Submission by the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Professor Ben Saul, in *Yasak v. Türkiye* (Application No. 17389/20) before the European Court of Human Rights (Grand Chamber)

INTRODUCTION

1. The United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism established by Human Rights Council resolution 40/16 ("Special Rapporteur") was granted leave on 21 March 2025 to make a submission. The Special Rapporteur reports to the United Nations Human Rights Council and General Assembly on the protection of human rights while countering terrorism, including by monitoring respect for the international prohibition on retroactive criminal punishment.

2. In performing his mandate, Special Rapporteur is accorded privileges and immunities as an expert on mission under the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946. This submission is provided voluntarily without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on mission, under the 1946 Convention. In accordance with his independence, the Special Rapporteur has not sought authorization for this submission from the United Nations, Human Rights Council, Office of the United Nations High Commissioner for Human Rights, or any officials associated with those bodies.

3. As a third-party intervention, this submission is limited to issues within the expertise of the Special Rapporteur, does not comment on the facts or merits of the case and addresses only the applicable general principles. It addresses the foreseeability element of the principle of legality within the international prohibition on retrospective criminal punishment, in the context of the Grand Chamber's question: "Was the applicant's conviction for membership of an armed terrorist organisation compatible with the "foreseeability" requirement under Article 7 of the [European] Convention [on Human Rights]?".

4. In this respect, the European Court of Human Rights has indicated that the European Convention on Human Rights "should so far as possible be interpreted in harmony with other rules of international law of which it forms part",[1] "in particular" human rights.[2] It has a "constant practice" of interpreting the Convention in the light of the Vienna Convention on the Law of Treaties 1969, including the duty in article 31(3)(c) to take into account "any relevant rules of international law applicable in the relations between the parties".[3]

[1] E.g. *Al-Adsani v United Kingdom* [GC] App No. 35763/97, ECHR 2001-XI, para. 55.
[2] E.g. *National Union of Rail, Maritime and Transport Workers v the United Kingdom,* App. No. 31045/10, para. 76; *Nait-Liman v Switzerland* [GC], App. No. 51357/07 (2018), para. 174.
[3] *Hassan v the United Kingdom [GC] (2014), App. No. 29750/09,* para. 100.

5. The Special Rapporteur recognizes the challenges that States face in addressing terrorism. The obligation to respect international human rights law while countering terrorism has been repeatedly affirmed by the United Nations General Assembly, Security Council and Human Rights Council. The General Assembly's 2006 Global Counter-Terrorism Strategy recognized that "effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing".[4]

THE PRINCIPLE OF LEGALITY UNDER INTERNATIONAL LAW

6. Article 15(1) of the International Covenant on Civil and Political Rights 1966 ("ICCPR") prohibits retroactive criminal punishment: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed…." Article 4(2) of the ICCPR provides that Article 15 is non-derogable, even in time of public emergency which threatens the life of the nation. Other international treaties also prohibit retroactive punishment,[5] along with Article 11 of the Universal Declaration of Human Rights 1948.

7. In addition to Article 7(1) of the European Convention on Human Rights 1950 ("ECHR"), other major regional human rights instruments contain a similar prohibition,[6] which is non-derogable under the ECHR and the American and African instruments.[7] Retroactive criminal punishment is also prohibited under treaty[8] and customary[9] international humanitarian law in time of armed conflict (international and non-international) and under international criminal law.[10]

8. The prohibition is well-established in customary international law[11] and may be *jus cogens*.[12] In 2024 the United Nations Human Rights Committee observed that "[t]he universal acceptance of the principle of the non-retroactivity of penal law… is evidenced by its inclusion in virtually all universal and regional human rights treaties".[13] The prohibition reflects principles commonly found in the domestic criminal laws of virtually all states, including in many national constitutions. The prohibition is thus a "general principle of law" under Article 38(1)(b) of the Statute of the International Court

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[4] A/RES/60/288, annex, pillar IV.
[5] Convention on the Rights of the Child, art. 40(2)(a); Convention on Migrant Workers, art. 19(1).
[6] EU Charter of Fundamental Rights, art. 49; American Convention on Human Rights, art. 9; African Charter on Human and Peoples' Rights, art. 7(2).
[7] ECHR, art. 15(2); American Convention, art. 27; the African Charter admits no derogations.
[8] Third Geneva Convention 1949, art. 99(1); Fourth Geneva Convention 1949, art. 67; Additional Protocol I of 1977, art. 75(4)(c); Additional Protocol II of 1977, art. 6(2)(c).
[9] International Committee of the Red Cross, Customary International Humanitarian Law, Rule 101.
[10] E.g. Statute of the International Criminal Court, art. 22(1).
[11] K. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2010), 352-358 (and practice cited therein); C. Kreß, "Nulla poena nullum crimen sine lege" in Max Planck Encyclopedias of International Law (online 2010), para. 19.
[12] Gallant, ibid, 402; Kreß, ibid, para. 19.
[13] *Bratyslo et al v Russia*, UNHCR Communication No. 3022/2017 (27 March 2024), para. 8.5.

of Justice.[14] As the International Military Tribunal declared in 1946, "the maxim *nullum crimen sine lege*… is in general a principle of justice".[15]

9. As early as 1935 the Permanent Court of International Justice observed that *nulla poena sine lege* aims to "protect the individual against the State"[16] and to "safeguard individual liberty from any arbitrary encroachment" by the State.[17] It also aims to give fair notice, to ensure that it is "possible for the individual to know, beforehand, whether his acts are lawful or liable to punishment".[18]

10. The over-arching principle of legality under international human rights law is understood to comprise a number of distinct but inter-related principles:

    (a) non-retroactive criminal laws, i.e. no liability unless the conduct was a crime at the time it was committed (*nullum crimen sine lege*);

    (b) non-retroactive criminal penalties, i.e. no punishment (including higher penalties) without law (*nulla poena sine lege*);

    (c) a prohibition against analogy, i.e. a court must not fill gaps by unreasonably applying the law beyond its language or precedent (*nullum crimen sine lege stricta*);[19] and

    (d) the requirement of certainty in the definition of offences (*nullum crimen, nulla poena sine lege certa*), so that a person may prospectively know the scope of their liability and over-breadth and risks of abuse are avoided.

CERTAINTY AND FORESEEABILITY UNDER INTERNATIONAL LAW

11. The United Nations Human Rights Committee has indicated that Article 15 of the ICCPR requires "that both criminal liability and punishment be limited to clear and precise provisions in the law that was in place and applicable at the time that the act or omission occurred".[20] It has further stated that proof of all elements of an offence is necessary to satisfy the principle of legal certainty.[21]

12. In a case on the vague classification of treason as "aggravated terrorism", the Inter-American Court of Human Rights elaborated on certainty in offences:

> crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense, thus giving full meaning to the principle of

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[14] E.g. International Law Commission Yearbook, vol. II (1976), 90-91; *Oppenheim's International Law* (9th edition, 1996), vol. I, 38; Kreß, supra, para. 19; Y. Kryvoi and S. Matos, "Non-Retroactivity as a General Principle of Law" (2021) 17 Utrecht Law Review 46, 51.

[15] *United States of America et al v Hermann Göring et al*, International Military Tribunal at Nuremberg, Final Judgment, 30 September–1 October 1946, [1947] 1 Trial of the Major War Criminals Before the International Military Tribunal, 219.

[16] *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City* (Advisory Opinion No. 27), Permanent Court of International Justice, 4 December 1935, para. 52.

[17] Ibid, para. 50.

[18] Ibid, para. 52.

[19] E.g. *Kokkinakis v Greece [Judgment]*, App. No. 14307/88, A/260-A, [1993] ECHR 20, para. 52.

[20] *Bratyslo v Russia*, supra, para. 8.5; see similarly HRC, General Comment No. 29 (2001), para. 7.

[21] *Nicholas v Australia*, HRC Communication No. 1080/2002 (19 March 2004), para. 7.5.

nullum crimen nulla poena sine lege praevia in criminal law. This means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment. Ambiguity in describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to ascertaining the criminal responsibility of individuals and punishing their criminal behaviour with penalties that exact their toll on the things that are most precious, such as life and liberty.[22]

13. As noted by the Permanent Court of International Justice, "criminal law does not always regulate all details" and the principle does not require absolute certainty; it admits a degree of judicial interpretation in clarifying the scope of an offence, "[b]ut there are some cases in which the discretionary power left to the judge is too wide to allow of any doubt but that it exceeds these limits".[23]

14. The European Court of Human Rights has indicated that Article 7 of the ECHR is to be applied to provide effective safeguards against arbitrary prosecution, conviction and punishment.[24] Offences must be defined in such a manner that the individual may see from the wording of the definition which acts or omissions are prohibited, if needed with the assistance of judicial interpretation and legal advice.[25] In addressing the indeterminacy of legal language and the need to flexibly adapt to changing circumstances, the European Court has held that the principle of certainty does not prohibit gradual judicial interpretation,[26] provided that the outcome is consistent with the essence of the offence and could reasonably be foreseen;[27] judicial interpretation itself must not use overly vague concepts.[28] Foreseeability may not be satisfied where there is an extensive and unforeseeable interpretation to the accused's disadvantage, for example, due to a reversal of precedent[29] or interpretation by analogy.[30]

15. The Pre-Trial Chamber of the International Criminal Court has also held that legality requires offences to be "defined with sufficient particularity".[31]

FORESEEABILITY IN RELATION TO TERRORIST OFFENCES

16. In its Concluding Observations on States parties' periodic reports, and in its Views in individual communications, the **Human Rights Committee** has frequently expressed concern at offences that are too "vague and

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[22] *Castillo Petruzzi et al v Peru*, Merits, 30 May 1999, (1999) IACtHR (Ser C) No. 52, para. 121.
[23] *Danzig Advisory Opinion*, supra, para. 51.
[24] *S.W. v the United Kingdom*, 22 November 1995, Series A no. 335-B, para. 35; *C.R. v the United Kingdom*, 22 November 1995, Series A no. 335-C, para. 33.
[25] *Cantoni v France [Judgment]*, App. No. 43522/98 Reports 1996-V paras. 29, 35.
[26] *Kokkinakis v Greece*, supra, para. 40; *Cantoni v France*, supra, para. 31; *S.W. v UK,* supra; *C.R. v UK*, supra, para. 41.
[27] *S.W. v UK*, ibid, para. 36.
[28] *Liivik v Estonia [Judgment]*, App. No. 12157/05, [2009] ECHR 989, paras. 96-104.
[29] *Dragotoniu and Militaru-Pidhorni*, App. No. 77193/01 & 77196/01, 24 May 2007, paras. 39-48.
[30] *Vasiliauskas v Lithuania* [GC], App. No. 35343/05, 20 October 2015, paras. 179-186.
[31] *Prosecutor v Dyilo*, ICC-01/04-01/06, Decision on Confirmation of Charges, 29 Jan. 2007, para. 302.

insufficiently defined (or 'abstract')",[32] including group-based offences such as those relating to secret associations and terrorist organizations. Thus, the Human Rights Committee has been concerned at:

(a) A definition of terrorism that "is so broad that it encompasses a wide range of acts of differing gravity", which needed to be defined "much more precisely",[33] and other over-broad or ambiguous definitions of terrorism;[34]

(b) Imprecise offences, such as the criminalisation of encouragement of and inducement to terrorism through publication, which can lead to abuse against the media;[35] and "referring to the degree of severity of offences and the perpetrators' intended purpose";[36]

(c) Broad definitions of membership of a terrorist group;[37] and criminalization of a "terrorist organization without any reference to a particular criminal offence committed by or through such an organization, as well as a lack of "objective criteria for determining membership" of such organization;[38]

(d) Imprecise definitions of "extremist activity", which are prone to arbitrary application and do not give individuals notice of their liability;[39] and

(e) The use of evidentiary presumptions to the detriment of the defendant.[40]

17. The overriding concern of the Human Rights Committee has been to ensure that terrorism definitions and offences are "defined in a precise and narrow manner",[41] in order to ensure "certainty and predictability" and avoid "wide interpretation"[42] and "arbitrary application".[43]

18. The **United Nations General Assembly** has called on States "to ensure that their laws criminalizing acts of terrorism are accessible, formulated with precision, non-discriminatory, non-retroactive and in accordance with international law, including human rights law".[44] The **Human Rights Council** has similarly called on States to ensure "that terrorism and related offences are

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[32] HRC Concluding Observations: Portugal (Macao), CCPR/C/79/Add.115, 4 Nov. 1999, para. 12.
[33] HRC Concluding Observations: Egypt, A/48/40 vol. I (1993) 139 at para. 705.
[34] E.g. HRC Concluding Observations, Estonia, A/58/40 vol. I (2003) 41 at para. 79(8); Israel, A/58/40 vol. I (2003) 64 at para. 85(14); Portugal, A/58/40 vol. I (2003) 56 at para. 83(15); Belgium, A/59/40 vol. I (2004) 56 at para. 72(24); Morocco, A/60/40 vol. I (2004) 35 at para. 84(20); Pakistan, CCPR/C/PAK/CO/1 (2017) 21; Korea, CCPR/C/KOR/CO/4 (2015) 20, 21; and *Nasheed v Maldives*, HRC Communication No. 2270/2013 (4 April 2018), para. 8.3.
[35] HRC Concluding Observations: Ethiopia, CCPR/C/ETH/CO/1 (2011) 15.
[36] HRC Concluding Observations: Belgium, A/59/40 vol. I (2004) 56 at para. 72(24).
[37] HRC Concluding Observations: Estonia, A/58/40 vol. I (2003) 41 at para. 79(8).
[38] HRC Concluding Observations: Uganda, A/59/40 vol. I (2004) 47 at para. 70(8).
[39] HRC Concluding Observations: Russian Federation, A/59/40 vol. I (2003) 20 at para. 64(20).
[40] HRC Concluding Observations: Israel, A/58/40 vol. I (2003) 64 at para. 85(14).
[41] HRC Concluding Observations: Korea, CCPR/C/KOR/CO/4 (2015) 20, 21.
[42] *Nasheed v Maldives*, HRC Communication No. 2270/2013 (4 April 2018), para. 8.3.
[43] HRC Concluding Observations: Korea, CCPR/C/KOR/CO/4 (2015) 20, 21.
[44] General Assembly res. 63/185 (3 March 2009): para. 18; also resolution 68/178 (2013), para. 6(m).

narrowly defined and meet the principles of legality, necessity and proportionality"[45] and "legal certainty";[46] as has "soft law" guidance.[47]

19. The **Counter-Terrorism Executive Directorate (CTED)** monitors national implementation of State obligations under relevant Security Council resolutions, including the duty to criminalize "terrorist acts" under paragraph 2(e) of resolution 1373 (2001). In that context, CTED's 2021 Global Survey of two decades of national implementation identified in various jurisdictions "overbroad" and "sweeping definitions, sometimes compounded by an expansive list of ancillary offences, [which] risk leading to the criminalization of non-violent conduct that falls outside the scope of the relevant international instruments"[48] and challenge compliance with human rights law.[49] CTED has indicated that among the Counter-terrorism Committee's "most frequent recommendations" has been to ensure terrorism laws are "defined clearly and precisely in accordance with the principle of legality" and do "not apply to acts beyond those envisaged by the international counter-terrorism instruments",[50] Security Council resolutions and international human rights law.[51]

20. Examples of over-broad definitions publicized by CTED include reference to "acts that 'destabilize 'social structures', acts against 'moral integrity' or 'public health' or which 'impair national integrity'"[52] and "acts said to threaten national security or stability without further elaboration, conventional crimes, or non-violent acts of protest or dissent".[53] Further examples include "destabilizing the social order/seriously disturbing the public peace/sowing discord among the population/harming the interests of the State",[54] as well as acts prejudicial to public safety.[55] CTED has been concerned about both ambiguous and over-broad *actus reus* elements and vague outcome or terrorist purpose elements.[56] Conduct elements may be over-broad where there is no element of violence (i.e. no act "intended to cause death or serious bodily injury", as suggested by the Terrorist Financing Convention and Security Council resolution 1566 (2004)) or the act is of insufficient gravity.

Practice of the Special Rapporteur

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[45] Human Rights Council res. 57/11 (10 October 2024), para. 14.
[46] Human Rights Council res. 57/11 (10 October 2024), para. 22.
[47] United Nations CTIFT Working Group, Basic Human Rights Reference Guide (2014), paras. 41 and 46 and Guiding Principles and Guidelines No. 3.
[48] CTED, Global Survey of the Implementation by Member States of Security Council resolution 1373 (2001) and other relevant resolutions (S/2021/972), para. 631.
[49] Ibid, para. 633.
[50] CTED Analytical Brief: A Commentary on the Codification of the Terrorism Offence, June 2024, 5; CTED, Technical Guide to the Implementation of Security Council Resolution 1373 (2001) and Other Relevant Resolutions, (S/2019/998), para. 192; Global Survey, para. 631.
[51] CTED, Global Survey, supra, para. 631.
[52] Ibid, para. 632.
[53] CTED, Technical Guide, supra, para. 192.
[54] CTED Analytical Brief, supra, 23.
[55] Ibid, 18.
[56] Ibid, 17-23.

21. International procedures addressing human rights while countering terrorism have also been concerned about the principle of legality. The 2006 Report of the **Commission on Human Rights' Independent Expert on the protection of human rights and fundamental freedoms while countering terrorism** highlighted that many states had enacted laws with "sweeping, vague and/or ambiguous terms and concepts" that were "considerably broader" than the standard in the Terrorist Financing Convention 1999.[57] The Report was concerned that "[d]efining crimes without precision can also lead to a broadening of the proscribed conduct by judicial interpretation".[58] It indicated that Article 15 of the ICCPR requires that "the criminalized conduct be described in precise and unambiguous language that narrowly defines the punishable offence and distinguishes it from conduct that is either not punishable or is punishable by other penalties", and that the law must be "reasonably foreseeable in its application and consequences".[59] The Report warned that imprecise laws "clearly risk criminalizing the lawful exercise of freedom of speech, assembly, association and other basic human rights, but are also subject to abusive application".[60]

22. Since 2005, vague and over-broad terrorism definitions and offences have been among the most common human rights concerns identified when monitoring States by the **Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism**, including in 900 communications to States (individual complaints and legislative reviews), country visits, and annual reports to the General Assembly and Human Rights Council. In the mandate's first report in 2005, the Special Rapporteur set out the position consistently held by the mandate since then:

> The first requirement of article 15, paragraph 1, is that the prohibition of terrorist conduct must be undertaken by national or international prescriptions of law. To be "prescribed by law" the prohibition must be framed in such a way that: the law is adequately accessible so that the individual has a proper indication of how the law limits his or her conduct; and the law is formulated with sufficient precision so that the individual can regulate his or her conduct. Terrorism offences should also plainly set out what elements of the crime make it a terrorist crime. Similarly, where any offences are linked to "terrorist acts", there must be a clear definition of what constitutes such acts.[61]

23. The Special Rapporteur has furthermore linked the requirement of legality and certainty with stringent limits on the **substantive definition of terrorism and terrorist offences**: "Arising from the need for precision, and to avoid use of

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[57] Report of the Independent Expert on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Robert K. Goldman, 7 February 2005, para. 32.
[58] Ibid.
[59] Ibid.
[60] Ibid, para. 35.
[61] Special Rapporteur Scheinin, E/CN.4/2006/98 (28 December 2005), para. 46. See also A/HRC/16/51 (22 December 2010), para. 27; A/HRC/31/65 (29 April 2016), para. 22; E/CN.4/Sub.2/2005/39 (22 June 2005), para. 33(c).

the fight against terrorism as an excuse to unnecessarily extend the reach of criminal law, it is essential that offences… be limited to countering terrorism”[62]

24. Accordingly, the Special Rapporteur has long recommended that terrorist offences be defined in accordance with the elements in Security Council resolution 1566 (2004),[63] which in turn incorporate the offences in the international counter-terrorism instruments and the “specific intent” or purpose elements in the Terrorist Financing Convention 1999 – namely, “to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”. The underlying convention offences were the product of careful multilateral negotiation open to all States and avoid the over-breadth that is characteristic of certain general definitions of terrorism in some national law and regional instruments. As such, they generally respect legality.

25. Resolution 1566 limits the *actus reus* of terrorism to criminal acts that also qualify as offences under international counter-terrorism instruments. This means that certain methods of terrorist violence are not covered where they do not constitute a treaty offence, such as attacks on civilians using guns or knives or perpetrated by vehicles. Accordingly, the model definition[64] of the Special Rapporteur recognizes that terrorist acts can include other “serious crimes” under national law that are intended to cause death or serious injury, accompanied by one of the above-mentioned specific intent elements. Departing from the best practice standards raises the likelihood of national definitions being vague and or overbroad and infringing legality/certainty.

26. Many states have added a cumulative specific intent element to their definitions – that the act should further a political, ideological, or religious purpose.[65] This is additional to intimidating a population or compelling a government. Such element beneficially narrows the scope of definitions. The United Nations General Assembly’s Declaration on Measures to Eliminate International Terrorism 1994 notably describes terrorism as involving “political purposes”.

27. International “best practice” definitions of terrorism also contain three “exclusion clauses” to narrow their scope:

    (a) Six international counter-terrorism instruments and a number of regional instruments exclude the “activities of armed forces during armed conflict, as those terms are understood under international humanitarian law, which

[62] E/CN.4/2006/98 (28 December 2005), para. 47.
[63] “[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 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”.
[64] A/HRC/16/51, para. 28.
[65] A/HRC/16/51, para. 27. See also CTED, Analytical Brief, supra, 16.

are governed by that law".[66] The exclusion ensures that violence in armed conflict is regulated by international humanitarian law as the *lex specialis*;

(b) One regional instrument excludes "[t]he provision of humanitarian activities by impartial humanitarian organisations recognised by international law".[67] This ensures that terrorist offences do not impermissibly criminalize activities protected under humanitarian law, including humanitarian relief and medical care; and

(c) Where definitions are not limited to causing death or serious injury, it is best practice to exclude acts of advocacy, protest, dissent or industrial action where they do not cause death or serious injury. This ensures offences do not unjustifiably criminalize acts committed in the exercise of freedom of expression, assembly, association and political participation.[68]

28. The Special Rapporteur has been particularly alert to the compounding violations of human rights law arising from the often complex structure of terrorism offences, as where a vague definition of terrorism triggers an additionally vague category of "terrorist organization", which in turn triggers vague offences relating to that organization, such as membership, support, association, recruitment, training, financing and so on. **Definitions of "terrorist organization"** should require that the entity has the substantial purpose of intentionally committing or facilitating terrorist acts, as properly defined.[69] Special care is required where an entity has mixed purposes, as where it also engages in legitimate commercial, charitable, political, social, educational, religious or media activities. Since identification of an entity as "terrorist" gives rise to interferences with a range of human rights, such classification must be strictly necessary and proportionate to the legitimate security objective, which may not be the case where the entity's activities are predominantly legitimate and any terrorist activity is an isolated instance or is confined to a small number of individuals acting outside of the entity's purposes or leadership structure or control. In such cases, those involved in terrorist activity should be investigated for terrorist offences in their own right.

29. The **link between a terrorist organization and any offences** relating to that organization must be articulated in a sufficiently narrow and precise manner, to avoid over-expansive liability. First, as regards the *actus reus*, the individual's conduct should materially and proximately contribute to the commission of a terrorist act by the group, i.e. death or personal injury for a terrorist purpose. It is not sufficient that the person makes any, even innocent, contributions (such as providing human rights or humanitarian law training, or

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[66] Terrorist Bombings Convention 1997, art. 19(2); Nuclear Terrorism Convention 2005, art. 4(2); Nuclear Material Convention 1979 (as amended by the Amendment 2005), art. 2(4)(b); Hague Convention 1970 (as amended by the Beijing Protocol 2010), art. 3 bis; Rome Convention 1988 (as amended by the Protocol 2005), art. 2 bis (2); Beijing Convention 2010, art. 6(2).

[67] EU Counter-Terrorism Directive 2017, recital 38.

[68] See also CTED, Analytical Brief, supra, 17.

[69] See e.g. A/HRC/16/51, para. 34.

medical care protected under international law); trivial or minor contributions; or remote, speculative or hypothetical conduct that does not objectively contribute to the likelihood of realization of terrorist acts by the group.

30. Secondly, as regards the mental element of criminal responsibility, the person must have knowledge (namely, an awareness or consciousness) of the terrorist purpose of the organization, in addition to intending to commit the terrorist offence relating to the organization. Lower mental standards, such as constructive knowledge ("should have known"), recklessness or negligence, are not sufficient. Maintaining a high mental standard is essential to ensure that liability for terrorism is limited to the highest level of culpability commensurate with the gravity of terrorist crime. Presumptions or inferences as to a person's knowledge are to be generally avoided, particularly where they reverse the burden of proof or require the defendant to invoke a defence.

31. A factor such as participation in "secret" activities by a group is not necessarily indicative of wrongdoing or knowledge of the group's terrorist purpose, particularly in States where freedom of political, religious and other expression, and freedoms of association and assembly, are limited in a manner inconsistent with human rights law and "secrecy" aims to avoid unjustifiable criminal repression. Further, an individual's position of leadership or responsibility in an organization likewise may not demonstrate knowledge of the group's terrorist purpose where the organization is large, diverse and decentralized, and knowledge of its violent purpose or activities may be confined to a few senior leaders. The bar to establish knowledge of the group's terrorist purpose may be heightened where the organization has not been previously declared "terrorist" by a court decision, or by any lawfully authorized designation procedure of the executive authorities that respects due process in accordance with international law, and there is otherwise no convincing evidence of any pattern of prior terrorist activity by the group.

32. The mandate of the Special Rapporteur has previously expressed concern that the definitions of "terrorism" and "terrorist organization" under Turkish law, and the offence of membership of a terrorist organization, are vague and overbroad, prone to arbitrary application, and have been abused against individuals legitimately exercising human rights and fundamental freedoms.[70]

33. In addition to giving fair notice to individuals, the ultimate purpose of the principle of legality is to prevent arbitrariness and over-reach in the criminal law, and thereby to prevent the consequential violation of other human rights, including liberty and even the right to life in death penalty cases. The prolific abuse of vague and over-broad terrorism offences in multiple jurisdictions has criminalized the legitimate activities of civil society and the exercise of freedoms of expression and of the media, association, assembly, political participation, and religion, and violated freedom from discrimination.

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[70] See e.g. Special procedures communications TUR 9/2020, TUR 13/2020 and TUR 5/2024.

Respectfully submitted at Sydney, 1 April 2025

Ben Saul

Professor Ben Saul