extent the measures adopted against communism were influenced by colonial practices and agendas, and to what extent these measures are extended to the current war on terrorism.

The subsequent section examines Islamic terrorism as the common enemy in the neo-colonial era. This section examines the emergence and development of Islamic movements. Islamic scholars argue that Islamic extremism and Islamic terrorism were a result of conflicting post-colonial political and cultural values (al-Ghanoushi 1993, 60; Fadlallah 1997, 50). Most Arab countries sought “modernity” and to “Westernize” the political system, which neglected Islamic values.³⁶⁵ In addition, economic reforms largely served the few in power, affirming a system of local and global elitism. This section aims to show that the war on Islamic terrorism is, at least partially, a war of protecting the political and economic interests of neo-colonial powers and post-colonial authoritarian regimes. This makes the war on terror similar to the war on communism: both protect the status quo. In addition, national and global efforts to combat common enemies, whether communists or Islamists, focus on the identity of the enemy rather than the causes of its emergence or the nature of the wrongdoing. This has led to short-term peace and security at best.

However, this short-term peace and security did not prevent radical violence and the emergence of new terrorist groups. The Arab world responded to the increasing threat of terrorism by adopting the Arab Convention in 1997. This Convention is an Egyptian product, and reflects the Egyptian definition of terrorism adopted in its Penal Code in 1992. It also reflects the collective Arab view regarding issues of self-determination, overprotecting heads of state, and political

³⁶⁵ Rashid al-Ghanoushi, *al-Hurrīyāt al-‘āmmah fī al-dawlah al-Islāmīyah* [Public Liberties in the Islamic State] (Beirut: Markaz Dirāsāt al-Waḥdah al-‘Arabīyah, 1993) at 60-62; Mohammad Hussain Fadlallah, *Hiwarat filfīkr wa esyasa wa elejtima* [Dialogues in Thought, Politics and Sociology] (Beirut: Dar al-Malak: 1997) at 50-57.

crimes. The importance of the Arab Convention is that it shows that the Arab world was ahead of the West in the war on terrorism. This suggests that the Arab world had an interest in criminalizing terrorism well before the post-9/11 global shift in counter-terrorism. In this chapter, I will answer the questions: what motivated Arab states to adopt the current anti-terrorism laws and policies, and what are the protected values and interests? Does the colonial rationale appear in these laws? And is there any external pressure, specifically by neo-colonial powers, to adopt these laws? This investigation will be accomplished by a detailed evaluation of the relevant articles of the Arab Convention.

“Terrorism” at an intellectual level

An internet column by an Arab professor at an American university asks “where are our Arab intellectuals?”³⁶⁶ This question may not resonate with youthful Arabs who carried out the so-called Arab Spring without the fuel of intellectuals. However, Arabs who witnessed the colonial and immediate post-independence eras would appreciate the role of intellectuals, who fuelled regime change revolutions. From the late nineteenth until the late twentieth century, Arab poets, writers, and artists played a significant role in challenging the tyrannical systems of the Ottoman Empire, European colonialism, and local authoritarianism. These include Syrian author Abd al-Rahman al-Kawakibi (1855–1902), Tunisian poet Aboul-Qacem Echebbi (1909–1939), and Egyptian writer and Nobel Prize winner Naguib Mahfouz (1911–2006). Another internet column by an Arab writer describes the influence of Edward Said and Arab intellectuals:

³⁶⁶ Nabil Echchaibi, “Where Are You, Arab Intellectuals?” (30 June 2015) *Open Democracy*, online: <www.opendemocracy.net/arab-awakening/nabil-echchaibi/waiting-for-arab-intellectuals>.

[Said's] column ran in Egypt's al-Ahram Weekly. His non-conformist political style—let alone his literary genius—did more than convey information and offer sound analyses. It also offered guidance and moral direction.

Professor Said, and many such giants, were missed most during this current [Arab Spring] upheaval, where intellectuals seemed negligible, if at all relevant. There is no disrespect intended here, for this is not about the actual skill of articulation, but alternatively it concerns the depth of that expression, the identity and credibility of the intellectual, his very definition of self, and relationship with those in power.³⁶⁷

The devolution of Arab intellectualism has its causes and effects that are beyond the scope of this dissertation. However, we can briefly summarize that censorship, unfair arrests, and torture are among the many reasons for the fear to express freely.³⁶⁸ Many Egyptian journalists and writers, including Mustafa Amin and Fekry Abaza, were imprisoned and some were tortured for criticizing President Nasser's policy.³⁶⁹

Government policies of mind control have led to a shortage of critical scholarly work on counter-terrorism written in Arabic. For example, one of the few books on counter-terrorism is *High State Security Crimes* by Judge Ahmad Mahmud Khalil (2009). Despite describing 900 pages of relevant laws, accompanied by some verdicts of the Egyptian Court of Cassation, the author makes not a single criticism of these laws, as will be shown later in this Chapter. By examining this and other Arab writings, this section aims to determine the level of awareness of current Arab scholars and their potential influence over social and political discourse.

³⁶⁷ Ramzy Baroud, "The Arab Intellectual is Resting, Not Dead" (3 March 2015) *Middle East Eye*, online: <www.middleeasteye.net/columns/arab-intellectual-resting-not-dead-201261283>.

³⁶⁸ Hassan, *Supra* 360, at 146-51.

³⁶⁹ *Idem*.

It is worth mentioning that under the pretext of confidentiality, the difficulty in the Arab world of accessing information from official centers in the field of national security and counter-terrorism has created a one-sided view of the phenomenon: the way it is conceived and understood by governments. By mobilizing the media, these governments deny the problem of failing to define terrorism. Rather, they blame the “enemy,” who the government views as the source of insecurity and instability. Laws that identify the “enemy” based on their group affiliation rather than on their engagement in criminal conduct give a sense of security to citizens who believe that they will be safer if the “enemy” is being put under the microscope. Arab governments have been successful in evoking a sense of hate towards the “other.” This hatred can be detected in the language of many ordinary people, who immediately think they know the perpetrators of any bombing attack. Their knowledge is only guesswork, or more precisely, the result of manipulation by the government. This Schmittian based approach of the notion of the “enemy”³⁷⁰ seems also to accord with the idea that “terrorism” cannot be defined: only the enemy can be defined.

Counter-terrorism in Arabic academic literature

The majority of Arabic writings on the definition of terrorism or terrorism in general shows a scarcity of critique and an overall submission to the status quo. Such studies occur in the fields of political science, Islamic studies, and sociology. They mostly discuss the term “terrorism” in a general way that lacks many of the details and technical legal issues that would be essential to a thorough critique of counter-terrorism.

³⁷⁰ According to Carl Schmitt, “The political enemy is not automatically morally evil, he does not have to be aesthetically ugly; he does have to act as an economical competitor, and it is very well possible that it is advantageous to make business with him. Now, he is the other, the stranger, and his being is sufficiently determined, if, in a particularly intensive way, he is something other and alien so that, in an extreme case, it is possible to conflict with him.” Quoted in Christoph Burchard, “Puzzles and Solutions: Appreciating Carl Schmitt’s Work on International Law as Answers to the Dilemmas of his Weimar Political Theory” (2003) 14 Finnish Y.B. Intl L 89 at 91.

Egyptian scholars often write rhetorically without providing useful criticism. This can be seen in the book *Mubarak and the Confrontation of Terrorism* (2002) published in Egypt and written by a committee of political scientists supervised by Osama Al-Ghazali Harb, a liberal Egyptian politician. The authors praise Mubarak's approach to counter-terrorism by stating that "Mubarak has realized through his nationalist sense and his military history that terrorism is directed against Egypt—the stronghold of Arabia and the castle of the correct Islam."³⁷¹ The use of exaggerated language is a common tendency in Egyptian writings. In my view, such a style aims to take people's attention away from the core issue of terrorism and its causes as well as counter-terrorism and its effect on human rights to a false reality of pride and firmness. It also normalizes the exception. For example, referring to Mubarak as "a military man"³⁷² suggests an overlap between the civil and military domains. The authors also refer to Mubarak and Egypt as almost the same thing. For instance, one quote states that "Egypt-Mubarak played a major role regionally[.]"³⁷³ Another quote states, "Mubarak's approach of counter-terrorism is characterized as tough and firm."³⁷⁴ These quotes suggest that the Egyptian president centralizes the state's authorities and condone torture and celebrate military trials.

Another Arabic book is *Islam and International Terrorism: The Bloody Trilogy of Religion, Law, and Politics* (2002), written by the Iraqi scholar Abdul-Husain Sha`ban and published in London. Unlike *Mubarak and the Confrontation of Terrorism*, this book provides a valuable critique from the political science and human rights perspectives. For example, in his evaluation of the collective policy of counter-terrorism in the Arab world, Sha`ban argues that:

³⁷¹ Committee of Political Scientists, *Supra* 360, at 143.

³⁷² *Idem*, at 146.

³⁷³ *Idem*, at 151.

³⁷⁴ *Idem*, at 150.

The strength of the modern state is derived from the strength of its civil society organizations, an indicator of the political dynamics and guarantees to rights and freedoms, review, and accountability. If we imagine a strong state with weak, prohibited civil associations, the situation will be far from accountability and transparency, thus tightening freedoms. Whereas a strong state with strong civil society and civil associations [assures] a wide space for participation and guarantees to respect human rights.³⁷⁵

This argument suggests that the role of Arab scholars can play an important role in spreading political awareness among politicians and people. Such an objective view, however, is rare compared with the majority of Arab writings. The definition of “terrorism” remains one of the most controversial subjects among Arab legal scholars, and perhaps the least criticized. The following section shows some definitions suggested by Arab scholars, followed by examples of criticism of current Arab definitions of terrorism.

The definition of “terrorism” in Arabic academic literature

In the legal field, Arab legal scholars have undertaken attempts at defining terrorism. From a criminal law view, Abdu-lwahab Homid defines terrorism as “an approach that relies on frightening and terror to obtain its goals, and this approach has two sides, a social side that aims to eliminate the existing system in all its forms, so the social system is its target. And a political side that aims to change the regime totally, which does not hesitate in targeting the state’s representatives in order to attack the state itself.”³⁷⁶ Abdu-alaziz Sarhan, approaching the matter

³⁷⁵ Sha`ban, *Supra* 361, at 88.

³⁷⁶ Quoted in Sālim Rawḍān al-Mūsawī, *Fi’l al-irhāb wa-al-jarimah al-irhābiyah : dirāsah muqāranah mu’azzazah bi-taṭbīqāt qaḍā’iyyah* [Terrorism and Terrorist Crime: Comparative Study Supported by Judiciary Decisions] (Beirut: Manshūrāt al-Ḥalabī al-Ḥuqūqīyah, 2010) at 49.

from an international law standpoint, defines terrorism as “every attack on lives, public or private property contrary to the norms of international law in all its sources[.]”³⁷⁷ Shereif Bsyoni defines international terrorism as an “internationally prohibited [violent strategy] driven by dogmatic motives, [and] aim[ed] to create terrifying violence in a specific class within a particular society in order to seize power, or to make propaganda about a demand or a grievance, regardless whether the actors work for themselves or on behalf of a country.”³⁷⁸

All the above views suggest a broad definition of terrorism that goes beyond violence. There are two problems with this view. First, none of the above authors defines “violence”. As a result, their suggested categorizations fail to uphold the principle of legality, in which each unlawful act must be clear and precise. Second, the non-violent acts that threaten the “existing system in all its forms,” as Homid defines it, could include lawful acts, such as political opposition and strikes. Such a general approach to criminalization threatens human rights and the participation in civil society, as discussed earlier.

As for criticizing current definitions of terrorism, the few Arabic legal studies on Egyptian legislation adopt a descriptive approach that lists existing laws with an explanation of their contents and a superficial evaluation of the legislature’s motives or the real utility of these laws. For instance, Khalil, a head of Egypt’s Court of Appeal, dedicates part of his 900-page book to the crime of terrorism, listing the articles, followed by his explanation, and judicial decisions if available. After listing the articles that define terrorism (articles 86 and 86*bis* of Law 97 of 1992), he states that:

³⁷⁷ Quoted in *idem*, at 49-50.

³⁷⁸ Quoted in *idem*, at 50.

The law confronted terrorism as a form of organized crime, by criminalizing establishing, finding or organizing any association or organization or group the purpose of which is to call by any means for thwarting the provisions of the Constitution or the laws or preventing one of the government institutions from exercising its functions, or attacking the personal freedom of the citizen or other public rights and freedoms guaranteed by the Constitution and the law, or harming national unity, considering these organizations whatever their label [as terrorists] as a first step to [identifying] terrorist acts. And the law punishes whoever joined these organizations or participates in any form with knowledge of its purpose, as well as each [person] who promotes through speech or writing the purposes and principles of [such organizations].³⁷⁹

Khalil provides no critique or analysis of the definition of terrorism; rather, he gives almost a word-for-word repetition of the actual articles, which we discuss in Chapter 5. Khalil then moves on to listing the next article, followed by an “explanation,” which is a shorter version of the article itself. This tendency is also found in Arab law schools, which often follow the Egyptian model, in which the student is not taught to think, but to take the law as it is.

Another example of evaluating the current definitions of terrorism is provided by the Iraqi judge Sālim Rawḍān al-Mūsawī in his book *Terrorist Act and Terrorist Crime: Comparative Study Supported with Judicial Applications* (2010), published in Beirut. Al-Mūsawī criticizes definitions of terrorism including the Iraqi definition in Law no. 13 of 2005, which states that terrorism is:

Every criminal act committed by an individual or an organized group that targeted an individual or a group of individuals or groups or official or unofficial institutions and caused damage to public

³⁷⁹ Khalil, *Supra* 4, at 49-50.

or private properties, with the aim to disturb the peace, stability, and national unity or to bring about horror and fear among people and to create chaos to achieve terrorist goals.³⁸⁰

Al-Mūsawī argues that modern definitions lack the precision needed in criminal terms. According to him, “terrorist crimes and terrorist acts include general features, such as a lack of clarity and explicitness of the meaning of terrorist acts; in addition, a broad description [of criminal acts added to the definition], creates a confusion to legislatures, judges [...], or even legal scholars in identifying the specific *actus reus*.”³⁸¹ Many Western scholars also adopt this view (e.g., Roach 2011; Hocking 1993; Coady 2004), which affirms the current problematic aspects of the definition of terrorism worldwide. The significance of an Iraqi judge taking this critical position suggests a resistance to the extended colonial rationale adopted by Arab governments. This scholarly position insists on terrorism laws that respect legal principles and democratic freedoms.

“Terrorism” at a historical-legal level

The term “terrorism,” understood as referring to acts of violence, including bombing and hijacking, that target civilians, was not codified in the Arab world until the 1940s. Lebanon and Syria were among the first Arab countries to criminalize terrorism. The Lebanese Penal Code of 1943 defines terrorism as “all acts [that] aim to create a state of panic and are committed by means such as explosives and inflammable materials, toxic or burning products, epidemiological or microbial factors that could cause a public danger.”³⁸² This general definition, which focuses on the element of fear, inspired Syria to adopt the same definition in its Penal Code of 1949.³⁸³ However, before

³⁸⁰ Article 1 of the Iraqi Anti-Terrorism Law no. 13 of 2005.

³⁸¹ Al-Mūsawī, *Supra* 376, at 146-47.

³⁸² Article 314 of the Lebanese Penal Code no. 340 of 1943.

³⁸³ Welchman, *Supra* 31, at 639.

these definitions were adopted, “terror” was associated with the threat of communism and its attempts to overthrow tyrannical regimes. This interpretation can be seen in the Egyptian experience. In 1946, Article 98(b) was added to the Egyptian Penal Code, stating that “whoever promotes in the Egyptian Republic in any way to change the fundamental principles of the constitution [...] or to overthrow the state’s fundamental social or economic system [...] when the use of force or terror or any other illegal means is noticeable.”³⁸⁴ This article was adopted during the war on communism in Egypt. The article does not criminalize “communism” per se, but its judicial application shows that it targeted communists. A detailed examination of the application of this article is addressed in Chapter 5 when examining the case of Egypt. The next section looks into the war on communism in the Arab world in general, and in Iraq in particular. Iraq represents a clear case of the struggle between, on the one hand, colonialism, local monarchism and elitism, and, on the other, ordinary people inspired by communist ideas in their challenge against the tyranny of the authority.

While communism was the common enemy that threatened monarchies and colonialists, Islamic terrorism has become the common enemy that currently threatens Western democracies and Arab authoritarian regimes. It is addressed in a following section. Finally, this chapter examines the current legal meaning of “terrorism” in the Arab Convention. The examination includes a legal analysis of the most important articles of the Convention, and a historical analysis of any possible colonial and neo-colonial influence on the articles of the Convention.

³⁸⁴ Article 98(b) of the Egyptian Penal Code added by Law no. 117 of 1946.

Communism: The common enemy during colonialism

After the Russian Revolution of 1917, communism spread all over the world including different parts of the Arab region, promoting social revolutions against the dominant capitalist regimes. Arab communist movements sought social, economic, and political reforms to protect people and particularly workers' rights from the unfair distribution of power. This desire to close the gap between classes threatened the interests of colonists and local ruling classes and elites. These capitalism-driven powers responded by adopting legal and exceptional measures to suppress the emerging threat of communism. The war on communism was a war on ideology and not on particular violent acts. It targeted all acts associated with communist thought regardless whether they included action, planning, or mere speech, and regardless whether such speech was expressed publicly or privately.

The background and influences on communism in the Arab world differ from one place to another. For example, Iraqi and Syrian communist movements were connected to the international and particularly the Russian movement of communism but were developed locally.³⁸⁵ The Egyptian communist movement did not have direct connections with Russia, but was at first influenced by Greek, Italian, and Russian residents in Egypt. However, the movement was established and developed locally.³⁸⁶ The Tunisian communist movement inherited its thought from the communist movement in France.

In the Arab states, the communist movement in Iraq, which we start with and focus on in this chapter, was the most effective and the most suppressed. The Kingdom of Iraq under British Administration was established in 1920. The British had great influence and control in the area. They chose the ruler of Iraq, King Faisal ibn Husayn, and established a system of elitism that

³⁸⁵ Maxime Rodinson, *Marxism and the Muslim World* (London: Zed Press, 1979) at 61.

³⁸⁶ *Idem*, at 61-62.

favoured the minority of Sunni Arabs over the rest of the Iraqis.³⁸⁷ The British granted the elite the effective political and economic positions in the country. On the other hand, the Iraqi monarchy and the elite became puppets of the British administration. This system secured the mutual interests of each: the ruling family enjoyed nominal power, the local elite held the key political and economic positions in the country, and the British secured their route to India and benefited from the Iraqi oil supply and investment.³⁸⁸ This scenario was repeated in many colonies, but the case of Iraq represented “the most tyrannical state in the Middle East[,]”³⁸⁹ as historian Elizabeth F. Thompson puts it.

The Iraqi Communist Party (ICP) was very popular in Iraq. It attracted workers and students who protested and rebelled against the unfair social order, shortage of food, and poverty.³⁹⁰ The influence of the ICP threatened the monarchy and the existence of the British in Iraq. As a response, the Iraqi authority, supported by the British administration, used exceptionalism in their war on communism. For instance, during the 1920s, a communist group named Mutadarisi al-Afkār al-Ḥurrah published a journal called al-Ṣaḥifah, which was soon closed down under the allegation that it attacked religion.³⁹¹ Restrictions on expression was one among the many tools of social control. The infamous Prime Minister Nuri al-Said ordered other exceptional measures, which included detention, torture, and execution of communist figures.³⁹²

³⁸⁷ Elizabeth F Thompson, *Justice Interrupted: The Struggle for Constitutional Government in the Middle East* (Cambridge; London: Harvard University Press, 2013) at 178.

³⁸⁸ Ian Rutledge, *Enemy on the Euphrates: The Battle of Iraq and The Great Arab Revolt 1914–1921* (London: Saqi, 2015) 18-19.

³⁸⁹ Thompson, *Supra* 387, at 178.

³⁹⁰ *Idem*, at 193.

³⁹¹ “A History of The Iraqi Communist Party: Interview With University of East Anglia’s Johan Franzén” (15 July 2015) *Musings in Iraq* (blog), online: <musingsoniraq.blogspot.ca/2014/07/a-history-of-iraqi-communist-party.html>.

³⁹² Thomason, *Supra* 387, at 178.

Communist figures and protesters were fought for their ideas and not for specific offences. Historian Johan Franzén describes the war on communism in Iraq by stating that:

The “threat” of Communism had initially very little to do with the ICP as a political party. It was a British obsession that was imported to Iraq by paranoid British officers. They perceived “Communism” as a worldwide conspiracy directed at their empire by evil linchpins operating out of Moscow [...]. “Communism” became a label that could be attached to anyone who did not accept the British-installed order and who did not “play by the rules” [...]. British officers even invented the appellation “Communazi” to describe oppositional politicians. Pro-British politicians from the Iraqi elite inherited this worldview.³⁹³

The British had a direct interest in suppressing communism worldwide. According to a manual issued in 1962 for the guidance of British troops operating in Southeast Asia, communism was an evil philosophy that “means the elimination of free societies everywhere—it spells the end of freedom, it spells the end of a way of life, it spells the end of all the powers of goodness in the world—Christianity, Islam, Buddhism, Hinduism, Judaism—it spells the end of our birthright[.]”³⁹⁴ The war on communism in Iraq was not a war on criminals, but a war on the “enemies” of imperialism and monarchism. Both British imperialism and the Iraqi monarchy did not contain the ideological differences or even attempt to bridge the social and economic gap between classes. Rather, the local tyranny continued with the approval of the British administration, which served the monopoly of Iraq’s wealth among those in power.³⁹⁵

³⁹³ “A History of The Iraqi Communist Party: Interview With University of East Anglia’s Johan Franzén”, *Supra* 391.

³⁹⁴ Quoted in French, *Supra* 2, at 44.

³⁹⁵ Thomason, *Supra* 387, at 178.

The same tendency also existed in other Arab countries. For instance, Egypt's experience in developing national security laws and measures goes back to the time of the monarchy, which was seen by nationalists as an ally to the colonial power. At that time, Islamic groups had no significant role in political life, whereas liberals and communists did. These latter two groups sought to change the political and socio-economic system, which represented a threat to the monarchy and to the colonial interests in the region.³⁹⁶ In recent history, the main threat became Islamic groups. While methods and agendas differ among these opposition groups, the law has responded to all of them similarly. The importance of examining this war is that it shows patterns of suppression that focus on social control rather than reducing violent crimes. It also shows possible direct or indirect colonial influence, which only encourages authoritarian practices. To avoid repetition, a detailed history of the war on communism and the emergence of the use of the term "terror" in Egypt is discussed in Chapter 5.

In Tunisia, the Tunisian Communist Party was less popular. Unlike the Iraqi Communist Party, which included thousands of members, the Tunisian Communist Party had only a few hundred members. Nonetheless, the communist agenda threatened the French colonialist and the local government, who fought communism through banning communist papers,³⁹⁷ arresting communist figures,³⁹⁸ and convicting them of conspiracy.³⁹⁹ A detailed review of the suppressive measures in Tunisia is provided in Chapters 6 and 7.

An overall observation of the war on communism in the Arab world is that communists represented the common enemy of imperialism and Arab monarchism. There was a concern that

³⁹⁶ *Idem*, at 156, 178.

³⁹⁷ Khamis Arfawi, *Al-Qadā' wa-al-siyāsah fī Tūnis zaman al-isti'mār al-Faransī, 1881–1956* [*The Judiciary and Politics in Tunisia During French Colonialism: 1881–1956*] (Şafāqis: Şāmid lil-Nashr wa-al-Tawzī', 2005) at 43.

³⁹⁸ Donald F Busky, *Communism in History and Theory: Asia, Africa, and the Americas* (Westport: Greenwood Publishing Group, 2002) at 96.

³⁹⁹ Arfawi, *Supra* 397, at 208-9.

allowing the spread of the ideology of Communism would lead to a large insurgency war. Galula describes this concern, “The East-West conflict that today covers the entire world cannot fail to be affected by any insurgency occurring anywhere. Thus, a Communist insurgency is almost certain to receive automatic support from the Communist bloc. Chances for Communist support are good even for non-Communist insurgents, provided, of course, that their opponent is an ‘imperialist’ or an ally of ‘imperialism’” (1964, 30). Arab countries in their war against communism were influenced directly or indirectly by the Western imperial agenda. Suppressing the ideology required adopting many measures. These include restrictions on expression through censorship, and exceptionalism through using extra-legal measures including arrest, detention, and torture. Such measures spread a culture of fear as another tool of social control. While the threat of communism has faded, a new common enemy has emerged: Islamic terrorism.

Islamic terrorism: The common enemy in post-colonialism

In the late seventies until early nineties, the Arab world witnessed a wave of Islamic terrorism. This wave included radical movements such as Al-Gama'a al-Islamiyya and the Takfir wal-Hijra (Excommunication and Exile), which emerged in the Egyptian prisons.⁴⁰⁰ This wave differed from the early version of the Muslim Brotherhood established in 1928 and led by Hassan Al-Banna. During colonialism and the Egyptian Monarchy, the Muslim Brotherhood mostly restricted their attacks to assassinations and targeting British troops. They claimed that their primary aim was to expel the colonist, end the elite privileges, and grant welfare.⁴⁰¹ In this respect, the Brotherhood was similar to communism.⁴⁰² However, post-independence, the Brotherhood and other groups

⁴⁰⁰ Gilles Kepel, *Muslim Extremism in Egypt* (Berkeley: University of California Press, 1986) at 97.

⁴⁰¹ Thompson, *Supra* 387, at 156-61.

⁴⁰² *Idem*, at 192.

expanded their violent attacks to include mass bombings and shootings worldwide that continue until today.

Multiple factors are behind this violent phenomenon that seeks a return to the original political-religious state or Caliphate. Islamic scholars explain the emergence of Islamic terrorism as the result of the disappointing post-independence governments that, among their many socio-economic failures, disregarded the original Islamic heritage and mimicked Western culture (al-Ghanoushi 1993, 60). Islamic thinkers agree that with the rise of imperialism and Western influence, the Arab ruling elites became more secular, and Islam became secondary in political life (al-Ghanoushi 1993, 60–62; Fadlallah 1997, 50–57). Yet parts of marginalized society remained religious, and found in religion a sanctuary from the corrupt secular rulers. The distrust between rulers and people led to the emergence of politicized Islamic groups that seek to counter the state's tyranny through violence. Due to the use of violence by these groups, they are considered terrorists who represent a serious threat to the safety of civilians and the security of the state. The problem is in including other peaceful Muslim opponents as terrorists based on their identity and beliefs.

In Egypt and Tunisia, nationalism, which took control of post-independence life, did not fulfil people's aspirations. In fact, it fought Islamists in order to secure those in power. The suppression of Islamists led to more resistance and the emergence of countless Islamic extremists. Tunisia too, due to its bold secular approach, fought the presence of Islamists, which also led to an emergence of extremists, but at a different level to their emergence in Egypt.

Arab states have never taken into account the underlying reasons for the increasing use of radical violence. Furthermore, whether or not these Islamic movements were open to peaceful dialogue, Arab states chose to launch a war against terrorism. The war on terrorism has included

military and special courts, state of emergency, censorship, and other harsh legal and extra-legal measures, which are examined in more detail in Chapters 5 and 7.

The Arab Convention for the Suppression of Terrorism

Arab states have long countered “terrorism” through tough national security laws and measures. Yet, unlike their position in the UN, which refuses to define terrorism and primarily focuses on the causes of terrorism, these causes are intentionally neglected at the Arab regional and domestic levels. Under the leadership of Egypt, Arab states have reached an agreement regarding defining terrorism. However, contrary to their early view in the UN that emphasized on excluding the right to struggle and self-determination from the definition of terrorism, the legitimacy of this right is not granted at the regional level, as we will see in discussing the Arab Convention.

The importance of the Arab Convention in this dissertation is in two things: its timing, and the leading role of Egypt in its creation. As for the first point, it was adopted after the independence of Arab countries and pre-9/11. In other words, there cannot be a direct colonial influence. What we need to know, though, is whether neo-colonialism played any role in influencing Arab states to establish this convention. And if not, what are the other factors that shaped it? Answering this question requires looking into the second point, which is the leadership role of Egypt in shaping this document. As we will see, the definition of terrorism in this convention is almost the same as the Egyptian definition added to the Penal Code in 1992. While Egypt’s leading role in framing the Arab Convention is undeniable, we still need to examine the collective motives of the Arab states in adopting this convention.

In 1998, Arab governments, under the League of Arab States, adopted the Arab Convention for the Suppression of Terrorism, which came into force in 1999. The terrorism definition in the

Convention is almost word-for-word the definition in the 1992 Egyptian Penal Code, which is discussed in Chapter 5.⁴⁰³ Arab governments consider the Convention to be a remarkable achievement in suppressing terrorism regionally. However, civil society groups, especially human rights organizations, consider it to be flawed because it restricts individual freedoms and increases governments' power.⁴⁰⁴ My goal is to reveal the failures related to the definition of terrorism in some of the Convention's articles in an attempt to determine the utility of defining terrorism. The broad definition of terrorism and the political reasons behind this document will be a key to answering the question: What interests and values do Arab states tend to protect through using anti-terrorism legislation?

The Arab Convention is a controversial regional document that is highly politicized because of its broad definitions and wordplay. "Terrorism" is defined in Article 1(2) as:

Any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize a national resource to danger.⁴⁰⁵

This definition requires the element of violence or threat of violence, which is broad enough to include any criminal act the state wishes to consider as terrorism. This could include acts of vandalism against private property for the motive of revenge, which are not necessarily violence

⁴⁰³ Article 86 of Law no. 97 of 1992, *Official Gaz 29bis*, 18 July 1992.

⁴⁰⁴ Sha`ban, *Supra* 361, at 81; Mahmoud Samy, "The League of Arab States" in Giuseppe Nesi, ed, *International Cooperation in Counter-terrorism* (Aldershot, England; Burlington, VT: Ashagte, 2006) at 156-57.

⁴⁰⁵ Article 1(2) of the Arab Convention for the Suppression of Terrorism [Arab Convention].

against persons. Such acts are still condemned under criminal law. Amnesty International considers this convention a serious threat to human rights.⁴⁰⁶ The meaning and boundaries of the terms “violence” and “threat of violence” are not clarified, and as a result there is a higher risk of charging innocent people⁴⁰⁷ (Welchman 2012, 630; Saul 2008, 154).

The term “violence” included in the definition is left undefined, and it is not clear whether it exclusively refers to unlawful acts of violence or includes all violent acts. Another point is that the statement “seeking to cause damage to the environment or to public or private property” does not require any actual damage to be done (Saul 2006, 145). Article 1 suggests considering a wide range of actions as terrorism—acts that in other legislation would be no more than arson and property damage crimes.

The purpose of condemning and criminalizing terrorism is not clear in the Arab Convention. It is unclear whether the protected value is security or the suppression of any political opposition. In fact, common practice suggests the second option. Anti-government groups in the Arab world, such as political opponents, non-violent critics including suspected Islamists and communists, human rights defenders, and journalists, have become the targets of anti-terrorism measures (Welchman 2012, 628), especially in those states that have permanent or semi-permanent states of emergency.

It should be noted that the Arab Convention has been ratified by most Arab states, which means that the above definition is part of their domestic laws. Syria is one of those that has ratified and utilized the Convention. In its first report to the CTC, Syria claimed that, because UN Resolution 1373 did not define terrorism, it relies on the definition in the Arab Convention, which

⁴⁰⁶ Amnesty International, “The Arab Convention for the Suppression of Terrorism: A Serious Threat to Human Rights” (9 January 2002) online: <amnestyinternational.org>.

⁴⁰⁷ *Idem*.

“distinguishes between terrorism and legitimate struggle against foreigner occupation.”⁴⁰⁸ While Syria considers financing terrorists against Israeli citizens to be legitimate struggle,⁴⁰⁹ it considers financing all other opposing groups as terrorism. This is indeed a result of the lack of international guidance, which allows states to understand and define terrorism selectively and to justify coercion against civilians under the pretext of the right to struggle.⁴¹⁰

Article 1(3), which defines “terrorist offence,” was amended in November 2006. This version offered a new paragraph which reads that a “terrorist offence” would also include “incitement to commit or praise terrorist crimes, or publish, print, or prepare writings, prints, or records in any form, for distribution or to show it to others with the aim of encouraging committing such crimes.”⁴¹¹ This paragraph was added after the establishment of UN Security Council Resolution 1624 (2005) regarding incitement and glorification of terrorism, which was discussed earlier in Chapter 2. The neo-colonial influence of the Security Council regarding incitement is clear in this example.

Despite this neo-colonial influence, colonial speech regulations pre-existed in the Arab world. For instance, the French colonist had long suppressed people through speech regulations. These include the application of the French Press Law of 1881 in protectorate Tunisia. This law prohibits speeches and publications that incite hatred or violence.⁴¹² Article 24 of this Law states that “Shall be punished [...] those who, by one of the means set forth in Article 23, incite hatred or violence against a person or group of persons on account of their origin or membership or non-

⁴⁰⁸ “Letter dated 13 December 2001 from the Permanent Representative of the Syrian Arab Republic to the Chairman of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism” (13 December 2001), S/2001/1204 [Syria’s Report to the CTC, 2001].

⁴⁰⁹ Roach, *Supra* 7, at 93.

⁴¹⁰ *Idem*, at 93.

⁴¹¹ The new paragraph as it is stated in the Arabic version of the Convention:

وكذلك التحريض على الجرائم الإرهابية أو الإشادة بها ونشر أو طبع أو إعداد محررات أو مطبوعات أو تسجيلات أيا كان نوعها للتوزيع أو لاطلاع الغير عليها بهدف تشجيع ارتكاب تلك الجرائم.

⁴¹² Article 23 of the French Press Law 1881.

membership of a given ethnic group, nation, race or religion.”⁴¹³ The vague wording of “incite hatred or violence” can be selectively used against opponents.

The ordinary crimes of incitement and sedition have long been part of many domestic criminal codes. The problem is the difficulty in drawing a line between legitimate and illegitimate speech or other forms of expression. This line is more blurry in the Arab world, where there are limited actual safeguards on individuals’ rights. For instance, in 2005 the State Security Court of the UAE charged an offender for “promoting in speech Al-Qaeda as a terrorist organization by wearing shirts that have the leader’s picture to make him more acceptable among people [...] and call[ing] in public places for not hating [bin Laden].”⁴¹⁴ The offender, who was a Sudanese citizen, was charged and exiled based on the 2004 Counter-terrorism Act.

In addition to including some acts that should not be considered as terrorism, the Convention excludes some actions that either should be included (or at least that Western countries include) or that could be used to exclude some acts that seem to be included in the definition otherwise. For example, after proposing the definition of “terrorism” and “terrorist acts,” the Convention excludes the case of armed struggle against foreign occupation from the definition of “terrorism.” Article 2(a) states:

All cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with the principles of international law, shall not be regarded as an offence. Such cases shall not include any act prejudicing the territorial integrity of any Arab state.⁴¹⁵

⁴¹³ Article 24, *idem*.

⁴¹⁴ State Security Case no. 237:33 (30 May 2005), UAE University Press, Ministry of Justice, vol 61:27 (2005) at 616.

⁴¹⁵ Article 2(a) of the Arab Convention.

This clause suggests that armed struggle for self-determination is excluded from terrorist offences. Apparently, the continuous conflict between Israel and Palestine, as well as the battles involving Israel and other Arab states like Lebanon and Syria, is the reason behind the creation of this article. Some Arab scholars argue that this clause was created to distinguish between terrorism and lawful resistance.⁴¹⁶

Mahmoud Samy, Legal Advisor for the Permanent Mission of Egypt to the UN, proudly claims that Arab states, unlike the rest of the countries in the UN, share a clear view of what is and what is not terrorism: “They clearly differentiate between criminal acts of terrorism and other acts that fall within legitimate rights of people to struggle against foreign occupation and aggression.”⁴¹⁷ By reading the clause carefully, however, we see that Arab states offer a double standard on the meaning of the right to self-determination. The Convention creates an exception in which the right to self-determination “shall not apply to any act prejudicing the territorial integrity of any Arab State[,]”⁴¹⁸ meaning that Arab states have created an arbitrary dual meaning to deal with rebellions and opponents.

The motive behind this clause is directly related to Morocco’s interests. While drafting the Convention, Morocco insisted on adding this part of the article so that the struggle by the national liberation movement Polisario Front in Western Sahara would be considered terrorism.⁴¹⁹ In 1975, in the Western Sahara Case, the International Court of Justice (ICJ) pointed out that the 1960 UN

⁴¹⁶ Rajaa Anaser, “al etifaqia alarabia le mukafahat al erhah: hal tasluh asasan leda`wa ela moatmar dawli li mukafahat alerhab?” [The Arab Convention for the Suppression of Terrorism: Is it Suitable to Call for an International Conference] *Damascus Center for Theoretical and Civil Rights Studies*, online: <www.mokarabat.com/mo3-3.htm>.

⁴¹⁶ Samy, *Supra* 404, at 157.

⁴¹⁷ *Idem*.

⁴¹⁸ Article 2 (a) of the Arab Convention.

⁴¹⁹ Anaser, *Supra* 416.

Declaration on the Granting of Independence to Colonial Countries and Peoples⁴²⁰ “allows a people to choose from three options: to emerge as an independent state, to associate with an independent state, and to integrate with an independent state.”⁴²¹ Although the right to self-determination for people in Western Sahara is internationally respected, it is not respected by Morocco. In October 2009, the Moroccan authorities arrested three “Sahrawi activists” for their visit to refugee camps in Algeria which are run by the Polisario Front. They have been accused of “undermining (Morocco’s) internal security.”⁴²² Other Sahrawi activists were also arrested and charged with “undermining (Morocco’s) external security”⁴²³ and its “territorial integrity.”⁴²⁴ This is another example of the actual use of the term “terrorism,” which tends to serve political interests rather than combating terrorism and ensuring security. The authoritarian ambition thus appears clearly in the collective agenda of Arab states.

The Convention also excludes political crimes from the common extradition norms. Article 2(b) excludes the offences that are defined and listed in the Convention from being considered political offences, even if they were committed for political reasons, and, as a result, such offenders lose any protection applied to political criminals. Examples of terrorist offences that cannot be considered as political offences include:

- (iv) Premeditated murder or theft accompanied by the use of force directed against individuals, the authorities or means of transport and communications;

⁴²⁰ Declaration on the Granting of Independence to Colonial Countries and Peoples Adopted and Proclaimed by United Nations General Assembly Resolution 1514 (XV) of 14 December 1960.

⁴²¹ Roach, *Supra* 26, at 144.

⁴²² “Sahrawi activists on trial for visiting refugee camps” (13 October 2010) *Amnesty International*, online: <www.amnesty.org>.

⁴²³ *Idem*.

⁴²⁴ *Idem*.

(v) *Acts of sabotage and destruction* of public property and property assigned to a public service, even if owned by another Contracting State.⁴²⁵ [emphasis added]

Sabotage is one of the crimes that were first added to Arab penal codes, and is borrowed from the French Napoleonic model. This point is further examined in Chapters 5 and 7. Amnesty International points out that this article “defines what is not a ‘political crime,’ but does not define what is a political crime.”⁴²⁶ Even though distinguishing between terrorist crimes and political crimes is not easy, it is very important in the matter of extradition. The problem is that, in the absence of guidance that clarifies the meaning of terrorism, and by leaving the distinction to the executive rather than the courts, there is a risk of charging and extraditing innocent people and political activists.

Another point to discuss in relation to the Arab Convention is the security of state leaders. Such protection is not a new concept.⁴²⁷ An early codification can be found in the French Penal Code of 1810. According to Article 86 of this Code, “An attempt or plot against the life, or against the person of the emperor, is a crime of high treason (*lèse majesté*); this crime is punishable as parricide; and, moreover, infers the confiscation of property.”⁴²⁸ This law, created under Napoleon, aimed to protect the emperor from those opposed to the French Revolution. Article 87 of this Napoleonic Code also provides wide protection to the imperial family:

Every attempt or plot against the life or the person of any member of the imperial family;

Every attempt or plot, the object of which shall be,

⁴²⁵ Article 2(b) of the Arab Convention.

⁴²⁶ Amnesty International, *Supra* 221.

⁴²⁷ It is considered in the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (Diplomatic Agents Convention), which was signed in New York.

⁴²⁸ Article 86 of the French Penal Code of 1810.

Either to destroy or change the government, or the order of succession to the throne;
Or to incite the citizens or inhabitants to arm themselves against imperial authority,
Shall be punished with death and confiscation of property.⁴²⁹

The same tendency can be seen in the Arab Convention. It, however, considers such crimes as terrorism. Article 2 of the Arab Convention states:

(b) None of the terrorist offences indicated in the preceding article shall be regarded as a political offence. In the application of this Convention, none of the following offences shall be regarded as a political offence, even if committed for political motives:

(i) Attacks on the kings, Heads of State or rulers of the contracting States or on their spouses and families.

In regard to protection of heads of state, the Arab Convention goes too far by protecting their families, especially when we look at the Arabic version, which includes “the ancestors and descendants” of the head of state. Members of royal families can absolutely abuse such protection. A hypothetical example can be pondered in which a grandson of an Arab head of state, while visiting another Arab State or within his own state, fights with a waitress for refusing to pay the bill. In such a case, the waitress would be considered a terrorist. The Diplomatic Agents Convention, on the other hand, has listed internationally protected persons in the same way as the Arab Convention; however, they are followed by two conditions, which as stated in Article 1(1)(a) are: “whenever any such person is in a foreign State, as well as members of his family who accompany him.” The protection is for those who are outside their country, and for the family

⁴²⁹ Article 87, *idem*. It should be noted that this article no longer exists in the French Penal Code.

members who are accompanying state leaders. Based on the Arab Convention, the family members of a head of state are protected wherever they are, in their country or abroad, whether or not they are accompanied by the head of state. This wide protection shows how Arab leaders are more concerned with their positions and personal safety under the cover of anti-terrorism than with public safety, which reflects an authoritarian ambition.

The Convention includes many other failures related to the lack of safeguards from the risk of torture and the death penalty, of guarantees to a fair trial and of rights in general, especially the rights to privacy and freedom of expression (Welchman 2012, 632). My primary aim, however, is to evaluate the overall policy and motive of counter-terrorism in the Arab world and have therefore focused on the broad and vague regulations and their origin and authoritarian rationale.

Conclusion of chapter: The leadership of Egypt

After viewing the Arab counter-terrorism policy, an overall observation is that crime control in the Arab world starts at a socio-cultural level. This is done through restrictions on expression, thoughts, and beliefs. Arab intellectuals are suppressed through censorship, imprisonment, and other unfair measures. The same policy is applied against the common enemy, whether communists or Islamists. This policy has its roots in the colonial practice against communists worldwide. This policy, however, has remained in the post-colonial Arab world because it continues serving those in power. In addition, it serves the neo-colonial powers and their interests in the region.

The Arab world, led by Egypt, has codified the inherited colonial legacy and indigenous authoritarian practices in the Arab Convention. This Convention defines terrorism broadly in a way that allows targeting of the “enemy” rather than establishing clear and precise wrongdoings

and provides maximum protection for the state and its ruling elites. The amendment made to the Convention in 2006, in which incitement through speech or writing is also considered terrorism, reflects the colonial origin of these practices which have long restricted freedom of expression. More importantly, it shows that the Arab world is bound by UN Security Council Resolution 1624 (2005), which reflects neo-colonial policy in global counter-terrorism.

The Arab Convention also shows that Egypt represents the most influential leader within the Arab region. Egypt has significant political and legal influence over the rest of the Arab world. Roach observes that Arab countries, including Jordan, Iraq, Qatar, and Bahrain, have adopted a definition of terrorism based on the Egyptian model. Similarly to Egypt, they included vague concepts like “threats to national unity” and “disturbing public order” in their definition of terrorism (2015, 36–38). Kuwait is one of the few if not the only Arab country that has not ratified the Arab Convention and has not adopted a separate anti-terrorism law or even criminalized “terrorism” within its penal code.⁴³⁰ Nonetheless, Kuwait includes the concept of threatening public order in its Press and Publication Law no. 3 of 2006. Article 21 criminalizes “incitement to violate public order or to violate the laws or to commit crimes even if they are not carried[.]”⁴³¹ Such migration of elements of the Egyptian definition of terrorism was done voluntarily without direct pressure from Egypt. In this respect, the influence of Egypt is similar to the influence of the United Kingdom, although the former is regional and the latter is global. However, Egypt’s reliance on Western aid keeps it in a submissive position. This relative duality of being a leader at

⁴³⁰ Despite this fact, Kuwait defines “terrorist acts” within its Law no. 106 of 2013 regarding Combating Money Laundering and Terrorism Financing. Article 1 states: “any act or attempt inside or outside Kuwait committed in the following cases: if the act intended to cause death or serious injury to civilians, or against any person who did not take part of aggression acts during armed conflict, when the purpose of such act, by its nature or context intended to intimidate the population or to compel a government or an international organization to take a specific action or to refrain from taking it.

⁴³¹ Article 21 of Kuwaiti Press and Publication Law no. 3 of 2006.

the regional level and a follower at the global level has created a complex political condition, which is examined in the next chapter.

CHAPTER 4 THE COLONIAL AND NEO-COLONIAL EXPERIENCE IN EGYPT

Egypt is located in the heart of the Arab world, bridging Western Asia and North Africa. The Canal Zone has long made Egypt a strategic cosmopolitan center that attracts regional and global powers. Its significant geographical location and lack of natural barriers has affected its political status. In the past, it made it vulnerable to invasion by the Greek, Roman, Arab, Ottoman and later by the French and the British. At the same time, this allowed it to become more receptive to cultural, political, and legal progress.

This chapter is dedicated to modern Egypt and is thus divided to five main parts: Egypt under French colonialism (1798–1801); during the subsequent period of informal imperialism (mainly between the 1850s and 1870s); under British colonialism (1882–1914); during post-colonialism; and lastly during the current era of neo-colonial economic dependency and political submission. The aim of examining these eras is to employ the four perspectives suggested in Chapter 1, i.e., the economic aspect, centralization, militarism, and exceptionalism. The question is to what extent these perspectives were used by the colonial power in shaping national security in Egypt, and to what extent post-colonial Egypt uses them. In addition, this chapter asks if there has been neo-colonial pressure in this respect.

Employing the four perspectives

The four perspectives through which we are analyzing the Egyptian legal and political framework have different application and weight in each Arab country. For instance, militarism applies largely to Egypt but not Tunisia, whereas the economic aspect, exceptionalism, and centralization have a

similar impact in both countries. These perspectives are not each discussed in a separate section, as was done in Chapter 1; rather, they are employed within a historical framework.

The French occupation (1798–1801)

The French, under the leadership of Napoleon Bonaparte, invaded the Ottoman province of Egypt in 1798 and continued ruling it until 1801. The French army was too advanced to be resisted by locals, who soon surrendered. Napoleon's primary intention went beyond Egypt itself: by occupying Egypt, he aimed to challenge British expansion in the Middle East and obstruct the British from getting to India easily.⁴³²

This had an impact on Napoleon's policy in Egypt. He adopted—at least on the surface—a relatively tolerant policy towards local Egyptians, as their support was needed in the face of any external competitor. According to Paul Strathern, Napoleon proclaimed a compassionate approach towards Islam.⁴³³ His tactic was to draw near to the *ulema*, or scholars of Muslim religious law, of Al-azhar Mosque. Napoleon also raised questions with Arab Egyptians that could provoke a sense of patriotism and ethnocentrism: “Why has the Arabic nation submitted to Turks? How come that fertile Egypt and holy Arabia are under the domination of a people from the Caucasus?”⁴³⁴ Breaking Egyptian society into smaller opposing groups was part of the colonial strategy of divide and rule. Napoleon was aware of the internal conflicts and social gap between Arab Egyptians and the dominant groups, which were the Ottoman *pashas* and the Mamluk household. Napoleon proclaimed that he would bring justice to Arab Egyptians. In his pronouncement when he invaded Egypt he declared: “People of Egypt! [T]hey will tell you that I come to destroy your religion.

⁴³² Juan Cole, *Napoleon's Egypt: Invading the Middle East* (Houndmills, Basingstoke: Palgrave Macmillan, 2007) at 9

⁴³³ Paul Strathern, *Napoleon in Egypt* (New York: Bantam Books Trade Paperbacks, 2009) at 139.

⁴³⁴ Quoted in *idem*.

Believe it not! Answer that I come to restore your rights, to punish the usurpers [Mamluks], and that I respect, more than the Mamelukes do, God, his Prophet, and the Koran.”⁴³⁵

Under the cloak of the spirit of the French Revolution, Napoleon claimed to be a liberator. Egypt was viewed by the French as a producer of tyranny and injustice, where slavery and inequality dominated social and political culture. In Paris, the occupation was seen as part of the Western civilizing mission. French legislator Joseph Eschasseriaux argued that:

What finer enterprise for a nation which has already given liberty to Europe [and] freed America than to regenerate in every sense a country which was the first home to civilization [...] and to carry back to their ancient cradle industry, science, and the arts, to cast into the centuries the foundations of a new Thebes or of another Memphis.⁴³⁶

The French, despite their policy, which appeared to be tolerant in Egypt, were strict in bringing order, and, whenever they needed to be, were violent and terrifying.⁴³⁷ Any opposition acts by local Egyptians were faced with official terror. This can be seen in an incident in the Egyptian village of Alkam, when the locals killed Capitan Thomas Prosper Jullien and another 15 Frenchmen. As a response, Napoleon ordered the village to be destroyed by fire; thus, it was completely burned.⁴³⁸ The French were serious about maintaining order and harsh with their

⁴³⁵ Quoted in *The Quarterly Review* 75 (London: John Murray, Albemarle Street, 1845) at 541.

⁴³⁶ Quoted in Cole, *Supra* 432, at 16.

⁴³⁷ This is the other aspect of the French Revolution in its homeland, in which it did not only bring liberty, but also “terror.” The word “terrorism” first emerged in the French Revolution during the 1793–1794 *régime de la terreur* (system of terror). *The régime de la terreur* was adopted by the established revolutionary state as a legitimate means to secure order by frightening counter-revolutionaries during the upheaval that followed the 1789 revolutions. Hoffman describes terrorism during the period of the French Revolution as horrific acts carried out by the authority against anti-revolutionaries who were labelled as “enemies of the people.” Accordingly, this special use of terror gave it a positive meaning. See Hoffman, *Supra* 237, at 4.

⁴³⁸ Cole, *Supra* 432, at 172.

opponents. This can also be seen in the Revolt of Cairo in October 1798, to which the French responded with excessive use of force.⁴³⁹

Cole argues that the French wanted to bring their revolutionary sense into Egypt—to overthrow the Old Regime of Ottoman-Egypt and replace it with a government that guaranteed “liberty” and “rights” (2007, 172). Nonetheless, those who did not respect the government were considered “enemies”; as a result, they lost their liberty and rights.⁴⁴⁰ This is part of applying the social contract.⁴⁴¹ The breach of the social contract justifies the use of “enemy criminal law.” Enemy criminal law or *Feindstrafrecht* is a concept promoted by the German scholar Günther Jakobs. According to enemy criminal law, anti-terrorism laws do not deal with criminals (citizens), but rather with enemies. Enemies lose their citizenship rights because they do not respect their duties.⁴⁴² The enemy in this concept includes individuals who belong to groups that represent extreme threat, or, more precisely, those who are viewed as a source of extreme danger.

Although theories of enemy versus friends were suggested by many ancient philosophers, Jakobs is known as the founder of this concept in its specific meaning. According to Jakobs, enemy criminal law has three features: First, punishment is not imposed retrospectively after wrongdoing, but prospectively by preventing future harms (the scope of harm takes into consideration perceived threat);⁴⁴³ second, enemy criminal law includes extreme sanctions; and third, criminal procedural rights are intentionally disregarded.⁴⁴⁴ It should be noted that the North American concept of

⁴³⁹ Gebre Tsadik Degefu, *The Nile: Historical, Legal and Developmental Perspectives* (Victoria: Trafford, 2003) at 29.

⁴⁴⁰ Carlos Gómez-Jara Díez, “Enemy Combatants Versus Enemy Criminal Law: An Introduction to the European Debate Regarding Enemy Criminal Law and Its Relevance to the Anglo-American Discussion on the Legal Status of Unlawful Enemy Combatants” (2008) 11:4 New Criminal L R: Intl and Interdisciplinary J 529 at 530-62.

⁴⁴¹ *Idem*.

⁴⁴² *Idem*, at 529-33.

⁴⁴³ *Idem*, 531.

⁴⁴⁴ *Idem*.

“enemy combatant” and its application in Guantanamo Bay is similar to the concept of enemy criminal law with different terminology.⁴⁴⁵

Some theorists of the social contract have proposed that in order to suppress threats the enemy should be deprived of their basic rights. Citizenship in its broad sense grants particular rights, and at the same time obliges major duties, so if individuals do not fulfil their duty their rights will not be acknowledged.⁴⁴⁶ Accordingly, these individuals will lose their privileges as citizens and will be treated as enemies. For example, Jean Jacques Rousseau⁴⁴⁷ and Johann Gottlieb Fichte⁴⁴⁸ consider every criminal an enemy, and as a result criminals lose their status as citizens. On the other hand, Thomas Hobbes considers criminals who commit high treason to be the enemy while other criminals remain citizens.⁴⁴⁹ Jakobs shares Immanuel Kant’s⁴⁵⁰ view, which envisions a “citizen criminal law” for ordinary lawbreakers and an “enemy criminal law” against extreme offenders.

In this sense, enemy criminal law allows the government to adopt extra-legal measures that could ensure the overall right to security.⁴⁵¹ This philosophical foundation, which was established by Western thinkers of modern philosophy and the Age of Enlightenment, was to a large extent misused by authorities in general and colonial powers in particular, as we saw in the above example of the village of Alkam. The claim of protecting the right to security and maintaining order has created and justified an authoritarian ambition to rule through control and coercion.

⁴⁴⁵ *Idem*, at 531-32.

⁴⁴⁶ *Idem*, at 529.

⁴⁴⁷ Jean Jacques Rousseau, *The Social Contract* (New York: Penguin Books, 2006).

⁴⁴⁸ Johann Gottlieb Fichte, *Foundations of Natural Right: According to the Principles of the Wissenschaftslehre* (Cambridge; New York: Cambridge University Press, 2000).

⁴⁴⁹ Thomas Hobbes, *Leviathan* (Cambridge: Oxford University Press, 1997) at Ch. 28.

⁴⁵⁰ Immanuel Kant, *Perpetual Peace* (New York; London; Collier Macmillan, 1957) at 25.

⁴⁵¹ See Emanuel Gross, “Thwarting Terrorist Acts by Attacking the Perpetrators or Their Commanders as an Act of Self-Defense: Human Rights versus the State’s Duty to Protect Its Citizens” (2001) 15 *Temple Intl & Comparative L J* 159 at 195.

The French were forced to leave Egypt after less than four years. It was not the Egyptians who forced the French to leave but the British. In 1801, Britain and France signed the Peace of London, which required France to leave Egypt and restore it to the Ottoman Empire.⁴⁵² This short period of occupation explains the limited French colonial influence in Egypt. The French did not fundamentally change the political and social life of Egyptians. Nevertheless, the French introduced centralization and liberal ideas to Egypt,⁴⁵³ which both seemed attractive to later rulers of Egypt.

A few years after the French left Egypt, Khedive Muhammad Ali ruled Egypt from 1805 to 1848. Ali, known as the “Father of Modern Egypt,” was attracted to the French system. He desired to build a modern state based on European models. Security was a priority, so he established an organized army and military schools supervised by the French officer Joseph Anthelme Sève.⁴⁵⁴ He also sent many who belonged to the elite ruling class to European military academies. Even though he bought warships and weapons from Europe, he sought independence through establishing arms factories.⁴⁵⁵ Despite the military reforms, Muhammad Ali was aware that he was unable to defeat major powers like the British who had interests in Egypt. Therefore, to avoid an occupation, he granted the British grain for their army, favorable trading rights, and secure lines of communication to India.⁴⁵⁶ This was an early economic-political trade.

Other aspects of Muhammad Ali’s and subsequent eras were the tendency to abandon Islamic Sharia and adopt laws based on the French model, and sometimes the application of French

⁴⁵² Cole, *Supra* 432, at 29

⁴⁵³ *Idem*, at 224.

⁴⁵⁴ Jamal Badawi, *Muhamad Ali wa awladah [Muhamad Ali and His Sons]* (Cairo: Matabie` alhaya` almasriya alama` lilkitab, 1999) at 90-95.

⁴⁵⁵ Abdu-rahman aRifa`ee, *Tareakh alharaka alqawmiya wa tatawur nitham alhukom [History of Nationalist Movement and the Development of the Ruling System]* (Cairo: Matabie` alhaya` almasriya alama` lilkitab, 2000) at 327-50.

⁴⁵⁶ Andrew McGregor, *A Military History of Modern Egypt: From the Ottoman Conquest to the Ramadan War* (Westport, Conn.: Praeger Security International, 2006) at Ch. 5.

law directly, while considering local customs.⁴⁵⁷ The most significant legacy that the French left in Egypt was centralization. Egyptian politicians and lawmakers found that the French system fostered their ambitions in increasing their own power by “centralizing state elites.”⁴⁵⁸ In Africa, India, and the Arab world, the European system was adopted mainly for those benefits. Nathan Brown suggests that principles such as “no punishment without a text” were used to benefit the new regime by guaranteeing that criminalization and interpretation were within their power and based on their views and interests.⁴⁵⁹ Brown also observes that the timing of this legal shift in Egypt suggests a gradual legal evolution rather than an external imperial transplanting.⁴⁶⁰

Informal imperial control

The French remained an influential power in Egypt even after ending the military occupation. Two of the ways in which this influence manifested itself were: in scientific and archaeology campaigns, and economic control. The first method focuses on studying the history and culture of a particular place as a step to control it through “knowledge.” The second method focuses on the financial in/stability of a country, providing it with loans and controlling its budget when it fails to pay the debts. Both of these methods attracted other Western powers, particularly the British, to expand their informal imperial control away from direct colonization. The importance of such methods is that they are similar to the neo-colonial ways of control, in which a system of hierarchy is established that grants the West superior authority economically, politically, and culturally, without the need for a direct military occupation.

⁴⁵⁷ *Al-kitab al-dahabi li-lmahakim al-ahliyya* [*The Gold Book of the National Courts*], vol 2 (Cairo: Al-matba’a al-amiriyya bi-bulaq, 1937) at 282.

⁴⁵⁸ Nathan Brown, *The Rule of Law in the Arab World*, (New York: Cambridge University Press, 1997), at 57.

⁴⁵⁹ Brown, *Supra* 62, at 118.

⁴⁶⁰ *Idem.*

Scientific expeditions and control through “knowledge” (1798–1920s)

The French established an effective security system not only through crime control, but also through what I will refer to as “knowledge-control.” Said argues that knowledge means the actual attempts to study and understand others’ culture based on their history, social life, and political system in order to manipulate the comprehension of these cultures, which allows dominating the nation (2003). Michel Foucault uses the term “power-knowledge” in suggesting that observing people, their behavior, and studying their history provide the state with the knowledge that allows it to manipulate and control. According to Foucault, this knowledge becomes a source of the state’s power. Foucault seems to view colonialism as just one manifestation of a form of state power that includes this type of knowledge-power.⁴⁶¹

Said suggests that imperialism conceives knowledge within a politicized utilitarian approach that makes the apprehension and outcome of such studies one-sided and biased. He argues that the aim was not to serve the highest good of knowledge itself, but the interest of the colonial or imperial power.⁴⁶² In *Orientalism* (1979), Said differentiates between knowledge and “knowledge-control”:

[T]here is a difference between knowledge of other peoples and other times that is the result of understanding, compassion, careful study and analysis for their own sakes, and on the other hand knowledge—if that is what it is—that is part of an overall campaign of self-affirmation, belligerency, and outright war. There is, after all, a profound difference between the will to understand for purposes of coexistence and humanistic enlargement of horizons, and the will to dominate for the purposes of control and external dominion.⁴⁶³

⁴⁶¹ Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Pantheon Books, 1977) at 12.

⁴⁶² Said, *Supra* 79, at xix.

⁴⁶³ *Idem.*

This logic of knowledge-control was cleverly used by the imperial powers in their overseas colonies. For instance, the French occupation of Egypt was not merely military; besides the army and the navy forces, Napoleon brought along teams of scientists and researchers to examine and explore Egyptian culture and history.⁴⁶⁴ The actual military occupation did not last for more than four years, but the imperial scientific and scholarly expedition continued for decades. This gave French imperialism the privilege of monitoring the Egyptians through “knowledge.”

Said claims that because of the knowledge that the West has about the Orient, a belief was set into the Oriental mind about its identity and its position within a system of superiority and hierarchy (Said 2003). Said suggests that the identity of the Orient is a Western invention that is based on manipulating interpretations of the Oriental culture. Such culture is viewed as different, inferior, backward and aggressive, which justifies categorizing the Orient as “other.”⁴⁶⁵ According to Said, this conflict of identity creates a “flexible *positional* superiority, which puts the Westerner in a whole series of possible relationships with the Orient without ever losing him the relative upper hand.”⁴⁶⁶

In Egypt, knowledge-control was not only used by the French. The British also justified their superiority because of their “knowledge.” In 1910, Arthur James Balfour worked on convincing the House of Commons about the privilege Britain has because of its knowledge about Egypt:

I take up no attitude of superiority. But I ask [Robertson and anyone else...] who has even the most superficial knowledge of history, if they will look in the face the facts with which a British

⁴⁶⁴ “The Napoleonic Invasion of Egypt” *Linda Hall Library*, online: <napoleon.lindahall.org/learn.shtml>.

⁴⁶⁵ Said, *Supra* 79, at 5-11, 98.

⁴⁶⁶ *Idem*, at 7.

statesman has to deal when he is put in a position of supremacy over great races like the inhabitants of Egypt and countries in the East. *We know* the civilization of Egypt better than we know the civilization of any other country. *We know it* further back; *we know it* more intimately; *we know more* about it. It goes far beyond the petty span of the history of our race, which is lost in the prehistoric period at a time when the Egyptian civilisation had already passed its prime. Look at all the Oriental countries. Do not talk about superiority or inferiority.⁴⁶⁷ [emphasis added]

“Knowledge,” as explained by Balfour, seems to justify the British occupation of Egypt. This justification is derived from the characteristics of the Oriental political identity, which is seen as despotism. Balfour suggested that Egypt has always been ruled by dictatorships, so why not allow the British colonizer to correct the course of history:

You may look through the whole history of the Orientals in what is called, broadly speaking, the East, and you never find traces of self-government. All their great centuries—and they have been very great—have been passed under despotisms, under absolute government [...]. It is not a question of superiority and inferiority [...].

Is it a good thing for these great nations—I admit their greatness—that this absolute government should be exercised by us? I think it is a good thing [...] which not only is a benefit to them, but is undoubtedly a benefit to the whole of the civilised West [...]. We are in Egypt not merely for the sake of the Egyptians, though we are there for their sake; we are there also for the sake of Europe at large.⁴⁶⁸

⁴⁶⁷ Quoted in *idem*, at 32.

⁴⁶⁸ Quoted in *idem*, at 32-33.

In this respect, Foucault uses the term “power-knowledge” to signify that power—importantly, power to enforce social discipline and conformity—is constituted through forms of knowledge and scientific understanding (1977). Said follows Foucault’s view; yet, unlike Foucault, who focuses on the West, Said applies his argument to the unequal positions of power between the Orient and the Occident. According to Said,

Under the general heading of knowledge of the Orient, and within the umbrella of Western hegemony over the Orient during the period from the end of the nineteenth century, there emerged a complex Orient suitable for study in the academy, for display in the museum, for reconstruction in the colonial office, for theoretical illustration in anthropological, biological, linguistic, racial, and historical dissertation... Additionally, the imaginative examination of things Oriental was based more or less exclusively upon a sovereign Western consciousness out of whose unchallenged centrality an Oriental world emerged, first according to a detailed logic governed not simply by empirical reality but by a battery of desires, repressions, investments, and projects.⁴⁶⁹

Said suggests that the West implanted the idea that the Orient is backward, has always ruled by dictatorships, is unable to rule, does not respect women, is lazy, and lacks democracy. In addition, the West is here not to rescue the Orient from its backwardness, but to continue ruling it with different methods yet within the same logic.⁴⁷⁰ And because the West studies the Orient and its culture and history, it has the superiority to control it. This control can be direct as was the case during colonialism, but it is also indirect, for example in influencing the Orient about its “fixed” identity that requires a ruling hand to control it.⁴⁷¹

⁴⁶⁹ *Idem*, at 7-8.

⁴⁷⁰ *Idem*, at xv.

⁴⁷¹ *Idem*, at 336.

Controlling through knowledge gradually developed in other areas of political life, including policing and secret intelligence. This dissertation does not cover these areas since it is difficult to obtain information about secret intelligence in the Arab world. However, it is important to understand the rationale and utility of “knowledge” in order to suggest corrections to the contemporary use of it. For instance, this kind of knowledge is used in secret intelligence, monitoring financial transactions of charities, and tracing individuals and groups based on their associations.

Political and economic control (1850s–1870s)

Colonial economic policy was not isolated from law. In fact, law was, whenever needed, designed to serve colonial economic ambition. Byron Cannon, in *Politics of Law and the Courts in Nineteenth-Century Egypt* (1988), argues that informal empire played a significant role in shaping law and politics in Egypt for economic ends. He gives the example of the Mixed Courts, which were active from 1875 until 1949. This judicial system, which streamlined legal issues between foreigners and between foreigners and Egyptians, was an Egyptian invention. This system was founded before the British occupation. However, despite the fact that at that time Egypt was not officially a colony, it was under great political and economic pressure from Europe.⁴⁷²

According to Cannon, the tactics of informal empire allowed France to impose its will on the Egyptian legal system and defy the will of Egyptian powers regarding the functioning of the Mixed Courts.⁴⁷³ The power of France was not derived from any formal position as colonizer, but from its economic position as an informal imperial power in Egypt (Cole 1993, 3). In other words,

⁴⁷² Byron Cannon, *Politics of Law and the Courts in Nineteenth-Century Egypt* (Salt Lake City: University of Utah Press, 1988) at 50-51.

⁴⁷³ *Idem.*

the *de facto* power of imperialism made Arab countries, and their legal systems, subject to the control of an imperial power that controlled the economy (Cole 1993, 19, 55; Cannon 1988, 50).

During the 1870s Egypt went through financial crisis, and Isma'il Pasha was blamed for the huge debt. This put Egypt under European financial control. As part of this control, Isma'il Pasha was forced under French and British pressure to step down in favor of his son Tewfiq Pasha. This can be seen as the starting point of the puppet government in Egypt, which gradually deepened and became most evident in the 1950s during King Farouk's reign. The relationship between the British and the Egyptian rulers, whether the sultan or the king, was a superior-subordinate relationship. For instance, the first sultan of the Sultanate of Egypt, Hussein Kamel, came into power after the British forces deposed the khedive, at that time Abbas II Hilmi.⁴⁷⁴ The stability of any ruler depended largely on the approval of the British. European pressure had an early impact on Egypt's political, economic, and legal systems. The impact of this informal imperial political and economic control provides a precedent for post-9/11 pressures. It is discussed further in the section titled Neo-colonialism in Egypt.

The increased European control in Egypt led to a nationalist uprising, known as the 'Urabi Revolt (1879–1882), led by nationalist officer Ahmed 'Urabi against Tewfiq Pasha's policy. 'Urabi was described on different occasions by Khedive Tawfiq as a “rebel” who committed “anarchist acts” and “treason.”⁴⁷⁵ These terms were used arbitrary well before establishing a penal code in Egypt. The revolt was a threat not only to the Khedive, but also to European interests in Egypt.

⁴⁷⁴ Naguib Mahfouz, *Palace Walk* (New York: Anchor Books, 1991) at 12.

⁴⁷⁵ Aḥmad Urābī, *Mudhakkirāt al-Za'im Aḥmad 'Urābī : kashf al-sitār 'an sirr al-asrār fī al-naḍah al-Miṣrīyah, al-Mashhūrah bi-al-Thawrah al-'Urābīyah, fī 'āmay 1298 wa-1299 al-hijrīyatayn, wa-fī 1881 wa-1882 al-mīlādīyatayn* [Ahmad Urabi's Memoir] (Cairo: Dār al-Hilāl, 1989) at 10-2.

The British occupation (1882–1952)

The direct reason for the British occupation was to end the ‘Urabi revolt, which aimed to end European political and economic control in Egypt. Thus, in 1882 Britain sent its troops to Egypt, fought ‘Urabi in the Battle of Tel el-Kebir, and secured the Khedive’s government.⁴⁷⁶ This event suggests that militarism as a colonial tool seeks to protect the imperial economy abroad.

‘Urabi’s trial is a case that shows the actual influence the British had in criminal matters. The trial was arranged between the British and the Egyptians. The Egyptians aimed to punish ‘Urabi with death, but the British insisted on several things: a “fair” and public trial, that the charge must be for acts of rebellion, and that the death sentence must be replaced with life in exile to one of Britain’s colonies, Ceylon.⁴⁷⁷ This arrangement suggests a direct British influence; however, it is not clear from the available documents whether the British had a similar role in influencing or approving the Egyptian Penal Code.

After the occupation, the Egyptian government was no longer able to take a major decision without British approval.⁴⁷⁸ In this regard, Nathan Brown describes the British position in Egypt as follows:

The British never assumed direct control of the Egyptian government (even though British personnel were employed at all levels of Egyptian administration), but British power was exercised regularly and even heavy-handedly in the country. No Egyptian government could take an action that the British actively opposed [... T]he British unilaterally declared the country independent in

⁴⁷⁶ *Idem.*

⁴⁷⁷ Earl of Cromer, *Modern Egypt*, vol 1 (New York: The Macmillan Company, 1908) at 336-37.

⁴⁷⁸ *Idem.*, at 336.

1922 but refused to concede control over important issues, including defense and protection of foreigners.⁴⁷⁹

This suggests that at the administrative level, the British used methods of informal imperialism that allowed indirect involvement in decision-making. According to David French, the British colonials relied on local elites to rule and direct people on their behalf—a cheaper way to rule.⁴⁸⁰ This required building a strong network with the ruling class and elites.

During colonialism, the British secured the khedive's government, yet it was a nominal government with limited authority. The actual governor was Evelyn Baring, also known as Lord Cromer, who ruled Egypt on behalf of Britain until 1907.⁴⁸¹ Cromer's policy in ruling Egypt was to identify the "oriental mind." He advised that "British officials in Eastern countries should be encouraged by all possible means to learn the views and the requirements of the native population."⁴⁸² Said argues that this attempt was undertaken not in order to cooperate with the natives, but to manipulate them according to imperial standards.⁴⁸³ Unlike in India, where a coercive policy was enforced in order to change the native mentality, and which was faced with violent resistance, there was relatively limited coercion in Egypt. The colonialists attempted to accommodate natives' needs without compromising their imperial agenda.⁴⁸⁴ The British managed to combine methods of informal imperialism and colonialism in ruling Egypt. Both of these forms dissatisfied Egyptians who sought complete self-government.

⁴⁷⁹ Brown, *Supra* 62, at 107.

⁴⁸⁰ French, *Supra* 2, at 16.

⁴⁸¹ Sean Lyngaas, "Ahmad Urabi: Delegate of the People's Social Mobilization in Egypt on the Eve of Colonial Rule" (Spring 2011) *The Fletcher School Online Journal for Issues Related to Southwest Asia and Islamic Civilization*, online: <fletcher.tufts.edu/Al-Nakhlah>, at 6.

⁴⁸² Evelyn Baring, *The Government of Subject Races* (Cambridge: Cambridge University Press, 2011) at 27.

⁴⁸³ Said, *Supra* 79, at 207.

⁴⁸⁴ *Idem*.

Egyptian nationalists were aware that a revolt against the British would probably end up like the ‘Urabi revolt. And, recognizing that “the Oriental” was not an equal competitor, they faced the colonizer with an equal method—the French system. Egyptian laws and institutions were based on a French model, which we will discuss in more detail later. This allowed Egyptian nationalists to negotiate and be confident in pushing for independence.

In 1922, a nominal independence was granted to Egypt, and it was declared a monarchy. The substance of this independence was to end the British protectorate that had been announced in 1914 due to World War I. The British troops, however, remained in Egypt, especially in the Suez Canal. This nominal independence did not satisfy nationalists, who saw the new monarchy an extension of the “puppet government.”

As an objection to the British existence in Egypt, in the 1940s Islamic violence, carried out particularly by the Muslim Brotherhood, emerged. Bombings and other forms of violent attacks were carried out against British troops, as well as constant assassinations of Egyptian officials. Over time, especially post-World War II, the Brotherhood’s influence increased rapidly, establishing schools and hospitals, as well as a secret army, which was viewed by the monarchy as carrying a potential threat of establishing another state within Egypt.⁴⁸⁵ A suppression policy was carried out against the Brotherhood as a group and against its members. This suppressive policy consisted in banning publications by the Brotherhood, dissolving the group, and arbitrary arrest and imprisonment of its members.⁴⁸⁶ This policy continued after the establishment of the republic and until this day. As we will see in the next section and in Chapter 5, the British way of crime and social control, including state of emergency and special courts, was adopted by post-colonial Egypt in its war on terror.

⁴⁸⁵ Richard P Mitchell, *The Society of the Muslim Brothers* (London: Oxford University Press, 1969) at 58-61.

⁴⁸⁶ “Profile: Egypt's Muslim Brotherhood” (25 December 2013) *BBC*, online: <www.bbc.com/news>.

The British legacy of martial law

Britain was able to pull Egypt, at least to some extent, towards a Western political culture of modernization. Britain avoided being directly involved in decision- or policy-making in Egypt. It prepared Egypt for a gradual political and cultural shift. Nonetheless, when it comes to martial law and state of emergency, Britain had a direct role in transplanting these forms of the exception to Egypt (Brown 1995).

The first time martial law was declared in Egypt was by the British in 1914. That was when Britain declared Egypt a protectorate as a result of declaring war with the Ottoman Empire, of which Egypt was nominally a province. A British governor headed the Egyptian military, and military actions were immunized from the jurisdiction of the courts. This martial law remained active until the declaration of Egypt's independence in 1922.⁴⁸⁷

In 1936, an Anglo-Egyptian treaty was signed which allowed the British military two things: to remain in Egypt, and to request the declaration of martial law. Accordingly, and as a necessary response to World War II, Egypt declared martial law in 1939, which lasted until the end of the war in 1945.⁴⁸⁸ The law imposed limitations on rights and liberties, but its significance during the two World Wars was that it immunized the military from lawsuits by forbidding claims to revoke any military decision or action or claims for compensation.⁴⁸⁹

Martial law was a useful tool to protect the military during the two World Wars. For these reasons, the British insisted on including martial law in the 1923 Egyptian constitution (Brown 1995, 111; Reza 2007, 535–37). Although Nathan Brown plays down the role of colonialism in imposing law in general, when it comes to the field of national security, he explains the adoption

⁴⁸⁷ Reza, *Supra* 11, at 535.

⁴⁸⁸ *Idem*, at 536; Brown, *Supra* 458, at 82.

⁴⁸⁹ Article 10*bis* of the Egyptian Law no. 15 of 1923 on the System of Martial Law.

of these laws as part of the colonial legacy (Brown 1997, 72–82; Reza 2007, 535–36; Roach 2011, 82).

Sadiq Reza argues that the advantages of martial law, in which the military can enjoy unlimited authority without accountability, encouraged the newly liberated Egyptian elite to regulate it further in the 1923 Egyptian constitution and its subsequent amendments (2007, 535). A piece of legislation regarding martial law was also established in 1923.⁴⁹⁰ Article 1 of this law states that “Martial law may be declared whenever security or public order in the Egyptian territory or part of it is at risk, whether due to an armed enemy raid or due to internal disturbance.”⁴⁹¹

This law granted the military governor several authorities outside the field of war, including searching persons and houses, monitoring newspapers before they are published, suspending or closing any press without prior notice, monitoring the mail and teleconferences, preventing any public meeting and resolving it by force, as well as preventing associations or meetings and resolving them by force.⁴⁹² These restrictions to rights and liberties were justified as part of securing the mission of the military in protecting the stability of the state by suppressing any propaganda by the enemy during wartime. Among these authorities was the right to fire in cases of disobedience. In one occasion in 1951, the British army opened fire on a car that disregarded the army’s order to stop. The result was the killing of a female passenger and wounding of the male driver.⁴⁹³ This action broadens the right to fire to include cases of disobedience without the use of force. This rationale is borrowed from the colonial counter-insurgency experience. According to French, in “Cyprus, and Nyasaland [the British] could create

⁴⁹⁰ Law no. 15 of 1923 on the System of Martial Law.

⁴⁹¹ Article 1, *idem*.

⁴⁹² Article 3, *idem*, replaced by Law no. 533 of 1954.

⁴⁹³ French, *Supra* 2, at 108

free-fire zones where the security forces could engage suspected insurgents with lethal force.”⁴⁹⁴ The treating civilians equally with “insurgents” suggests that discipline rather than crime-control is the ultimate goal of the colonial order.

British colonialism, due to its commitment to the principle of “minimum use of force,” was less coercive than that of the French.⁴⁹⁵ However, a minimum use of force is a principle without clear definitions, allowed the use of force, especially during martial law. For instance, counter-insurgency campaigns were carried out in Egypt, particularly across the Canal Zone. In January 1952, the British troops launched Operation Eagle by firing on the Egyptian police, who were considered insurgents. The operation resulted in the killing of around 40 and injuring of over 60 Egyptians.⁴⁹⁶ The excessive use of force was faced with an increased number of attacks on British figures and troops. This led the British to replace the unnecessary use of force with low-intensity counter-insurgency operations.⁴⁹⁷

The British legacy of special courts

The British legacy in Egypt included special courts—another form of exceptionalism. In Egypt, when crimes were committed against the British troops by locals, extreme emergency measures were imposed. These included establishing special courts and invoking collective responsibility (Brown 1995, 121).

In Egypt, the British immunized military actions, including actions that are practiced during peacetime. For example, one special tribunal sentenced several Egyptian villagers to death

⁴⁹⁴ *Idem*, at 80.

⁴⁹⁵ *Idem*, at 75-79.

⁴⁹⁶ *Idem*, at 114-15.

⁴⁹⁷ *Idem*.

and others to flogging because of a conflict with pigeon-hunting British troops.⁴⁹⁸ The British were not comfortable with the Egyptian national system, especially regarding the judiciary and the police. Therefore, “sensitive cases” were not brought to the National Courts. Lord Cromer complained of “the delay which constantly occurs, in the Native Courts, in dealing with offences against British soldiers.”⁴⁹⁹ As a result, the British justified establishing special tribunals, where harsh verdicts were justified.⁵⁰⁰ More on the legacy of special courts in independent Egypt is discussed in a following section in this chapter. The British distrusted Egyptian National Courts; this has led to calls for Anglicization.⁵⁰¹ The British felt uncomfortable leaving the judiciary to Egyptian judges. In 1912, after an Egyptian court acquitted two men accused of carrying out an alleged attack on a French engineer, Lord Kitchener, British consul-general in Egypt, wrote:

All authorities agree that the case was fully and satisfactorily proved against the two men accused, one of whom had been twice tried for attempted murder in the last four years; yet they were both acquitted by Egyptian judges. These judges were known to be Nationalists, and it is naturally considered that race and religious feeling alone can account for their finding.⁵⁰²

British officials, in particular Baring, complained about the Egyptian tendency to apply legal procedures too strictly, which often resulted in setting free the guilty.⁵⁰³ National Courts did not recognize confessions under torture, which upset both the Egyptian government and the British. As a response, the British established a tradition of special procedures to deal with those convicted

⁴⁹⁸ Brown, *Supra* 458, at 45.

⁴⁹⁹ Quoted in *idem*.

⁵⁰⁰ Earl of Cromer, *Modern Egypt*, vol 2 (New York: Macmillan, 1908) at 32-33.

⁵⁰¹ Brown, *Supra* 458, at 45.

⁵⁰² Quoted in *idem*, at 46.

⁵⁰³ *Idem*, at 52.

by officials, but not necessarily by judges.⁵⁰⁴ Such a legacy still exists in Egypt, addressed in more detail in Chapter 5.

Post-colonialism: Colonial heritage blending into local authoritarianism

The Free Officers Movement was organized to end the *de facto* colonialism of the British. The movement included, among others, Muhammad Naguib, Gamal Abdel Nasser, and Anwar Sadat, who became the first three presidents of Egypt. In July 1952, a coup was carried out which forced King Farouk to leave Egypt, and the Republic of Egypt was established in July 1953. Naguib was the first president of the Republic of Egypt from July 1953 to November 1954. Naguib had a democratic stance and a desire to limit the authority of the army.⁵⁰⁵ He was forced to leave office after only 16 months by Nasser and other officers.

Nasser was the following president. He ruled Egypt with a military and authoritarian approach, which continues until the day of writing this paper. Freedoms were limited through censorship and travel restrictions. Powers were centralized within the personal control of the president, with the aid of some members of the army and the Ministry of the Interior.⁵⁰⁶ Other economic activities and international trade were limited within a socialist policy.⁵⁰⁷

Nasser, although a revolutionary ruler, could not commit to the aspirations and goals of the revolution, and designed a constitution that allowed him to back out of the promises made in it. For instance, while the constitution listed individual rights, it also granted the president the right to dissolve the parliament and declare a state of emergency. This failure to observe a national

⁵⁰⁴ *Idem.*

⁵⁰⁵ Nissim Rejwan, *Arabs Face the Modern World: Religious, Cultural, and Political Responses to the West* (Florida: University Press of Florida: 1998) at 87.

⁵⁰⁶ Clement Henry Moore, "Authoritarian Politics in Unincorporated Society: The Case of Nasser's Egypt" (1974) 6:2 *Comparative Politics* 193 at 196.

⁵⁰⁷ Thomas W Lippman, *Egypt after Nasser: Sadat, Peace and the Mirage of Prosperity* (New York: Paragon House, 1989) at 5.

constitution has been a common shortcoming of statesmen in other modern states. Karl Loewenstein observes that “Mussolini, Goebbels, Peron, Ngo Dinh Diem, Nasser and *tutti quanti* are modern men and no fools. They cannot believe in what their constitutions proclaim, and their elections produce.”⁵⁰⁸ Nathan Brown describes these documents as “generally viewed as elegant but insincere expressions of aspirations that rulers issue in an effort to obscure the unrestrained nature of their authority.”⁵⁰⁹ This description of constitutions fits well with those that are adopted in post-independent Arab countries, including Egypt.

The reaction towards this extreme authoritarian approach led to an attempted assassination of President Nasser in 1954. As a response, hundreds of members of the Brotherhood were arrested and some were sentenced to either death or life imprisonment.⁵¹⁰ Egyptian prisons became filled with Brotherhood members—a factor that had counterproductive results. Prisons became the birthplace of many influential radical figures and groups.⁵¹¹

Nasser was clear in his war against the Brotherhood and other Islamist groups. He relied on exceptional courts and measures. Several exceptional courts were established by decree, such as the Court of Ethics, the Court of Sequestration, and the Court of the Revolution. These extraordinary courts had vague tasks that allowed the authority to protect itself under the pretext of protecting the public order. These courts can be seen as part of the British legacy in Egypt (Brown 1995). Such practices thwarted democratic progress and consolidated authoritarianism in post-independent Egypt.

⁵⁰⁸ Karl Loewenstein, *Political Power and the Governmental Process* (Chicago: University of Chicago Press, 1957) at 146.

⁵⁰⁹ Nathan Brown, *Constitutions in a Nonconstitutional World: Arab Basic Laws and the Prospects for Accountable Government* (New York: State University of New York Press, 2002) at 2.

⁵¹⁰ Anthony Nutting, *Nasser* (New York: EP Dutton, 1972) at 73-74.

⁵¹¹ Jeffery T Kenney, *Muslim Rebels: Kharijites and the Politics of Extremism in Egypt* (Oxford: Oxford University Press, 2006) at 129-33.

Neo-colonialism: Economic dependence and political submission

Sadat came to power in 1970 after the death of Nasser. Sadat adopted a less strict policy at the national level and a friendly policy towards the West. Internally, he released political prisoners in an attempt to culturally contain Islamists and other opposition groups.⁵¹² His foreign policy welcomed a “partnership” with the United States.⁵¹³ He hoped to secure economic prosperity for Egypt by getting financial and technological support from the United States.⁵¹⁴

Sadat signed the Egypt–Israel Peace Treaty in the United States in 1979. On the one hand, this step made him hated among Egyptians and most Arab rulers, and led to his assassination in 1981 by soldiers belonging to the al-Jihad group.⁵¹⁵ On the other, it improved Sadat’s relations with the West. Since the date of signing the peace treaty with Israel, Egypt has been the second-largest recipient of American foreign aid.

Hosni Mubarak, another military officer, came to power in 1981. He ruled Egypt through a middle course. He satisfied the West while taking Egypt back to its leadership role in the Arab region.⁵¹⁶ He recognized the necessity of foreign economic and military support in order to keep peace with Israel and maintain internal security. This was achieved primarily through American aid.⁵¹⁷ Egypt receives annual aid from the United States of \$2.1 billion (\$1.3 billion for the military; \$815 million in economic aid),⁵¹⁸ and the number has varied in later years.

⁵¹² Gilles Kepel, *Jihad: The Trail of Political Islam*, trans Anthony F Roberts (London; New York: IB Tauris, 2006) at 83.

⁵¹³ Brad Plumer, “The U.S. Gives Egypt \$1.5 Billion a Year in Aid. Here’s What It Does” (9 July 2013) *Washington Post*, online: <www.washingtonpost.com>.

⁵¹⁴ Thomas W Lippman, *Egypt After Nasser: Sadat, Peace and the Mirage of Prosperity* (New York: Paragon House, 1989) at 13.

⁵¹⁵ Cleveland & Bunton, *Supra* 9, at 229.

⁵¹⁶ Tony Karon, “What the U.S. Loses if Mubarak Goes” (31 January 2011) *TIME*, online: <content.time.com>.

⁵¹⁷ Jeremy M Sharp, “Egypt: Background and U.S. Relations” (10 January 2014) *Congressional Research Service*, online: <www.crs.gov>, at 18-38.

⁵¹⁸ Robert Satloff & Patrick Clawson, “U.S. Economic Aid to Egypt: Designing a New, Pro-Growth Package” (7 July 1998) *The Washington Institute*, online: <www.washingtoninstitute.org/policy-analysis/view/u.s.-economic-aid-to-egypt-designing-a-new-pro-growth-package>.

This sort of relationship between Egypt and the United States suggests a new form of subordination to the Western neo-colonial powers, at least financially, which could give the superior the upper hand regarding other political matters. Post-9/11, Mubarak found the global war on terror a new justification for the endless state of emergency and other restrictive measures. Yet he also had to keep pace with global countermeasures, especially regarding terrorism financing, which will be discussed further in Chapter 5. The Egyptian subordination to the West is what had kept a dictator like Mubarak secure for all these years. As a scholar puts it, the “firm backing of the United States and a formidable Egyptian security apparatus were for thirty years safeguards to Mubarak’s throne.”⁵¹⁹

American aid continued during the presidency of Mohamed Morsi.⁵²⁰ Morsi’s presidency—which began in June 2012 and ended in July 2013—was too short to evaluate the American influence over Egypt during that one year. The coup that ended the rule of Morsi was supposed to end American military aid. According to the United States Foreign Assistance Act, “None of the funds appropriated or otherwise made available pursuant to this Act shall be obligated or expended to finance directly any assistance to the government of any country whose duly elected head of government is deposed by military coup or decree.”⁵²¹ However, after the election in June 2014 of President el-Sisi, the leader of the coup, the United States released \$575 million in military aid to Egypt.⁵²² El-Sisi has shown the need for approval and support from the United States. He announced that “We need American support to fight terrorism, we need American equipment to

⁵¹⁹ Lyngaas, *Supra* 481, at 10.

⁵²⁰ “Obama: Egypt is Not US Ally, Nor an Enemy” (13 September 2012) *BBC*, online: <www.bbc.com>.

⁵²¹ United States Foreign Assistance Act 1961.

⁵²² “US Unlocks Military Aid to Egypt, Backing President Sisi” (22 June 2014) *BBC*, online: <www.bbc.com>.

use to combat terrorism.”⁵²³ El-Sisi follows in Mubarak’s footsteps and obviously pushes for a wider war on terrorism, which not only satisfies the West, but also secures his position.

Conclusion of chapter: Authoritarian ambition as an additional perspective

The common features of imperialism, colonialism, and neo-colonialism discussed in this and the previous chapter do not explain all the post-colonial legal and extra-legal practices in the Arab world. This requires an inquiry into the unique features of Arab states as mostly authoritarian regimes. An important feature of such regimes is the lack of power-sharing, which creates either personal dictatorship or highly centralized authoritarianism. Both limit political freedoms.

Post-independence, in order to secure the newly independent states, Arab rulers transformed the former colonized regimes into authoritarian governments. The duality in modern Arab legal systems—a European legal system with a colonial model regarding national security—could be viewed as a consequence of ambivalent colonial policy: preparing states for independence while protecting imperial interests in these colonies. The policies in former Arab colonies mirror the paradoxical side of these two goals.

Post-independence, Arab states sought to increase their domestic power. This was done through replacing colonial control with local control. A combination of centralization, special courts, and extra-legal authorities served the regimes’ purposes well. The state aimed to bring under its supervision all opponents. In this respect, regulations were applied to educational bodies by imposing national programmes and restricting students’ political activities (Owen 2004, 28–29).

⁵²³ Barbara Tasch, “Egypt’s Al-Sisi Asks Obama For Help in ‘War on Terrorism’” (15 May 2014) *Time*, online: <www.time.com>.

Religious bodies like mosques are another set of organizations that might provide state opponents. Therefore, Arab states brought religious establishments under their umbrella by officializing the positions of *mufti* (the clergy) and paying them salaries.⁵²⁴ Egyptian presidents often relied on *fatwa* (religious opinion) to justify their political actions,⁵²⁵ such as issuing *fatwa* against the Brotherhood in Egypt. Even in more secular states like Tunisia, the position of *mufti* still exists.⁵²⁶ By containing religious positions within the state and placing limits on freedom, the state is controlling the society through ‘winning hearts and minds’ approach.

Other professions were also brought under the supervision of the state, such as judges, teachers, and journalists. Replacing existing judges was not always easy; therefore, the state found a way of reducing the role of jurisdiction through establishing exceptional courts. This is a combination of centralization and exceptionalism.

The authoritarian ambition makes Arab state seem right in influencing the West to adopt or cling into suppressive laws that reflect the counter-insurgency tradition. For instance, in 26 September 2001, US Secretary of State Colin Powell praised Egypt’s anti-terrorism approach by stating that “Egypt, as all of us know, is really ahead of us on this issue. They have had to deal with acts of terrorism in recent years in the course of their history. And we have much to learn from them and there is much we can do together.”⁵²⁷ This statement suggests a devolution in global and Western counter-terrorism and a justification of the Arab authoritarian approach.

An important aspect of the authoritarian ambition is that it controls through “knowledge”. By knowledge, I refer to Said’s argument (discussed in Chapter 4) that imperial powers studied

⁵²⁴ Owen, *Supra* 10, at 29.

⁵²⁵ *Idem*.

⁵²⁶ Article 79 of the 2014 Constitution: “The President of the Republic is responsible for: Appointing and dismissing the General Mufti of the Tunisian Republic”.

⁵²⁷ Quoted in “September 11, 2001: Attack on America Secretary Colin L. Powell Remarks with Egyptian Minister of Foreign Affairs Ahmed Maher; September 26, 2001” *Yale Law School Avalon Project*, online: <avalon.law.yale.edu/sept11/powell_brief21.asp>.

and monitored Oriental nations in order to place them into categories that serve the Western agenda (1978, xix). This kind of “knowledge”, which was used during informal imperialism through scientific expeditions and political and economic control, was later developed into advanced secret intelligence agencies worldwide. As mentioned earlier in this chapter, due to the sheer number of documents regarding secret intelligence in the Arab world, the dissertation does not discuss this aspect in depth. Nevertheless, this dissertation suggests that using “knowledge” to control rather than to understand, whether by imperial, colonial, post-colonial, or neo-colonial powers, is a manifestation of an authoritarian ambition.

Even though when we talk about authoritarian regimes we mean governments with high centralization and limited political freedoms and mobilization, such as that in Egypt, many colonial and neo-colonial practices are authoritarian in nature. The obsession with monitoring, whether through censorship and speech restrictions, travel bans, or freezing funds, are all part of a worldwide collective authoritarian ambition. This means that the authoritarian ambition as a theoretical perspective, while capable of explaining practices in the Arab world, can also explain counter-terrorism practices in Western democracies.

CHAPTER 5 COUNTER-TERRORISM IN EGYPT

A dramatic scene has been dominating Egyptian political life for decades. The opposition has been mixed up with terrorism, and national security necessity has overlapped with excessive control. This chapter examines the development of the Egyptian war on terror and the possible influence of colonialism and neo-colonialism and of indigenous authoritarian ambition in shaping anti-terrorism law and measures. The question raises in this chapter is: Are the anti-terror and national security laws in Egypt established to keep pace with the evolving requirements of our time, or are they an extension of a deep-rooted colonial rationale? To answer this question, we examine the early laws that were adopted in the 1880s. The timing of the earlier laws is important because some of them were adopted during colonialism. These laws will reflect one or a mix of the following influences: colonial influence, an oppositional approach to colonialism, or local authoritarianism.

The chapter starts by discussing the Egyptian national security laws and measures. It examines the origin of the Penal Code, which goes back to 1883. Three crimes are selected for analysis from this law: sabotage, rebellion, and sedition. Examining these crimes shows that they form the basis of the later anti-terrorism law. The chapter then examines Law 162/1958 Concerning the State of Emergency, followed by the Egyptian application of special courts. The analysis of these suggests a direct colonial influence, which, in the case of Egypt, combines with authoritarian ambition. I argue that these regulations are extended in the war on terror.

The chapter then provides an overview of the emergence of the term “terror” during the war on communism. “Terror” and other vague terms like “sabotage” were intensively used against communists during both the monarchy and the early stages of the Republic. During that period, the Egyptian courts, including the Court of Cassation, sentenced hundreds of people for “revolutionary acts,” including “membership in communist organizations.” The importance of

these verdicts is in showing how vague terms like “sabotage” were applied against opponents, and how the term “terrorism” first emerged and was applied in Egypt. More importantly, it shows the patterns of control adopted by the state to deal with enemies.

After the historical background of the internal war on communism, the chapter then discusses current counter-terrorism policy. It starts with an overview of the Egyptian approach to counter-terrorism, the constitutional amendments that centralized powers within the president, the use of the state of emergency as an anti-terrorism tool, and the exceptional nature of the internal war on terror. Egyptian laws were extremely broad well before 9/11. This section provides a criticism and evaluation of the legal framework of counter-terrorism. It covers the broad definitions and the problematic criminalization of terrorism-related crimes, including terrorism financing and speech related to terrorism. This includes problems of vagueness, excessive discretion for emergency powers, and violations of constitutional and procedural rights. In addition, it stresses the practices of exceptionalism, special courts, and regulations of speech and associations that are most related to colonial legacy. It also examines the theme of dualism—the fact that the Egyptian post-colonial anti-terrorism offences are broader than those inherited from or accepted in the United Kingdom or France.

Laws and measures regarding national security: The influence of colonialism

Prior to regulating the crime of terrorism, there were far-reaching laws regarding crimes against the state in Egypt. Crimes against the state are undeniably dangerous: what affects the stability and the safety of the state will directly or indirectly affect the society. In this part, my aim is not to argue for or against the different meanings of the notion of “state security,” but to show how this

concept is conceived in Egypt. It is important to look at the values that are protected and the rationale of state security laws as part of evaluating the current criminal system.

This section examines the colonial influence in shaping national security laws and measures. It starts by discussing the Penal Code of 1883 and the current Penal Code of 1937. It should be noted that the British granted Egypt nominal independence in 1922, but full independence not obtained until 1952; or even later until 1965 when all the British troops left the Canal Zone. According to Nathan Brown, it was only post-1922 and later that the Egyptian government had full autonomy in legislation related to its local citizens. In this period, Egypt codified a new set of political crimes, mostly protecting the king and the regime. These legal reforms were meant to strengthen the state (1997, 60).

A following section examines the exceptional measures inherited from colonial practice. These include Law 162/1958 Concerning the State of Emergency, and the Egyptian application of special courts. By examining these laws and measures and their legal and political roots, the aim is to compare them with the current war on terror.

The Penal Code and its amendments

The current Egyptian Penal Code was established in 1937 after Egypt obtained a nominal independence. The law has been amended several times since then. However, the very first modern penal code was established in 1883. The 1883 code was the first to criminalize sedition, sabotage, and any attempt to changing the governmental system. These regulations still exist in the current Penal Code.

The Penal Code of 1883 was replaced in 1904 and again in 1937. Each of these laws was expanded by including broad and vague terms. For instance, in 1923 an amendment was made to

the Penal Code of 1904, which condemns incitement of revolutionary ideas. Article 105 criminalizes “dissemination of revolutionary ideas”⁵²⁸ and “advocating changing the basic social system through force or terror.”⁵²⁹ This article condemns incitement of “revolutionary ideas” and the use of “force or terror.” The underlying wrongdoing can be categorized as “sedition,” “sabotage,” and “rebellion.” At the time of adopting the above article, Islamic movements were not yet visible at the political arena. In principle, this article was designed to protect the monarchy from any potential threat, particularly that of communism. The following sections discuss in detail the crime of sabotage and its relationship to rebellion, as well as the crime of sedition. We argue that these acts, which are drawn from the 1883 and 1904 Penal Codes, are the basis of all subsequent national security crimes, including terrorism.

Rebellion and sabotage

In Egypt, there is not a distinctive crime under the term “rebellion.” However, the history of Egypt is rich with those labeled as rebels, such as Ahmad ‘Urabi and Saad Zaghloul, who were exiled during British colonialism. Instead, the Penal Code uses the terms “revolutionary crimes” and “sabotage.” Even though there is not much written on the background of the first Penal Code of 1883, the facts suggest that the failure of ‘Urabi revolt (discussed in Chapter 4) led to the shaping of the Penal Code in a way that served the victorious government. The significance of the case of ‘Urabi in shaping the Penal Code, which was adopted a year later, can be seen in two codifications: the labeling of anti-government acts with terms like “rebellion” and “sabotage,” and the criminalizing of unlawful association.

⁵²⁸ Article 151 (2) of Law no. 37 of 1923 on Adding Provisions to the Penal Code no. 3 of 1904.

⁵²⁹ Article 151 (3) of Law no. 37 of 1923 on Adding Provisions to the Penal Code no. 3 of 1904.

The 1883 Penal Code embodied a tough approach to revolutionaries and anti-government groups. Article 77 of the Code focuses on incitement, even unsuccessful instigation. It states that “Whoever instigated the population to take arms to fight the government, shall be punished with death whether there were full or partial outcomes, though if no outcomes occur from such instigation, the punishment shall be life in exile.”⁵³⁰ Although this article does not use the term “rebellion,” its wording implicitly suggests that open political resistance is not allowed.

The root of this law can be seen in colonial and imperial practice. As mentioned earlier, the defeat of ‘Urabi by the British may have been influential in adopting an anti-revolutionary policy. However, a more direct influence can be seen in the French Penal Code of 1810. Egypt willingly built its Penal Code based on the French model (the attractiveness of the French model is addressed in Chapter 4). The *Gold Book of the National Courts* (1937), which documents the development of law and national courts in Egypt, confirms the French origin of the Egyptian Penal Code. It states that Egyptian Penal Code of 1883 “cut the link with the past [...] in adopting the approach of the French law of 1810, with some variations that consider the cultural difference between the Egyptian civilization and its mentality and the Western civilization and its mentality, particularly the French.”⁵³¹ This requires a direct examination of the French Penal Code of 1810.

Section IV of the French Penal Code of 1810, “Resistance, Disobedience, and other Defaults, in regard to the Public Authority,” addresses crimes of “rebellion” in at least ten articles. For instance, Article 217 states that:

⁵³⁰ The exact wording of Article 77 translated above reads in Arabic:

كل من حرّض بفعل محسوس سكان القطر على حمل السلاح لقتال الحكومة بعاقب بالقتل سواء تم المقصود من ذلك التحريض أو ظهرت بعض مبادئه فإن لم يتم المقصود منه يحكم على المحرض بالنفي المؤبد.

⁵³¹ *The Gold Book of the National Courts*, *Supra* 457, at 5.

Whoever shall have incited a rebellion, either by discourses pronounced in any public places or assemblies, or by bills posted up, or by printed writings, shall be punished as guilty of such rebellion. In case the rebellion shall not have taken place, the inciter (provocateur), shall be punished with an imprisonment of not less than six days, nor more than one year.⁵³²

French history is full of revolutions, so it is not surprising that the First French Empire, which adopted this law was aware that a revolution could threaten its stability. In addition to the French Penal Code, France targeted rebels based on its state of siege regulations adopted in 1797 (mentioned in Chapter 1). According to the 1797 regulations, a state of siege can be declared in case of “rebellion.” However, the definition of rebellion remained unclear, which allowed domestic disturbance to be included.⁵³³ The Egyptian monarchy probably found the French approach useful, especially after its experience with the ‘Urabi revolt. Codifying the crime of rebellion adds legitimacy to the state and its countermeasures.

In addition to crimes associated with rebellion, the Egyptian Penal Code of 1883 focuses on the crime of sabotage. For instance, Article 83 states, “Whoever burned or sabotaged intentionally and malevolently buildings, stores or suchlike of government property shall be punished with death.”⁵³⁴ Another article punishes with death those involved in “temptation that is intended to incite the population to fight each other or to sabotage [state institutions.]”⁵³⁵ The Egyptian authority places special protection on public property, regardless of the motive. The same tendency is extended to the current counter-terrorism approach, examined in a following section regarding the definition of “terrorism.”

⁵³² Article 217 of the French Penal Code of 1810.

⁵³³ Feldman, *Supra* 194, at 1024.

⁵³⁴ Article 83 of the Egyptian Penal Code of 1883.

⁵³⁵ Article 78, *idem*.

The Egyptian legislation also borrowed the above crimes of sabotage from the French Penal Code of 1810. For instance, Article 95 of the French Penal Code states that “Whoever shall have set fire to, or destroyed by the explosion of a mine, any buildings, magazines, arsenals, ships, or other property, belonging to the state, shall be punished with death and confiscation of property.”⁵³⁶ The death penalty and life imprisonment are among the distinctive features of the Napoleonic Code that Egypt willingly clings to until this day.

In Egypt, the articles regarding rebellion and sabotage regulated in the Penal Code of 1883 were transferred to the subsequent Penal Code of 1904, and they still exist in the current Penal Code of 1937⁵³⁷ but with different wording. For instance, Article 90 of the current Penal Code states that:

Shall be punished with imprisonment for no more than five years everyone who intentionally damages [sabotages] buildings or public property [...].

And shall the maximum limit of this punishment be multiplied if the crime was committed for a terrorist purpose.

And shall the punishment be life imprisonment if the crime was committed during a time of agitation or civil strife or with the intention to place terror or anarchy among people.

And shall a death penalty be imposed if the crime caused death of a person[.]⁵³⁸

It is not clear in this article what “sabotage” means. Is it exclusive to damaging property partially or completely through bombs or weapons? Does it include acts of vandalism, such as breaking the glass or the lamps of a building, or creating graffiti? The wording of the above article does not

⁵³⁶ Article 95 of the French Penal Code of 1810.

⁵³⁷ Articles 89*bis* and 90 of the Egyptian Penal Code of 1937.

⁵³⁸ Amended by Law no. 120 of 1962, and later by Law no. 97 of 1992.

suggest any limits. Moreover, the wording of this article suggests that once property damage is undertaken for the purpose of intimidating the government, it will probably be categorized as terrorism.

While the punishment of life in exile no longer exists, partly because of the end of colonialism, which enabled the colonial power to send its enemies to any of its outspread colonies, and partly because of the evolution of human rights, the punishment is multiplied when the same violent acts are committed for a “terrorist” motive. In practice and in theory, determining such a motive will not be possible as long as terrorism is ill-defined. C. A. J. Coady interestingly suggests that it is important to have a definition of terrorism that leaves open the possibility of non-terrorist revolutionary violence to occur and be morally legitimate against oppressive governments (2004, 40). However, as long as there are governments that use the anti-terrorist campaign to suppress internal or secessionist opposition, such a suggestion may seem too idealistic, especially in authoritarian regimes like the Arab world.

Sedition

Sedition is commonly understood as any politically motivated action, especially in speech or writing, that promotes a rebellion against the government or the socio-economic system. There is no doubt that acts that target the stability of the state and its order are considered serious offences. However, in Egypt, in order to prevent such serious acts, criminalization is extended to include expressions of ideas that are viewed by the state as dangerous. The problem is that the definition of “dangerous ideas” is not specified; it is left to the state to be determined and applied arbitrarily in each case.

In Egypt, crimes under the umbrella of sedition were regulated in the 1883 Penal Code. According to Article 88 of this Code, “whoever speaks out shouting or singing to provoke civil strife (*fitan*) shall be punished with eight days to one-year imprisonment and a fine[.]”⁵³⁹ This restriction on speech is drawn from Article 23 of the French Press Law of 1881 (mentioned in Chapter 3). Briefly, the French Press Law condemns “speeches, shouts or threats proffered in public places or meetings, or by written words[.]”⁵⁴⁰ Both the Egyptian and the French texts leave the door open for the state to tighten freedom of expression and suppress opposing voices. The above Egyptian article, with the exact wording, still exists in the current Penal Code of 1934.⁵⁴¹

In 1957, Article 102*bis* was added to the Penal Code of 1934,⁵⁴² which imposes more restrictions on freedom of expression. It condemns anyone who “deliberately diffuses news, data, or false or tendentious rumors, or propagates controversial propaganda, if they disturb public safety or spread terror among people or harm public interest.”⁵⁴³ The article also condemns anyone who “holds prints or publications [...] intended for distribution”⁵⁴⁴ that aim to disturb public order. The wording of this article is similar to the restriction stated in the British Defence of the Realm Consolidation Act 1914 (DORA) (discussed earlier in Chapter 1). To remind the reader, DORA condemns the “the spread of false reports or reports likely to cause disaffection to His Majesty or to interfere with the success of His Majesty’s forces by land or sea or to prejudice His Majesty’s relations with foreign powers[.]”⁵⁴⁵ The *Gold Book of the National Courts* explicitly states that the Egyptian Penal Code of 1881 and its amendments were influenced by the British approach. It states, “the British influence and mentality appeared clearly in the current Penal Code [of 1904

⁵³⁹ Article 88 of the Egyptian Penal Code of 1883.

⁵⁴⁰ Article 23 of the French Press Law of 1881.

⁵⁴¹ Article 102 of the Egyptian Penal Code of 1934.

⁵⁴² Egyptian Law no. 112 of 1957.

⁵⁴³ Article 102*bis* of the Penal Code of 1934.

⁵⁴⁴ *Idem*.

⁵⁴⁵ Defence of the Realm Consolidation Act as amended on 27 November 1914.

and as amended in 1923] and its preparation works, including the borrowed quotes from the Indian, Sudanese, and British laws. The British influence, however, did not overtone the [Egyptian] Penal Code, but left it with its origins borrowed from the French law[.]”⁵⁴⁶ This suggests that the British did not force Egypt to adopt legal provisions from the British law. However, it also suggests that even after the nominal independence of Egypt in 1922, the British represented an influential and perhaps an attractive power to Egypt.

As the *Gold Book of the National Courts* suggests, the Egyptian Penal Code kept its French origin. The restriction on expression in the above Article 102*bis* does not significantly differ from the restriction drawn from the French Press Law mentioned earlier. In addition, the Egyptian Penal Code borrowed the concept of “public order” from the French Law Regarding the State of Siege of 1849 (mentioned in Chapter 1). This law does not clarify the meaning of this concept, but it allows trying civilians who commit crimes against “public order.”⁵⁴⁷ Protecting public order was thus restricted to exceptional times, such as the state of siege. However, adding this phrase to the Egyptian Penal code suggests normalizing the exception—a theme that is seen in other practices in Egypt, including the endless state of emergency and the application of special courts.

Exceptionalism and militarism

When Colonel Nasser was elected as president, Egypt entered a period of military control, as opposed to rule according to the social contract. In 1954, a new martial law was established that strengthened the military’s powers and broadened the military courts’ jurisdiction. Several military courts were established by decree. They had vague tasks that allowed the authority to protect itself under the pretext of protecting the public order. Nasser imposed martial law in November 1956

⁵⁴⁶ *The Gold Book of the National Courts*, *Supra* 457, at 10.

⁵⁴⁷ Article 8 of French Law Regarding the State of Siege of 1849.

with the outbreak of the Suez Crisis,⁵⁴⁸ and re-imposed it in 1958 upon the socialist union with Syria.⁵⁴⁹ Egypt followed in British footsteps by limiting the use of martial law and replacing it with emergency legislation. The post-colonial Egyptian regime established a new emergency law in 1958⁵⁵⁰ that strengthened military power through transferring some of the authority of individual ministers or the cabinet to the military.⁵⁵¹ The following two sections will discuss separately state of emergency and special courts.

Law no. 162 of 1958 Concerning the State of Emergency

Egypt has a long history of ruling under the exception, whether by martial law or state of emergency. The state of emergency was a useful replacement for martial law, the latter of which was declared during the British existence in Egypt, especially during World War II.⁵⁵² Egyptians' discontent with martial law paved the way for adopting Law no. 162 of 1958 Concerning the State of Emergency (State of Emergency Law), softened the measures of martial law.⁵⁵³

A state of emergency was first declared in Egypt in 1958 until 1980.⁵⁵⁴ It was declared again a year later, when President Sadat was assassinated by Islamist militants, and was continually renewed for another three decades.⁵⁵⁵ The state of emergency was due to expire in 2006, and Mubarak promised to end it and to replace it with a new anti-terrorism law that was intended to be influenced by the post-9/11 Western approach. Despite this promise, Mubarak declared a state of

⁵⁴⁸ The Suez Crisis or Suez War was between, on the one hand, Egypt and the Palestinians, and, on the other, Israel, the UK, and France.

⁵⁴⁹ Reza, *Supra* 11, at 536.

⁵⁵⁰ Law no. 162 of 1958 Regarding State of Emergency.

⁵⁵¹ See Reza, *Supra* 11, at 537.

⁵⁵² *Idem*, at 536.

⁵⁵³ *Idem*; Brown, *Supra* 458, at 83.

⁵⁵⁴ Reza, *Supra* 11, at 536-37.

⁵⁵⁵ *Idem*, 537.

emergency in 2006, alleging that the anti-terrorism draft law had not been completed.⁵⁵⁶ The state of emergency lasted until 2012 after Mubarak left the presidential office. Since then, it has been declared for one month in August 2013⁵⁵⁷ and is still declared frequently in Sinai.⁵⁵⁸

By law, a declaration of state of emergency must specify the period, the area, and the reason,⁵⁵⁹ and must be referred to the People's Assembly for approval.⁵⁶⁰ However, practice shows centralization in decision-making that mostly leaves declaring a state of emergency solely to the president. According to Article 1 of the State of Emergency Law, a state of emergency may be declared "whenever public safety or order is threatened [...] whether because of war or a state threatening the eruption of war, internal disturbances, public [natural] disasters, or the spread of an epidemic."⁵⁶¹ The broad concept of "public order" is borrowed from the French Law Regarding the State of Siege, as mentioned in the previous section regarding the crime of sedition. In addition, the concept of "public safety" is listed in DORA (discussed in Chapter 1). The British adopted DORA during World War I, which justified the broad wording that suits the necessity of wars. In reality, however, broad and vague terms are used frequently in specifying domestic and peacetime crimes. The Egyptian use of state of emergency has created a *de facto* normalization of the exception in a way that exceeded the colonial practice.

The State of Emergency Law grants vast exceptional powers to the president. According to Article 3, upon a declaration of emergency the president may, "by an oral or written order," do the following:

⁵⁵⁶ "Egypt and The Impact of 27 Years of Emergency on Human Rights" (28 May 2008) *Egyptian Organization for Human Rights*, online: <web.archive.org/web/20110201013303/http://en.eohr.org/2008/05/28/%E2%80%9Cegypt-and-the-impact-of-27-years-of-emergency-on-human-rights%E2%80%9D/#more-22>.

⁵⁵⁷ "Egypt Declares National Emergency" (14 August 2013) *BBC*, online: <www.bbc.com>.

⁵⁵⁸ "President Sisi Extends State of Emergency in North Sinai for 3 Months" (4 May 2016) *Ahram Online*, online: <english.ahram.org.eg>.

⁵⁵⁹ Article 2 of Egyptian Law no. 162 of 1958 Regarding State of Emergency.

⁵⁶⁰ Article 3, *idem*.

⁵⁶¹ Article 1, *idem*.

- (1) Restrict people's freedom of assembly, movement, residence, or passage in specific times and places; arrest suspects or [persons who are] dangerous to public security and order [and] detain them; allow searches of persons and places without being restricted by the provisions of the Criminal Procedure Code; and assign anyone to perform any of these tasks.
- (2) Order the surveillance of letters of any type; supervise censorship; seize journals, newsletters, publications, editorials, cartoons, and any form of expression and advertisement before they are published, and close their publishing places.
- (3) Determine the times of opening and closing public shops, and order the closure of some or all of these shops.
- (4) Confiscate any property or building, order the sequestration of companies and corporations, and postpone the due dates of loans for what has been confiscated or sequestered.
- (5) Withdraw licenses of arms, ammunitions, explosive devices, and explosives of all kinds, order their submission, and close arms stores.
- (6) Evict some areas or isolate them; regulate means of transport; limit means of transport between different regions.⁵⁶²

During the nearly endless state of emergency, practice showed abusive searching without warrants, systematic practices of indefinite and incommunicado detention, and torture.⁵⁶³ Reza argues that excluding the application of this law from the provisions of the Criminal Procedure Code, as is stated in the first paragraph, means that there are no limits to authoritarian practices.⁵⁶⁴ However, as part of the minor but positive outcomes of the more recent uprising in Egypt, in 2013 the

⁵⁶² Article 3 of Law no. 162 of 1958 Regarding State of Emergency. Translation quoted in Reza, *Supra* 11, at 538.

⁵⁶³ "Egypt: Systematic Abuses in the Name of Security" (April 2007) *Amnesty International*, online: <amnesty.org/resources/Egypt1/pdf/2007_04_amnesty_international_egypt_report.pdf>.

⁵⁶⁴ Reza, *Supra* 11, at 538-39.

Constitutional Court held part of paragraph one, which granted the president “the power to authorize arresting, detention, and searching people and places without being bound by the provisions of the law Criminal Procedure[,]” to be unconstitutional.⁵⁶⁵

The State of Emergency Law authorizes the establishment of special courts, which is another form of exceptionalism. According to a presidential decree adopted in 1981, the president has the authority to refer several ordinary crimes to these courts.⁵⁶⁶ The decree is a combination of centralization and exceptionalism—an ultimate authoritarianism.

The application of special courts

The experience of Egypt in establishing and depending on exceptional courts is unusual. During colonialism, both the British and the Egyptians relied heavily on exceptional courts. These included the 1882 exceptional court to try ‘Urabi and those involved in that revolt,⁵⁶⁷ the 1884 Commissions of Brigandage under the jurisdiction of the Ministry of the Interior,⁵⁶⁸ the special courts to try offences against the British army, and the martial law courts established during World War I, all of which had exceptional measures and procedures.⁵⁶⁹ After declaring the independence of Egypt in 1922, the Egyptian government, responding to British pressure by codifying martial law, which allowed the trial of civilians in military courts.⁵⁷⁰

⁵⁶⁵ Constitutional Court, case 17 of 2013, issued on 2 June 2013, *Eastlaws*, online: <www.eastlaws.com>

⁵⁶⁶ Reza, *Supra* 11, at 539.

⁵⁶⁷ Brown, *Supra* 458, at 77.

⁵⁶⁸ During and in the aftermath of the ‘Urabi revolt, Egypt witnessed an interior distribution and an increasing phenomenon of brigandage; it was the British who took action by arresting 54 brigands. Later, the idea of establishing the Commissions of Brigandage came from the pro-British Prime Minister of Egypt, Nubar Pasha. See Harold Tollefson, *Policing Islam: The British Occupation of Egypt and the Anglo-Egyptian Struggle over Control of the Police, 1882–1914 (Contributions in Comparative Colonial Studies)* (London: Greenwood Publishing Group, 1999) at 27-29.

⁵⁶⁹ Brown, *Supra* 458, at 77.

⁵⁷⁰ Reza, *Supra* 11, at 535-37.

One might think that the need for exceptional courts would be over by the end of colonialism and the major wars surrounding that period, or that such courts would be exclusive to wartime. However, the experience in Egypt suggests that exceptional courts and exceptional rule like the state of emergency have become the norm rather than the exception. While it is true that Egypt faced external threat, mainly from Israel, that period has been over since the signing of mutual peace agreements in 1978. This clinging to exceptional rule requires a deeper look.

Following the 1952 Revolution by the Free Officers Movement and the coup that overthrew the monarchy, the new government did not hesitate in bringing back the old legacy of exceptional rule. Egypt, with its newborn authoritarian regime, avoided the regular courts and instead relied on special courts for sensitive political cases (Brown 1977, 77). By avoiding the regular procedures, the regime hoped to achieve quick adjudication in its own favor, which could deter opponents through harsh punishments.

Between 1952 and 1954, four exceptional courts were established.⁵⁷¹ Among them is the People's Court, which was established to try the Muslim Brotherhood for their attempt to assassinate President Nasser.⁵⁷² The Court's mandate was to try "actions considered as treason against the Motherland or against its safety internally and externally as well as acts considered as directly against the present regime or against the bases of the Revolution."⁵⁷³ This text sets no limits for interpretation. Its scope could include the members of the Brotherhood as well as the Brotherhood itself.

⁵⁷¹ These include the Court of Treason; the special court against Egyptian communists; the Court of Revelation; and the People's Court.

⁵⁷² Brown, *Supra* 458, at 77.

⁵⁷³ Quoted in *idem*, at 80.

The People's Court had a broad scope.⁵⁷⁴ It disregarded the right to appeal and allowed trials *in absentia*.⁵⁷⁵ The members of the courts were from the military with no judicial background. Furthermore, trials aimed to embarrass the enemies of the regime rather than to punish wrongdoers; in other words, they were show trials.⁵⁷⁶ These show trials, with their overbroad mandate and collective punishment, managed to deter the "enemy" by targeting individuals and groups based on their associations.

The motive behind the People's Court, according to the account of the American Embassy in Cairo, is that "it had been demonstrated that the Civil Courts could not be trusted to deal adequately with the Muslim Brotherhood and hence the People's Court had to be set up [for another year to] secure the Revolution first."⁵⁷⁷ President Nasser alleged that the special courts were a way to avoid involving the judiciary in the new regime's political activity.⁵⁷⁸ Nathan Brown explains that the quick decisions of these courts were an advantage to the new regime, but the courts were also a useful tool to avoid forcing the judiciary, which Brown describes as highly independent, to convict the regime's political opponents.⁵⁷⁹ Simpson describes a similar process in the replacing of courts with committees in Britain during World War II—a process in which "judges come to be *used* by the executive, essentially cosmetically, to legitimate decisions they do not in fact control[.]"⁵⁸⁰ Regardless of what form the judiciary takes, whether a committee or a martial court, exceptionalism leads to a misuse of justice.

Besides the People's Court, courts-martial were active almost constantly in Egypt from 1952 until 1958. While courts-martial combined judges and military officers, when needed, they

⁵⁷⁴ *Idem*, at 77.

⁵⁷⁵ *Idem*, at 78-81.

⁵⁷⁶ *Idem*.

⁵⁷⁷ Quoted in *idem*, at 77.

⁵⁷⁸ *Idem*, at 78.

⁵⁷⁹ *Idem*, at 77.

⁵⁸⁰ Simpson, *Supra* 177, at 16.

included military officers only.⁵⁸¹ Judgments were final and not subject to appeal.⁵⁸² Nonetheless, the law gave the military governor the right to commute sentences or abolish the verdict.⁵⁸³

Similar to courts-martial are State Security Courts,⁵⁸⁴ which were established under the 1958 Law of State of Emergency. According to Nathan Brown, the “Law of Emergency is a direct descendant of measures taken by the British during the occupation[.]”⁵⁸⁵ This colonial legacy has become an aid and a justification to continue ruling through the exception. In its interpretation of a state of emergency, the Supreme Constitutional Court states that:

The origin of a state of emergency is that it is not announced except to face serious threats to national interests, or imminent risks that could affect the stability of the state or its security or safety. And it is a state that occasionally does not suit it—considering its severity and the nature of the risks associated with it—those measures the state adopts during regular conditions, considering that its conditions and extent require proper exceptional measures, which are necessary to face the consequences. These measures are not necessarily limited to crimes threatening the internal or external state security, but include in many ways of their application other crimes beyond this range, and there is no argument about the danger [of these crimes] and the rationale for treating them under the exceptional measures that require quick judgement to deter the offenders and to maintain national safety.⁵⁸⁶

⁵⁸¹ Article 8 of Law no. 533 of 1954 of the System of Martial Law.

⁵⁸² Article 11, *idem*.

⁵⁸³ Article 13, *idem*.

⁵⁸⁴ Article 8 of Law no. 162 of 1958 Regarding State of Emergency.

⁵⁸⁵ Brown, *Supra* 458, at 112.

⁵⁸⁶ جلسة 30 يناير سنة 1993, الطلب رقم 1 لسنة 15, أحكام المحكمة الدستورية العليا

[30 January 1993, request 1/15, Part 5 no. 2, High Constitutional Court Decisions] *Mohamoon*, online: <www.mohamoon-ju.net>.

The decision suggests that state security is above the rule of law. This broad understanding is a serious threat to individual rights and long-run state stability. The Egyptian use of special courts suggests a strong attachment to centralization, exceptionalism, and militarism. These qualities, which are noticeable in colonialism, as discussed in Chapter 1, have been absorbed in the Egyptian authoritarian system.

Another court that we did not discuss is the special military court to try Egyptian communists established in 1953.⁵⁸⁷ Little has been published about this court since its verdicts remained confidential.⁵⁸⁸ However, ordinary courts have tried many other communist cases. The following section examines some of these cases. The importance of these cases is in showing two major things: the early use of the term “terror” and its relation to group identity rather than wrongdoings, and the inefficiency of ordinary courts as long as the penal code is exceptionally broad.

The emergence of the term “terror” during the war on communism

During the monarchy and the early stages of the newborn Republic, communism was considered a serious threat to the state. The threat of communists was in their organized civil acts aiming to overthrow the government and change the political system. Communism was a common threat to Western empires as well as Arab regimes. The large volume of material regarding Anglo-Egyptian history and law does not provide detailed indications of colonial pressure to adopt suppressive measures against communists. Nonetheless, there could still be evidence of colonial influence to be drawn from the similarities in the legislation. Furthermore, the period of British involvement in Egypt was one of virtually continual difficulty in keeping order, and British influence over

⁵⁸⁷ Brown, *Supra* 458, at 78.

⁵⁸⁸ *Idem.*

Egyptian officials in terms of amending the Penal Code is difficult to detect in the available documents—the Foreign Office officials must have been far too clever to commit anything overt to paper. However, we will avoid making assumptions about the existence of external influence in this regard and will examine this period in accordance with the available material.

The available material suggests a strong tendency towards an authoritarian and centralized form of ruling. While the Penal Code does not mention the term “communism,” it was written in general and vague language that ensured the protection of the dominant groups in power. This can be observed in Article 98(b), which was added in 1946. It states that:

Shall be punished for a period not exceeding five years and a fine not less than fifty Pounds and not exceeding five hundred Pounds whoever promoted in the Egyptian Republic in any way to change the fundamental principles of the constitution or the basic systems of the social body, or to dominate one social class, or to overthrow the state’s fundamental social or economic system, or to destroy any system of the fundamental systems of the social body when the use of force or terror or any other illegal means is noticeable.⁵⁸⁹

This article was established during the monarchy, which adopted capitalism as it was introduced by imperial and colonial powers. Therefore, any call to change the economic system, especially by communists, was a threat to several dominant groups: the ruling class represented by the Egyptian monarchy, capitalists represented by both the Egyptian landowners and merchants and the European corporations, and lastly the colonial power and its political interests. Joel Beinin and Zachary Lockman argue that the Egyptian Monarchy was so tyrannical that it did not consider Egyptian workers as a class that deserved rights. Instead, it suppressed any threat to the ruling

⁵⁸⁹ Article 98(b) added by Law no. 117 of 1946.

class and the British colonist.⁵⁹⁰ Even though these dominant groups had different priorities, they all shared a common enemy: communism. This made the war on communism that took place in special and military courts as well as in regular courts justifiable.

In a case during the monarchy, the Court of Cassation upheld the conviction of the defendants the defendants of several acts: unlawful association, sedition, and the use of violence and terror. The verdict states that:

[First,] the defendants joined an organization that aims to dominate one social class over the others, and to end a social class and overthrow the state's fundamental social and economic systems [...] and *the use of force and terror were noticeable* [.... The defendants] joined a secret organization that works on eliminating the capitalist class and [ensuring] the dominion of the working class [...] along the lines of the Russian revolutionary style adopted by Lenin and Stalin by instigating workers to assault and violate others' rights to work and instigating them against some owners and capitalists in a way that disturbs the public peace. And second, [they] promoted in the Egyptian monarchy to change the fundamental constitutional principles [...] with the use of force, terror, and illegal means [...] by issuing bulletins, forming cells, and promoting ideas [encouraging] the rule of the working class.⁵⁹¹ [emphasis added]

The court's interpretation of the meaning of "terror" was that it was not a distinctive crime, but a method used to commit criminal wrongdoing. This can be understood from the language used in Articles 98(a)⁵⁹² and 98(b),⁵⁹³ which condemn attempts to overthrow the state's social or economic

⁵⁹⁰ Joel Beinin & Zachary Lockman, *Workers on the Nile: Nationalism, Communism, Islam, and the Egyptian Working Class, 1882–1954* (Cairo: American University in Cairo Press, 1998) at 350.

⁵⁹¹ جلسة 11 مارس سنة 1952, (208), القضية رقم 419 سنة 21 القضائية, أحكام النقض [11 March 1952, (208), case no 419/21, appealing decisions] *Mohamoon*, online: <www.mohamoon-ju.net>

⁵⁹² Egyptian Penal Code 1937.

⁵⁹³ Added to the Egyptian Penal Code by Law no. 117 of 1946.

system with “the use of force or terror or any other illegal means noticeable.” So in order to consider the organization illegal, or, as it was labeled, “subversive,” two conditions had to be met. The first is related to the objective, and the second to the means. The objective is to destroy the capitalist class and replace it with another. As for the means, which I will focus on, there must be a noticeable use of force, terror, or any other illegal means. The court defines the meaning of “use of force” as “all means of physical violence over people or the threat to use weapons.” Whereas it defines “terror” as “all means of pressure, damage, sabotage, or obstructing facilities.” While each of these terms needs to be defined, the court went further by leaving open the meaning of “other illegal means,” stating that “it is not necessary for the other illegal means to reach a limit of a crime.”⁵⁹⁴

The earlier verdicts show that the court condemned defendants based on the argument that communism as it is practiced in Russia calls for the use of force. As a result, the court did not look into whether or not there was an actual use of force in each case, especially considering broad clauses like “other illegal means,” which do not require the use of violence. Consequently, freedom of expression and association were tightened based on the assumption that these groups were dangerous. When defendants argued that their actions were not associated with the use of force, the Court dismissed this argument, claiming that the use of force or terror are not part of the crime, but aggravating circumstances. According to the Court, “considering the explanatory notes, the use of force, terror, or illegal means are not part of the elements of this crime [... It] is not required to be mentioned explicitly in the text [of Article 98(a)*bis*] to use force, violence, or terror, which are considered by the legislature as aggravating circumstances.”⁵⁹⁵ “Terror” while not considered

⁵⁹⁴ جلسة 12 من فبراير سنة 1987, (38) الطعن رقم 5903 لسنة 56 القضائية

[12 February 1987, (38) appeal no 5903/56] *Mohamoon*, online: <www.mohamoon-ju.net>.

⁵⁹⁵ *Idem*.

a crime by itself, was linked to acts that aim to overthrow the government or change the system. The early use of the term “terror” at the legal level was to protect the regime, not necessarily from violent acts, but from civil acts that included speech and meetings.

The use of terror as an aggravating circumstance allowed the punishment to be increased from five years imprisonment to hard labor.⁵⁹⁶ Despite the political nature of communist activities, Egyptian authorities treated communists neither as political criminals nor as ordinary criminals. They received harsher punishments, and were not granted pardon. For instance, in the aftermath of the Egyptian Revolution of 1952 that abolished the monarchy, political prisoners were released. However, communists were not included because communism was a “social crime.”⁵⁹⁷ This makes communists fit best in the category of “enemies” rather than criminals.

The monarchy and its supporter the British had common interests in suppressing the emerging labor class that threatened the imperial order. However, when the Free Officers overthrew the monarchy and established the Republic, the same suppressive policy was carried out against communism. This observation requires a deeper look. Unlike the monarchy, President Nasser was a socialist who supported the working class and the peasants. He succeeded in introducing socialist principles into the constitution, not only of Egypt, but also of many other Arab states. This can be noticed in Article 98*bis*(a) of the Penal Code, which was added in 1956.⁵⁹⁸ This article provides protection to socialist principles by condemning “acting against the fundamental principles underpinning the socialist system of the country.”⁵⁹⁹ The vague wording

⁵⁹⁶ Article 98(a) of Egyptian Penal Code of 1937.

⁵⁹⁷ Tareq Y Ismael, *The Communist Movement in Egypt, 1920–1988* (New York: Syracuse University Press, 1990) at 73.

⁵⁹⁸ Law no. 68 of 1956.

⁵⁹⁹ Article 98*bis*(a) of the Egyptian Penal Code.

reflects the same mindset of the monarchy, except it protects “socialist principles” instead of capitalism.

A judiciary decision issued during Nasser’s era confirms the same exaggerating tendencies of the monarchy against communism. The Court of Cassation states that the threat of communism is derived from “[its] principles that [...] absolutely are not consistent with the fundamental social system settled in Egypt that is based on respecting faith, family, and freedom of interaction [...]. The organization’s] goals cannot be obtained [...] in any country without the use of force and violence.”⁶⁰⁰ This decision creates a subjective modality that allows communists to be accused of being violent even when violence is not used. It exceeds the colonial rationale, which allowed political and exceptional regulations to be applied during periods of martial law by normalizing vagueness within the criminal law. Listing acts such as being inconsiderate to faith and family is an example of the wordplay that authoritarian Egypt has mastered throughout its modern history.

With the gradual fading of the threat of communism, the Egyptian Court shifted its view by rejecting the accusation of suspects for mere membership in a communist movement. In 1986, the Court issued a remarkable precedent stating that “The defendants’ announcing in itself that they are Marxists does not support the [Prosecution’s] argument that their principle is the use of force and violence to achieve their goals; but [being Marxist] only refers to their political and economic views.”⁶⁰¹ In practice, this precedent was far from perfect. The Court, then charged the defendants with sedition. It states that:

جلسة 28 من مايو سنة 1956, (217) القضية رقم 470 سنة 26 قضائية, أحكام النقض.⁶⁰⁰

[28 May 1956, (217) case no 470/26, appealing decisions] *Mohamoon*, online: <www.mohamoon-ju.net>.

⁶⁰¹ 12 February 1987, (38) appeal no 5903/56, *Supra* 594.

The defendants held many of the prints that include [anti-regime] ideas in a large amount, which conclusively indicates that [the defendants] had prepared them for distribution. [...] The Court investigated the content of these prints and concluded that they aim to change the basic principles of the Constitution [...] so that a social class dominates over others, or [they aim] to change the fundamental social and economic system of the State.⁶⁰²

The verdict shows that the crime of sedition can be flexibly used against opponents. This flexibility is derived from colonial exceptional and military principles such as “minimum use of force” that do not precisely identify the boundary of applying such principles. The court’s broad interpretation of these vague crimes normalizes the exception at a judicial level, which closes the door to unfairly convicted people to challenge the system. Such practices belong to enemy criminal law that treats convicted people as second-class citizens who enjoy no basic rights.

Another important point is regarding evidence in criminal trials. The court shows its acceptance of intelligence testimony without requiring examining the testimony of the source, or, as he is called, the “guide”:

It is constant from reviewing the witness testimony [which is derived from what the guide divulged to him] regarding the truth of the defendant, [the witness] ended up being confident that the defendant has criminal activities and that his frequent visits to other homes listed in the search warrant [...] should be considered as] criminal contact aimed for protest.⁶⁰³

The use of intelligence in the war on communism has its origins in colonial practice. The experience in Egypt shows that British intelligence tracked the communist movement. In 1921,

⁶⁰² *Idem.*

⁶⁰³ 11 March 1952, (208) case no 419/21, appealing decisions, *Supra* 591.

the British appointed Major G. W. Courtney as head of the Secret Intelligence Service in Cairo, primarily to monitor communist movements.⁶⁰⁴ Whether or not influenced by the British, the Egyptian authority relied heavily on secret intelligence to identify communist members before they had committed any harmful offence. In this regard, courts' verdicts show that the evidence presented by the secret intelligence was accepted without cross-examination, and the identity of the witnesses was surrounded with confidentiality that even the judge could not breach. For example, the following judgment states that:

The political intelligence men (*el qalam esiyasi*) were monitoring the accused who frequently visited houses in different neighborhoods aiming to transfer the instructions to the leaders of the communist movement and its members. The monitoring continued [...] in order to identify the main center of the organization and to figure out the members of the communist cell[.]⁶⁰⁵

The verdict shows that conviction was based on identity rather than criminal conduct, and that mere previous accusation can be designed to be used against anti-government opponents. It states: “[The accused] intended to contact Mustafa Abbas Fahmi who was known for his communist activities, and who was previously accused in case no. 478 Military High Court in 1949, and was acquitted.”⁶⁰⁶ Unfair accusations could result from such assumptions, especially with the knowledge that during the war on communism, the Egyptian government offered a financial reward to anyone who revealed information about communist activities.⁶⁰⁷

⁶⁰⁴ Keith Jeffery, *MI6: The History of the Secret Intelligence Service 1909–1949* (New York: Penguin Press, 2010) at 206-7.

⁶⁰⁵ 11 March 1952, (208) case no 419/21, appealing decisions, *Supra* 591.

⁶⁰⁶ *Idem*.

⁶⁰⁷ جلسة 3 فبراير سنة 1959, (30) الطعن رقم 1013 لسنة 28 القضائية, أحكام النقض [3 February 1959, (30) appeal no. 1013/28] *Mohamoon*, online: <www.mohamoon-ju.net>.

Furthermore, the Egyptian Court states in another verdict that “it does not affect the procedure if the identity of the source remains unknown.”⁶⁰⁸ The use of undisclosed witnesses affects the fairness of the trial and breaches the principle of equality of arms, in which each party has access to the evidence against him. As we will see later, this fundamental principle is violated by law in the current Egyptian and Tunisian anti-terrorism laws.

The communist wave in Egypt gradually dissolved with the diminishing of the global influence of communism. Later, the growing power and influence of Islamic extremists led to a shift in national and international efforts in the war on terror. Legislation and judicial practice directed against communism show some of the same tendencies of current anti-terrorism legislation.

The Egyptian anti-terrorism approach in a neo-colonial era: The peak of authoritarianism

Terrorism as a distinctive crime was only added to the Egyptian Penal Code in 1992, a few years before the adoption of the Arab Convention. This amendment to the Penal Code did not make a significant difference to the course of justice or the internal security because of two things. First, the Penal Code already had many broad articles that could be applied flexibly against suspects. Second, the endless state of emergency allowed “terrorists” to be referred to special and military courts.⁶⁰⁹ This section examines the overall policy of counter-terrorism by focusing on the constitutional amendments that affirmed exceptionalism and centralization.

⁶⁰⁸ *Idem.*

⁶⁰⁹ Ahmed Mahmoud, “Egypt's Long History of Military Trials” (25 September 2011) *Al-Ahram Online*, online: <english.ahram.org.eg>.

In 2005, the Egyptian authorities announced their intention to establish a new anti-terrorism law.⁶¹⁰ The law aimed to be influenced by the post-9/11 Western anti-terrorism laws⁶¹¹ and to replace the state of emergency.⁶¹² It is not clear whether the Egyptian intention is to follow such a model, set by the United Kingdom and other democracies, which adopt broad definitions that seem to continually serve their political interests rather than crime control and security, or whether the intention is to include minimum human rights safeguards.

The anti-terrorism experience of several Arab states, such as Egypt, Syria, Jordan and Bahrain, shows that states of emergency have been enforced under the pretext of combating terrorism. During such periods, most of the constitution's norms were suspended and a set of national security measures were enforced, including the establishment of military courts. These forms, which are supposed to be exceptional, became endless in some countries, including Egypt. A tactic that Arab executives take is to put pressure on the parliament to pass a broad anti-terrorism bill in return for abolition of, for instance, the state of emergency. In 1991, this tactic was used in Jordan, in which in order to cancel most provisions of martial law,⁶¹³ which had been imposed multiple times since 1957 and continuously enacted from 1970 to 1991, the parliament had to pass an amendment to the law on the State Security Court to ensure the Court's jurisdiction over national security cases.⁶¹⁴ The alleged reason for keeping this special court was to avoid a legislation vacuum. This approach affirms a duality in crime control: terrorism is countered through the exception, whether through the state of emergency or by law, while all other crimes are dealt with under the umbrella of the penal code and criminal law principles. The use of special

⁶¹⁰ Welchman, *Supra* 31, at 636.

⁶¹¹ Roach, *Supra* 7, at 87.

⁶¹² Nathan J Brown, Michele Dunne & Amr Hamzawy, "Egypt's Controversial Constitutional Amendments" (23 March 2007) *Carnegie Endowment for International Peace*, at 2.

⁶¹³ "Jordan Cancels Most Martial Law Rules" (8 July 1991) *New York Times*, online: <www.nytimes.com>.

⁶¹⁴ Tujan Faisel, "qanoon mukafahat elrhab fi alordon: lawb da'e" ["Counter-terrorism Law in Jordan: Lost Game"] *Aljazeera Net*, online: <www.aljazeera.net/opinions/pages/cdff9c16-becc-4611-8092-e6611e67736c>.

courts was advanced by Mubarak Presidential Decree no. 375 of 1992, which granted the president the authority to transfer terrorist cases to military courts.⁶¹⁵

In 2013, Egypt's intention to enact a new anti-terrorism law that would replace the state of emergency was taken seriously after a series of terrorist attacks claimed to be carried out by the Brotherhood in the aftermath of the withdrawal of President Morsi and the army's takeover. The Brotherhood was immediately accused of these attacks before any investigation was started. Such accusations are built on a previous political and social judgement that the Brotherhood is a violent organization that aims to destroy the "public and social order."

At the constitutional level, in 2007 an article regarding the state's role in countering terrorism was introduced to the 1923 constitution. It excludes counter-terrorism laws and measures from ordinary criminal procedures and constitutional guarantees regarding arrest, preventive detention, search, and monitoring. It also grants the president the right to refer terrorist cases to any judiciary body, including military courts.⁶¹⁶ Article 179 states that:

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

The President may refer any terror crime to any judicial body stipulated in the Constitution or in law.⁶¹⁷

⁶¹⁵ Michael Farhang, "Recent Development: Terrorism and Military Trials in Egypt: Presidential Decree No. 375 and The Consequences for Judicial Authority" (1994) 35:225 Harvard Intl LJ 225 at 232.

⁶¹⁶ Article 179 of the 2007 amendment to the 1923 Egyptian Constitution.

⁶¹⁷ Translation quoted on United Nations Office on Drugs and Crime website, online: <www.unodc.org/tldb/pdf/Egypt_const_1971.pdf>.

The essence of this constitutional amendment is similar to the regulations of the endless state of emergency that was enacted for the last decades, and which allowed suspension of constitutional rights and activation of special and military courts (Welchman 2012, 636; Brown, Dunne & Hamzawy 2007, 2). According to the UN Special Rapporteur on Counter-terrorism and Human Rights Martin Scheinin, “article 179 of the Constitution carries features of a permanent state of emergency, although under a new name.”⁶¹⁸ Article 179 demonstrates exceptionalism and dualism in dealing with domestic peacetime situations—terrorists are second-class citizens treated outside the umbrella of ordinary law.

The Egyptian Revolution of 2011 resulted in the overthrow of the 1923 constitution. The hope was to adopt a new constitution that does not use the war on terror as a pretext to enact a state of emergency and suspend rights and liberties. In an attempt to meet that hope, on 30 March 2011 the Supreme Council of the Armed Forces of Egypt adopted a Constitutional Declaration, which restricts the authority to enact a state of emergency. It requires the approval of the majority of parliament members, limits the period of state of emergency to three months, and allows an extension once after the approval of two-thirds of the parliament members. These requirements were included in the Constitution of 2012⁶¹⁹ and the current Constitution of 2014.⁶²⁰

Adopting a new constitution after the “Arab Spring” suggests that the old constitutions no longer reflect the political and socio-economic desires of the current generation of Egyptians. Nonetheless, the issue is not with the constitutions or their aims as a whole, but in the clauses their authors include that allow them to back out of their promised obligations. For instance, Article 237

⁶¹⁸ Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin. Mission to Egypt. 14 October 2009.

⁶¹⁹ Article 148 of the Egyptian Constitution of 2012.

⁶²⁰ Article 154 of the Egyptian Constitution of 2014.

of the Constitution of 2014 brought back the substance of Article 179, which was introduced to the constitution in 2007. The new article obliges the state to counter terrorism by stipulating that:

The state commits to fighting all types and forms of terrorism and tracking its sources of funding within a specific time frame in light of the threat it represents to the nation and citizens, with guarantees for public rights and freedoms. The law organizes the provisions and procedures of fighting terrorism, and fair compensation for the damages resulting from it and because of it.⁶²¹

The above article is the latest constitutional foundation that allows the state to justify its war on terror. It should be noted that this article follows the international obligations set by UN Security Council Resolution 1373 (2001). However, the problems remain in the broad definition and the draconian measures that Egypt continues to adopt in the name of protecting society from terrorism. More constitutional reforms were made in 2014 to suppress Islamists. Article 74 states that “no political parties may be formed on the basis of religion [...] or on a sectarian basis[.]”⁶²² This restriction on associations has raised many questions, especially because several Islamic political parties exist in Egypt, such as al-Wasat and al-Nour. One Egyptian professor of constitutional law argues that this article will not affect the existence of parties since none of the existing parties includes religious clauses in their platforms.⁶²³ However, there is a concern that this article will be interpreted differently based on the authority’s view.

⁶²¹ Article 237 of the Egyptian Constitution of 2014. Translation quoted in International IDEA, online: <constituteproject.org>.

⁶²² Article 74 of the 2014 Egyptian Constitution. This Article was first included in the Egyptian constitution during Mubarak’s rule in 2007.

⁶²³ “Ghmood hawla maser alhazab esiyasiya fi M`ser” “[*Vagueness Around the Destiny of Islamic Parties in Egypt after the Constitutional Ban*]” (1 December 2013) *Al Arabiya*, online: <www.alarabiya.net>.

Following the removal of President Morsi in July 2013, the Egyptian authorities released a draft of a new anti-terrorism law. Unsurprisingly, the draft law included broad definitions and subjective regulations that could violate basic rights and freedoms. Despite the concerns that this draft has created, President el-Sisi neglected most of the criticism and issued Anti-terrorism Law no. 94 of 2015.⁶²⁴

Evaluating the Egyptian anti-terrorism legislation

Although Egypt adopted a new anti-terrorism law in 2015, the law did not include a statement on abolishing the previous laws. This may create a contradiction between the pieces of legislation. Since the previous anti-terrorism regulations adopted in 1992 are still active, we will use a chronological order in examining these laws. This section starts by examining Law no. 97 of 1992, which was added to the Penal Code of 1937, followed by Law no. 8 of 2015 Regarding Regulating Terrorist Entities and Terrorists, and finally the most recent legislation, Anti-terrorism Law no. 94 of 2015.

Law no. 97 of 1992 (Penal Code)

Egypt considers itself one of “the first states to deal with the phenomenon of terrorism and its causes[.]”⁶²⁵ In 1992, Egypt decided to criminalize terrorism within its Penal Code by adopting Law no. 97 of 1992.⁶²⁶ According to the Parliamentary Report on the Penal Code, there was no necessity to adopt a separate law since “the Penal Code is the overall law of criminalizing and

⁶²⁴ Egyptian Anti-terrorism Law no. 94 of 2015. *Official Gaz 33bis*, 15 August 2015.

⁶²⁵ Egypt’s CTC Report 2001, *Supra* 302.

⁶²⁶ Law no. 97 of 1992. This legislation added new articles to the Penal Code and amended other laws including the Code of Criminal Procedures, the Law Regarding State Security Courts, the Law Regarding the Confidentiality of Bank Accounts, and the Law Regarding Weapons and Explosives.

sentencing in Egypt, as well as incorporating the general rules that apply to all crimes.”⁶²⁷ Despite this claim, practice suggests that terrorist cases were excluded from the umbrella of criminal law and procedures. This legislation introduced a definition of terrorism, and toughened punishments for terrorist acts, for which the death penalty is set for several acts that do not necessarily cause death.⁶²⁸ Terrorism is defined in Article 86 as follows:

[A]ny use of force or violence or threat or intimidation resorted to by the perpetrator in implementation of an individual or collective criminal undertaking aimed at disturbing public order or jeopardizing the safety and security of society, which is of such nature as to harm persons or sow fear among them or imperil their lives, liberty or security; or of such a nature as to damage the environment, or to damage, occupy or take over communications, transport, property, buildings or public or private realty; or to prevent or impede the exercise of their functions by public authorities or places of worship or institutions of learning; or to thwart the application of the Constitution or the laws or regulations.⁶²⁹

This definition is based on three elements. The first is the means, which include the use of force, violence, threat, or terror, none of which is clearly defined. The second is the objective, which relies on the individual or collective criminal project. The third is the result, which is disturbing public order, terrifying society, or any of the outcomes referred to by the unclear phrases used, which are based on a catch-all logic. The law lacks a clear and objective determination of the meaning of its terms and clauses, which makes the intent of the legislature and the utility of the law unclear.

⁶²⁷ Preamble to Law no. 97 of 1992.

⁶²⁸ Article 86bis(c) of Law no. 97 of 1992.

⁶²⁹ Article 86, *idem*. Translation quoted in Welchman, *Supra* 31, at 634.

Egypt has long borrowed clauses from other, particularly French, legislation. From where did Egypt borrow this definition or its elements? Considering the timing, which is long after the end of colonialism and well before 9/11, it is challenging to find a conclusive answer to this question, especially since no Arab writer has addressed it. However, a general observation is that Egypt continues countering terrorism with the same centralizing approach that it borrowed from France. A heavy reliance on centralizing powers in counter-terrorism is noticeable in the current French experience of counter-terrorism.

France has progressively adopted several anti-terrorism laws, including Act no. 86-1020 of 9 September 1986 on action against terrorism, amended in 2012, which outlines the judicial authorities and procedures for dealing with terrorism crimes. France also adopted several amendments in the aftermath of 9/11.⁶³⁰ Yet the definition of terrorism is regulated within the Penal Code, having been added to the Penal Code in 1996 and 1998.⁶³¹ This means that the French definition cannot be the source of the 1992 Egyptian definition. According to Article 421-1 of the French Penal Code, offences constitute acts of terrorism when “committed intentionally in connection with an individual or collective undertaking the purpose of which is seriously to disturb public order through intimidation or terror.”⁶³² Acts considered to be terrorism include, among other acts, attacks on life and the physical integrity of persons, unlawful detention, hijacking of planes, theft, extortion, destruction, defacement and damage, computer offences, transport of weapons, and money laundering offences. The French definition is less complex than the Egyptian, but it can be equally flexible.

⁶³⁰ French Act no. 2001-1062 of 15 November 2001 on Everyday Security; Act no. 2003-239 of 18 March 2003 on Internal Security; Act no. 2004-204 of 9 March 2004 Bringing Justice into Line with New Patterns of Crime.

⁶³¹ Act no. 96-647 of 22 July 1996; Act no. 98-348 of 11 May 1998. *See* [French] Criminal Codes, *Legislationline*, online: <www.legislationline.org/documents/section/criminal-codes/country/30>.

⁶³² Article 421-1 of the French Penal Code of Act no. 96-647 of 22 July 1996.

Earlier French penal statutes include several phrases that allow a flexible interpretation and application of its regulations. For instance, the French Penal Code of 1810 uses the phrase “disturbances of public order” (*des Troubles apportés à l’ordre public*).⁶³³ The same phrase is used in the French Law Regarding the State of Siege of 1849 (mentioned earlier in Chapter 1). It should be noted that these codes were not directly transplanted into Egypt, but had a great influence over European and non-European territories, including the Ottoman Empire and Egypt. The current French definition of terrorism includes this clause by criminalizing the aim “to seriously disturb public order through intimidation or terror.”⁶³⁴ The vague concept of “disturbing public order” can be found repeatedly in the Egyptian and most Arab penal and penal-related statutes.⁶³⁵

Another concept that is used in the Egyptian definition of terrorism is “thwart[ing] the application of the Constitution.” This concept can be traced back to the French 1810 Penal Code, which had a section titled “Crimes and Delicts against the Constitutions of the Empire” (*Crimes et délits contre les constitutions de l’Empire*). This Napoleonic concept criminalized, for example, conspiracies. It condemned individuals and public officers “concerted against the execution of the laws, or against the orders of the government.”⁶³⁶

This short review of the Napoleonic and current French statutes does not directly answer the above question regarding the source of the Egyptian definition of terrorism, but it shows some similarities between the French and Egyptian punitive models. Similarly to France, the 1992 Egyptian anti-terrorism law was regulated by the Penal Code, and it remained that way until 2015. Also similarly to France, Egypt created a special judicial system and minimal procedures to deal

⁶³³ Section III of the French Penal Code of 1810. English translation quoted in *The Napoleon Series*, online: <www.napoleon-series.org/research/government/france/penalcode/c_penalcode.html>.

⁶³⁴ Article 421-22 of Act no. 1996-647 of 22 July 1996, Article 2 Official Journal 23 July 1996; Act no. 2004-204 of 9 March 2004, Article 8 Official Journal of 10 March 2004.

⁶³⁵ For instance, Article 21 (3) of the Kuwaiti Law no. 3 of 2006 regarding the Press and Publications; Article 1 of the Bahraini Law no. 58 of 2006 regarding Protecting Society from Terrorist Acts.

⁶³⁶ Articles 123 and 124 of the French Penal Code of 1810.

with terrorist cases. While France abandoned some of the Napoleonic concepts, Egypt still clings to that imperial approach to crime control. On the other hand, the post-9/11 wave of legal modifications includes both countries, especially regulating terrorism financing (this aspect of counter terrorism financing will be discussed in a following section regarding anti-terrorism Law no. 94 of 2015). Nonetheless, Egypt exceeded all national anti-terrorism laws by adopting an extremely broad definition and draconian measures.

Egyptian Law no. 97 of 1992 lists a set of ordinary crimes that can be treated harshly if terror was used as one of their means. These include establishing illegal organizations, membership in these organizations, and promoting and inciting terrorism. Article 86*bis* states that:

Shall be punished by imprisonment whoever establishes, founds, organizes or directs, in violation of the law, an association or body or organization or group or gang, the purpose of which is to call by any means for thwarting the provisions of the Constitution or the laws or preventing one of the government institutions or public authorities from exercising its functions, or attacking the personal freedom of the citizen or other public rights and freedoms guaranteed by the Constitution and the law, or harming national unity or social peace.

Shall be punished by hard labor whoever, with the knowledge of the purpose for which it calls, holds any kind of leadership within it, or supplies it with material or financial provisions.

Shall be punished by prison for a period not exceeding five years whosoever joins one of the associations, bodies, organizations, groups or gangs, with his knowledge of its purpose [...]

[... and] whosoever promotes by saying, writing, or any other means for the purposes mentioned in the first paragraph [...] or holds publications or recordings promoting what has been stated, if it was prepared for distribution.⁶³⁷

⁶³⁷ Article 86*bis* of Law no. 97 of 1992.

This article condemns mere membership in illegal associations, even if violence was not used (Welchman 2012, 635). Many were detained and faced trials for belonging to NGOs that were not accurately registered to work in Egypt,⁶³⁸ a pretext that Egypt used to weaken human rights groups. This article imposes high restrictions on the freedom of expression by criminalizing all forms of expression that “promote” almost anything the state conceives as illegal. This has led to the arrests and prosecutions of not only Islamic extremist members, but also journalists, demonstrators, and academics for their peaceful expression of their views.⁶³⁹

The danger of Law no. 97 of 1992 is higher due to the tough penalties set by Article 86*bis*(a), which imposes life imprisonment or death if any of these illegal associations adopts terrorism as a means to achieve its goals.⁶⁴⁰ Hundreds of individuals were referred to military courts, accused of establishing and belonging to an illegal organization that used terrorism to achieve its objectives.⁶⁴¹ With this broad definition of terrorism, accusations can be easily fabricated against political opponents who do not necessarily carry out any violent acts.⁶⁴²

As well as the broad definition of terrorism and the harsh treatment of illegal associations that use terrorism as a means to their ends, Law no. 97 of 1992 treats other ordinary crimes as terrorism if committed for a “terrorist objective.” For instance, Article 160⁶⁴³ condemns disturbing religious celebrations or damaging buildings dedicated to religious practices or any religious

⁶³⁸ “Egypt: High Price of Dissent: Journalists, Protesters, Academics Charged over Speech Offenses” (19 February 2014) *Human Rights Watch*, online: <www.pri.org/stories/2013-01-25/egyptian-lawyer-trial-working-illegal-organization>.

⁶³⁹ *Idem*.

⁶⁴⁰ Article 86*bis*(a) of Egyptian Law no. 97 of 1992.

⁶⁴¹ “Egypt: 7,400 Civilians Tried In Military Courts” (13 April 2016) Human Rights Watch, online: <<https://www.hrw.org/news/2016/04/13/egypt-7400-civilians-tried-military-courts>>; “Trials of Civilians in Military Courts Violate International Law Executions Continue, No Appeal of Death Sentences to Higher Court” (3 July 1993) Human Rights Watch, online: <<https://www.hrw.org/report/1993/07/02/egypt-trials-civilians-military-courts-violate-international-law/executions>>.

⁶⁴² Welchman, *Supra* 31, at 635.

⁶⁴³ Egyptian Penal Code as amended by Law no. 97 of 1992.

symbols. Such acts are considered misdemeanors,⁶⁴⁴ whereas if the same acts are committed for a terrorist objective they are considered felonies.⁶⁴⁵ The same principle is applied in Articles 216–219, which consider making or using fraudulent traveling tickets or false names in renting hotel rooms as misdemeanors, but consider the same acts as felonies if used for a terrorist objective.⁶⁴⁶ For some scholars, this terrorist objective is what makes terrorism a distinctive crime compared with ordinary ones (Saul 2006; 60–63), yet there is a problem, particularly in Egyptian law, in the lack of a clear definition of the criminal term “terrorism” and other related terms like “terrorist objective.”

Law no. 8 of 2015 Regarding Regulating Terrorist Entities and Terrorists

In December 2013, a terrorist attack was carried out against Dakahlia Governorate’s Directorate of Security, northeast of Cairo. This attack resulted in killing 16 people and injuring about 150 persons. The Council of Ministers responded by listing the Muslim Brotherhood, who did not claim responsibility for the attack but were assumed to be responsible, as a terrorist entity. A debate followed about the legal status of this listing. No explanation was provided by the Council of Ministers, and the debate was ended two years later when President el-Sisi issued Law no. 8 of 2015 Regarding Regulating Terrorist Entities and Terrorists (Terrorist Entities Law).⁶⁴⁷

This law establishes two terms: “terrorist entities” and “terrorist.” The term “terrorist entities” is defined as:

⁶⁴⁴ The punishment shall be a fine, imprisonment for no more than three years, or both. Article 160 of the Penal Code.

⁶⁴⁵ The punishment shall be imprisonment for no more than five years. *Idem*.

⁶⁴⁶ Penal Code as amended by Law no. 97 of 1992.

⁶⁴⁷ Official Gaze 7/58, no 7bis, 17 February 2015.

Any association, organization, group, gang, cell, or other entity whatever its legal or actual status, that practices or aims to call for by any means inside or outside the country to harm people, sow fear among them, or imperil their lives, liberty or security; or of such a nature as to damage the environment, natural resources, antiquities, financial resources, institutions, public or private property, or occupy or seize them, or prevent or obstruct public authorities or judicial bodies, governmental interests, local units, places of worship, hospitals or institutions of learning, or diplomatic and consular missions in Egypt from the exercise of all or some of their activities, or resist [them], or disrupt public or private transportation, or prevent, endanger or interrupt its movement; *or if it aims to disturb public order, endanger society's safety, interests, or security; or thwart the application of the Constitution or the laws*, or prevent any of the state's institutions or any of the public authorities from practicing their duties; or violate citizens' personal freedoms, or the other freedoms and rights granted by the constitution or by law; or harm national unity, social peace, or national security.⁶⁴⁸ [emphasis added]

The term “terrorist” is defined as:

Each natural person who commits, attempts to commit, incites, threatens, or plans inside [Egypt] or abroad a terrorist crime by any means even individually, or contributes to a joint criminal enterprise, or takes command, leadership, management, creation or establishment, or becomes a member of any of the terrorist entities stipulated in Article 1 of this law, or funds or participates in its acts with knowledge of [its purposes].⁶⁴⁹

⁶⁴⁸ Article 1 of the 2015 Terrorist Entities Law.

⁶⁴⁹ *Idem.*

Both definitions implicitly define terrorist crimes. They contain ambiguous terms that may be interpreted subjectively, such as “public order,” “harm national unity,” and “endanger the society’s safety.” These terms represent a repeated theme in the Egyptian national security laws. The Terrorist Entities Law is similar to anti-terrorism Law no. 97 of 1992, which both treat as terrorist acts harming people, damaging the environment or natural resources, public and private property, places of worship, and disturbing public order. In addition, both criminalize mere membership. This suggests that authoritarianism in Egypt, whether under Mubarak or el-Sisi, carried the same features of exceptionalism, centralization and dualism.

The Terrorist Entities Law creates an arbitrary system of listing that does not belong to criminal law. Under this law, there are two ways to list terrorists and terrorist entities: The first is by a final court decision in a criminal case, which is the regular road of prosecution and sentencing. The second is by specified criminal courts within the Cairo Appeal Court. This can be done based on the Public Prosecution’s request together with the investigation records and other supporting documents.⁶⁵⁰ In both cases, the role of the court is not clear. Is it only judicial, or is it political? The constitution does not give an answer in this respect, but the practices of the Supreme Constitutional Court of Egypt have shown a tendency to issue decisions of a political nature, such as dissolving the parliament. Yet can a criminal court issue a political decision? Article 186 of the Constitution of 2014 states that “Judges are independent and immune to dismissal, and are subject to no other authority but the law.”⁶⁵¹ This article creates by law a conditioned independence for the judiciary, and it empties the role of the constitution and the role of judges from any

⁶⁵⁰ Article 3 of the 2015 Terrorist Entities Law.

⁶⁵¹ Egyptian Constitution of 2014.

constitutionalist values.⁶⁵² As long as the law is politicized, the role of judges will automatically be politicized.

Experience has shown constant politicized decisions by the judiciary, whether during the monarchy or the republic. The Court of Cassation has played a politicized role in dealing with communists, as was shown earlier when discussing the emergence of the term “terror” during the war on communism. Such decisions were made based on an assumption that communism as derived from Russia uses force. Thus, Egyptian judges did not make an effort to look objectively at whether or not force or violence were actually used in each case. The same tendency has been evident in actions carried out against the Muslim Brotherhood. For instance, in 2014 a decision made by a criminal court sentenced 683 members of the Muslim Brotherhood to death.⁶⁵³ Despite the fact that this mass death-sentence verdict was appealed, it sent a politically charged message by frightening ordinary people to stay away from engaging with the Brotherhood or any act that could disturb “public order.”

There are serious consequences of being listed as a terrorist or terrorist entity. These include: a ban on the entity, its practices and meetings; prohibition of financing the entity or raising its money; freezing funds; travel bans; passport seizure; and loss of reputation.⁶⁵⁴ Moreover, until a final judicial decision is made, suspected entities remain on the list for three years, renewable for another term.⁶⁵⁵ This law contradicts the presumption of innocence and creates terrorists well before a criminal trial. The law also allows the Public Prosecutor to rely on secret evidence, which

⁶⁵² Brown, *Supra* 509, at 89.

⁶⁵³ Mai El-Sadany, “The Politicization of Egypt’s Judiciary Amidst the ‘War on Terror’” (29 April 2014) *Tahrir Institute for Middle East Policy*, online: <timep.org/commentary/politicization-egypts-judiciary-amidst-war-terror/>.

⁶⁵⁴ Article 7 of the 2015 Terrorist Entities Law.

⁶⁵⁵ Article 4, *idem*.

is problematic. These measures transfer this law to a realm of exceptionalism normalized by unfair law.

This law raises concerns about basic rights and freedoms, including freedom of assembly and freedom of movement, especially with the broad authorities granted to the Public Prosecutor, which weaken the effectiveness of the judiciary. It seems that the Public Prosecutor is being included within the executive—a step towards expanding centralization. Following the overthrow of President Morsi, Public Prosecutor Hisham Barakat enabled the detention of thousands of Islamists and sent thousands of others for trial.⁶⁵⁶ His approach of collective accusation and pre-trial detention created concerns and discontent about the overlapping roles of the Public Prosecutor, which seemed to shift from bringing justice to satisfying those in power. On June 29 2015, Barakat was assassinated in a car bombing.⁶⁵⁷ This incident has sped up the adoption of a new anti-terrorism law.

Anti-terrorism Law no. 94 of 2015

Following the assassination of Public Prosecutor Barakat, President el-Sisi announced at the funeral that “The arm of justice is chained by the law. We’re not going to wait for this. We’re going to amend the law to allow us to implement justice as soon as possible.”⁶⁵⁸ With the absence of a sitting parliament, President el-Sisi issued Anti-terrorism Law no. 94 of 2015—a solidification of the continuous centralization of powers. This law defines terrorism even more broadly than before,⁶⁵⁹ creates a judiciary system that provides quick rather than just decisions,⁶⁶⁰ grants the

⁶⁵⁶ “Egypt Prosecutor Hisham Barakat Killed in Cairo Attack” (29 June 2015) *BBC*, online: <www.bbc.com>.

⁶⁵⁷ *Idem*.

⁶⁵⁸ “Egyptian President ‘to Change Law to Allow Faster Executions’” (30 June 2015) *The Guardian*, online: <www.theguardian.com>.

⁶⁵⁹ Articles 1, 2, 3 of Egyptian Anti-terrorism Law no. 94 of 2015.

⁶⁶⁰ Article 50, *idem*.

Public Prosecution vast authorities,⁶⁶¹ and allows the president to take all necessary measures whenever needed⁶⁶²—a confirmation of exceptionalism and even militarism.

The definition of “terrorism”

Article 1 starts by defining a list of terms including “terrorist entity,” “terrorist,” and “terrorist crime,” all of which are defined broadly and vaguely. Unlike in the Terrorist Entities Law, in the 2015 Anti-terrorism Law the legislature attempted to distinguish between “terrorist acts,” “terrorist crimes,” and “terrorist entities” by creating a definition for each instead of defining them all under one label. However, the attempt is limited to using separate titles with the same broad vague terminology. The definition of “terrorist entity” refers to:

[E]ach group, association, institution, organization, or gang composed of at least three persons, or any other entity proved to be [a terrorist group] regardless of its legal or factual status, whether inside or outside the country, and regardless of its nationality or the nationality of its members, [if it] aims to commit one or more terrorist crimes, or if [it takes] terrorism as a means to achieve or implement its criminal objectives.⁶⁶³

The 2015 Anti-terrorism Law borrowed the definition of “terrorist entities” stipulated in the Terrorist Entities Law, but added a minimum number of members of “at least three persons.”⁶⁶⁴ It then added the phrase “whatever its legal or actual status, and whether it is inside or outside the

⁶⁶¹ Articles 43, 46, 48, 49, 51, *idem*.

⁶⁶² Article 53, *idem*.

⁶⁶³ Article 1(1), *idem*.

⁶⁶⁴ *Idem*.

country[.]” This attempt to broaden the Egyptian jurisdiction could overlap with the legal and judicial practices in other jurisdictions, as we will explain later.

The Law then defines a “terrorist” as:

[E]ach person who commits, attempts to commit, incites, threatens, or plans inside [Egypt] or abroad a terrorist crime by any means even individually, or contributes to a joint criminal enterprise, or takes command, leadership, management, creation or establishment, or becomes a member of any of the terrorist entities stipulated in Article 1 of the presidential decree of Law no. 8 of 2015 Regarding Regulating Terrorist Entities and Terrorists, or funds or participates in its acts with knowledge of [its purposes].⁶⁶⁵

According to the above definitions, a “terrorist group” and a “terrorist” are those who commit terrorist acts, as defined in Article 1(3) and Article 2, *or* those who the authority decides are terrorists based on the Terrorist Entities Law. This second clause is another flexible statement that adds ambiguity to the notion of terrorism and violates the principles and role of the criminal law. It should be noted that the definitions and regulations in this law do not replace the ones in the Terrorist Entities Law or those in Law no. 97 of 1992. This could create an overlap between the three laws. However, the primary issue remains the continuous adoption of broad definitions, vague terms, and arbitrary regulations.

Article 1 of the 2015 Anti-terrorism Law of 2015 defines “terrorist act” as:

[A]ny use of force, violence, or threat inside [Egypt] or abroad aiming to disrupt public order or endanger the safety, interests, security of the society; harm people, or horrify them, or risk their

⁶⁶⁵ Article 1(2), *idem*.

lives, liberties, public or private rights, their safety, or the other freedoms and rights granted by the constitution or by law; harm national unity, social peace, or national security; damage the environment, natural resources, antiquities, financial resources, institutions, public or private property, or occupy or seize them, or prevent or obstruct public authorities or judicial bodies, governmental interests, local units, places of worship, hospitals or institutions of learning, or diplomatic and consular missions in Egypt from the exercise of all or some of their activities, or resist [them], or thwart the application of the Constitution or the laws or regulations.

As well as all conduct committed with the intention of achieving one of the objectives shown in the first paragraph of this article, [including] preparing or incitement, if it caused damage to communication, information systems, financial or banking systems, national economy, energy storage, or security storage of goods, food and water, or their safety, or [against] medical services during disasters and crisis.⁶⁶⁶

This definition, while broader than the one created by Law no. 97 of 1992, shares some of its features. Neither requires any specific motive (e.g., religious, political, or ideological). They require the use of “violence” or “threat,” yet without providing a clear understanding of these terms. The definition in the 2015 Anti-terrorism Law is exceedingly repetitious, although the two definitions share this feature. They include the terms “violence,” “damage,” “harm,” and “destroy,” which sound similar but still do not have a clear meaning at a legal level. The two Egyptian definitions also include clauses like “disturb public order” or “thwart the application of the Constitution,” which only add more ambiguity to the definition. Such clauses provide extra protection to tyrannical regimes. In fact, they can transfer the legitimacy of any unsuccessful revolution into acts of terrorism.

⁶⁶⁶ Article 1, *idem*.

The 2015 definition includes additional vague terms like harming “national unity” and “social peace.” It also provides protection to diplomatic and consular missions in Egypt not only from harmful violent acts, but also from preventing them from exercising “all or some of their activities.” The wording does not suggest any use of force. Thus, it implicitly allows the inclusion of strikes by labor unions and students that take place across governmental institutions and embassies, since such strikes could harm “communication” or “national unity,” or may be considered as “occupying public or private property.”

The above definition explicitly includes acts committed or planned inside or outside Egypt. This is similar to Article 86*bis*(c) of the 1992 Egyptian anti-terrorism regulations, which states:

Shall be punished with permanent hard labor, whoever seeks with a foreign country or an association, corporation, organization, group, or gang whose headquarter is abroad, or with any of those who work for the interest of any of them, or spies with them, or carry out a terrorist act in Egypt, or against its properties, its institutions, employees, diplomatic representatives, or its citizens in the course of their duties, or while they are abroad, or who joins in committing any of the foregoing.⁶⁶⁷

While criminalizing multi-national or cross-boundary terrorism seems to be a step towards globalization, it may cause difficulties regarding sovereignty and jurisdiction. With the absence of a unified international definition of “terrorism”, and with the overbroad Egyptian definition, identifying the terrorist can be arbitrary. The lines between a political criminal, a peaceful

⁶⁶⁷ Article 86*bis*(c) of the 1992 amendment added to the Egyptian Penal Code.

protester, and a terrorist within the Egyptian anti-terrorism law are blurry. Besides, Egypt's poor human rights record and its constant use of torture⁶⁶⁸ represent a concern regarding extradition.

Articles 1–4 of the Egyptian Penal Code specify its regional jurisdiction, which covers, besides crimes committed in Egypt, those that are committed abroad but harm the national security of Egypt. The 2015 Anti-terrorism Law, however, expands Egyptian jurisdiction in a way that could interfere with other jurisdictions and violate the principle of sovereignty. For example, the new law gives Egypt the authority to prosecute those who committed crimes that cause “damage to any international or regional organization.”⁶⁶⁹ The article is not clear about the purpose of broadening its jurisdiction over crimes committed against organizations with which Egypt may or may not have any relationship. The law also does not require that the criminal holds Egyptian citizenship, which does not serve crime control as much as creating unreasonable interference with other jurisdictions.

Speech related to terrorism

Egypt has long restricted the freedom of expression through criminalizing sedition and other ill-defined activities. However, the global tendency towards criminalizing speech linked to terrorism was taken into account in the Egyptian 2015 anti-terrorism law. The law criminalizes incitement in three articles, but using vague language.

It is first mentioned as part of the definition of “terrorist acts” provided in Article 1 (addressed above). This article condemns inciting any of the listed terrorist acts, from damaging property to disturbing public order. With the overbroad wording of this definition, any speech that

⁶⁶⁸ “Egypt: Hundreds Disappeared and Tortured Amid wave of Brutal Repression” (13 July 2016) *Amnesty International*, online: <www.amnesty.org/en/latest/news/2016/07/egypt-hundreds-disappeared-and-tortured-amid-wave-of-brutal-repression/>.

⁶⁶⁹ Article 4(b) of the 2015 Anti-terrorism Law.

criticizes the government, corruption, or socio-economic issues including poor living conditions can be misinterpreted as inciting to harm national unity, social peace, or public order.

The application of this article is flexible and depends on the identity of the accused. For instance, in a TV interview in January 2016, Egyptian Justice Minister Ahmed al-Zind encouraged killing all members of the Muslim Brotherhood, stating that for each member of the Egyptian security forces who died during counter-terrorism campaigns, “I swear by God almighty that, personally, the fire in my heart will not be extinguished unless for each one there’s at least 10,000 [of the Muslim Brotherhood is killed].”⁶⁷⁰ Al-Zind continued, “I’m saying the Brotherhood and whoever aids them and whoever loves them and whoever pleases them and whoever takes bribes from them and whoever lives off their ill-gotten funds from Turkey and Qatar and Iran [should be killed].”⁶⁷¹ HRW conceived these statements as hate speech.⁶⁷² Despite this explicit aggressive language against the Brotherhood and their sympathizers, the Egyptian authorities did not condemn al-Zind for incitement or hate speech. This selectivity in applying the law creates a sharp line between elite criminals, who can act and express their immoderate opinions freely, and “enemies,” who have not necessarily engaged in any criminal activity, yet are condemned as terrorists because of their identity.

Article 6 is the next that condemns incitement. It attempts to define incitement as terrorism by stating that, “shall be punished for inciting a terrorist crime with the same punishment for the full crime, whether the incitement is directed towards a particular person or group, or whether it is general, made in public or in private, and whatever the means used, even if no effects have resulted

⁶⁷⁰ “Egypt: Condemn Justice Minister’s Hate Speech: Suggested Mass Killing of Brotherhood Supporters” (8 February 2016) *Human Rights Watch*, online: <www.hrw.org/news/2016/02/08/egypt-condemn-justice-ministers-hate-speech>.

⁶⁷¹ *Idem*.

⁶⁷² *Idem*.

from this incitement.”⁶⁷³ The roots of this restriction can be found in Article 88 of the 1883 Penal Code, which was modeled on the French Press Law of 1881 (both addressed earlier in Chapter 2). This attempt to define incitement fails to provide a clear meaning for its framework. By condemning speech expressed in private, it risks basic human rights and encourages false accusations. By punishing incitement as a full crime, it advances an anti-insurgency orientation that focuses on ideas.

The third article that regulates incitement is Article 18. This article treats attempting to overthrow the regime as terrorism, and punishes such attempts with life imprisonment or hard labor. The article defines these acts as terrorism by stating that, “Whoever tried through force, violence, threat, intimidation, or any other methods of terrorist acts to overthrow the government, change the state constitution, the Republican system, or the form of government.”⁶⁷⁴ The origin of this article goes back to the Penal Code of 1904 that criminalizes “dissemination of revolutionary ideas”⁶⁷⁵ and “advocating changing the basic social system through force or terror.”⁶⁷⁶ Similar wording is also found in Article 98(b) added to the Penal Code in 1946, which back then was applied against communists.⁶⁷⁷ Both of these articles are drawn from Section IV of the French Penal Code of 1810 on “Resistance, Disobedience, and other Defaults, in regard to the Public Authority” (discussed earlier in this chapter under the crimes of rebellion and sabotage). Restrictions on speech have a colonial origin which has strongly re-emerged in the neo-colonial global war on terror.

⁶⁷³ Article 6 of Egyptian Anti-terrorism Law of 2015.

⁶⁷⁴ Article 18, *idem*.

⁶⁷⁵ Article 151(2) of Law no. 37 of 1923 on Adding Provisions to the Penal Code no. 3 of 1904.

⁶⁷⁶ Article 151(3), *idem*.

⁶⁷⁷ A detailed evaluation of Article 98(b) is provided in the section regarding the emergence of the term “terror” during the war on communism.

The definition of “incitement” in Article 18 of the Egyptian 2015 anti-terrorism law does not clarify the limits of its meaning. It seems to target all acts including mere criticism by academics and journalists, or any form of political pressure used by activists to modify the constitution. Such practices are legal and protected in democracies. Treating these practices as wrongdoing, and worse as terrorism, is another way of utilizing law as a suppressive tool. Post-9/11, there is a global tendency to narrow freedom of expression, but Egypt has gone far beyond any Western clampdown on freedom of expression.

Another restriction on speech and expression is listed in Article 35, which targets journalists and media. It condemns “publishing, forecasting, displaying, or promoting false news or information about terrorist acts that are committed in Egypt, or about the countering measures in opposition to the official statements issued by the Ministry of Defense.”⁶⁷⁸ The origin of this text goes back to Article 102*bis* added to the Penal Code in 1957, which is found in DORA (1914), both of which condemn spreading false reports or news (discussed in the beginning of this chapter under the crime of sedition). Article 35 of the 2015 Egyptian anti-terrorism law enacts a high penalty of a fine between 200,000 and 500,000 Egyptian pounds (\$25,550–\$64,000), as well as depriving the involved journalist or the institution from practicing for a year. This article empties journalism of its monitoring role by thus effectively immunizing the abusive authoritarian regime from accountability.

Restrictions on the use of the internet are among the latest of the counter-terrorism tactics. Article 29 criminalizes use of the internet that aims to “incite thoughts or ideas that call to commit terrorist acts” or “mislead security forces” or “affect the course of justice.”⁶⁷⁹ The internet has made communications easier among terrorists worldwide. A report by the United Nations Office

⁶⁷⁸ Article 35 of Egyptian Anti-terrorism Law of 2015.

⁶⁷⁹ Article 29, *idem*.

on Drugs and Crime shows that the internet is a useful place for secret intelligence services to gather information about terrorists by monitoring online discussions and websites, which helps prevent terrorist acts.⁶⁸⁰ However, monitoring already published information in websites is one thing, whereas monitoring unpublished forms of communication, including in emails and chat rooms, is a violation of the right to privacy and to confidential communication. The global restrictions on speech, especially those imposed by UN Security Council Resolution 1624 (2005), encourage authoritarian regimes to become more oppressive and arbitrary, which in turn affects international peace and security.

Terrorism financing

Since 9/11, the theme of terrorism financing has become an essential part of the global war on terror. The international obligations listed in UN Security Council Resolution 1373 (2001) are clear in calling upon states to criminalize terrorism financing. Egypt has adopted several legal modifications to meet the requirements of Resolution 1373, and more importantly the FATF's standards (discussed in Chapter 2).

Egypt was ahead of this international obligation. It has already criminalized terrorism financing in Law no. 97 of 1992. Article 86*bis* condemns “whoever, with the knowledge of the purpose for which [the terrorist group] calls, holds any kind of leadership within it, or supplies it with material or financial provisions.”⁶⁸¹ Despite this text, the 2015 Anti-terrorism Law dedicated two articles to this theme. Article 3 of the 2015 Anti-terrorism Law defines “terrorism financing” as:

⁶⁸⁰ United Nations Office on Drugs and Crime, “The Use of the Internet for Terrorist Purposes”, United Nations, September 2012.

⁶⁸¹ Article 86*bis* of Law no. 97 of 1992.

Collecting, receiving, holding, supplying, transferring, or providing funds, weapons, ammunition, explosives, missions,⁶⁸² machines, data, information, materials, or other things directly or indirectly, and by any means including digital and electronic forms, with the intention to use all or some of it to commit any terrorist crime, or knowing that it will be used for this purpose, or to provide a safe haven to terrorists or to financiers of terrorists in any of the mentioned ways.

Unlike Article 86*bis* of Law no. 97 of 1992, this article does not require knowledge of the terrorist purpose of the group or its actions. This puts anyone who associates with or helps terrorist groups at risk under this article. For instance, if a technician fixes the laptops of terrorists, even if he does not know about their criminal activities, he is, according to this article, a “terrorist financier.” The 2015 Anti-terrorism Law establishes tough punishments for terrorism financing. Article 13 states:

Shall be punished with life imprisonment whoever commit a crime of terrorism financing if the funding was to a terrorist, and shall the death penalty be applied if the funding was to a terrorist group or terrorist act.

And in the cases when the crime [of financing] is committed by a terrorist group, shall those responsible for the actual management of this group be punished with the motioned sentences in the previous paragraph as long as the crime was committed for the benefit of the group.

And shall the terrorist group be punished with a fine not less than one hundred thousand and not more than three million pounds, and [shall the group] be jointly responsible for the payment of any financial penalties or compensation.

⁶⁸² The article uses the word مهمات, which means “missions.” Even though it is not clear what the meaning or purpose of this word is in this article, I translate it as it is.

The severity of the punishment is an aspect inherited from exceptionalism and militarism, which prioritize discipline over justice. Egyptian national security and anti-terrorism laws have long included tough punishments, which have not resulted in reducing crimes or terrorist cells. This tough approach is also seen in the special procedural regulations that treat terrorist suspects as enemies rather than criminals.

Procedural regulations

The 2015 anti-terrorism law is designed in a way that violates the procedural guarantees of the accused in the stages of arrest and investigation. It broadens the authorities of investigators, extends the period of remand, deprives detainees of their right to contact a lawyer, and allows monitoring of the homes, phone calls, and letters of any suspected person. Article 50 allocates specific criminal courts to deal with terrorist lawsuits. These courts are required to ensure expeditious trials.⁶⁸³ This requirement can explain the state's substitution of special courts for ordinary courts. By transferring many of the judges' authorities to the Public Prosecutor, this anti-terrorism law has designed the role of the judiciary in a way that suits the interests of the executive. All articles that regulate investigation use the phrase "the Public Prosecution" followed directly by "or the competent investigation authority[.]"⁶⁸⁴ The law does not clarify the meaning of this latter authority. The wording implicitly allows the establishment of a special investigation body for terrorist cases, or even their referral to military courts. Interpreting this measure required looking at the draft law. The intention was to establish a special investigation body for terrorist cases. Removing the explicit wording that was suggested in the draft law from this current law

⁶⁸³ Article 50 of the 2015 anti-terrorism law.

⁶⁸⁴ Articles 40, 43, 46, and 49, *idem*.

may have been done in order to eliminate objections. Only time will show the real utility of this vague phrase.

The law in Article 40 allows the arrest of any person and their retention whenever “a danger of terrorism emerges” or “for the necessity to counter this danger” or “for the objective of collecting evidence and searching for the criminals.”⁶⁸⁵ The wording of the article includes anyone, even non-suspects. The detention is allowed for up to 24 hours, but the Public Prosecution may extend this period for up to seven days. By not requiring serious suspicion in order to arrest, the law legalizes arbitrary arrests and detention and violates due process.

The Egyptian Criminal Procedures Law no. 50 of 1951 provides several guarantees for those under preventive custody. The person must be notified of the accusation and the reason for the detention, and must be allowed to contact a lawyer.⁶⁸⁶ While these guarantees are included in Article 41 of the 2015 anti-terrorism law, they are followed by the phrase “without violating the benefit of investigation.”⁶⁸⁷ This vague phrase allows, by law, the most fundamental procedural guarantees to be disregarded.

The law in Article 46 grants the Public Prosecution or the competent investigation authority the power to issue permits regarding monitoring and recording calls, videotaping private places, and monitoring emails. Such monitoring can be put in place for 30 days, and can be extended for longer periods. On the other hand, Article 57 of the Constitution of 2014 requires a justified court order in order to permit such monitoring. The anti-terrorism law thus violates the constitution and basic human rights under the pretext of counter-terrorism. Such practices are a reflection of exceptionalism that may be justified during wartime but not in civil peacetime life.

⁶⁸⁵ Article 40, *idem*.

⁶⁸⁶ Articles 40, 41, 124, and 139 of Egyptian Criminal Procedures Law no. 50 of 1951.

⁶⁸⁷ Articles 40 of the 2015 anti-terrorism Law.

Article 8 excludes those who work on enforcing this law from any criminal accountability “if they use force during their duty or to protect themselves from an imminent danger that is about to harm lives or property, as long as the use of this right is essential and sufficient to counter the risk.”⁶⁸⁸ The root of such immunities may be found in British martial law, which immunized military members and actions from legal accountability. Article 8 is not clear about the meaning of “danger” and endangering “lives or properties.” It overprotects the authority and its persons, which results in creating two opposing groups without necessarily any actual opposition. Anyone who does not support the regime and its practices is a potential target, whereas those in power and their supporters are immunized. The situation becomes more problematic with Egypt’s security forces, which are known for their unjustified use of coercion,⁶⁸⁹ and this article implicitly encourages more use of force against the “enemy,” whether armed terrorists or peaceful opponents. This is another example of authoritarian ambition.

Egyptian counter-terrorism law and policy elevate the protection of the government over all other values. They intentionally turn a blind eye to the fact that there are tyrannical and corrupt governments that could be faced with anti-government revolutionary groups. While the acts of these groups are considered by society as morally right, they will always be considered by corrupt governments as legally wrong.⁶⁹⁰ This policy serves the Egyptian authoritarian government and the West, which indirectly supports Egypt in its war on terror against the common enemy.

⁶⁸⁸ Article 8, *idem*.

⁶⁸⁹ “Egypt: State-sanctioned Pattern of Excessive Use of Force by Security Forces” (14 October 2013) *Amnesty International*, online: <<https://www.amnesty.org/en/latest/news/2013/10/egypt-state-sanctioned-pattern-excessive-use-force-security-forces/>>.

⁶⁹⁰ See Coady, *Supra* 26, at 40.

Conclusion of chapter: Colonial heritage and neo-colonial approval of authoritarianism

Egyptian counter-terrorism policy is rooted in colonialism, informal imperialism, and indigenous authoritarianism. The colonial influence is seen in the British state of emergency and the use of special courts that were transplanted into post-colonial Egypt. In post-colonial Egypt, exceptionalism and the interference of the military or the militarized security forces in everyday civil life has become the norm. Such normalization of the exception serves the authoritarian ambition of Arab governments.

The influence of informal imperialism is seen in the Egyptian Penal Code, which is built on the French model. France did not place direct pressure on Egypt to incorporate aspects of France's laws into its anti-terror legislation. According to Nathan Brown, Egypt found the French system attractive because of its feature of centralization, which serves the ruling class and the elite (1995, 116). In addition to centralization, the French law codified the crimes of rebellion and sabotage. Criminalizing these acts gave the Egyptian government legal protection, especially after its tough experience with the 'Urabi revolt that was only ended with the British occupation of Egypt. Sedition is another crime that the Egyptian Penal Code of 1883 borrowed from the French Press Law. This was the beginning of speech restrictions in Egypt.

Egypt first adopted the term "terror" in Article 98(a) of the 1937 Penal Code. In this article, "terror" was considered an aggravating circumstance rather than a crime by itself. Egyptian ordinary courts used this and other vague articles against communists, who were assumed to use force and terror. Such an assumption belongs to the approaches of exceptionalism and militarism, which aim to pre-empt crimes through identifying the enemy before a crime or a threat of a crime occur.

Egyptian laws were extremely broad well before 9/11 because of colonial influence, but they have become even broader under the neo-colonial influence that continues the indirect Western support and encouragement of authoritarianism. Owen examines inter-state relations, making the important point that in the Arab world the boundary between domestic politics and foreign relations is far more porous than in most other regions. This can be seen in the American role in shaping counter-terrorism policy in the region post-9/11 (2004, 219–24). Thus, external political pressure plays a role in reshaping the policy of the war on terror. For example, the American approval of arbitrary Middle Eastern counter-terrorism policy extends to well before 9/11. Roach shows the connection between Egypt and the United States in their use of extraordinary rendition. The American authorities transferred terrorist suspects into Egyptian custody.⁶⁹¹ Even though Egypt is infamous for its willingness to use torture and other extra-legal measures, the cooperation between the West and Egypt in extraordinary renditions suggests approval of Egyptian authoritarianism.

The 2015 Egyptian anti-terrorism law is similar to post-9/11 Western laws in one respect: proposing a broad definition of terrorism. Other than that, it excessively disregards human rights and criminal law principles and safeguards. In the face of rising violence and terrorist attacks, this approach advances the authoritarian regime through centralizing powers with the president or other bodies, away from the ordinary course of governing. Egypt criminalizes incitement of terrorism and financing terrorism in its 1992 anti-terrorism law. However, it emphasizes these two themes in its 2015 anti-terrorism law, which reflects compliance with the post-9/11 global regulations. While satisfying the neo-colonial powers, represented by UN Security Council and FATF, Egypt is enhancing the centralization and exceptionalism of its authoritarian powers.

⁶⁹¹ Roach, *Supra* 7, at 80-81.

CHAPTER 6 THE COLONIAL AND NEO-COLONIAL EXPERIENCE IN TUNISIA

The Republic of Tunisia is a small state that is bordered by Algeria to the west, Libya to the southeast, and the Mediterranean Sea to the north and east. Although it is located in North Africa and Arabic-speaking Sunni Muslims represent 98 percent of the population, at the social and cultural levels, it reflects Europe's strong influence (Alexander 2010, 1). Its location on the Mediterranean coast has linked it culturally and economically to France, Italy, and Spain.⁶⁹²

Before the establishment of the republic, Tunisia was an extension of the Ottoman Empire known as the province of Tunis (1574–1705). It was ruled by monarchs, known as beys, between 1631 and 1956. Like Egypt and the Ottoman Empire during that time, Tunisia, under the rule of Ahmad I ibn Mustafa, sought modernizing reforms that included state institutions and the economy.⁶⁹³ This chapter is concerned with modern Tunisia. It examines chronologically four main periods: informal imperialism (1850–1870s), which represents European political and economic control; colonialism under the French protectorate of Tunisia and its legacies of centralization and exceptionalism (1881-1956); post-colonialism and the falling back into authoritarianism; and finally, neo-colonialism and the economic dependence on and political submission to the West.

Employing the five perspectives

The four perspectives suggested in Chapter 1 and the fifth suggested in the conclusion of Chapter 4 are applied in the case of Tunisia. To remind the reader, these include the economic aspect,

⁶⁹² Alexander, *Supra* 25, at 1.

⁶⁹³ Clancy-Smith, *Supra* 25, at 157.

centralization, militarism, and exceptionalism, and the fifth perspective, the authoritarian ambition. They are employed within a historical framework.

Informal imperialism: Political and economic control (1850s–1870s)

During the 1850s, European countries considered Tunisia a place for agricultural and other investments, and established railways, ports, and lending companies.⁶⁹⁴ Through informal imperialism, Britain and France placed pressure on the bey to issue the Fundamental Pact (‘*Ahd al-Amān*’) in 1857.⁶⁹⁵ This document served foreigners by granting them the right to business activities and owning property.⁶⁹⁶

The Fundamental Pact paved the way for the adoption of the Tunisian Constitution of 1861—a more sophisticated legal framework for governing, rights and duties. This document is considered the first constitution in the Arab world.⁶⁹⁷ Even though it centralized authority with the bey and his ministers,⁶⁹⁸ it made the bey accountable to a Grand Council if he violated the law.⁶⁹⁹ Another aspect of the constitution is that, unlike the Fundamental Pact, which stated in its introduction the validity of Islamic Sharia, the constitution did not mention Islam. Instead, it emphasized the equality between citizens and foreign subjects of all religions before the law.⁷⁰⁰ It also stated foreigners’ rights to own land and practice business activities.⁷⁰¹ Nathan Brown argues

⁶⁹⁴ Khalil, *Supra* 4, at 43-45.

⁶⁹⁵ Brown, *Supra* 509, at 16.

⁶⁹⁶ Articles 9 and 10 of the Tunisian 1857 Fundamental Act (‘*Ahd al-Amān*’), 10 December 1857. See “‘*Ahd al-Amān* Text” *Higher Committee for Human Rights and Fundamental Freedoms in Tunisia*, online: <www.droitsdelhomme.org.tn/?page_id=105>.

⁶⁹⁷ Brown, *Supra* 509, at 16.

⁶⁹⁸ Articles 12, 13, 16, 18 of the 1861 Tunisian Constitution, 26 April 1861. See “Dustor (qanon adawla aTunisia)” [“Constitution of Tunisia”], *Higher Committee for Human Rights and Fundamental Freedoms in Tunisia*, online: <www.droitsdelhomme.org.tn/?page_id=106>.

⁶⁹⁹ Article 11, *idem*.

⁷⁰⁰ Articles 86-90, *idem*.

⁷⁰¹ Articles 98, 112, 113, *Idem*.

that the timing of adopting the constitution and its content suggest that it was designed to serve two categories: foreign subjects and the political elite.⁷⁰² Foreign subjects enjoyed unconditional rights, and the political elite enjoyed centralized administration. Leon Carl Brown argues that the constitution was a sham step that aimed “more to curry favor and suppress criticism from abroad than to regularize the actual balance of political forces within Tunisia.”⁷⁰³ The constitution was suspended by a beylical order in 1864 as a response to a revolution, known as the Ali Ben Ghdahem Revolt.⁷⁰⁴

European control was more evident in Tunisia’s economic life. Britain, France, and Italy invested their financial surplus by offering loans to the bey. The lending agreements included unfavorable rates and terms, displaying unequal positions of power.⁷⁰⁵ As a result, in 1869 Tunisia declared bankruptcy.⁷⁰⁶ This led to the establishment of a European commission (*Commission Financière Internationale*) in 1871, formed by France, Britain, and Italy, to supervise Tunisia’s budget and protect European investors.⁷⁰⁷ According to Leon Carl Brown, European powers were aware of Tunisia’s increasing debt but paid no attention to it until Tunisia reached a complete deficiency and the need to protect European stakes became a necessity.⁷⁰⁸ Brown suggests that European financial control in both Egypt and Tunisia “was the last stage before outright western control.”⁷⁰⁹ This suggests that a pattern of informal imperial domination placed Arab countries in

⁷⁰² Brown, *Supra* 509, at 18.

⁷⁰³ Quoted in *idem*.

⁷⁰⁴ Ali Muhafitha, “Reform and Modernization in Nineteenth Century Tunisia” (16 August 2009) *Addustor Newspaper*, online: <www.addustour.com>

⁷⁰⁵ ‘Alī al-Mahjūbī, *‘Ālam al-‘Arabī al-ḥadīth wa-al-mu‘āṣir: takhalluf fa-isti‘mār fa-muqāwamah* [Modern and Contemporary Arab World: Backwardness, Colonialism, Resistance] (Beirut: al-Intishār al-‘Arabī; Ṣafāqis, Tūnis: Dār Muḥammad ‘Alī lil-Nashr, 2009) at 43-45.

⁷⁰⁶ Lisa Anderson, *The State and Social Transformation in Tunisia and Libya, 1830–1980* (Princeton, NJ: Princeton University Press, 1986) at 70.

⁷⁰⁷ Leon Carl Brown, *International Politics and the Middle East: Old Rules, Dangerous Game* (London: IB Tauris, 1984) at 75.

⁷⁰⁸ *Idem*.

⁷⁰⁹ *Idem*.

a subordinate position. This pattern of imperial control starts with economic and political control, then military control.

The economic crisis weakened the Tunisian government and made Tunisia more vulnerable to external threat. France, Italy, and the Ottoman Empire were all ambitious about controlling Tunisia. In 1881, France presented itself to the bey as a protector ally, and an era of direct French control lasted until 1956.

French protectorate of Tunisia (1881–1956)

In April 24, 1881, the French sent 35,000 of its troops in Algeria to Tunisia, and invaded several Tunisian cities with limited resistance.⁷¹⁰ The representative of the French Republic, General Jules Aime Bréart, reached the Tunisian Bardo Palace on May 12, 1881, promising to restore Tunisia's economic stability.⁷¹¹ Therefore, the bey signed the Treaty of Bardo, granting the French the right to supervise Tunisia's financial, foreign, and military matters.⁷¹²

The French, at least at the beginning, ruled Tunisia based on a system of sharing powers with the bey. The bey was granted his authority and, as a result, Tunisia remained an absolute and centralized monarchy.⁷¹³ For instance, the bey had unlimited right—without a legal text—to punish those whom he considered rebels against his authority.⁷¹⁴ According to one Tunisian scholar, because there were no constitutional regulations, the bey had absolute legislative and administrative power.⁷¹⁵

⁷¹⁰ Al-Mahjūbī, *Supra* 705, at 118-19.

⁷¹¹ Charles William Olson, *Decolonization in French politics (1950–1956): Indo-China, Tunisia, Morocco* (Ann Arbor, Mich.: University Microfilms, 1966) at 111.

⁷¹² *Idem.*

⁷¹³ Arfawi, *Supra* 397, at 73.

⁷¹⁴ *Idem.*

⁷¹⁵ *Idem.*, at 72-73.

Despite the autocratic position that the bey enjoyed, the French gradually expanded their powers. In 1883, the Bey signed the French proposed Convention of La Marsa, which officially established a French protectorate over Tunisia.⁷¹⁶ The Convention granted the French Resident General additional financial and political control.⁷¹⁷ According to Lars Rudebeck, the French Resident General ruled Tunisia “through the bey if he cooperated and without him if he occasionally tried to oppose his will to that of the French government.”⁷¹⁸ The bey’s government was required to put into action French recommendations regarding administrative, judicial, and financial reforms.⁷¹⁹ These conditions undermined local authority without destroying it, and centralized powers with the French.

France ruled the three Maghreb countries, Algeria, Morocco, and Tunisia, but each of these colonies presented a unique case by itself. For instance, Algeria was administered as an integral part of France, whereas the rest of the Maghreb was never considered part of France. This difference is due to the various French political interests and economic ambitions in each, which led to the use of different policies in each case. The case of Algeria differed from the others insofar as, unlike in the other Maghreb countries, there was a deep-rooted enmity between the Kingdom of France and the government of Algeria.⁷²⁰ The timing of the invasion of Algeria was essentially due to domestic issues in France. The invasion was a tactic that the French King Charles X used to turn the attention of his people to this external victory.⁷²¹ By considering Algeria as part of France, the French used a destructive policy that included disposing of thousands of Algerians and completely replacing the local social and political structure with a French model. This also resulted

⁷¹⁶ Olson, *Supra* 711, at 111.

⁷¹⁷ Alexander, *Supra* 25, at 20.

⁷¹⁸ Quoted in *idem*.

⁷¹⁹ *Idem*.

⁷²⁰ For more, see Jamil M Abun-Nasr, *A History of the Maghrib in the Islamic period* (Cambridge; New York: Cambridge University Press, 1987) at 250.

⁷²¹ *Idem*.

in the form of resistance. Algerian nationalists faced the French with guerrilla fighters,⁷²² and the French systematically responded with a coercive counter-insurgency policy and measures.⁷²³

The long period of French colonization of Algeria (1830-1960) led to a nationalist struggle and a revolutionary war, in which both sides used almost all kinds of violence. France developed counter-insurgency as a military-political doctrine. By looking at Algeria, we learn that the French doctrine in Algeria was extended to Tunisia, yet to a lesser extent. The French in Tunisia were aware that relying solely on a military doctrine might be counterproductive. Therefore, in order to prevent Tunisia from splitting into an Islamic country—as was the case in Algeria—a tolerant policy was required regarding social and cultural matters like education. The tolerant French policy, however, was only considered in the first few years in Tunisia. With the emergence of opposition, a more coercive policy was adopted. Post-independence, Tunisia mimicked the latter French approach by adopting tough national security and anti-terror laws to prevent Tunisians from becoming radical Islamists and to counter all forms of political opposition.

Counter-insurgency was used in Tunisia, but it involved the use of military courts more than direct military campaigns. Many exceptional measures were taken to suppress nationalists, regardless whether they were considered insurgents or political criminals. Exceptionalism included declaring a state of siege, establishing military committees and military courts, imposing executive and military censorship, and applying French rather than Tunisian laws.

This section examines the exceptional and militarized measures adopted during colonialism. The themes examined are censorship, state of siege and military courts. France has long used press legislation and measures to pre-empt crimes. This tendency is seen in the French

⁷²² Alexander, *Supra* 25, at 19, 34.

⁷²³ French, *Supra* 2, at 163, 173.

Press Law of 1881 and the exceptional measures adopted in the protectorate of Tunisia. The other theme is the state of exception, which includes the state of siege as well as military courts.

The French legacy of censorship

French colonialism used censorship in suppressing free speech that could threaten national security and order. In this section, I address censorship as an exceptional measure because of the source that regulated it, which was the executive or the military, and the suppressive nature of speech and press regulations. According to Tunisian scholar Khamis Arfawi, French colonialism used censorship in Tunisia in monitoring journalism, books, cinema, theater, and radio. Censorship focused particularly on expression that addressed or criticized the political system.⁷²⁴ In addition to applying the French Press Law of 1881, Arfawi argues that censorship in Tunisia was an exceptional system that was largely regulated by executive and military orders during the state of siege and the two World Wars.⁷²⁵ This section examines these exceptional regulations.

With the growing number of French and Tunisian newspapers, the French adopted an order on 14 October 1884 referring to the French Press Law of 1881 as the pertinent law. This law prohibits incitement, through speech or written words,⁷²⁶ of hatred or violence,⁷²⁷ and defamation of the president,⁷²⁸ the army, or court.⁷²⁹ The decree of 14 October 1884 created two additional crimes: criticizing the bey or his family, and criticizing France.⁷³⁰

⁷²⁴ Khamis Arfawi, “aSahafa wa raqaba fi Tunis 1938–1953” [“Journalism and Censorship in Tunisia: 1938–1953”] (25 September 2016) *Alawan*, online: <www.alawan.org/content/1953-1938-الصّحافة والرّقابة في تونس>.

⁷²⁵ *Idem*.

⁷²⁶ Article 23 of the 1881 French Press Law.

⁷²⁷ Article 24, *idem*.

⁷²⁸ Article 31, *idem*.

⁷²⁹ Article 30, *idem*.

⁷³⁰ Arfawi, *Supra* 397, at 47.

The French Press Law and the 1884 order were not sufficient to suppress nationalists and communists. Therefore, more regulations were adopted. In 1911, Tunisians carried out violent protests against the French in an event known as the Jellaz Conflict, which led the French to declare a state of siege.⁷³¹ During the state of siege, Arabic newspapers were banned.⁷³² This ban continued during World War I.⁷³³ The French added additional precautionary measures regarding expression by adopting order 29 August 1939 regarding publications and order 1 September 1939 regarding the state of siege.⁷³⁴ Accordingly, the military authority could ban newspapers that could provoke disorder. In addition, no newspaper, whether Tunisian or foreign, could be published without a license. In Algeria, the French established a central agency to monitor news, and branches of this agency were established in Tunisia in 1943.⁷³⁵ Axis forces dominated parts of Tunisia from November 1942 until May 1943. Once they were expelled, a decree was adopted on 19 August 1944 transferring censorship authorities during wartime to the French Resident General. According to this decree, the French Resident General had the authority to ban all news and publications that could endanger the security of the army or the safety of civilians.⁷³⁶

According to Arfawi, the rationale for censorship in Tunisia was divided into two. The first regards national security during wartime. It includes regulations that prohibit disclosure of military, diplomatic, or economic information. This sort of censorship prohibits criticism of the state's institutions, or comments that could affect the morale of army and civilians. Any criticism of other French colonies, including Syria, Lebanon, and Indochina, were referred to the French Resident General. In addition, it was prohibited to publish news that showed reprehensible acts by

⁷³¹ Aljelani ben Haj & Muhamad alMarzuqi, *Ma`rakat alzalaj [Jellaz War]* (Tunis: Asharika atunisia letawzie) at 38.

⁷³² *Idem.*

⁷³³ Arfawi, *Supra* 724.

⁷³⁴ *Idem.*, at 53.

⁷³⁵ *Idem.*, at 720.

⁷³⁶ *Idem.*

the French army. Censorship regarding national security also included prohibiting the publicization of ideological beliefs.⁷³⁷

The second rationale for censorship was protecting the colonial regime. Arfawi argues that protecting colonialism required isolating Tunisians from revolutionary events in the Arab world. Accordingly, criticism of the French Resident General, the bey, or the security services was prohibited. News regarding public strikes and social struggle were referred to the French Resident General to take the appropriate action.⁷³⁸ Other restrictions included a prohibition of the use of the term “constitution,” which could remind people of the banned Constitutional Liberal Party.⁷³⁹

When whole or parts of columns were deleted by the French authority, newspapers filled the blank areas with the words “censuré,” “X lignes censures,” or “Un article censuré.”⁷⁴⁰ Arfawi observes that the French censorship policy produced counterproductive results. In his view, while censorship forced newspapers to delete some parts and leave them blank, which made them unattractive and difficult to read, it led to finding other means of expression. These included secret leaflets and newspapers, such as the communist newspaper *Altaleea*.⁷⁴¹

The use of censorship shows that it was an exceptional politicized tool centralized within the military or the French Resident General for social and mind control. It might have been necessary during wartime, but the experience in protectorate Tunisia suggests that it exceeded this necessity. This is supported by the fact that even though World War II ended in 1945, censorship continued under the regulations of state of siege until 1955.⁷⁴²

⁷³⁷ *Idem.*

⁷³⁸ *Idem.*

⁷³⁹ *Idem.*

⁷⁴⁰ *Idem.*

⁷⁴¹ *Idem.*

⁷⁴² Arfawi, *Supra* 397, at 103.

The French legacy of state of siege and military courts

The French declared a state of siege in two cases of internal disorder in 1911 and another in 1938, and during the two World Wars.⁷⁴³ Before that, transferring authority to the army was done without the declaration of state of siege by beylical decree. For example, the Bey of Tunisia issued a decree in 10 June 1882 authorizing French military commanders to use deterrent powers against whoever showed dissent or disobeyed military orders. The above beylical order of 1882 also allowed the establishment of military councils. These councils were the first French judicial system in Tunisia. The councils had the power to try Tunisians for attacks against French residents and against the French army.⁷⁴⁴

In France and colonized Tunisia, both military courts and ordinary courts were active in viewing sensitive cases. For instance, on its homeland France adopted Law of 9 March 1928 replacing the war councils established during World War I with military tribunals.⁷⁴⁵ These military tribunals became responsible for specific crimes committed during peacetime, including rebellion.⁷⁴⁶ Other crimes remained within the jurisdiction of ordinary courts.⁷⁴⁷ The jurisdiction of these military tribunals was expanded by a decree of 29 July 1939 to include crimes that affect the external security of the state, such as treason and other vague crimes like “enterprise of demoralization.”⁷⁴⁸ The French Law of 9 March 1928 was applied in Tunisia, replacing the earlier military councils with military courts.⁷⁴⁹

⁷⁴³ *Idem*, at 101, 103.

⁷⁴⁴ *Idem*, at 100.

⁷⁴⁵ Yves Beigbeder, *Judging War Crimes And Torture: French Justice And International Criminal Tribunals and Commissions (1940–2005)* (Martinus Nijhoff, 2006) at 12.

⁷⁴⁶ *Idem*.

⁷⁴⁷ *Idem*.

⁷⁴⁸ *Idem*.

⁷⁴⁹ Arfawi, *Supra* 397, at 102.

During the state of siege in Tunisia,⁷⁵⁰ the jurisdiction of military courts included crimes against the state or against the authorities, and crimes against public peace and security.⁷⁵¹ Among these crimes were sabotage and insurgency. For instance, on May 31, 1953, 15 Tunisians were accused of bombing a hospital (sabotage), and attempting to kill soldiers and the Tunisian Minister of Commerce, Ben Raïce. Accordingly, the military court sentenced one person with the death penalty, two with hard labour for life, and the rest with two to 20 years of imprisonment.⁷⁵² Another case involved a group of nationalists who was accused of being “rebels” or “insurgents.” During a search in May 1953, security forces found weapons and a printing machine with the signature of the “resistance committee.” The investigation showed that the group was divided to two parts, one responsible for assassination and sabotage, and the other for making weapons and hiding rebels. Accordingly, they were accused of several bombings that were committed during February and March 1952. On November 3, 1953, the suspects were referred to a military court. The suspects claimed their confessions had been induced through coercion. Despite that, the military court sentenced one person to death, another to hard labor for life, eight to 20 years of imprisonment, and 11 others to hard labour of one to five years.⁷⁵³ Another group of nationalists were accused of engaging in acts of sabotage between 1952 and 1953. These acts included damaging buildings, phone lines, power stations, and streetcars. They were also accused of acts of insurgency against French army and security forces. On January 14, 1954, a military court sentenced two to death, another two to death in absentia, six others to hard labor for life, and two to hard labor for 20 years.

⁷⁵⁰ State of siege in Tunisia was issued by beylical decrees based on the French Resident General’s orders. See Jacob Abadi, *Tunisia Since the Arab Conquest: The Saga of a Westernized Muslim State* (Cornwall: Apollo Books, 2012) at 379.

⁷⁵¹ Arfawi, *Supra* 397, at 101.

⁷⁵² *Idem*, at 394.

⁷⁵³ *Idem*, at 396.

Many Tunisian nationalists and political activists were labeled as “rebels” without a trial, and thus were exiled based on administrative decision by the French Resident General.⁷⁵⁴

It should be noted that crimes of sabotage and insurgency were not necessarily defined by law. This is because the state of siege suspended ordinary laws and instead applied the French laws and other decrees adopted in Tunisia by the French army and the French Resident General.⁷⁵⁵ The related articles of the French law are addressed in Chapter 7. Nonetheless, a general observation is that the French Penal Code of 1810, which is also referred to as the Napoleonic Code, had a revolutionary and vengeful nature that primarily served the empire.

In addition, in its homeland France adopted the law of 14 August 1941, which established special courts that combined civil and military judges to try communists.⁷⁵⁶ In Tunisia, a decree adopted on 29 September 1941 established special courts to try communists.⁷⁵⁷ According to Arfawi, these special courts in Tunisia were formed by military officers and had special procedures that allowed suspects caught in flagrante to be tried directly without prior interrogation. In other cases, the investigation took no longer than eight days, and judgments were final.⁷⁵⁸ Despite the fact that the communist movement in Tunisia was small in size with limited influence, measures that were taken in France were implanted in Tunisia without consideration of actual necessity. This direct involvement of French laws in Tunisia is not seen in the case of colonized Egypt. The British in Egypt had exceptional powers, but they did not apply or implant their legal and judicial system.

⁷⁵⁴ *Idem*, at 398.

⁷⁵⁵ *Idem*, at 103.

⁷⁵⁶ Sarah Fishman, *The Battle for Children: World War II, Youth Crime, and Juvenile Justice in Twentieth-century France* (Cambridge, Mass: Harvard University Press, 2002) at 105.

⁷⁵⁷ Arfawi, *Supra* 397, at 103.

⁷⁵⁸ *Idem*.

Post-colonialism: The centralization of a “Westernized” authoritarian regime

French intervention in local affairs provoked the rage of Tunisians. Nationalists, under the leadership of Habib Bourguiba, did not seek negotiations with the French protectorate for redistribution of power, but sought complete independence. Even though Bourguiba was arrested several times and was exiled more than once, his strategy suggested adopting an approach of gradual transition that ensured not only peaceful independence, but also a strong long-term relationship with France.⁷⁵⁹

Tunisia achieved independence in 1956, and Bourguiba came to power as a nationalist hero. Bourguiba sought a secular state that could bring Tunisia to the level of development of European countries. At the legal level, Bourguiba introduced the most liberal family and personal status law in North Africa. But at the political level, he selectively modernized the state. Bourguiba turned Tunisia into a single-party authoritarian regime. At a cultural level, he worked on weakening Islamic traditions and developed a “secular national identity” (Noyon 2003, 96). This included closing the historical Islamic school Zitouna University.⁷⁶⁰ Jennifer Noyon describes modernization in Tunisia as a self-styled secularism: a rejection of higher laws, with a continuous old-style Eastern mentality in treating people as subjects rather than citizens (2003, 96).

The lower classes continued to live according to their traditional Arab-Islamic culture. Yet they felt marginalized. This led to a deepening of the social and cultural gap between the Westernized classes and the traditional Arab-Islamic class, similar to what happened in post-

⁷⁵⁹ Alexander, *Supra* 25, at 31.

⁷⁶⁰ Jennifer Noyon & Royal Institute of International Affairs, *Islam, Politics and Pluralism: Theory and Practice in Turkey, Jordan, Tunisia and Algeria* (London; Washington: Royal Institute of International Affairs, Middle East Programme, 2003) at 97.

independence Algeria.⁷⁶¹ Rashid al-Ghannouchi, who is an Islamic thinker and the co-founder of the En-Nahda Movement, describes this gap:

The attack against religious institutions was one of the first decisions after independence. My generation felt thus that it had been made extraneous, subjected to a very strong alienation, the victims of a kind of banishment[.]

At independence, those who attended institutions dependent on Zitouna were about 25[,000] to 27,000. Those who were studying at secondary schools, created under the French occupation, were less than 4,500 to 5,000. So it was the majority which felt that it had been marginalized by the minority [...]; it was an effective minority because it could understand the West, and understand foreigners and communicate with the new international order.⁷⁶²

It should be noted that Tunisian Islamic movements are different than any other Islamic movement in the Arab world. Unlike the Egyptian Muslim Brotherhood and Algerian Islamic Salvation Front, Tunisian Islamists are mostly moderate, with a liberal approach to Islamic politics.⁷⁶³ This moderate approach did not rescue Tunisian Islamists from the government's suppressive policy against Islamic movements and their potential influence. This included denying legal recognition to their political parties, waves of arrests, and sentences of up to 11 years for no clear wrongdoing.⁷⁶⁴

The unrest between Bourguiba and the Islamists paved the way to overthrowing Bourguiba, whose health was declining. In 1987, Prime Minister Zine El Abidine Ben Ali seized the

⁷⁶¹ *Idem.*

⁷⁶² Quoted in François Burgat & William Dowell, *The Islamic Movement in North Africa* (Austin: Center for Middle Eastern Studies, University of Texas at Austin, 1993) at 54-55.

⁷⁶³ Noyon, *Supra* 760, at 100.

⁷⁶⁴ *Idem*, 102.

presidency in a bloodless coup. The early stages of Ben Ali's rule witnessed some reforms, including abolishing the infamous state security court, and a new code regarding associations was adopted that allowed legal opposition parties. However, the substance of these reforms was bound by Article 7 of the constitution, which allowed citizens' rights to be limited for the sake of "public order, national defense, the development of the economy and social progress."⁷⁶⁵

At the beginning of his presidency, Ben Ali showed tolerance towards Islamists, which led to reopening Zitouna University, releasing thousands of political prisoners, and promising a plural political environment capable of embracing both secular and religious thought.⁷⁶⁶ Despite this political openness, Ben Ali was not expecting a serious challenge to his power. Once En-Nahda showed strong representation in the election of July 1989, it once again lost its legal recognition as a legitimate political party, and no party that mixed religion with politics was allowed.⁷⁶⁷ From 1989 to 1992, violence was carried out by Islamists, which led to widespread arrests and repression. Charges included membership in an illegal organization and holding unauthorized meetings.⁷⁶⁸

This anti-Islamist campaign was later escalated by linking En-Nahda to terrorism. In this respect, Noyon observes that, "By carefully emphasizing the alleged terrorist character of En-Nahda, the regime was able to undermine the movement's legitimacy in the eyes of the people and to jail and repress its members. As 'terrorists,' they could be viewed as less than human or as carriers of a 'disease,' as the regime has since termed Islamism."⁷⁶⁹ Tunisia thus fell into

⁷⁶⁵ Article 7 of the Tunisian Constitution of 1959.

⁷⁶⁶ Kenneth Perkins, *A History of Modern Tunisia* (New York: Cambridge University Press, 2014) at 189.

⁷⁶⁷ Noyon, *Supra* 760, at 102-3.

⁷⁶⁸ *Idem*, at 106.

⁷⁶⁹ *Idem*, at 110.

authoritarianism. Bourguiba and Ben Ali made Tunisia a *de facto* one-party state, discarding the values of republican life and democratic practices.

Although some claim that, politically, Tunisia has been relatively stable,⁷⁷⁰ the 2010 uprising brought to the surface the consequences of the failure of the post-colonial authoritarian regime. Since 2010, until the day of writing this dissertation, the political life of Tunisia is difficult to predict. People in Tunisia, Egypt, and elsewhere have staged massive populist revolutions, protesting for greater individual rights in the hope that the latter would additionally give rise to greater benefits for the population as a whole. Arab peoples have always remonstrated with social and political suppression; however, during the Arab Spring, protesters expressed their will by sacrificing their lives, in light of the high stakes—to live free or die with dignity.

The starting point was in Tunisia when a street-cart vendor, Mohamed Bouazizi, immolated himself in protest against his continuous mistreatment by the police, who forcibly took his cart on December 17, 2010. The event led to a series of protests over unemployment and political restrictions, which led to what is known as the Jasmine Revolution. The protests continued despite the aggressiveness of the police in their use of live ammunition against mostly peaceful demonstrators.⁷⁷¹ The biggest achievement of this revolution was forcing Ben Ali to give up his presidency on January 14, 2011.

During Ben Ali's rule, Tunisia was turned into a police state and thousands of political opponents were jailed. Ben Ali needed to secure himself with a long-lasting authoritarian presidency, which required a suppressive policy against opposing political parties, particularly the

⁷⁷⁰ See Alexander, *Supra* 25, at 1-3.

⁷⁷¹ "World Report 2012: Tunisia, Events of 2011" *Human Rights Watch*, online: <www.hrw.org/world-report-2012/world-report-2012-tunisia>.

Islamist party En-Nahda. The global wave of countering Islamist terrorism made any legal or extra-legal anti-terrorism efforts in Tunisia more acceptable.

The tyranny of Ben Ali's regime came to an end after 23 years. The circle of opposition was significantly widened by the 2000s, when the target was no longer limited to Islamists, but included anyone, including journalists and human rights activists, who criticized Ben Ali's rule.⁷⁷² By the year 2010, Tunisia suffered government corruption, high rates of unemployment, food inflation, and poor living conditions.⁷⁷³ This economic decline provoked the whole population, including the Westernized elite, to oppose Ben Ali's reckless policy.

Neo-colonialism: Economic dependence and political submission

France has long feared the wave of violence related to the Algerian civil war that started in 1991. Algeria suffered bloody massacres carried out by the Algerian Islamic Salvation Front and other Islamic groups and gangs. As an extension of this struggle, France also witnessed a wave of terrorist attacks carried out by Algerian Islamist groups.⁷⁷⁴ This regional threat required more efforts by the Tunisian government to secure itself and to satisfy France. France and Europe supported Ben Ali's government through financial aid.⁷⁷⁵ Aside from the strong relationships between France and Tunisia, Tunisia represents an important tourist spot to Europeans. This has required a strict national security policy that ensures the safety of tourists.

Tunisia continues to receive financial aid from France and the European Union. In January 2016, France promised to provide Tunisia with one billion euros over the next five years to support

⁷⁷² "A Middle Class Revolution" (19 January 2011) *Human Rights Watch*, online: <www.hrw.org/news/2011/01/19/middle-class-revolution>.

⁷⁷³ *Idem*.

⁷⁷⁴ Pia Christina Wood, "French Foreign Policy and Tunisia: Do Human Rights Matter?" (2002) 9:2, *Middle East Policy Council*, online: <www.mepc.org/journal/middle-east-policy-archives/french-foreign-policy-and-tunisia-do-human-rights-matter?print>.

⁷⁷⁵ *Idem*.

its economy. Yet some of the French financial aid has been directed to support special military forces and cooperation between the two countries to counter terrorism.⁷⁷⁶

Another source of financial aid is the United States. Between 2012 and 2015, the United States loaned Tunisia one billion dollars and promised another \$500 million. Tunisia is described by American officials as a “great model”⁷⁷⁷ in a part of the world where democracy seems impossible. In July 2015, the United States designated Tunisia a major non-NATO ally, a status that could bring military cooperation.⁷⁷⁸

The lack of democracy in the Arab world is partially due to the Western interest in keeping the status quo. The constant Western financial and military support for Tunisia also represents approval of its suppressive policy. Such a Western-Tunisian relationship is thus transactional: Tunisia receives support as long as it complies with the neo-colonial requirements of counter-terrorism. Tunisia’s submission to the West also makes it drift into an over-reaction approach in dealing with terrorist crimes, especially aimed at Westerners.

Conclusion of chapter: Direct French transplanting of laws and measures

Unlike the British in Egypt, the French were directly involved in transplanting their laws into the Tunisian legal system. This had a major impact on post-colonial Tunisian ordinary laws and exceptional measures. During British colonialism Egypt had a parliament—regardless of how active it was—and a constitution, both of which empowered Egyptians to willingly adopt a system based on a French model to counter the British imperial order. Tunisia, on the other hand, had no

⁷⁷⁶ “Tunisia: 20 mil Euro in Aid from France Against Terrorism” (6 October 2015) *ANSamed*, online: <www.ansamed.info/ansamed/en/news/nations/tunisia/2015/10/06/tunisia-20-mil-euro-in-aid-from-france-against-terrorism_c6d04f24-ee1e-488a-adea-d1831bac8536.html>.

⁷⁷⁷ Julie Hirschfeld Davis, “John Kerry Says U.S. Will Give Tunisia More Financial Aid” (13 November 2015) *New York Times*, online: <www.nytimes.com>.

⁷⁷⁸ *Idem*.

parliament and no constitution, factors that allowed the French to easily control the autocratic ruler and his centralized powers. In addition, the French revolutionary way of ruling, derived from the French Revolution, requires changing the system of government in accordance with their mindset. This is a differentiating feature between French and British colonialism of the late nineteenth and twentieth centuries. The British often supervised and advised, an implicit way of control, whereas the French did not hesitate in depriving the local authority of its powers. The direct involvement of the French in Tunisia normalized the colonial policy. Thus, after colonialism, Tunisia continued using exceptional measures even during peacetime.

In addition, the Napoleonic Penal Code that was transplanted in Tunisia was known for its severity. Above all other interests, it aimed to protect the French Empire and the emperor himself. In this respect, Gerhard O. W. Mueller and Jean F. Moreau observed that “The severity of the Penal Code of 1810 was remarkable [...] We are no longer facing a Code of Revolution or even of the "Consulate," but, in fact, a Code of the Empire, enacted at the apogee of Napoleon's reign [...] this code was marked by some authoritarian ideas, and the felonies and misdemeanors against the state as such were repressed with harshness.”⁷⁷⁹ The harsh nature of this law has been extended to the current Tunisian laws.

⁷⁷⁹ *The French Penal Code*, translated by Gerhard OW Mueller & Jean F Moreau (South Hackensack, N.J: F.B. Rothman, 1960) at 9.

CHAPTER 7 COUNTER-TERRORISM IN TUNISIA

Tunisia has had a less dramatic history than Egypt. Communism was less influential and Islamic movements are generally moderate in Tunisia. Despite this relative stability, Tunisia had strict national security and counter-terrorism laws and measures well before 9/11. This chapter starts by examining the early Tunisian national security laws. Tunisia has fewer national security laws and concerns than Egypt, but it has a stronger colonial heritage. French colonialism had direct influence over Tunisia that was practiced through transplanting and applying French laws in protectorate Tunisia. However, such a migration of law was dual. With French approval, Tunisia selected the most arbitrary aspects of the French system and combined them with local regulations that served the indigenous authoritarian ambition (Arfawi 2005, 28).

This chapter examines the Penal Code of 1913, which is still active. In particular, this chapter addresses the crimes of plotting and inciting, sabotage and rebellion or insurgency. The Tunisian Penal Code was framed by a French-Tunisian committee—a factor that effected the signification of the articles.⁷⁸⁰ The chapter then examines exceptionalism and militarism in Tunisia. Post-colonial Tunisia did not use the state of emergency extensively the way Egypt did, but relied on military courts in trying civilians in national security cases. However, with the outbreak of the Revolution of 2011, a state of emergency was imposed from 2011 to 2014, and later in 2015 and 2016 for several months to deal with internal disorder and terrorist attacks.⁷⁸¹ In addition, military courts were established to try those involved in terrorism.

⁷⁸⁰ Arfawi, *Supra* 397, at 40.

⁷⁸¹ “Tunisia’s Moncef Marzouki Lifts State of Emergency” (6 March 2014) *BBC*, online: <www.bbc.com>; “Tunisia’s President Extends Nationwide State of Emergency” (19 July 2016) *Press TV*, online: <www.presstv.com/Detail/2016/07/19/475982/Tunisia-Essebsi-Habib-Essid-Daesh-Libya-Algeria>.

The chapter then examines the Tunisian approach to counter-terrorism. Islamic terrorism was never an issue until recently. The fact that Tunisia is a neighbor of the strict Islamic Algeria, as well as the disordered Libya, makes Tunisia vulnerable to terrorist attacks and influx of arms. Right after the 2011 revolution, groups like Al-Qaeda in the Islamic Maghreb (AQIM) and Ansar al-Shari'a in Tunisia (AAS-T) took advantage of Tunisia's instability by establishing training camps in the country's suburbia.⁷⁸² They have been disturbing the peace and security of the post-revolutionary state and later the elected government through bombings and assassinations that target the army and the police, political figures, embassies, and civilians.⁷⁸³ The chapter examines the 2015 Anti-terrorism law, with a focus on the definition of terrorism and crimes related to terrorism.

Laws and measures regarding national security: The influence of colonialism

French colonial expansion produced contradictory results that exist until this day. While France developed an advanced the legal system, it established or allowed the establishment of oppressive laws in its colonies. For example, a new Tunisian Penal Code was adopted in 1913. This law reflects the overall principles of French law, but with some Tunisian features that are derived from both Islamic law and the earlier bey's arbitrary system. For instance, unlike the French Penal Code of 1810, which treats crimes of bodily harm against heads of state and their families as public order crimes, the Tunisian Penal Code of 1913 considers such crimes as crimes against the state, similar to the Islamic crime of *baghi*, which is basically carrying out assaults and violating imams. The next section addresses the duality through examining its Penal Code.

⁷⁸² Oussama Romdhani, "Terror and Politics in Tunisia" *World Affairs Journal*, online: <www.worldaffairsjournal.org/article/terror-and-politics-tunisia>.

⁷⁸³ "Country Reports on Terrorism 2013: Tunisia" *Embassy of the United States in Tunisia*, online: <tunisia.usembassy.gov/country-reports-on-terrorism-2013-tunisia.html>.

The Penal Code

Tunisia first adopted its modern Penal Code, which is still active, in 1913.⁷⁸⁴ After independence the law was amended several times.⁷⁸⁵ These amendments were made, as the Code's preamble states, "to support the foundations of the Republican system and to respect all elements of national sovereignty and the establishment of the state of law and institutions and human rights[.]" This was in order to "refine the terminology and the form and to clear them of extraneous phrases associated with political and administrative systems no longer in line with independent Tunisia."⁷⁸⁶ Despite this statement, the French influence can still be seen in the current law in the crimes of plotting, sedition, and sabotage.

Plotting and incitement

The crime of "plotting" is one of the oldest crimes in Tunisia that provides special protection to the ruler and the royal family as part of the state. This approach vanished with the fading of imperialism and the emergence of democracy. However, Tunisia, as well as the rest of the Arab world, still clings to the earlier imperial protection for heads of state. The Tunisian Penal Code of 1913 defines the crime of plotting as an act that "occurs once there is an agreement, decision, or intention [to carry out] the action between two persons or more."⁷⁸⁷ This text, which is still active, is derived from Articles 88 and 89 of the 1810 French Penal Code:

88. Such an attempt (*attentat*) exists, whenever any act is committed or commenced, in order to the execution of those crimes, though they have not been actually effected.⁷⁸⁸

⁷⁸⁴ Issued on 1 October 1913, *Official Gaz* 79.

⁷⁸⁵ Amended in 1956, 1964, 1966, 1989, 1999, 2003, and 2005.

⁷⁸⁶ Preamble of the Penal Code as amended by Law 46 of 2005.

⁷⁸⁷ Article 69 of the Tunisian 1913 Penal Code.

⁷⁸⁸ Article 88 of the 1810 French Penal Code.

89. Such a plot (*complot*) exists, whenever the purpose of acting is concerted and resolved upon, between two or more conspirators, though there may not have been an attempt.⁷⁸⁹

In a subsequent article, the Tunisian Penal Code combines the crimes of plotting and incitement. Article 70 states that “Expressing an opinion [proposing]⁷⁹⁰ to form a plot in order to commit any attacks [against the internal security of the State] as stated in Articles 63, 64 and 72 of this Code, shall be punished with ten years in exile and two years imprisonment[.]”⁷⁹¹ This Article shows the early speech restrictions in Tunisia. This article refers to three other articles that address the protected value. Articles 63 and 64 consider assaults against the president a crime against the state.⁷⁹² Another crime against the state can be found in Article 72, which condemns “changing the form of the state, encouraging people to attack each another with weapons, or provoking disorder, murder and pillage.”⁷⁹³ The basis for these crimes is Article 87 of the 1810 French Penal Code, which criminalizes plotting “against the person of the emperor” or “to destroy or change the government.”⁷⁹⁴ It should be noted that when the Third French Republic was established, crimes against the life or safety of the president became ordinary crimes, but Tunisia did not adopt this amendment. This suggests selectivity in the Tunisian approach.

Another article from the French Penal Code of 1810 that could be a basis for the Tunisian crime of plotting is Article 202, which condemns “any direct incitement to disobedience of the laws, or any other acts of the public authority, or if it tends to stir up or arm a part of the citizens

⁷⁸⁹ Article 89, *idem*.

⁷⁹⁰ The text in the Tunisian Code, written in French, focuses on the actor, “l’auteur de la proposition,” or the “the proposer of the proposal”, whereas the Arabic text focuses on the opinion. Both texts, however, are vague.

⁷⁹¹ Article 70 of the Tunisian Penal Code of 1913.

⁷⁹² Articles 63 and 64, *idem*.

⁷⁹³ Article 72, *idem*.

⁷⁹⁴ The full article is mentioned in Chapter 3 of this dissertation.

against the others[.]”⁷⁹⁵ This is an early speech regulation that goes back to the Napoleonic era. The wording of this article suggests a pre-emptive approach to countering potential rebellions. During colonialism, this approach provided protection to the Tunisian government and the existence of the French in Tunisia.

The French not only transplanted their tough laws to Tunisia, but also created new, more arbitrary regulations that applied in colonies but not in France. For example, Tunisia adopted its Penal Code in 1913 under the supervision of the French colonist.⁷⁹⁶ This law created the crimes of “Hatred or contempt of the President, the government, or the international administration[.]”⁷⁹⁷ “Provoking people’s anger in a way that confuses public security[.]”⁷⁹⁸ and “Incit[ing] people to non-compliance with the country’s laws[.]”⁷⁹⁹ all punished with five years imprisonment and a fine. This Article was abolished in 1956; however, its essence still exists in other arbitrary articles within the Penal Code and other national security laws.

Both the French and Tunisian legislatures seem to take the crime of inciting very seriously, even though they do not clarify its meaning. It is not clear whether illegal speech is limited to serious plans or includes sarcastic comments and jokes, or whether it depends on whether the other person accepts the proposal or rejects it. In fact, the wording of the mentioned articles suggests that committing a crime based on incitement is not required. Criminalization of peaceful activities under the crime of “incitement” is arbitrary.

⁷⁹⁵ Article 202 of the French Penal Code of 1810.

⁷⁹⁶ Arfawi, *Supra* 397, at 40.

⁷⁹⁷ Article 81 of the Tunisian Penal Code of 1913, quoted in *idem*, at 42.

⁷⁹⁸ *Idem*.

⁷⁹⁹ *Idem*.

Sabotage and rebellion/insurgency

Sabotage consists of attacks on internal state security directed against property. The Tunisian Penal Code describes this crime as, for example, “burning” or “destroying” state property, or “attacking” private property” or “as, for example, “burning,” “destroying,” or “attacking” property. Another crime is insurgency, which is disobeying orders, or attacking or threatening to attack law enforcement officers. This crime requires an interaction between “insurgents” and officers. Attacks on public property and attacks on public authority are listed in the Tunisian Penal Code under “attacks on public order.”⁸⁰⁰ As mentioned earlier, “Disturbances of Public Order”⁸⁰¹ is a notion established in the Napoleonic Penal Code of 1810. This suggests that Tunisia borrowed this notion—willingly or under French pressure—from the French model and implanted it into its own Penal Code.

Sabotage is the basis of other acts like subversion, coup, and terrorism. The Tunisian Penal Code considers destroying public property as sabotage that requires the death penalty. Article 76 states: “Shall be punished with death whoever burns or destroys by using explosive materials buildings or military ammunition stores or other state property.”⁸⁰² The root of the crime of sabotage is Article 95 of the French Penal Code (addressed in Chapter 5), which condemns setting fires and the use of explosions to destroy public property. The wording of the Tunisian crime of sabotage is simpler than in Egyptian and French law; however, it is equally broad and flexible. This flexibility reflects a colonial rationale that desires the ability to interpret and apply the law selectively against opponents.

⁸⁰⁰ See Tunisian Penal Code of 1913, Book the Second, Chapter 2, Sec 1 and 4.

⁸⁰¹ See French Penal Code of 1810, Book the Third, Title 1, Chapter 3, Section 3.

⁸⁰² Article 76 of the Tunisian Penal Code of 1913.

Another Tunisian article addresses sabotage against private property. It states: “if an armed or non-armed group attacked the residence of a person or his work place [...] with the intention of assaulting, each [member of the group] shall be punished with three years imprisonment.”⁸⁰³ The Tunisian Penal Code considers attacks on private property as attacks on public order. This is not the case in the Napoleonic Code, which considers such attacks as crimes against individuals.⁸⁰⁴ According to Article 436 of the French Penal Code of 1810, “The threat of burning a habitation, or any other property, shall be punished with the penalty provided against the threat of assassination[.]”⁸⁰⁵ The punishment ranges from the death penalty to no more than five years imprisonment.⁸⁰⁶ Another article about sabotage in the French Penal Code of 1810 states that:

Whoever shall wilfully set fire to any buildings, ships, boats, warehouses, dock or timber yards; woods, underwoods, or crops, either standing or cut down; and whether the wood be in heaps or cords, and the crops in heaps or stacks; or to combustible materials, so placed as to communicate the fire to such objects, or any of them; shall be punished with death.⁸⁰⁷

Even though sabotage in the above two cases is listed as a crime against individuals and not against the state, the punishment is severe in a way that makes the distinction between crimes against the state and crimes against individuals insignificant. Nonetheless, in some crimes against the state, the judge may apply other punitive measures, such as civic degradation and interdiction from some civil rights.⁸⁰⁸ These measures are also found in the Tunisian Penal Code, and they are particularly

⁸⁰³ Article 78 of the Tunisian Penal Code of 1913.

⁸⁰⁴ Article 436 of the French Penal Code of 1810.

⁸⁰⁵ Article 436, *idem*.

⁸⁰⁶ Article 436 refers to the punishments imposed in Articles 305, 306, and 307. *Idem*.

⁸⁰⁷ Article 434, *idem*.

⁸⁰⁸ Articles 8 and 9 of the French Penal Code of 1810.

applied in crimes against the state.⁸⁰⁹ One observation is that Tunisian law selectively adopts harsh crimes from the French model and regards them as crimes against state security, a tendency that suggests an authoritarian ambition justified under the pretext of Westernization of law.

Rebellion is another crime against public order. The Tunisian use of the word *`esyan*⁸¹⁰ can also be translated as “insurgency,” but this dissertation uses the term “rebellion” in accordance with the French translation of the Tunisian law, which uses *rébellion*. This crime is regulated in nine articles of the Tunisian Penal Code,⁸¹¹ giving it exaggerated emphasis. Unlike the Egyptian crime of rebellion, which focuses on the overthrow of the regime, the Tunisian law understands rebellion as the use of violence against public authority or security forces during their application of law and regulations. A rebel is defined in Article 116 as “whoever attacks with violence or threatens to do so an employee during his duty or person who is legally invoked to help the employee [...] or whoever attacks with violence or threatens to do so an employee to force him to do or not do something that is part of his job[.]”⁸¹² Another article states: “whoever took part in an insurgency, with or without the use of weapons, assaulted a public employee during his duty, they shall be punished for their participation[.]”⁸¹³ The law also criminalizes inciting insurgency by condemning “whoever called for it in public places or public meetings or in advertisements or publications[.]” even if acts of insurgency did not occur.⁸¹⁴

These articles have their origin in the Napoleonic model. The French Penal Code of 1810 in Article 209 considers “Every attack or resistance, by force or violence, against ministerial officers” as rebellion “according to the circumstances.”⁸¹⁵ Articles 210–221 show that rebellion

⁸⁰⁹ See Articles 5, 70, and 141 of the Tunisian Penal Code.

⁸¹⁰ *`Esyān* or عصيان means disobedience or insurgency.

⁸¹¹ Articles 116–124, *idem*.

⁸¹² Article 116, *idem*.

⁸¹³ Article 119, *idem*.

⁸¹⁴ Article 212, *idem*.

⁸¹⁵ Article 209 of the French Penal Code of 1810.

can be committed individually or by a group of people, armed or unarmed. In addition, inciting a rebellion is considered a full crime of rebellion.⁸¹⁶ The broadness and vagueness of this definition of rebellion is one of the noticeable features of the “flexibility” of the French Penal Code in regard to crimes against the state. This feature is also clear in the Tunisian Penal Code, which combines the inherited colonial rationale with local authoritarian ambition.

State of emergency and military courts

The history of post-colonial Tunisia shows no use of state of siege. However, the French enacted the state of siege in Tunisia for 16 years.⁸¹⁷ The state of siege allowed the suspension of Tunisian laws and the application of French law and military courts. The long period of state of siege left a strong colonial heritage regarding exceptionalism and militarism in Tunisia.

In the post-colonial era, Tunisia replaced the state of siege with the state of emergency. The state of emergency is regulated by Presidential Decree of 26 January 1978. Emergency cases include imminent danger that threatens public order or disasters.⁸¹⁸ The president can declare a state of emergency in all or part of the state for a maximum period of 30 days which may be extended by another decree. The state of emergency grants the authority to arrest and detain suspects, ban meetings, impose curfews, search places, and censor without prior permission from the judiciary.⁸¹⁹

A state of emergency was declared five times between 1957 and 1984.⁸²⁰ Both internal and external security were behind declaring the state of emergency. For instance, it was declared three

⁸¹⁶ Article 217, *idem*.

⁸¹⁷ Arfawi, *Supra* 397, at 103.

⁸¹⁸ Article 1 of Tunisian Presidential Decree of 26 January 1978.

⁸¹⁹ Article 4, *idem*.

⁸²⁰ These include Law no. 29 of 1957 issued on 9 September 1957 declaring a state of emergency in five Tunisian governorates; Law no. 57 of 1958 issued on 12 May 1958 extending the previous state of emergency; Law no. 59 of

times in 1957 due to French threats and attacks by the French air force against Tunisia.⁸²¹ Whereas threats to internal security were represented by general strikes.⁸²² In all of these cases, the state of emergency was declared for a limited time and was ended after the end of the emergency. Therefore, no observations of misusing state of emergency can be made. A second phase of the use of state of emergency started as a response to the uprising of 2011. At this time, the state of emergency was enforced for more than three continuous years, and declared occasionally in later years. As a result of the constant use of state of emergency, civilians were referred to military courts. However, despite this recent use of state of emergency, Tunisia relied on military courts well before 2011. This section chronologically examines the early use of military courts followed by the more recent use of state of emergency and its consequences.

Military courts are regulated by the Penal and Procedures Military Code no. 92 of 1957, adopted one year after independence. In 1979, Tunisia amended this law by expanding the military court's jurisdiction to include crimes of rebellion committed during peacetime. The jurisdiction of this court is derived from the colonial experience in following the French model, in which military courts targeted crimes against the state, particularly rebellion (discussed in the previous section). Article 123 of the Tunisian Penal and Procedures Military Code states that:

Shall be punished with the death penalty, any Tunisian who is enrolled in favor of a state that is at war with Tunisia, or joins rebels.

1958 issued on 25 May 1958 declaring a state of emergency in all Tunisia; order no. 49 of 1978 issued on 26 January 1978; order no. 1 of 1984 issued on 3 January 1984 declaring state of emergency in all Tunisia.

⁸²¹ Martin S Alexander & JFV Keiger, *France and the Algerian War, 1954–1962: Strategy, Operations and Diplomacy* (New York: Routledge, 2013) at xiii.

⁸²² Abadi, *Supra* 750, at 495.

And every Tunisian who puts himself during peacetime under the dominance of a foreign army or terrorist organization operating abroad, shall be punished with ten years of hard labor and banned from exercising civic rights and confiscation of all or part of his property [...].

And shall be punished with the same penalty whoever incites to commit these crimes.⁸²³

This Article represents the first codification of crimes of terrorism in Tunisia. It condemns mere membership in a “terrorist organization.” The timing of adopting the above article requires a deeper look. An important event in the year of 1979 is the Iranian Islamic Revolution. Jacob Abadi argues that this Revolution affected Tunisian Islamists in a way that concerned Bourguiba’s regime.⁸²⁴ Accordingly, the Islamic movements were suspended and not allowed to form political parties.⁸²⁵ The rise of Islamic movements represented a threat to Bourguiba’s regime and France, therefore it was considered justified to re-activate colonial methods of social control within the Tunisian Penal and Procedures Military Code.

The direct application of military courts in accordance with the above article of the Penal and Procedures Military Code has not been documented, probably because of the confidential and exceptional nature of such courts. However, HRW observes that since the mid-nineties, under the above article the authorities have accused hundreds of civilian Tunisians who live abroad and have come back home of “serving terrorist organizations operating abroad.”⁸²⁶ According to HRW, most were charged with not less than eight years imprisonment, even though the court, in most of the cases, did not accuse them of committing any violent acts.⁸²⁷

⁸²³ Article 123 as amended by Decree-Law of Penal and Procedures Military Code no. 12 of 1979, issued on 10 October 1979.

⁸²⁴ Abadi, *Supra* 750, at 496.

⁸²⁵ *Idem*, at 498-99, 509.

⁸²⁶ *Human Rights Watch World Report, 2003* (New York: Human Rights Watch, 2003) at 489-90.

⁸²⁷ *Idem*, at 489.

In 2011, Ben Ali's regime was overthrown, and a state of emergency was declared from 15 January 2011 until 6 March 2014. In 2015 and 2016, a number of terrorist attacks were committed, forcing the state to declare the state of emergency. During these periods of state of emergency, several exceptional measures were taken, including speech restrictions and trying civilians by military courts.⁸²⁸ Journalists criticizing state policy through writing or even caricature were accused of crimes against "public order."⁸²⁹ Comments by other civilians in social media were also considered crimes against the state.⁸³⁰ Civilians were constantly referred to military courts for their speech crimes. This approach has its root in colonial practice, as we showed in Chapter 6. The problem with this approach is that it does not aim to deter crimes as much as to impose control and discipline.

In 2015, Tunisia issued a new anti-terrorism law that defines terrorism overbroadly. The Tunisian authority has been misusing this law by accusing hundreds of Tunisians of terrorism for their political opinions and without committing or planning to commit any violent action.⁸³¹ The following section examines the Tunisian anti-terrorism law and policy in more detail.

The Tunisian anti-terrorism approach in a neo-colonial era: The peak of authoritarianism

Although the recent increase of terrorist violence in Tunisia is related to the post-revolution instability, Tunisia's counter-terrorism measures have a longer history. During the reign of President Bourguiba, Islamist identity was fought as part of ensuring a secular state. President Ben

⁸²⁸ "Tunisia: Events of 2015" *Human Rights Watch*, online: <www.hrw.org/world-report/2016/country-chapters/tunisia>; "Tunisia: Severe Restrictions on Liberty and Movement Latest Symptoms of Repressive Emergency Law" (17 March 2016) *Amnesty International*, online: <www.amnesty.org/en/press-releases/2016/03/tunisia-severe-restrictions-on-liberty-and-movement-latest-symptoms-of-repressive-emergency-law/>.

⁸²⁹ "Tunisia: Severe Restrictions on Liberty and Movement Latest Symptoms of Repressive Emergency Law", *Idem*.

⁸³⁰ *Idem*.

⁸³¹ *Idem*.

Ali also applied the same rationale. And since the “global war on terror” was primarily directed against Islamic groups, Ben Ali found it a useful tool against Tunisian Islamists in general who represented a considerable competitor in the parliamentary and presidential elections. Similarly to Egypt, Ben Ali’s tactics included banning religious parties from standing for election and jailing Islamic and other political opponents.

Ben Ali used the constitution as a tool to express his politicized desire to protect his position. For instance, with the increasing power of Islamists, a constitutional reform was adopted in 1997 that prohibited establishing political parties on the basis of religion.⁸³² This restriction no longer exists in the 2014 Tunisian constitution.

In the aftermath of 9/11, Tunisia responded to Security Council Resolution 1373 by adopting the 2003 Law in Support of International Efforts to Fight Terrorism and the Repression of Money Laundering. This law was established regardless of the fact that in Tunisia from 1991 until 2005 only one terrorist attack was carried out. That was on Djerba Island in April 2002, targeted the Ghriba synagogue, killing around 19 people, including tourists and citizens.⁸³³ Other incidents were announced by the Tunisian government in December 2006 and January 2007, in which security forces engaged in clashes with armed militants.⁸³⁴ However, since the revolution of 2011, terrorist attacks have become uncountable.

In the aftermath of the 2011 uprising in Tunisia, there were calls to amend the 2003 anti-terrorism law.⁸³⁵ As a response, in May 2013, Minister of Human Rights and Transitional Justice Samir Dilou announced that a draft law is being prepared. Chakib Darwish, a spokesperson for the

⁸³² The fifth paragraph of Article 8 of the Tunisian Constitution. Added by Constitutional Law no. 65 of 1997, 27 October 1997.

⁸³³ “Al-Qaeda Claims Tunisia Attack” (23 June 2002) *BBC*, online: <news.bbc.co.>.

⁸³⁴ William Mark Habeeb, *The Middle East in Turmoil: Conflict, Revolution, and Change* (ABC-CLIO, 2012) at 158.

⁸³⁵ “Tunisia: Amend Counterterrorism Law, Reforms Necessary to Protect Fundamental Rights” (29 May 2013) *Human Rights Watch*, online: <www.hrw.org/news/2013/05/29/tunisia-amend-counterterrorism-law>.

Ministry, promised that the draft law will contain “a precise and clear definition of terrorist crime, unlike the old law, where the definition of the crime of terrorism was loose and open to many interpretations[.]”⁸³⁶ Also, there was a promise that the new law would respect human rights.⁸³⁷

In March 2015, as response to terrorist attacks, Tunisia imposed arbitrary travel restrictions primarily on males under 35 years old. To ensure that the trip is not intended for jihad, the restrictions require written authorization from the traveler’s parents. These restrictions are based neither on law nor an order from a court.⁸³⁸ These restrictions violate constitutional and international human rights, but the war on terror seems to justify all means in Tunisia.

Such restrictions, however, rely on implicit adherence to Security Council Resolution 2178, which encourages states to impose restrictions on traveling. The neo-colonial powers, represented by the permanent members of the Security Council, are directing not only the war on terror, but also the course of democracy worldwide, and particularly in third world countries. The rationale of the Tunisian anti-terrorism measures suggests selectivity: while influenced by the imperfect obligations of Security Council resolutions, it also embodies a colonial logic, all of which serves authoritarian ambition rather than human security.

In August 2015, Tunisia adopted a new anti-terrorism law, which reflects the same combination of colonial legacy and neo-colonial policy. The new law so far did not deter the frequent terrorist crimes carried out throughout the year of 2016. In addition, it did not provide human rights guarantees as promised. This retreat in criminal justice is examined in the following section.

⁸³⁶ “Tunisia Gearing Up To Implement New Anti-Terrorism Bill” (6 January 2016) *AFK Insider*, online: <afkinsider.com/36751/tunisia-anti-terrorism-bill/#sthash.L1QhxLbl.dpuf>.

⁸³⁷ *Idem*.

⁸³⁸ “Tunisia: Arbitrary Travel Restrictions: Apparent Effort to Prevent Recruiting by Extremists” (10 July 2015) *Human Rights Watch*, online: <www.hrw.org/news/2015/07/10/tunisia-arbitrary-travel-restrictions>.

Evaluating the Tunisian anti-terrorism legislation

Even though Tunisia had no history of jihadism, the secular governments of Bourguiba and Ben Ali adopted tough national security laws that particularly suppressed Islamists. During Ben Ali's presidency, two legal steps to counter terrorism were taken: adopting a definition of terrorism in 1993 within the Penal Code, and adopting a separate anti-terrorism law in 2003. After the overthrow of Ben Ali's regime in 2011, the new government sought a new anti-terrorism law to counter the unprecedented wave of terrorism in Tunisia. A new law was adopted in 2015. This section is divided to two parts: anti-terrorism laws prior to 2015, and the anti-terrorism law of 2015.

Counter-terrorism prior to 2015

Tunisia first added a definition of "terrorism" to the Penal Code in 1993. Accordingly, terrorist acts included "all actions relating to individual or collective initiatives, aiming at undermining individuals or properties, through intimidation or terror" and "acts of incitement to hatred or to religious or other fanaticism, regardless of the means used."⁸³⁹ This article does not clarify the meaning of "terror." In addition, by condemning inciting hatred, this definition of terrorist acts overlaps with hate crime. The focus on incitement of terror or hatred suggests that Tunisia was ahead of the international regulations in targeting speech associated with terrorism. It should be noted that the criminalization of inciting hatred is drawn from the French Press Law, which condemns inciting hatred or violence based on religious or other grounds.⁸⁴⁰

In 2002, Tunisia had its first significant terrorist act on Djerba Island (mentioned above). This resulted in Tunisia rushing into responding to UN Security Council Resolution 1373 (2001)

⁸³⁹ Article 52*bis*, amended by Law 93-112 of 22 November 1993, and abolished in 2003.

⁸⁴⁰ Article 24 of the French Press Law of 1881.

by adopting a separate anti-terrorism law in 2003. This made Tunisia the first Arab country to respond to the above resolution. In December 2003, Tunisia passed Law Concerning Support for International Efforts to Combat Terrorism and Prevent Money-laundering.⁸⁴¹ Article 4 defines terrorism as:

Shall be categorized as terrorist, every offence, regardless of its motives, related to an individual or collective undertaking liable to intimidate a person or group of persons or spread alarm among the population with the intention of influencing the policy of the state and prompting it to do or abstain from doing any action, disturbing public order or international peace and security, causing harm to persons or property, damaging the headquarters of diplomatic and consular missions and international organizations, inflicting serious harm on the environment so as to endanger the life or health of inhabitants, or damaging vital resources, the infrastructure, transport, communications, information system or public amenities.⁸⁴²

This broad definition is similar to the Egyptian definition in including vague terms such as “disturbing public order” and “causing harm to persons or property.” It includes the crime of sabotage by condemning causing damage to properties, as well as rebellion/insurgency by forcing authorities to act or prevent them from acting in a certain way. It also criminalizes mere membership without requiring specific acts of violence to be committed.

Despite the fact that no major terrorist attacks were carried out in Tunisia for several years, a report by HRW shows that under Ben Ali’s regime, over 3,000 people were prosecuted under

⁸⁴¹ Tunisian Act no. 75 of 2003 (10 December 2003).

⁸⁴² Translation quoted in Welshman, *Supra* 31, at 648.

this law.⁸⁴³ This huge number of prosecutions in a relatively safe country suggests that anti-terrorism law serves the authoritarian government rather than the safety of the nation.

In 2015, Tunisia adopted a new anti-terrorism law. The 2015 anti-terrorism law abolished the earlier law of 2003. Therefore, we will limit the discussion of the 2003 law to the above paragraphs and will address the 2015 law in detail in the following section.

Law no. 26 of 2015 regarding Anti-terrorism and Money-laundering

After a series of terrorist attacks in 2015, on August 7 Tunisia adopted a new anti-terrorism law. This law defines “terrorism” and “terrorist offences” overbroadly. It focuses on terrorism financing and speech crimes in a way that combines post-9/11 neo-colonial logic and authoritarian ambition. It also creates special procedural regulations similar to the exceptional regulations inherited from colonialism. We discuss these themes consecutively, starting with the definition of terrorism, followed by speech related to terrorism, terrorism financing, and finally the procedural regulations.

The definition of “terrorism”

The anti-terrorism law of 2015 is similar to the previous law of 2003 in adopting broad definitions and vague terms. Terrorism is defined in Article 13 as:

[Acts] deliberately implemented by any means an individual or collective project to commit any act listed in articles 14 to 36 aimed by its nature or context to spread terror among the population or to unduly compel a State or an international organization to do what it is not obliged to do or refrain from doing what it is obliged to do.

⁸⁴³ “Tunisia: Amend Counterterrorism Law, Reforms Necessary to Protect Fundamental Rights”, *Supra* 830.

The Tunisian definition, unlike the Egyptian, requires spreading fear or terror as an essential element of terrorism. Spreading fear is a controversial element. Some consider it, from a linguistic point of view, as part of the term “terrorism” that reflects the feeling of terror (Saul 2008, 62), while others reject adding this element to terrorist offences and suggest confining the definition to attacking civilians (Coady 2004, 39). Even if the effect of an explosion is limited to one place, its psychological and social effects (fear) are globally generated among people. What makes the element of fear controversial as part of a definition of terrorism is that the feeling of terror or fear is a psychological element that cannot be confined to terrorist crimes. School shootings, among other crimes, accidents, and tragedies, also terrify the whole society. However, we should also consider the role of the media in focusing on tragedies and in anticipating investigations by using big labels like “terrorists” and “enemies.” This not only provokes people’s emotions, but also manipulates them to believe whatever is being transplanted into their minds without being able to engage in a social dialogue. This is particularly true considering the fact that civil society organizations often either get into trouble or are seen as troublemakers. This irrational social chain of actions (e.g., violence) and immediate reactions (e.g., media’s judgments) maximize the spread of fear.

“Terrorism offences” are listed in Article 14 of the 2015 Law as:

Killing a person;

Injuring, assaulting, or other forms of violence contemplated by Articles 218 and 319 of the Penal Code;

Causing other forms of injury, assault or violence;

Damaging the buildings of diplomatic or consular missions, or international organizations;

Causing harm to food security and to the environment in a way that unbalances ecosystems, or natural resources or puts the life or health of its inhabitants in danger;

Intentionally opening flood discharge from dams or pouring chemicals or biological materials into those dams or into water facilities to cause harm to inhabitants;
Causing harm to public or private property, vital resources or infrastructure or means of transport or communication means or computer systems or public services[.]

This broad definition does not require the use of violence, and does not elucidate the level of damage that is considered terrorism. Damaging property, which is a form of the crime of sabotage, is becoming a common clause in many Arab definitions of terrorism. The origin of these crimes is the Napoleonic Penal Code of 1810, which treats most of the crimes of “destruction, spoil, and damage” under the title of crimes against individuals.⁸⁴⁴ As we mentioned earlier, the Tunisian legislature has long treated these crimes as crimes against the state and public order.

Another article of the 2015 anti-terrorism law suggests that the definition of terrorism is not limited to violent crimes like murder and sabotage, but also includes membership in terrorist entities and receiving “training” domestically or abroad for the purpose of committing terrorist crimes. Article 32 states that:

It is considered a terrorist act and shall be punished with imprisonment of six years up to twelve years and a fine of twenty thousand up to fifty thousand dinars, whomever intentionally joined [...] inside or outside the Republic, a terrorist organization or agreement associated with terrorist crimes, or received training [...] with the intention to commit any of the crimes listed in this law.⁸⁴⁵

⁸⁴⁴ Articles 434-42 of the French Penal Code of 1810.

⁸⁴⁵ Article 32 of the 2015 Tunisian Anti-terrorism Law.

The article condemns mere membership in a terrorist organization without requiring committing violent acts. It is also not clear what kind of training is prohibited. This article leaves the door open for political interpretation of who can be a terrorist or belongs to a “terrorist organization” or is involved in a terrorist agreement.

Speech related to terrorism

As part of the definition of “terrorist offences,” Article 14 of the 2015 law condemns “*Takfir* or [advocating for excommunication], or incitement of or calling for hatred or loathing among races, religions and faiths.”⁸⁴⁶ The meanings of the terms *takfir* and “incitement both leave the door open for broad and arbitrary interpretations. Even though the criminalization of incitement seems to follow the post-9/11 regulations, its origin goes back to colonialism, as mentioned earlier in our discussion of the definition of terrorism that was added in 1993 to the Tunisian Penal Code.⁸⁴⁷

The origin of criminalizing *takfir* is most likely Sharia law, which condemn excommunication among Muslims. Nevertheless, religious based speech restrictions are found in the Napoleonic Penal Code. For instance, article 201 of this Code states, “Ministers of religion, who shall pronounce, in the exercise of their ministry, and in a public assembly, any discourse, containing any criticism upon, or censure of, government, or of any law, imperial decree, or other act of the public authority, shall be punished with an imprisonment of from three months to two years.” Article 202 of the Napoleonic Penal Code follows that

If the discourse contains any direct incitement to disobedience of the laws, or any other acts of the public authority, or if it tends to stir up or arm a part of the citizens against the others; the minister

⁸⁴⁶ Paragraph 8 of Article 14, *idem*.

⁸⁴⁷ Article 52*bis* of the Tunisian Penal Code

of religion who shall have pronounced it, shall be punished with an imprisonment of from two to five years, if the provocation has not been followed by any effect; and with banishment, if it has caused any disobedience, other than such as shall have ended in sedition or revolt.”

The tension between the state and religion has its long history, which goes beyond the scope of this dissertation. However, long-term solutions require more than legal restrictions. The criminal law should not be the only tool for ensuring security. Socio-political solutions must be provided to deal with hatred speech and incitement, which can be symptoms of an imbalanced social system.

Another Tunisia article that criminalizes incitement states that “It is considered a terrorist crime and shall be punished with half the original penalties, whoever incites by any means to commit [terrorist crimes.]”⁸⁴⁸ This article does not require that the terrorist act is committed, but “the possibility of committing it”⁸⁴⁹ is considered a sufficient base for condemnation. According to a paper by the ICJ, this article fails to explain the boundaries of incitement and its subjective intent.⁸⁵⁰ Applying this article becomes more problematic when looking at the broad definition of terrorism in this law, which has the capacity to include any violent and non-violent acts.

Article 31 of the 2015 anti-terrorism law criminalizes speech that apologizes for terrorism. According to this article, speech is considered a terrorist act when a person “inside or outside the Republic, by any means, praises and glorifies, in a public, clear and manifest manner, a terrorist offence or its perpetrator or an organization or a conspiracy related to terrorist offences or its

⁸⁴⁸ Article 5 of the 2015 Tunisian Anti-terrorism law.

⁸⁴⁹ *Idem*.

⁸⁵⁰ “International Commission of Jurists, Position Paper: Tunisia’s Law on Counter-Terrorism in Light of International Law and Standards” (6 August 2015) *International Commission of Jurists*, online: <icj.wppengine.netdna-cdn.com/wp-content/uploads/2015/08/Tunisia-CT-position-paper-Advocacy-PP-2015-ENG-REV.pdf> at 6.

members or its activities.”⁸⁵¹ This article is drafted overbroadly in a way that reflects the spirit of the French Press Law of 1881 and censorship during colonialism (discussed earlier in this chapter).

Contrary to the above approach, the UN Special Rapporteurs on Counter-terrorism and on Freedom of Expression suggest that because of the consequences of the criminalization of these offences, criminalizing “glorification” offences should be avoided. Such offences “must be proscribed by law in precise language, including by avoiding reference to vague terms such as ‘glorifying’ or ‘promoting’ terrorism[.]”⁸⁵²

Terrorism financing

The 2015 anti-terrorism law combines counter-terrorism and anti-money laundering. In this respect, it follows the previous law of 2003. The 2003 law took that form partially to satisfy the FATF’s requirements. In other words, it was a formality rather than an effective act of crime control. The new law also emphasizes financing regulations, but it should be noted that combining terrorism financing and money laundering in one law and sometimes within the same articles has caused an overlap between the two.

In 2003, Tunisia reported its financing regulations to the CTC. According to the Tunisian report, the 2003 anti-terrorism law allows freezing of funds “even if no suspicious or unusual operation or transaction is reported, if authorized by the president of the Tunis Court of First Instance on the basis of a request from the Attorney-General to the Tunis Court of Appeal.”⁸⁵³ This

⁸⁵¹ Article 31 of the Tunisian Anti-terrorism Law of 2015.

⁸⁵² Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, *Supra* 333, para 31.

⁸⁵³ “Note verbale dated 15 September 2003 from the Permanent Mission of Tunisia to the United Nations addressed to the Chairman of the Security Council Committee established pursuant to Resolution 1373 (2001) concerning counter-terrorism” (27 October 2003) S/2003/1038 [Tunisia Report to the CTC, 2003]. In this report, Tunisia refers to the regulations of Article 94 of the 2003 Tunisian anti-terrorism law.

regulation is transferred to the 2015 anti-terrorism law.⁸⁵⁴ Freezing funds without committing or planning an actual crime is an arbitrary measure that belongs to the logic of enemy criminal law. The CTC showed no criticism of such measures. This passive attitude is an implicit neo-colonial license to continue using unfair measures without fear of being criticized.

The law prohibits funding terrorist entities or terrorist activities.⁸⁵⁵ It also prohibits accepting funds from unknown sources or from entities involved in terrorism.⁸⁵⁶ While these regulations are reasonable, without a clear definition of terrorism any opposition group can be listed as a potential terrorist entity. In 2013, Tunisia declared the radical Ansar al-Sharia a terrorist group.⁸⁵⁷ The news spread about this decision, but without clarifying the actual body or person who made this decision.

The 2015 anti-terrorism law established an executive body that has the authority to freeze funds, without a clear reference to procedures for listing and delisting. This body is called the National Commission to Combat Terrorism, which includes representatives of the Prime Minister, Ministry of Justice, Ministry of Interior Affairs, Ministry of Foreign Affairs, and many others. This commission has many nominal tasks, such as “preparing a national study on identifying the phenomena of terrorism and terrorism financing” and “cooperating with international organizations and civil society” to counter terrorism.⁸⁵⁸ The importance of this commission is in its authority to freeze the funds of suspected terrorists and terrorist entities.⁸⁵⁹ According to Article 103 of Tunisian Anti-terrorism Law of 2015, “The National Commission to Combat Terrorism shall within its framework to fulfill Tunisia’s international obligations decide to freeze the funds

⁸⁵⁴ Article 133 of Tunisian Anti-terrorism Law of 2015.

⁸⁵⁵ Article 98, *idem*.

⁸⁵⁶ Article 99, *idem*.

⁸⁵⁷ “Tunisia Declares Ansar al-Sharia a Terrorist Group” (27 August 2013) *BBC*, online: <www.bbc.com>.

⁸⁵⁸ Article 68 of the Tunisian Anti-terrorism Law of 2015.

⁸⁵⁹ Article 103, *idem*.

of persons or organizations that appear to it or to the specialised international bodies to be in association with terrorist offenses.”⁸⁶⁰ The article does not show the basis for and evidence relied upon in the Commission’s decisions.

Centralizing powers within the executive is a theme inherited from French colonialism and combined with authoritarian ambition. Since 9/11, centralization is being re-imposed by supra-national practices required by the UN Security Council and its right to list and de-list. Such a system undermines the role of ordinary judicial review.

Procedural regulations

The 2015 anti-terrorism law establishes within the ordinary Tunisian judicial system a specialized court for terrorist cases.⁸⁶¹ Such courts are an extension of the colonial legacy, which dealt with crimes against the state within an exceptional framework. So far, the court has issued several tough verdicts, including the death penalty.⁸⁶² It is too soon to evaluate the court’s conduct, but it is worrisome to see that the death penalty is still applied in a country that has overall a moderate policy and has been taking some serious steps towards democracy. Tunisia largely follows the French legal system. While France abolished the death penalty in 1981, Tunisia still clings to the Napoleonic model and its vengeful nature.

In Article 39 the Anti-terrorism Law allows judicial police officers to keep suspects in custody for five days. Article 41 allows the Public Prosecutor to extend the detention for a maximum of 15 days.⁸⁶³ These periods of detention may be renewed twice. On the other hand, the

⁸⁶⁰ Article 103, *idem*.

⁸⁶¹ Article 40, *idem*.

⁸⁶² “Mahkama Tunisia tusder ahkam bil e`dam dud annassir irhabia” [“Tunisian Court Sent Terrorist Members to Death”] (3 March 2016) *ASharaq Al-Awsat*, online: <aawsat.com/home/article>.

⁸⁶³ Article 41 of the Tunisian Anti-terrorism Law of 2015.

Tunisian Criminal Procedure Code as amended in 2016 limits the period of custody to a maximum of 48 hours based on permission from the Public Prosecutor, which may be renewed once.⁸⁶⁴ Despite the guarantees of the Criminal Procedure Code, the latest amendment of this Code in 2016 created an exception for terrorist cases. Article 57 of the Criminal Procedure Code states that “for the needs of investigating terrorist cases, the investigative judge may not allow the lawyer to visit the suspect, attend the hearing, or view the documents for a maximum period of 48 hours, unless the Public Prosecutor has previously taken a decision on this ban.”⁸⁶⁵ This duality in applying law, in which suspects of ordinary crimes are granted procedural rights whereas suspects of terrorism are treated as enemies, belongs to the colonial exceptionalism that was justified during wartime or state of siege. As we showed earlier in this chapter when discussing the state of exception, French colonialism suspended law and applied a set of exceptional orders that ensured the suppression of opponents.⁸⁶⁶

Another article shields members of security forces from criminal accountability when using force while performing their duty in countering terrorism. This is similar to the Egyptian anti-terrorism law of 2015 that we discussed in Chapter 5. The Tunisian law was issued nine days before the Egyptian law, which suggests no direct influence between the two. Article 72 of the Tunisian Anti-terrorism Law of 2015 stipulates that:

In addition to self-defence cases, internal security forces, military personnel and customs officers are not criminally liable when they use force or give orders to use force if that was necessary to

⁸⁶⁴ Article 13*bis* of the Tunisian Criminal Procedure Code as amended in 2016 (Law no. 5 of 2016).

⁸⁶⁵ Article 57, *idem*.

⁸⁶⁶ Arfawi, *Supra* 397, at 103-5.

perform tasks within the limits of the law, or internal regulations and instructions given on a legal basis in the framework of fighting terrorist crimes provided by this law.⁸⁶⁷

The article does not impose any explicit restrictions or any specific requirements regarding proportionality.⁸⁶⁸ By placing the authority and its security forces above other values, this article reflects the spirit of colonialism and authoritarianism in countering rebellion and insurgency. The above article leaves the door open to the use of coercion and shoot to kill tactics—a possibility that is not far from the actual Tunisian experience.

Conclusion of chapter: Colonial heritage and neo-colonial approval of authoritarianism

Well before 9/11 and the Tunisian Revolution of 2011, Tunisia had tough national security laws and policies. The French colonial legacy played a significant role in this regard. The direct implanting of tough colonial laws and exceptional measures created a *de facto* state of subordination in which Tunisia is unable or unwilling to detach from its colonial heritage. Unlike colonized Egypt, which had an independent parliament and an active constitution (at least partially), colonized Tunisia had neither. This paved the way for more centralization for both the bey and the colonial power. While the bey continued to enjoy absolute authority, whether actual or nominal, the French Resident General and the French army enjoyed superior centralization. After colonialism, the Tunisian regime re-imposed the system of centralization, ensuring the president absolute powers similar to those of the bey, and exceptional powers similar to those of

⁸⁶⁷ Translation quoted in “International Commission of Jurists, Position Paper: Tunisia’s Law on Counter-Terrorism in Light of International Law and Standards”, *Supra* 845.

⁸⁶⁸ *Idem*.

the French Resident General and the French army. This duality is a common outcome in post-colonial political life.

While colonialism established the legal foundation of national security laws and measures, post-colonial Tunisia used these measures to protect the authoritarian regime and to satisfy France. Differentiating Tunisia from Algeria, which long contained militant Islamist groups, is a French priority. Therefore, Tunisian Islamists were targeted regardless of their moderate approach. Exceptionalism continued through the use of military courts during peacetime and for domestic crimes. France turned a blind eye to Tunisia's weak human rights record and violations against Islamists. This can be taken as an implicit indication of Western approval of Tunisia's authoritarianism.

Since 9/11, Tunisia has responded to neo-colonial pressure by adopting a counter terrorism financing framework based on UN Security Council resolutions and FATF regulations. This neo-colonial pressure aims to stop domestic terrorism in Tunisia, in part to protect European tourists, and in part to cooperate in the fight against ISIS. The neo-colonial agenda of counter- terrorism requires imposing exceptionalism, which repeals elements of democracy—the promised outcome of the so-called Arab Spring. This agenda serves the entrenched authoritarian ambition of the Tunisian governments.

CONCLUSION AND ANALYSIS

This dissertation has argued that multiple factors play a role in shaping counter-terrorism law and policy. These factors can be characterized as colonialism, neo-colonialism, and authoritarian ambition. Identifying the origins of anti-terrorism legislation is one element in understanding the contemporary counter-terrorism framework. Another element of which is important to understand is the lack of a definition of terrorism at the international level, which has allowed broad definitions of terrorism to be adopted at the national level. The influence of neo-colonialism plays a significant role in leaving this problem without a solution.

This conclusion examines four problems or challenges to counter-terrorism. First, the lack of a definition of terrorism and its impact on politicizing the war on terror. Second, contemporary counter-terrorism often includes non-violent acts in terrorism-related crimes, including terrorism financing, speech related to terrorism, and membership in terrorist organizations. Applying these crimes has problematic consequences, including travel bans and freezing funds. Third, I argue that these forms have their colonial roots, and that by applying them in the contemporary war on terror, we are faced with some disproportionate response. This disproportionateness is addressed under three concepts: colonial implanting and imperial migration of law, neo-colonial migration of law, and post-colonial authoritarian migration of law. I argue that this migration, while it aims to unify contemporary anti-terrorism laws and efforts, may be an additional challenge in enhancing national and international security. Fourth, the conclusion then looks into the rationale for current approaches to counter-terrorism globally but in Egypt and Tunisia in particular, which are discussed under three categories: clinging to, respectively, the colonial rationale, neo-colonialism, and authoritarianism. I suggest that the current approaches—while differing in degree—share an

authoritarian ambition. This is addressed as a fourth challenge. I argue that under authoritarian ambition, states became more obsessed with identifying terrorists than identifying wrongdoings. This justified adopting flexible laws and measures that allow the capture of suspects rather than wrongdoers.

Problems with national and global anti-terrorism legislation

The main problem with national and international anti-terrorism legislation is the lack of a clear objective definition of terrorism. Most, if not all, national laws are broad and vague. Determining what terrorism is remains the crucial underpinning of any successful discussion of counter-terrorism, and of the future success of counter-terrorist measures. A number of problems arise from building counter-terrorism measures on the foundation of a vague definition of terrorism.

This problem is becoming more complex because of the post-9/11 global demands imposed by the UN Security Council and FATF. These neo-colonial powers have been encouraging states to adopt anti-terrorism laws, yet without emphasizing the importance of defining terrorism. This global neglect of the importance of the definition has allowed states to adopt broad definitions of terrorism that do not serve the common goal of national and international security.

The definition of “terrorism”

Defining the crime of terrorism is important because it sends a clear message to the society of what is legally wrongful. By outlawing particular acts and determining their illegal elements, criminal law sends a clear message to society to avoid these specific wrongdoings. Fair warning is essential in a criminal legal system so that the audience is able to understand the message behind the

criminalization of such acts and recognize its elements clearly.⁸⁶⁹ From this perspective, precise labelling is vital: a wrongdoer should be convicted for the specific act committed, so justice is not only being done but also seen by the public being done.⁸⁷⁰ This process would ensure that the values protected by criminalizing terrorism were clear to all members of society, so individuals could unambiguously recognize what type of wrongdoing was to be avoided.

Current national definitions are not only broad and vague; they also vary from one jurisdiction to another. Efforts to define terrorism within the UN General Assembly took decades without reaching an international agreement. UN Security Council Resolution 1373 (2001), adopted in the aftermath of 9/11, called on states to condemn terrorism and terrorism financing, but without providing a definition of terrorism. Some Western and Commonwealth countries rushed into adopting the British model, including Australia, Canada, and South Africa. While other countries that already had broad criminal laws, like Egypt and Arab states in general, only rushed into adopting counter-terrorism financing laws. This has resulted in the adoption of broad national definitions of terrorism, which lack precision and objectivity.

The complexities involved in defining terrorism have caused scholars to question the possibility of defining these activities objectively. In fact, achieving a united definition of terrorism might be impossible. I should point out that when criticizing national and global counter-terrorism frameworks, I do not aim to let criminals be free; they must be brought to justice. However, a first step in this regard must be to identify crimes and their elements in order to correctly charge wrongdoers in accordance to their actual wrongdoing. A murderer and a protester should not be equally labelled “terrorists.” International guidance on defining terrorism is essential in

⁸⁶⁹ Andrew Simester & Andreas Von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Oxford: Hart, 2011) at 198-99.

⁸⁷⁰ *Idem*, at 202.

encouraging states to define this notion within a framework that ensures respect for human rights and minimum guarantees according to the principles of criminal law.

This attempt requires the de-politicization of the definition of terrorism. An observation regarding current definitions of terrorism is that they have been designed to target those who are against the ruling authority, wrongdoers and peaceful opponents alike. This can be found for example, in Article 29 of the Egyptian Anti-terrorism Law of 2015, which criminalizes use of the internet that “incite[s] thoughts or ideas that call to commit terrorist acts” or “to mislead security forces” or “to affect the course of justice.”⁸⁷¹ This article includes vague concepts, which allows the authority to condemn anyone who uses their freedom of expression in a way that does not resonate with the state’s view.

The application of the definition of terrorism in national laws allows targeting groups based on their identities and their political or religious activities rather than on wrongdoing and criminal conduct. For instance, the experience in Egypt and Tunisia shows that the government captured and detained Islamists based on their association, regardless of whether or not they had committed terrorist acts. For instance, Egypt has long targeted those who associate with the Muslim Brotherhood, whether or not they are involved in criminal activities. This suggests that people are often biased against minorities or those who do not conform to mainstream social or political ideology. This political bias has made the overbroad politicized definition of terrorism acceptable since it is directed against “them,” not “us.” The “other,” who shares the same human nature and values as “us,” but differs in his or her political beliefs, is the suspected terrorist. Being charged with a crime of terrorism has dangerous consequences, which include travel bans and freezing of funds, and these risks mean it is important to have a precise definition that distinguishes between

⁸⁷¹ Article 29 of the Egyptian Anti-terrorism Law of 2015.

an ordinary criminal and a terrorist. The line between lawful and wrongful acts is blurred in current definitions of terrorism, and this requires a re-evaluation of the current national definitions of terrorism.

Terrorism-related crimes

Terrorism-related crimes include mere membership in terrorist organizations, speech related to terrorism, and terrorism financing. These are all non-violent activities, and criminalizing them without a clear definition of terrorism risks wrongfully or unfairly condemning innocent people who have associated with “terrorists” but are not involved in terrorist activities.

It has been argued that the utility of criminalizing these acts is in pre-empting crimes before they occur. According to Hocking, McCulloch and Pickering, by suppressing these acts, the aim is to pre-empt terrorism in its violent forms.⁸⁷² I agree that the concept of pre-emption suggests that the legislature’s strategy is to target potential threats in their peaceful forms. Therefore, “potential” wrongdoers, rather than wrongdoers, become the targets of anti-terrorism law. The pre-emptive approach is problematic because it is threat-based rather than crime-based, which therefore risks the course of justice. I discuss these issues in the next subsections.

Membership in terrorist organizations

Condemning membership in terrorist groups is one such activity that has been criminalized although it does not require committing violent acts. Criminalizing mere membership has become a tool that allows the labeling of enemies as “terrorists” and “terrorist entities.” This is a multi-dimensional problem because even if the group in question is involved in terrorist activities,

⁸⁷² Hocking, *Supra* 36, at 25-26; McCulloch & Pickering, *Supra* 38, at 17.

members may not be aware of this. The UN Security Council and some countries including the United States have blacklisted many organizations, some of which run schools and hospitals. Condemning mere membership in these organizations has dangerous consequences, especially considering the biased standards of the definition of terrorism and the standards for blacklisting. Criminalizing mere membership allows states to consider doctors, teachers, and others providing social services in charities to be considered terrorists.

It should be noted that the theme of criminalizing mere membership can be linked to the colonial experience of targeting individuals based on their associations. Associations that have been criminalized in the past include those that are ideological are either ideological, such as communism in colonized Greece and Iraq, or religious, such as Catholicism in Northern Ireland. The colonial methods of control included legal reforms, such as the Restoration of Order in Ireland Act of 1920 that targeted Irish rebels. Another example would be the establishment of special courts in 1941 to try communists in France and colonized Tunisia (addressed in Chapter 6).

Speech related to terrorism

Speech that encourages, glorifies or apologizes for terrorism have been criminalized as a form of terrorism. The problem with criminalizing “incitement” and “*apologie* for” terrorism is in the blurred lines between these crimes and other speech crimes, such as hatred. For instance, although the experience in Northern Ireland shows an excessive use of violent attacks against the British security forces, it also included a prevalence of hate speech against the British policy. Such hate speech has not necessarily encouraged terrorist attacks. In the contemporary war on terror, France has closed down several mosques without clear charges.⁸⁷³

⁸⁷³ Amnesty International, *Supra* 221.

The Arab world and the West are similar in their use of speech regulation as a form of counter-terrorism. The difference between the two is in degree; the Arab world uses excessive censorship and provides limited criminal procedural safeguards. In many Arab states, demands for political and socio-economic reforms are considered terrorism-related acts. With the “Arab Spring” and the following unrest, terms like “terrorists,” “opponents,” and “revolutionaries” complicate further the broad and nebulous understanding of what legally comprises “terrorism.”

Terrorism financing

Terrorism financing is a theme that dramatically evolved post-9/11. The post-9/11 emphasis on terrorism financing could be based on the assumption that Al-Qaeda was funded by the wealthy bin Laden. However, the 9/11 Commission report shows that Al-Qaeda’s primary source of funds was donations.⁸⁷⁴ Roach points out the difficulty of monitoring donations, which are usually given in small amounts that can come from legitimate sources, unlike money laundering operations that involve large amounts of funds and which are run by organized criminals.⁸⁷⁵

The collective adoption of laws regarding money laundering in the aftermath of 9/11, was more than mere adherence to UN Security Council Resolution 1373, which required combating the financing of terrorism. In my opinion, adopting counter terrorism financing regulations are fear-based action by states to satisfy the FATF and avoid being placed on its blacklist. Blacklisting became a neo-colonial method of control and maintaining unequal positions of power.

Regardless of the fact that reports have shown the limited efficiency of counter terrorism financing measures, neither the FATF nor the Security Council is backing away from the measures

⁸⁷⁴ The 9/11 Commission Report, *Supra* 47, at 172.

⁸⁷⁵ Roach, *Supra* 7, at 35.

they require.⁸⁷⁶ Questioning the actual utility of these measures is beyond the scope of this dissertation. A pretext can be made that states and supra-national bodies cannot identify suspected transactions related to terrorism without open access to bank accounts and financial transactions. However, I have argued that this open access is a way to increase neo-colonial control through “knowledge.” I share Said’s understanding of “knowledge,” which means selective assumptions built about “others” in “understanding” them and placing them into categories.⁸⁷⁷

Current definitions of terrorism create terrorists whether or not they have committed acts of terrorism, since terrorism has not been legally identified. The dissertation have concluded that the state prefers to know the enemy rather than the wrongdoer in order to maintain order and avoid the unknown. Identifying the unknown source of a threat is an added challenge. In order to gain people’s trust, the state must arm itself with “knowledge.”

Where do these problematic aspects of anti-terrorism law come from?

States have long been defining terrorism in accordance with their experiences or by borrowing elements of the definition from other countries and complying with global obligations. This section questions the ramifications of the migration of law at the national and global levels. Do the origins of counter-terrorism measures result in the advancement of the global counter-terrorism framework, or do these origins compromise the rule of law and aspects of national anti-terrorism law? For instance, the UN Security Council has an executive authority to blacklist individuals and entities. The listing mechanism requires states to cooperate in freezing the funds and restricting the movements of the blacklisted “terrorists.” However, such global executive authority could

⁸⁷⁶ “Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing of Terrorism, Egypt,” *Supra* 358.

⁸⁷⁷ Said, *Supra* 79, at xix.

violate human rights and interfere with the principle of sovereignty. The same problem can be applied at a national level, in which one country blacklists a particular group, but other countries do not recognize the decision. Scholars have pointed to this challenge as “the interplay between international and domestic regimes.”⁸⁷⁸ This dissertation has addressed this challenge within two dimensions: hierarchal, which includes national and international interplay, and historical, which links the past to the present: the colonial to the neo-colonial, and the (neo-)colonial to the Arab authoritarian.

Colonial implanting and imperial migration of law

Colonial implanting refers to the measures that the colonial power transferred to its colonies. These include legacies of exceptional measures, including martial law or state of siege, state of emergency, and special courts. On the other hand, imperial migration refers to the European influence during the nineteenth and early twentieth centuries, which spread into non-colonies. This applies particularly in Egypt, which willingly borrowed the French legal system while it was under British colonialism.

Arab states, whether willingly or forcibly, built their criminal laws based on the French model, and often express pride in having adopted this model. To them, the French system is the ultimate model of liberty and modernity. However, they neglect the fact that while the French model has developed over the decades, they still cling into the Napoleonic model. The reputation of the French Penal Code of 1810 differs from the French Civil Code of 1804. The latter is often appreciated for its fairness, whereas the former is noted to be outdated.⁸⁷⁹ Part of this reputation is derived from the Penal Code’s severity. For instance, the early version of the Napoleonic Penal

⁸⁷⁸ Ramraj, Hor & Roach, *Supra* 237, at 3-4.

⁸⁷⁹ See Mueller & Moreau’s argument in their translation of *The French Penal Code*, *Supra* 779, at 9.

Code treated any attack against the person of the emperor as high treason.⁸⁸⁰ Yet in 1853 the French code abolished this article, and no special protection is provided to the person of the emperor or the president. On the other hand, the Egyptian and Tunisian penal codes are still based on the early version of the Napoleonic Penal Code, and both provide special protection to the president and his family. Arab penal codes are similar to and sometimes worse than the Napoleonic model. They reflect the severity of that model by using harsh punishments and creating second-class citizens by depriving them of their civil rights.

Colonial implanting and imperial migration of law in Egypt

In Egypt, the imperial heritage regarding the definition of terrorism is indirect yet strong. Egypt first defined “terrorism” in 1993; it did not borrow the definition from any other jurisdiction. However, it borrowed some of its elements from the French law. This can be found in its inclusion of vague concepts that are derived from the Napoleonic Penal Code of 1810, such as “disturbances of public order” and “thwart the application of the Constitution.” In addition, the crime of “incitement” as regulated in the French Press Law of 1881 is also seen in the Egyptian definition of terrorism. Other acts, including damaging property (sabotage) and rebellion—all broadly and vaguely defined—are derived from the French Penal Code of 1810 are also part of the Egyptian definition of terrorism. These acts were earlier included in the first Egyptian Penal Code of 1883. Egypt prepared the draft of this law based on the Napoleonic model while it was independent, and issued it while under the British colonialism. It should be noted that Egypt, although under colonial pressure, had a constitution and a parliament, which partially empowered Egypt against the British authority. The Egyptian Penal Code was not a colonial product; rather, it represents the Egyptian

⁸⁸⁰ Article 86 of the 1810 French Penal Code.

will as influenced by French imperialism in the late nineteenth century. Most of the articles in the Egyptian Penal Code of 1883 still exist in the current Penal Code of 1937 and its amendments. I argue that the Egyptian Penal Code of 1883 is the direct bedrock of the later definitions of terrorism in Egypt.

British colonial influence in Egypt, while limited, has been significant in shaping current anti-terrorism law policy. This influence can be found in the British transplanting of exceptionalism into the Egyptian system. The British not only declared martial law in Egypt several times, but also insisted on regulating martial law within the Egyptian Constitution of 1923.⁸⁸¹ Martial law allowed the rule of the military with limited or no accountability for military actions. According to Reza, the Egyptian ruling class and the elite found martial law a useful tool that protected its position.⁸⁸² This suggests a combination of colonial legacy and local authoritarian ambition. Martial law, however, was seen as an extreme system. Therefore, the British invented the state of emergency. According to David French, “The British threw a veneer of legality over their operations by avoiding imposing martial law and instead employing emergency powers regulations to create a legal framework within which their security forces operated.”⁸⁸³

Another form of exceptionalism during colonialism was the use of military and special courts. The British established several special courts, including the special court to try ‘Urabi in 1882, the special courts to try offences against the British army during the period of colonialism, and the martial law courts established during World War I.⁸⁸⁴ During colonialism the British imposed their special tribunals whenever they felt discomfort about national courts.⁸⁸⁵ The impact

⁸⁸¹ Brown, *Supra* 458, at 111; Reza, *Supra* 11, at 535–37.

⁸⁸² Reza, *Supra* 11, at 535.

⁸⁸³ French, *Supra* 2, at 75.

⁸⁸⁴ Brown, *Supra* 62, at 121.

⁸⁸⁵ Cromer, *Supra* 496, at 32-33.

of such a dual legal system was to create a notion of “us” versus “them”, “good citizens” versus “evil enemies.”

In the post-colonial era, Egypt limited its use of martial law,⁸⁸⁶ but extensively used state of emergency. Egypt continuously declared state of emergency from 1967 to 2012, with an eighteen-month break in 1980 and 1981.⁸⁸⁷ After the assassination of President Sadat in 1981, Mubarak used the state of emergency in the name of national security and counter-terrorism. State of emergency allowed the use of many emergency powers, including searches and arrests without warrant, detention without trial, and the use of special courts.

During both ordinary times and emergencies, Egypt has relied heavily on military and special courts. Right after the overthrow of the Egyptian monarchy, the newborn government, run by the Free Officers, established several special courts, including the Court of Treason established in 1952 and the special Court against Egyptian Communists in 1953. These courts had broad procedural guidance, were run by political and military figures without legal backgrounds, and had a broad politicized mandate.⁸⁸⁸ The justification for these courts was to secure the newborn government. However, the same tendency continued in the 1990s in the name of counter-terrorism. In 1992, Mubarak issued a Presidential decree that allowed him to transfer terrorist cases to military courts.⁸⁸⁹ This duality, which existed under colonialism, was transferred to post-colonial authoritarian Arab regimes. The experience of Egypt shows that many judicial bodies were established to deal with the same wrongdoings but under different labels. This practice enables authoritarian regime to categorize their enemies as second-class citizens, and deprive them from

⁸⁸⁶ Martial law was declared three times: from 1952 to 1956 as a response to clashes with British troops at the Suez Canal; in 1956 due to the Suez War; and in 1958 to secure what was then the United Arab Republic—the union between Egypt and Syria. See Reza, *Supra*11, at 536.

⁸⁸⁷ Reza, *idem*, at 537.

⁸⁸⁸ Brown, *Supra* 458, at 72.

⁸⁸⁹ Presidential Decree no. 375, See Farhang, *Supra* 615.

some civil rights, including establishing political parties and running for parliament. Such measures that are associated with terrorist crimes serve authoritarian regimes through narrowing the circle of opposition.

Colonial implanting of law in Tunisia

This dissertation concluded that in the case the case of Tunisia, colonialism has had a direct yet limited role in shaping the definition of terrorism. The French colonial influence on the definition of terrorism can be found in the use of vague concepts derived from the 1810 French Penal Code, such as “disturbing public order” and “thwart the application of the Constitution.” However, unlike Egypt, which willingly adopted the French model, Tunisia had limited choice in this respect. The French colonials were directly involved in lawmaking in Tunisia. For instance, a French-Tunisian committee drafted the Tunisian Penal Code of 1913 based on the Napoleonic model. Tunisia’s Penal Code has been amended several times, but the basic provisions remain the same. This law includes the crimes of plotting, incitement, sabotage, and rebellion (or insurgency), all of which include vague terminology and broad definitions. This dissertation has argued that the specification of these crimes in the 1913 Penal Code are the direct foundation of Tunisia’s current definition of terrorism adopted in 2015.

Prior to colonialism, Tunisia was ruled by an autocratic bey, who suspended the Tunisian Constitution of 1861 and centralized powers within his authority. I have argued that this autocratic system allowed the French to easily control the country through controlling the will of one man. The French experience in Tunisia shows that the bey had nominal authority, signing decrees as designed by the French army or the French Resident General. For example, in 1882, the bey issued

a decree granting the French army suppressive powers against those who disobeyed military orders.⁸⁹⁰ This was the beginning of military involvement in civil life in Tunisia.

The state of siege was a militarized way of ruling that provided the French army and the Resident General exceptional powers. The French imposed the state of siege in Tunisia for over sixteen years.⁸⁹¹ During a state of siege, French laws as issued and applied in France replaced Tunisian laws. These included replacing the Tunisian Penal Code with the French Penal Code. In addition, military courts were established to try civilians for crimes against the state. Among these crimes were rebellion. According to the French Penal Code of 1810, “Every attack or resistance, by force or violence, against ministerial officers” is rebellion “according to the circumstances.”⁸⁹² Chapter 7 of this dissertation showed that cases held by the military courts often condemned nationalists for rebellion and acts of sabotage, which included acts of damaging public property. Combining the crime of rebellion and the crime of sabotage create a form of “insurgency,” which justified the use of military action.

Another form of direct French colonial involvement in the legal and political life of Tunisia was the application of strict censorship. During the state of siege, the French colonials applied the French Press Law of 1881 as the law pertinent to. This law condemns inciting hatred or violence against religions, the president, the army, or the courts.⁸⁹³ The French Press Law of 1881 is still active in France, suggesting that incitement is a crime that has consistently been taken seriously by the French. This legacy is seen in post-colonial Tunisia, which continues to criminalize incitement within its Penal Code as a crime against the state or a crime against public order.⁸⁹⁴

⁸⁹⁰ Arfawi, *Supra* 397, at 100.

⁸⁹¹ *Idem*, at 103.

⁸⁹² Article 209 of the French Penal Code of 1810.

⁸⁹³ Articles 23, 24, 30 and 31 of the French Press Law of 1881.

⁸⁹⁴ Articles 70 and 81 of the Tunisian Penal Code of 1913.

Post-colonial Tunisia continued adopting the colonial forms of exceptionalism. Tunisia replaced the use of state of siege with state of emergency, which was used five times between September 1957 and 1984 for specific cases and for limited periods and areas. Tunisia, while limiting its use of state of emergency, relied more extensively on military courts. Military courts were established one year after independence by the Penal and Procedures Military Code no. 92 of 1957. In 1979, the jurisdiction of these courts was expanded to include crimes of rebellion committed during peacetime, and the membership of a “terrorist organization operating abroad.”⁸⁹⁵

This dissertation has argued that by referring “rebels” and “terrorists” to military courts, Tunisia embodies the colonial legacy of counter-insurgency in the contemporary counter-terrorism framework. This dissertation concluded that the direct involvement of the French colonials in Tunisia, creating and implementing legislation, specifically the long period of state of siege and the application of military courts, undermined Tunisia’s long-term ability to establish ordinary regulations and a jurisprudence that reflects its civil identity. Ben Ali, relying on this colonial heritage, turned Tunisia into a police state by supervising civilian activities, especially those by journalists and Islamists. This policy imposed strict censorship that allowed the government to monitor the internet and mosques.⁸⁹⁶ Tunisians who published columns on French websites criticizing Ben Ali’s policies were charged with crimes against the state.⁸⁹⁷ While censorship has its roots in colonialism, the post-colonial use of this tool reflects an authoritarian ambition that serve those in power.

⁸⁹⁵ Article 123 as amended by Tunisian Decree-Law of the Penal and Procedures Military Code no. 12 of 1979. Issued on 10 October 1979.

⁸⁹⁶ “The Development of Tunisian Terrorism”, (11 October 2015), *Rawabet Center for Research and Strategic Studies*, online: <rawabetcenter.com/archives/13067>.

⁸⁹⁷ “Reporters Without Borders in Tunisia: A new freedom that needs protecting”, (10 February 2011 updated in 20 January 2016) *Reporters Without Borders*, online: <rsf.org/en/news/reporters-without-borders-tunisia-new-freedom-needs-protecting>.

In 1993, Tunisia established a definition of “terrorism” within its Penal Code. This definition condemns “all actions relating to individual or collective initiative, aiming at undermining individuals or properties, through intimidation or terror” and “acts of incitement to hatred or to religious or other fanaticism, regardless of the means used.”⁸⁹⁸ As mentioned earlier, the criminalization of inciting hatred is drawn from the French Press Law of 1881. The continuous reliance on French regulations, particularly those established during colonialism can be a sign of devolution in crime-control.

Neo-colonial migration of law

The United Kingdom is one of the most influential powers in counter-terrorism. This is due to its long colonial history of countering insurgency and all other violent and non-violent forms of resistance. Its experience in Northern Ireland, India, and many other colonies allowed it to develop a sophisticated counter-terrorism model. In the aftermath of 9/11, the British Terrorism Act of 2000 had a global influence over many common law countries and former British colonies.⁸⁹⁹ Roach observes that the migration of the British definition of terrorism to other Western countries and former British colonies was “a voluntary process” (2015, 18). In a neo-colonial era, the United Kingdom does not force states to adopt its model. Does this willingness suggest that states prefer to follow what is familiar than to create new models? This point requires further investigation. The United Kingdom built a model based on its experience, which may not suit other countries. This means a variety of laws rather than a united counter-terrorism law could be more useful and effective. Though, each crime should be clearly and precisely defined in any anti-terrorism law.

⁸⁹⁸ Article 52*bis*, amended by Law 93-112 of 22 November 1993, and abolished in 2003.

⁸⁹⁹ Countries that rushed into adopting the British model include Australia, Canada, and South Africa.

Terrorism includes multi-national and cross-boundary acts, and this requires states' cooperation rather than mimicking other states' tendencies in adopting broad definitions and tough measures.

Post-9/11, however, states have become more bound by global obligations. UN Security Council Resolution 1624 (2005), adopted in the aftermath of the 2005 London bombing, emphasizes speech related to terrorism. The resolution condemns “the incitement of terrorist acts and *repudiat[es]* attempts at the justification or glorification (*apologie*) of terrorist acts that may incite further terrorist acts.”⁹⁰⁰ The colonial experience showed a tendency of targeting speech that could threaten the imperial position. This was applied in Northern Ireland⁹⁰¹ and in India,⁹⁰² where incitement to hatred, whether against the government or other races or religions, was considered a crime of hatred. Another example is drawn from the French experience in Tunisia, which showed a strict censorship policy that granted the French colonial the power to monitor newspapers before they were published and to delete parts of or whole columns. The re-emergence of speech restrictions in the name of counter-terrorism and with the approval of the Security Council does not change the suppressive nature of these restrictions. Furthermore, history shows limited effectiveness if not a counteractive impact of speech regulations.

UN Security Council Resolution 1373 (2001) calls upon states to prevent the financing of terrorism⁹⁰³ and to freeze the funds of terrorists.⁹⁰⁴ Monitoring financing has its colonial roots, yet to a lesser extent compared with speech crimes. A colonial example of counter terrorism financing can be seen in the British experience in Northern Ireland. The British enforced the Prevention of Terrorism (Temporary Provisions) Act (PTA) issued in 1974 and renewed until 1989. This Act

⁹⁰⁰ UN Security Council Resolution 1624 (2005), para 1.

⁹⁰¹ Prevention of Incitement to Hatred Act 1970 (Northern Ireland).

⁹⁰² Section 295A, added to the Indian Penal Code in 1927.

⁹⁰³ UN Security Council Resolution 1373 (2001), para 1(a).

⁹⁰⁴ *Idem*, para 1(c).

criminalizes receiving or giving funds “in connection with, acts of terrorism.”⁹⁰⁵ The global impact of Security Council Resolution 1373 raises the question of the proportionality and efficiency of colonial practices in our current era. If this Security Council resolution and other related resolutions are rooted in the colonial practice, then they reflect an aged way of crime control, which does not serve the evolution of law and humanity.

The problem with the approach of mimicking other countries’ legislation instead of developing one’s own approach based on the specific situation in each country is not limited to the issue of neo-colonial influence in domestic affairs and encouraging puppet governments. It also, crucially, disregards the unique geopolitical features of each regime, each of which may call for a very different set of rules. An effective, informed global counter-terrorism effort can only be structured around a comprehensive geographical and political analysis. A reactive or transplanted approach to counter-terrorism cannot expect to meet success in every state. The resolutions adopted by the UN Security Council, however, suggest that the accepted approach to supposed global security is largely restricted to Western security, with little attention paid to the unique needs and demands of other regions.

Neo-colonial migration of law in Egypt

Neo-colonialism is another factor that shapes the Egyptian anti-terrorism framework, particularly post-9/11. Neo-colonial powers, represented primarily by the UN Security Council and FATF, have imposed global anti-terrorism obligations, including counter terrorism financing, condemning speech that encourages or apologizes for terrorism, travel restrictions, and blacklisting. Even though Egypt had tough anti-terrorism laws well before 9/11, it complied with

⁹⁰⁵ Part III, “Financial Inimical Assistance for Terrorism,” Prevention of Terrorism (Temporary Provisions) Act (PTA) issued in 1974.

the Security Council and FATF obligations regarding terrorism financing. In 2001, Egypt was listed by FATF as a non-cooperative country.⁹⁰⁶ As a result, it adopted an Anti-Money Laundering Law in 2002,⁹⁰⁷ and was delisted in 2004.⁹⁰⁸ However, the usefulness of counter terrorism financing, especially in Egypt, is questionable. For example, a report by the FATF shows that in Egypt, most financial operations are done in cash, and only 20% are done within the official banking system.⁹⁰⁹ This suggests that global regulations do not necessarily fit the conditions of all countries.

Egypt adhered to other Security Council obligations, yet not immediately post-9/11. This is because Egypt already had broad anti-terrorism laws. However, in 2015 Egypt adopted two laws regarding anti-terrorism. The first is the Terrorist Entities Law,⁹¹⁰ which creates an executive mechanism to blacklist terrorists and terrorist entities. Blacklisting—whether by states or by the Security Council—allows the freezing of funds and imposition of travel bans without providing a fair judicial review mechanism. The second, a new Anti-terrorism Law,⁹¹¹ includes an overbroad definition of terrorism with an emphasis on inciting terrorism.⁹¹² While drafting this law, Egypt claimed that it aimed to meet Western and post-9/11 standards. However, it went beyond such standards by adopting a draconian law that includes broad articles and harsh penalties, including the death penalty. This suggests that Egypt is making use of the obligations imposed by the neo-colonial powers to enhance its authoritarian ambition.

⁹⁰⁶ Financial Action Task Force, “Review to Identify Non-cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures” *Supra* 313.

⁹⁰⁷ Law no. 80 of 2002 on Anti-Money Laundering.

⁹⁰⁸ Egypt’s Report to the CTC, 2005, *Supra* 316.

⁹⁰⁹ MENAFATF, *Supra* 357, at 18.

⁹¹⁰ Egyptian Law no. 8 of 2015 Regarding Regulating Terrorist Entities and Terrorists.

⁹¹¹ Egyptian Anti-terrorism Law no. 94 of 2015.

⁹¹² Articles 1, 6, and 18, *idem*.

Neo-colonial migration of law in Tunisia

Post-9/11, Tunisia responded to Security Council Resolution 1373 by adopting the 2003 Law in Support of International Efforts to Fight Terrorism and the Repression of Money Laundering. The law defines “terrorism” broadly by including acts that “disturb public order,” which is derived from the Napoleonic Penal Code. The law also emphasizes incitement of terrorism, mere membership in a terrorist organization, and terrorism financing. The former two activities were criminalized in Tunisia well before 9/11, whereas the latter was adopted post-9/11. Counter terrorism financing can thus be seen as a reflection of the neo-colonial influence.

Tunisia had no history of extremism or jihadism. However, in the aftermath of the Tunisian uprising of 2011, it became a vulnerable target by ISIS, who access Tunisia through its neighbors, Libya and Algeria. As a response, Tunisia declared a state of emergency from 2011 to 2014, and declared it occasionally in 2015 and 2016. During a state of emergency, crimes against the state are referred to military courts, now in the name of counter-terrorism. Evaluating the Tunisian counter-terrorism experience is difficult due to this unusual wave of terrorism. Therefore, the dissertation avoided evaluating the necessity of these measures and focused on their roots.

In 2015, Tunisia adopted a new law regarding anti-terrorism and money-laundering. Similar to the 2003 Anti-terrorism Law, the new law defines terrorism broadly. A few new regulations were added to this law, including further emphasis on incitement. For instance, Article 14 condemns “*Takfir* [calling for excommunication], or incitement of or calling for hatred or loathing among races, religions and faiths.”⁹¹³ This is a reflection of the French colonial legacy as well as the post-9/11 neo-colonial emphasis on incitement. Another addition to the Tunisian 2015 anti-terrorism law is the establishment of an executive commission, the National Commission to

⁹¹³ Paragraph 8 of Article 14, *idem*.

Combat Terrorism, which is authorized to blacklist terrorist entities and freeze their funds. This is an instance of direct neo-colonial influence derived from the UN Security Council and FATF's obligations.

Neo-colonialism imposes global obligations regarding the definition of terrorism and terrorism-related crimes, which places pressure on Tunisia to take action against foreign terrorist fighters and terrorism aimed at Western tourists. Tunisia's anti-terrorism framework combines a colonial legacy with neo-colonial regulations and an internal authoritarian ambition, in which Tunisia selectively borrows anti-terrorism regulations from the French system and the post-9/11 regulations imposed by UN Security Council.

The anti-terrorism laws of both Egypt and Tunisia are hardly questioned by the neo-colonial powers, above all the UN Security Council. This dissertation has suggested that current anti-terrorism laws serve Arab states and neo-colonial powers in suppressing the common enemy—increasingly ISIS, which has had significant success in recruiting, particularly in Tunisia. This suggests implicit neo-colonial approval of Arab anti-terrorism policy. In effect, global counter-terrorism responses are informed by a neo-colonial rationale, which implicitly allows—by not questioning—Arab authoritarian regimes and their continuous clinging to repressive way of ruling that stands in the way of developing authentic Arab democracies.

Post-colonial authoritarian migration of law

In addition to the impact of colonial and neo-colonial powers in counter-terrorism, Egypt plays an influential role at a regional level. Many Arab states have willingly adopted the Egyptian definition of terrorism, or at least the main elements of this definition. Egypt's leadership regarding counter-terrorism goes back to its influence on Arab states in signing the 1998 Arab Convention on the

Suppression of Terrorism. This means that Egypt and the Arab world were ahead of the West in their legal efforts to counter terrorism.

This influence of Egypt has its historical reasons. While Egypt did not colonize the rest of the Arab world, it has long been ahead of other Arab countries at the legal and political levels. It was among the first to adopt the French model in its challenge against British colonialism. Nathan Brown argues that in the last quarter of the nineteenth century, Egypt realized that in order to counter colonialism peacefully, a strong state must be built that derived its power from its legal order and organized institutions. Brown describes this period as the emergence of liberal legality, in which the unlimited authority of the Egyptian ruler was restricted or at least regulated (1997, 8).

Many Arab countries mimicked the Egyptian model in order to be considered “modern,” and thus be able to develop diplomatic and economic relations with the West. This, however, is a general observation that has its exceptions. For instance, Lebanon and the Maghreb countries have long borrowed their laws directly from France. Iraq was also ahead of other Arab states in developing its own legal and political systems based on Western models.

My analysis of post-colonial Egypt is that when authoritarian leaders came to power, they turned the Egyptian approach of liberal legality developed during colonialism into a lost glory. The new government selectively chose centralization and harsh Napoleonic punitive measures, combined these with the British colonial legacy of exceptional powers, and formed a highly authoritarian system. Nationalists, communists, and Islamists felt betrayed, and thus opposed the government in many ways. Whether violent or non-violent groups, they were and still are equally suppressed by the government in order to maintain the post-colonial authoritarian system. Counter-terrorism laws and measures have been useful tools to the Egyptian authoritarian government. The

event of 9/11 added an additional justification to the coercive Egyptian laws. This tendency also extends to other Arab countries, including Jordan, Bahrain, and Qatar, which defined “terrorism” in their anti-terrorism laws in accordance to the Egyptian definition of terrorism, specifically by borrowing vague concepts, including “disturbing public order” and “threatening national unity.”⁹¹⁴

Post-9/11, Arab states came under neo-colonial pressure to adopt further counter-terrorism measures, especially regarding terrorism financing. Egypt already had a tough counter-terrorism model within its Penal Code, and in 2015 developed this model in a way that exceeded post-9/11 global regulations. Nevertheless, Western powers have not criticized the Egyptian Anti-terrorism Law of 2015, which could be an indication of approval. With this implicit approval of Egypt’s draconian laws, I think that Arab states found it safe to adopt the Egyptian model rather than developing their own.

The problems of the current rationales for anti-terrorism legislation

This dissertation has argued that counter-terrorism laws and measures in Egypt and Tunisia are influenced by colonial and neo-colonial practices. These practices, while they serve the global war on terror, also serve Arab authoritarian regimes. This combination of political interests has resulted in a utilitarian approach that strengthens neo-colonial powers and authoritarian regimes in the name of counter-terrorism. This sections separates these chains of political interests into three: the colonial rationale, neo-colonialism, and authoritarianism and the authoritarian ambition.

⁹¹⁴ Roach, *Supra* 342, at 35-37.

On the colonial rationale

I asked in the introduction of this dissertation whether the state's rationale in counter-terrorism represents an aspect of the modern state or a return to colonial state strategies and conceptions. In order to answer this question, one should be clear whether the colonial state was an exceptional form of government, or a normal yet special form of government that developed into a modern state.⁹¹⁵ There is no one answer to this question. Scholars who glorify the imperial "civilizing mission" consider colonialism a normal form of government that transformed backward nations into modern countries.⁹¹⁶ Others think that the colonial state is exceptional, thus not a form of the modern state. This is because of the special framework applied in the colonies.⁹¹⁷

I have argued that the colonial state is an exceptional form of government because it was not an organic system. It did not evolve gradually inside the colonized country, but was an unwelcomed sudden event or series of events. Even when "protection" agreements were signed between a powerful empire and a weaker state, such agreements represented unequal positions of power. In the case of Egypt and Tunisia, the colonial powers were not invited; they occupied these countries then offered their protection. Compliance in these cases does not represent the free will of the country and its people.

These events brought sudden changes at the political and legal levels, yet with limited preparation for constitutionalism.⁹¹⁸ And when the people of a particular nation valued constitutionalism, it was undermined by a system of elitism that served the local elite and the colonial power. Constitutionalism was also undermined through the use of exceptional powers.

⁹¹⁵ Partha Chatterjee, *The Nation and Its Fragments* (Princeton: Princeton University Press, 1993), at 14.

⁹¹⁶ Fitzpatrick, *Supra* 89, at 15; Philip Darby, *The Three Faces of Imperialism* (New Haven, CT: Yale University Press) at 31.

⁹¹⁷ Chatterjee, *Supra* 915, at 19.

⁹¹⁸ Brown, *Supra* 509, at 12, 19-20.

Even in cases where colonialism lasted for decades or even over a century (for instance the French remained in Algeria for 132 years and the British in India for 89 years), exceptionalism and militarism were at the heart of colonial practice. Ruling through the exception is an inorganic process that has resulted in producing an inorganic post-colonial rationale. The same culture of control has continued since the demise of colonialism but in different forms, just as the seeds look different from the trees.

The aim of this critical analysis is not to blame colonialism, but to recognize that measures that developed during that period should be part of the past. Colonialism can be understood as historical series of events, from which we can draw lessons. The problem is in clinging to the colonial rationale without realizing its exceptional nature. A conscious choice to detach from the colonial heritage requires an open mind that dares to challenge inherited understandings.

On neo-colonialism

Exceptionalism and militarism are not exclusive to the colonial experience. Britain and France applied exceptional measures in their mainland. Kiernan argues that measures that were carried out in colonies reflect practices carried out in Europe. He refers to the competitive attitude between the British and French empires, which enlarged their military to be the most dominant regionally and globally (1995, 31-32). This preparedness allowed the British and French empires to face external and internal unrest firmly. The two World Wars and the emergence of fascism, communism, and anarchism in Europe required or justified exceptional and military measures.

In the aftermath of World War II, Western Europe, while backing away from militarism, clung to restricting speech and other rights of expression and association. Roach argues that the European approach is based on a militant democracy that is intolerant with those considered

enemies of the democratic life.⁹¹⁹ This is reminiscent of Kitson, the counter-insurgency thinker, who believed that insurgency starts with non-violent acts, including strikes and all forms of disturbance, which he thought should be suppressed in order to ensure a threat-free environment.⁹²⁰

The Western approach found its way to global domination through neo-colonialism. Both colonialism and imperialism affected the neo-colonial distribution of power. Practices justified during imperialism in mainland Britain and France re-emerged in the neo-colonial era. For instance, at a supra-national level, European militant democracy explains the focus of the Security Council—and the European Union—on the theme of speech related to terrorism.

On authoritarianism and authoritarian ambition

To secure their newly independent states, Arab rulers transferred the former colonized regimes into authoritarian governments. The duality in the modern Arab legal systems, which adopted a European legal model but with a colonial model in regard to national security, could be a consequence of an ambivalent colonial policy: Preparing states for independence and at the same time protecting imperial interests in the colonies led to policies as paradoxical as these two goals. Authoritarianism is the post-colonial Arab way of ruling. It reflects the pre-colonial patriarchal autocratic practices, which emphasized the obligation of obedience to the ruler. Whether titled king, bey, or sultan, those who ruled the Arab world before colonialism were mostly autocrats. Even when they adopted the Islamic principle of *shura*, or consultation, decision-making remained largely within the authority of one person. This was clear in pre-colonial Tunisia, as shown in Chapter 7.

⁹¹⁹ Roach, *Supra* 7, at 57.

⁹²⁰ Kitson, *Supra* 245, at 3.

On the other hand, authoritarianism, compared to autocracy, is a functional system capable of dealing with the complexity of the post-colonial modern state. Post-colonial Arab countries have political institutions, justice systems, and capitalist markets. One person (the ruler) cannot control and regulate all of these modern institutions. Arab states found their salvation in French centralization, which at some level maintains the essence of autocracy. By adopting the colonial rationale of centralizing power in the executive and the use of the military in counter-terrorism, the Arab world in fact serves the Western-capitalist ideology. Authoritarian regimes are more interested in securing their positions than in any ideological goals. Through continuously obeying the Western agenda of the war on terror, both Western governments and authoritarian regimes are maximizing their interests. I have argued that this utilitarian approach will not work in the long run, as it threatens the essence of human security. Throughout history, fixated on securing themselves end in mass collapse. The “Arab Spring,” while overthrew two authoritarian presidents, is a recent example of this short-term regime stability.

While authoritarianism is a form of political government, this dissertation has suggested that authoritarian ambition can be an underlying reason behind states’ obsession with control. Restrictions on speech and association, travel bans, and monitoring of financial transactions, are all forms of authoritarian ambition that contradict liberal legality and democratic values. For instance, one of the problems of listing terrorists and terrorist entities is the mechanism of blacklisting. At the national level, decisions on blacklisting and freezing funds are left to the executive, and at a supra-national level, the UN Security Council has absolute authority in this regard. Centralizing power is a form of a collective authoritarian ambition. One could argue that practicality requires the use of this kind of mechanism. However, I have argued that practicality is overshadowing the legal principles that aim to protect rather than undermine human values.

Threat-free environment and “flexibility” of anti-terrorism law

This dissertation has suggested that authoritarian ambition is not limited to authoritarian regimes, but also can emerge in democracies. This can be found in the excessive need to identify terrorists, as can be seen in the use of blacklisting by UN Security Council and states. The events of September 11 demonstrated that the war on terror is a war against two enemies, both of which continue to be vaguely defined: terrorists and fear. In the context of the war on terror, fear is commonly interpreted as collective feelings of outrage and insecurity. Within the language of law and politics, these feelings are translated into the terms “security gap” or “lack of security.” Both legal and extra-legal measures continue to be taken to overcome this gap. The results have been of limited effectiveness: it remains impossible to absolutely ensure security. This has led officials to demand tougher and, crucially, more flexible anti-terrorism laws and measures. For instance, in the aftermath of the November 2015 Paris attacks, President Hollande asked for more flexible anti-terrorism and emergency laws.⁹²¹ Similar measures in the recent past have resulted in enhancing a temporary sense of security; however, these measures are not reliably effective in eliminating future crimes.

While criminal law must remain capable of adaptation as circumstances and situations change, the driving of states toward increased “flexibility” can contradict the benefits of a state that is run according to the rule of law. In other words, an excess of adaptation—an excess of flexibility—risks undermining the rule of law. The content and form of criminal law has never been fixed or static, nor is this thought to be desirable. The role of criminal law is not tethered solely to political purposes; it remains essential to shaping public policy and maintaining the conventions that are associated with a safe society. But the further that the criminal law strays from

⁹²¹ Henry Samuel, “France wants to change constitution to extend powers in state of emergency”, (3 December 2015), *The Telegraph*, online: <www.telegraph.co.uk>.

its conventional core, as flexible measures are adopted by judicial and legislative bodies—which has increasingly happened in the counter-terrorism area—the greater the strain becomes on the rule of law. The supposed benefits of these laws in countering terrorism are unproven, and the fracturing of the foundational rule of the law in these states could have negative long-term consequences.

The aim of the current approach to crime-control, as it relates to terrorism, is not only to eliminate the fear of deadly acts of violence, but seemingly to allay feelings of insecurity. This latter goal is what redirects the stream of counter-terrorism by targeting the fear of potential threats and of acts that have not yet been committed; this is all-important among decision-makers. This has led to counter-terrorism measures around the world becoming increasingly flexible and exceeding traditional legal boundaries.

Concluding remarks

Carl Jung wrote that “Nothing is more vulnerable than scientific theory, which is an ephemeral attempt to explain facts and not an everlasting truth in itself” (1964). I think this is particularly true in the field of humanitarian studies and political science, in which legal and historical analysis only leads to relative truths. This dissertation has offered a theoretical framework with the aim of providing a broader understanding of national and international counter-terrorism. Challenges regarding the definition of terrorism and regarding countering terrorism within a legal rather than a politicized framework require further efforts at all levels. While I invite politicians and lawmakers to re-evaluate national and global anti-terrorism regulations, I also invite individuals and civil society organizations to understand that there is nothing worse than fearing fear itself. I

leave a space to the reader to apply the suggested theoretical framework in accordance with their receptivity and with the unique geopolitics of their countries.

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