International Conference on the Investigation and Prosecution of Terrorism Offences Committed in the Context of Armed Conflict

Council of Europe Committee on Counter-Terrorism
Strasbourg, 15 May 2024

Opening Remarks of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Saul

Director-General, Excellencies, Distinguished Participants

I am delighted to join you to discuss the pressing issue of investigating and prosecuting terrorist offences committed in armed conflict. I thank the Council of Europe Committee on Counter-Terrorism for its invitation. I also look forward to learning more about its vital work as I prepare my first report to the General Assembly this October on the role of regional organizations in countering terrorism while respecting human rights.

Today's conference is timely because armed conflicts and armed actors of many kinds are proliferating globally. The International Committee of the Red Cross (ICRC) counts 120 current armed conflicts involving 60 states and 120 armed groups, with many more splinter groups. As I will discuss shortly, international and national laws take many divergent approaches to the extent to which counter-terrorism laws apply to armed conflicts.

One conflict stands out. While the territorial Caliphate of the Islamic State in the Levant was vanquished in 2019, the international community is chronically failing to effectively manage its aftermath. There are well over 56,000, people still detained in the custody of non-state forces in north-east Syria, including 11,500 men, 14,500 women, and 30,000 children. Most of them are foreign nationals, the majority from Iraq, but around 11,000 third country nationals come from 60 states. I endorse my predecessor's assessment that their detention is arbitrary under international law and that their detention conditions are inhumane and unlawful. Children should not expect to spend their whole childhoods in detention. Abandoning people to indefinite detention in conditions of chronic insecurity also invites more violent extremism conducive to terrorism that threatens security everywhere. States need to take more seriously Pillar I of the UN Global Counter-terrorism Strategy, to address structural drivers of terrorism such as serious human rights violations and protracted unresolved conflict.

Solutions are urgently needed, including by fulfilling the duty under international human rights law to repatriate nationals at risk there, as decided by the United Nations Committee against Torture last year and advocated by my mandate over many years.

Repatriation in turn requires a sustained commitment to ensuring prosecution on return where relevant, and rehabilitation and reintegration. Prosecution requires states to enact the necessary legal frameworks to give them adequate tools to classify and address the different kinds of unlawful violence encountered in armed conflict, and ultimately to do justice to the victims of international crimes and national terrorist offences alike. Collective solutions are also needed for the most forgotten and politically toxic group – male detainees, most from Syria and Iraq.

In part due to the well-known failure of the international community to define terrorism, **there remain widely divergent approaches to whether and how counter-terrorism law does or should apply to armed conflicts governed by international humanitarian law (IHL).**

One simple view is that conflict and terrorism should be governed by mutually exclusive regimes. IHL should apply exclusively to armed conflicts, and counter-terrorism law should apply only in peacetime. On this view, as the 'special law', IHL is already tailored to address all violence in conflict and its balancing of military and humanitarian interests should not be disrupted by counter-terrorism law designed for other violence. IHL already comprehensively prohibits unlawful violence against civilians, including murder, torture, hostage taking, attacks on civilians, and spreading terror, so counter-terrorism law seems unnecessary.

This approach is not, however, common in international, national or regional practice. **Instead, counter-terrorism law is applied to complement IHL to suppress additional forms of apparently undesirable violence, but there are a number of quite different approaches.**

One version of this complementarity approach is found in six international counter-terrorism instruments since the Terrorist Bombings Convention in 1997, and is also proposed in the UN Draft Comprehensive Counter-Terrorism Convention since 2001. They exclude the 'activities of armed forces during armed conflict, as those terms are understood under international humanitarian law, which are governed by that law'. This is also the approach in Council of Europe instruments and the 2017 European Union Directive on Combating Terrorism. The Security Council's working definition of terrorism in resolution 1566 (2004) also partly incorporates these exceptions by renvoi to those counter-terrorism conventions.

The conduct of hostilities and other activities of armed forces in armed conflict instead remain governed by IHL, international criminal law, and international human rights law. Counter-terrorism law still plays a role in criminalizing sporadic direct participation, or indirect participation, in armed conflict by civilians who are not members of an armed force, as well as by individuals or criminal groups with no nexus to the conflict.

There was ambiguity during the drafting, and the remains controversy, over whether the exclusion of 'armed forces' is limited to state forces or also covers non-state armed groups. At the time of adopting some conventions, the United States supported the view that they exclude non-state armed groups in non-international armed conflicts, but after 9/11 the US courts and subsequent administrations have adopted the opposite interpretation. In Europe, some states have not domestically implemented the exclusion in the European instruments and have instead applied their terrorism offences to the activities of armed groups.

The better technical view, supported by the drafting and a mainstream interpretation of IHL, is that the term 'armed forces' under IHL covers both state forces and organized armed groups. At the same time, confusion has been created by the Security Council's listing of certain armed groups in conflict – such as Al Qaeda in Afghanistan or ISIL in Syria/Iraq – for the different purpose of sanctions, without applying any exception for those armed forces. European law has a similar bifurcation, with no exception to European-wide sanctions, in contrast to European terrorism offences. Security Council resolutions have also often condemned terrorism by particular armed groups in conflict, and its resolutions on 'foreign terrorist fighters' pointedly criminalize members of armed groups who engage in terrorist acts – despite the apparent contradiction with its own working definition of terrorist acts in resolution 1566.

A second version of complementarity is the narrower approach, found for example in Canadian and New Zealand law, which excludes from terrorist offences 'an act or omission that is committed during an armed conflict' *and in accordance with* international law. In other words, terrorism offences can be applied to state or non-state armed forces where they violate IHL, such that both war crimes law and terrorism offences apply to attacks on civilians. At the same time, those terrorism laws do not criminalize mere participation in, or membership of, an armed group, since that is not unlawful under IHL. Counter-terrorism law and IHL thus mutually reinforce civilian protection.

A third and quite common approach is to apply counter-terrorism laws in full to armed conflicts because there is no exclusion clause at all. Thus, unlike the previous two approaches, all fighting by armed groups is treated as terrorism, even if it respects IHL by only targeting military objectives and sparing civilians. Taken to its extreme, last week Russia convicted members of Ukrainian state armed forces, from the 'Azov Brigade', for terrorism offences, violating the immunity of combatants from national criminal law under IHL in international armed conflict.

A few other approaches may briefly mentioned. The Terrorist Financing Convention 1999 uniquely criminalizes financing terrorist acts against civilians or others taking no active part in hostilities. It is thus an offence to finance attacks by state or non-state armed forces on civilians, but not an offence to finance attacks on combatants. The Hostages Convention 1979 criminalizes hostage taking only in non-international conflicts, on the basis that at that time it was already, but only, a war crime to take hostages in international conflicts. The earlier terrorism conventions do not expressly address IHL, but because their aviation and maritime safety offences only apply to civilian aircraft or ships, it is not an offence to target military ones, whether in armed conflict or even in peacetime. Attacks on civilian aircraft or ships would normally be war crimes under IHL in armed conflict, unless those targets had become military objectives as a result of their use. The Internationally Protected Persons Convention 1973 complements the protection of civilians under IHL, but it raises the unresolved question whether the inviolability of protected persons, such as diplomats, and their premises, prevails over IHL in rare cases where such premises may qualify as military objectives under IHL.

Advantages of Co-Application

The spectrum of approaches exposes competing policy positions among states about how to classify and regulate violence in war. Many states clearly envisage some legitimate role for counter-terrorism law in armed conflict. It seems to provide additional legal tools to suppress undesirable violence that IHL does not, which, if used wisely, could ultimately enhance IHL's objective of protecting civilians.

First, counter-terrorism laws often criminalize earlier preparatory conduct that is not covered by ordinary inchoate offences under international criminal law, including broad support offences, recruitment, training, financing, membership, association, weapons offences, speech-related offences and so on. Secondly, some of the counter-terrorism conventions contain specialised and more protective offences not found in IHL, such as those on civilian aviation, maritime and nuclear safety. Thirdly, counter-terrorism law may criminalize conduct that is prohibited under IHL but not a war crime such as the failure to take all feasible precautions in targeting, thus endangering civilians. Fourthly, some national terrorism offences criminalise mere participation in hostilities or membership of an armed group in non-international conflict, to deter such involvement, whereas these are neither prohibited nor war crimes under IHL.

Even where a terrorist act is also a war crime, prosecution for a terrorism offence may be tactically or procedurally easier for various reasons. Group-based membership, support or other preparatory offences do not require that any victim was physically harmed, or any advanced conspiracy to commit such harm. In some laws, the mere suspicious presence of a person in a conflict zone is a crime. Prosecuting such offences can also avoid the technical complexities, security challenges, and resource burdens of collecting battlefield evidence of war crimes in remote, dangerous conflict zones, while still incapacitating the offender through lengthy terms of imprisonment for terrorism. Most prosecutions of 'terrorist fighters' returning from Syria or Iraq have charged either terrorist or ordinary criminal offences, not international crimes.

Counter-terrorism law can also entail stronger special investigative or other law enforcement or intelligence powers compared with the investigation of war crimes or even genocide. Strategic extradition and mutual assistance channels may be available. Penalties for terrorism can sometimes be heavier than for international crimes. Some laws also assume that the labelling violence in war as "terrorism" has a distinctive expressive, denunciatory and stigmatizing purpose. An example is the labelling of Hamas as a terrorist organization – for example, as if calling Hamas an organization of war criminals is not powerful enough. For the same reason, others wish to equally denounce state violators of IHL as "terrorists" too, such as Israel or Islamic Revolutionary Guard Corps (part of the Iran's military apparatus).

A final reason why states may pursue terrorism charges is the pragmatic one that some states have simply lacked war crimes legislation, as was the case in Syria, Iraq and Afghanistan. It underscores the imperative that all states enact comprehensive international crimes legislation.

Disadvantages of Co-Application

Of course, there can be substantial disadvantages in applying terrorism laws to armed conflict, which warrants much caution. IHL was developed as an autonomous legal regime based on the best attainable balance between military necessity and humanitarian protection. Imposing another body of law on armed conflict, without due regard for the carefully negotiated balancing under IHL, could undermine essential military or humanitarian interests.

Where terrorism laws merely criminalize attacks on civilians or preparations for them, they can positively reinforce IHL. Even in this best case, however, where there is also evidence to prosecute war crimes, cumulative charges should be brought and not avoided for the convenience of laying terrorism charges alone. War crimes are the gravest crimes under international law, not merely national crimes like terrorism. Labelling conduct as a war crime has a unique denunciatory power of its own and prosecuting violence as such delivers full justice to the interests of victims. War crimes are universally defined with a rich international jurisprudence, unlike more divergent and often politicized terrorism offences. They attract universal jurisdiction, often unlike terrorism. There are well established modalities of transnational cooperation. Unlike terrorism, war crimes also potentially engage international jurisdiction, such as of the International Criminal Court, IHL specific mechanisms, and UN human rights and UN investigative bodies. There is also a well-established duty to provide compensation for violations of IHL, thus assisting victims.

A second problem is that terrorism laws are frequently not limited to attacks on civilians, but go much further in criminalizing conduct that is not unlawful under IHL. At worst, some laws against support for, association with, or funding of terrorism criminalize humanitarian relief and medical activities protected under IHL, or human rights protection, advocacy and monitoring activities permissible under international human rights law. Such laws are inconsistent with states' most fundamental international obligations, which cannot be overridden by counter-terrorism law, even under Security Council resolutions.

A third problem is that even where there is no formal legal conflict between counter-terrorism law and IHL, terrorism laws may still undermine the humanitarian policy interests underlying IHL. While mere participation in hostilities or membership of an armed group is not unlawful under IHL, some terrorism laws criminalize it regardless whether a person complies with IHL on the conduct of hostilities, as by only attacking military objectives and sparing civilians, avoiding excessive civilian casualties, and using lawful means and methods of war. All war fighting by armed groups then becomes terrorism.

IHL certainly permits states to criminalize insurgent violence in non-international conflicts, but it also encourages states to confer the widest possible amnesty at the end of the conflict for fighters who have not violated IHL. The ICRC warns against criminalizing war fighting as terrorism, or banning armed groups as terrorist, since it is likely to diminish incentives to comply with IHL if a person is treated as terrorist even if they respect IHL. While violating IHL may be the core business of some armed groups, we should not abandon efforts to bring armed groups into IHL compliance by indiscriminately labelling all of them as terrorist.

The problem has been aggravated since 9/11 because many states' terrorism laws no longer apply only to domestic terrorism, but also to terrorism abroad. States did not historically criminalize insurgents in foreign civil wars, and indeed typically gave them the benefit of the political offence exception in extradition and even asylum, unless they killed civilians. This was in part to ensure that one state does not interfere in political struggles in another state, which may also be an expression of internal self-determination. Now, since terrorism is often defined as any violence against any government in the world, terrorism laws have become a basis for even democracies to criminalize insurgents against authoritarian states.

labelling all insurgents as terrorist raises the political costs of engaging with armed groups: what government or politician is willing to negotiate with those they have long vilified as terrorists? It can make armed groups suspicious of agreeing to humanitarian access to vulnerable populations; obstruct entry into peace negotiations and the prospects of negotiations; and complicate post-conflict amnesty, reconciliation, and disarmament, demobilization and reintegration that are all necessary for a lasting peace. As we have repeatedly seen over many decades, including in present conflicts, the terrorist label can also too easily become a pretext for abandoning the application of IHL altogether in wars on terror.

Recommendations

For all of these reasons, I make one overarching recommendation today. National terrorism offences should ideally exclude acts committed in armed conflict that are in accordance with international law, following the Canadian and New Zealand approach and endorsed by the ICRC. This simple formula has three virtues. First, it ensures that providing humanitarian relief and medical activities protected under IHL are not terrorist crimes. Secondly, it does not criminalize mere participation in hostilities or membership of an armed group where IHL is not violated, thus avoiding undermining incentives to comply with IHL. Thirdly, it ensures that any armed forces – state or non-state – that attack civilians, take hostages, or torture or murder detainees, face the full force of both war crimes law and terrorism offences. It thus maximises opportunities for justice and accountability that are often so lacking in armed conflict.

While I welcome the Security Council's emphasis on compliance with IHL, and its exception from counter-terrorism sanctions regimes for humanitarian relief under resolution 2664 (2023), it would also be beneficial for the Council to formulate a wider, explicit carve out of the kind I have just recommended for national terrorist offences and terrorist financing laws, particularly since many of these were prompted by states' obligations under resolution 1373 in 2001.

Finally, whatever approach national laws take to the relation between counter-terrorism law and IHL, war crimes should always be prosecuted *as* war crimes where possible, to recognize their gravity in infringing the minimum standards of humanity in war recognized by the international community, and ultimately to provide full justice and accountability to victims.

Thank you.