

**United Nations Security Council Counter-Terrorism Committee, Open Briefing on
“Criminalization of Terrorist Offences and Strengthening of International Cooperation
in Bringing Terrorists to Justice”**

United Nations Headquarters, New York, 6 June 2024

“The Importance of Clear Terrorism Offences to International Cooperation”

Remarks of the Special Rapporteur on the Promotion and Protection of Human Rights
and Fundamental Freedoms while Countering Terrorism, Ben Saul

Excellencies, Distinguished Participants

I would like to thank the Committee for the invitation to present on this important aspect of implementing Security Council resolutions, namely how to ensure that terrorism offences are drafted in a sufficiently clear manner to maximize human rights-compliant, effective international legal cooperation to counter terrorism.

The absence of an agreed international definition of terrorism has led to many divergent definitions in national law. Over two decades the Special Rapporteur has been persistently disturbed by the prevalence of national definitions which do not satisfy the requirement of legality under article 15 of the International Covenant on Civil and Political Rights. Legality requires that criminal laws are sufficiently precise, unambiguous and accessible so that it is clear in advance what types of behaviour constitute an offence (A/HRC/16/51).

These differences in national definitions, particularly where definitions are vague or over-broad, can impede international cooperation for a number of key reasons.

First, the “double criminality rule” common in national laws and criminal cooperation treaties may prohibit extradition or mutual legal assistance where terrorist offences are defined too broadly or ambiguously under the requesting state’s law, such that the same conduct is not a substantive offence in the requested state. International cooperation stands a greater chance of success if states avoid criminalizing conduct that is not genuinely terrorist in nature and remain within the mainstream of what is regarded as terrorism.

In this respect, the Special Rapporteur has long recommended that terrorist offences be defined in accordance with the elements in Security Council resolution 1566 (2004), which in turn incorporate the offences in the international counter-terrorism instruments. The underlying convention offences were the product of careful negotiation by criminal law experts working across legal traditions and generally avoid the over-breadth that is characteristic of certain more general definitions of terrorism under national law and some definitions of regional organizations. As such, they generally conform to the principle of legality and provide a more secure basis for international criminal cooperation on the basis of a common set of offences.

The more recent international conventions since 1997 also typically exclude the activities of armed forces in armed conflict from the scope of their offences. Such exclusion helpfully narrows the scope of core terrorism offences by avoiding criminalizing conduct that is already effectively regulated by international humanitarian law. In doing so, it reduces potential disagreement between national laws over the scope of offences which could otherwise thwart extradition or mutual assistance.

Secondly, international cooperation can be stymied where overbroad national offences trigger the prohibition on *refoulement* under international human rights and refugee law. International cooperation in extradition must be refused under where the requested person would face a real risk of persecution or other serious human rights violations, including a flagrant denial of justice in a foreign criminal trial. Relatedly, many extradition and mutual assistance laws and treaties contain a specific non-discrimination clauses to prevent the abuse of international cooperation procedures. Over-broad terrorism offences may be susceptible to misuse against individuals on protected grounds, including political opinion, race, religion, nationality, ethnic origin and so on. The Special Rapporteur and other international human rights mechanisms and procedures have documented the common misuse of terrorism offences to discriminate.

Thirdly, there is a more general international obligation on states not to cooperate with another state where its excessive terrorism offences would violate international law. Under the general law of state responsibility, a state must not knowingly aid or assist another state to violate international law. Some national terrorist offences criminalize, for example, humanitarian assistance and medical care that are protected under international humanitarian law. Other offences intrude on protected freedoms of expression, association, assembly or religion. In such circumstances, extradition or mutual assistance would be prohibited if would assist the other state to prosecute such offences in violation of the international obligation separately owed by each state. Cooperating in the prosecution of offences that criminalize humanitarian or medical activities in armed conflict would also violate the cooperating state's obligation to "ensure respect" for international humanitarian law by parties to armed conflict.

As the Special Rapporteur reported to the Human Rights Council earlier this year, the misuse of excessive terrorism offences is rampant worldwide. More recently, the Special Rapporteur has been concerned about the increasing use counter-terrorism laws as part of the growing phenomenon of "transnational repression", where extraterritorial laws and international cooperation procedures are used in an attempt to harass, intimidate, punish and silence individuals who are exercising internationally protected rights and freedoms. It is essential that terrorism offences are defined restrictively and with full respect for the principle of legality, so as to limit the potential to misuse counter-terrorism laws to destroy fundamental rights.

Thank you.