

Preventing and Suppressing Nuclear Terrorism while Respecting Human Rights

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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 am pleased to support this important event to discuss the protection of human rights under the International Convention for the Suppression of Acts of Nuclear Terrorism. I thank the United Nations Office of Counter-Terrorism (UNOCT) and the United Nations Office on Drugs and Crimes (UNODC) for their work in promoting the implementation of the Convention since 2019, with the support of the European Union. The event is timely given the growing risks of nuclear proliferation and potential diversion in the current geopolitical climate.

When the first of the now 19 international counter-terrorism instruments were adopted in the late 1960s, little attention was given to the explicit protection of human rights in transnational legal cooperation. In part this was because certain instruments were drafted by technical experts in highly specialised areas such as aviation, maritime and nuclear safety. The twin international human rights covenants of 1966 also only entered into force in 1976.

In the half century since, as human rights assumed greater prominence, the counter-terrorism instruments incrementally paid more attention to human rights, particularly in the new generation of instruments adopted since 1997, including the Terrorist Bombings Convention 1997, Terrorist Financing Convention 1999, and the Nuclear Terrorism Convention 2005.

All of the instruments must nonetheless be interpreted consistently with states parties' existing international law obligations, including human rights law, humanitarian law and refugee law. The instruments do not attempt to "contract out" of these fundamental obligations.

The General Assembly, Security Council and Human Rights Council have consistently affirmed that states must respect human rights law while countering terrorism, not only as a matter of law, moral principle and public legitimacy, but because doing so makes counter-terrorism more effective. By requiring due process to be followed, human rights can safeguard the integrity of investigations, prosecutions and extraditions, and ensure that convictions are sound, victims receive justice, and the innocent are spared.

The offences in the Nuclear Terrorism Convention and its obligations of prevention, suppression, and cooperation play an important role in protecting the right to life. The Convention thus helps states, in a structured way, to fulfil their obligation under human rights law to diligently take all feasible measures to prevent foreseeable threats to life, including where this arises from the dangers of nuclear material.

Indeed, article 7 of the Convention requires states parties to cooperate to take “all practicable measures, including, if necessary, adapting their national law, to prevent and counter preparations in their respective territories for the commission within or outside their territories” of Convention offences.

The Convention’s “sectoral” offences are carefully and precisely drafted, both as regards their physical and mental elements, and the drafting benefitted from relevant experts from a variety of the world’s legal systems. The offences broadly comply with the principle of legality under article 15 of the International Covenant on Civil and Political Rights, which requires that offences be defined with sufficient clarity and specificity so as to enable individuals to prospectively know the scope of their criminal liability.

The offences thus avoid the problem of vague and overbroad terrorism offences found in too many national and regional terrorism laws, which are prone to abuse and can result in infringements of fundamental rights, including liberty and freedoms of expression, association, assembly and political participation, among others. The Convention also has a particular legitimacy because it was negotiated through the process of participatory and inclusive treaty-making, under the universal auspices of the General Assembly, unlike the more exclusive and less transparent Security Council “legislation” against terrorism, which has failed to define it.

Further specificity is provided by Article 6 of the Convention, which requires states to criminalize the offences “in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons”, thus giving the states the option of distinguishing an additional, more specific nuclear terrorism offence where the extra “specific intent” element of terrorization is present.

The same article also affirms that offences “are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature”, echoing the principle of human rights law that one person or group may not exercise their rights in a manner that destroys the human rights or freedoms of others.

I wish to focus now on some of the key human rights protections in the Convention.

“Fair treatment”

First, one of the most fundamental protections is article 12, which guarantees “fair treatment” of “[a]ny person who is taken into custody or regarding whom any other measures are taken or proceedings are carried out”. While a fair treatment clause appeared in some of the earliest counter-terrorism instruments, it has been gradually strengthened over time and the Convention’s clause is “state of the art”. Earlier instruments limited fair treatment to the commencement of criminal or extradition “proceedings”.

In contrast, the Convention’s clause covers all “measures” under the Convention, including pre-arrest and pre-charge investigations (including searches and seizure of evidence) and extradition inquiries prior to the receipt of a formal extradition request, including any incidental detention. Further, it could cover measures taken in fulfilling a state’s duty to cooperate to prevent offences, including law enforcement and security/intelligence measures, information sharing, and technical cooperation.

In the earliest instruments, there was some uncertainty about the meaning of “fair treatment”. In 1972, the International Law Commission indicated it was intended to include the guarantees afforded to a detained or accused person, including fair trial under article 14 of the ICCPR and

the prohibition on retrospective criminal punishment under article 15. Recall that at that time, the ICCPR was not yet in force, hence uncertainty about the applicable legal standards.

Since 1997, the fair treatment clause has been more explicit. It mentions “applicable provisions of international law, including international law of human rights”. At a minimum, this means applicable treaty and customary international law, including the Universal Declaration of Human Rights, ICCPR and International Covenant on Economic, Social and Cultural Rights, as well as many provisions of the specialised conventions on torture, women, children, disability and the like. Customary law is particularly relevant where a state party to the Convention is not also a party, for instance, to the ICCPR.

Not only fair trial and non-retroactivity, but other ICCPR provisions are especially relevant to the scope of “fair treatment”, including: freedom from arbitrary detention, and judicial review of detention, under article 9; freedom from torture or cruel, inhuman or degrading treatment or punishment under article 7; humane and dignified conditions of detention under article 10; and the right to privacy (article 17) in relation to searches and seizures.

In relation to extradition, “fair treatment” also encompasses due process in the expulsion of aliens under article 13 (in turn requiring a decision reached in accordance with law, a right to submit reasons, review by a competent authority, and legal representation); and *non-refoulement* to a risk in another state of serious violations of human rights.

To avoid doubt and disagreement, the drafters could certainly have expressly mentioned the relevant rights, rather than opting for highly generalized references to international law and human rights. Nonetheless, in the context of a criminal cooperation convention, and given the fundamental nature of human rights standards, it is reasonably clear what rights should be interpreted as falling within the fair treatment standard.

Apart from human rights, the reference to “international law” generally imports relevant standards on consular relations, the treatment of aliens (including as regards detention, due process, and expulsion), diplomatic protection, extradition, mutual assistance, refugee law, and international humanitarian law.

The modern “fair treatment” clause additionally guarantees “all rights and guarantees in conformity with the law of the State in the territory of which that person is present”. This ensures that a suspect enjoys higher protections where national law goes beyond the international minimum standards of human rights law.

Although the fair treatment clause largely operates by reference to external international legal standards, its inclusion in the Convention has more than a symbolic value. The dispute settlement clause in Article 23 of the Convention can serve to establish the contentious jurisdiction of the International Court of Justice where there are disputes over the interpretation or application of the Convention. It can thus enable inter-state human rights claims to be brought before the Court, where jurisdiction may otherwise be lacking; and such treaty clauses have increasingly been used in recent years to litigate human rights obligations.

Consular rights and ICRC access

Secondly, like the other counter-terrorism instruments the Convention safeguards the consular rights of foreign nationals where a state party takes measures to ensure their presence for extradition or prosecution, typically where they are detained. Article 10(3) protects the person’s right to communicate with the nearest appropriate representative of the State of nationality,

another state entitled to protect them (such as where a third state exercises substitute protection), or the state of habitual residence of a stateless person. There is further a right to be visited by such representative and to be informed of these rights.

These rights are broadly derived from and consistent with the international law of consular relations and protection and should be interpreted accordingly. For instance, it is well recognized that consular visits may entail arranging legal representation, which is not expressly mentioned in the counter-terrorism conventions. All of the counter-terrorism instruments recognize consular rights except the Nuclear Material Convention 1979 and given that omission it is welcome that the Nuclear Terrorism Convention includes such rights.

In addition, the Article 10(5) of the Convention preserves the right of a state with criminal jurisdiction over nationals or habitually resident stateless persons under the Convention to invite the International Committee of the Red Cross to communicate with and visit the alleged offender. This could be an important safeguard where, for example, the states concerned do not have diplomatic relations.

Non-discrimination clause

Thirdly, Article 16 provides that the Convention does not require extradition or mutual assistance if the requested state has substantial grounds for believing that (1) the request was made for the purpose of discriminatory prosecution or punishment on specified grounds, or (2) the person's position may be prejudiced for such discriminatory reason. The latter could include where discrimination affects the preparation of their defence, the presumption of innocence, fair trial, treatment in detention or sentencing. Positively, these grounds are not seemingly subject to security-based exceptions, unlike non-refoulement under refugee law.

The so-called non-discrimination clause permits states the discretion to refuse cooperation, but problematically does not mandate refusal – unlike under the earlier Hostages Convention 1979. The clause is rather symbolic, since the Convention does not require extradition; and the duty to provide mutual assistance, like extradition, is left to be governed by applicable national and international law. Such laws could thus already safeguard against discrimination at will.

The prohibition on refoulement to persecution or other serious human rights violations continues to apply in the background and is not affected by the Convention. Ideally the counter-terrorism conventions should explicitly prohibit non-refoulement in line with contemporary international law, including non-return to persecution under refugee law, as well as the absolute ban on return to torture or other ill-treatment (ICCPR article 7 and the Convention against Torture), arbitrary deprivation of life (article 6) and flagrant denial of fair trial (article 14); arbitrary detention (article 9) and other serious violations should also be considered.

On its own terms, the Convention's non-discrimination clause is rather selective. It recognizes the grounds of race, religion, nationality, ethnic origin or political opinion, but not also "particular social group" as under refugee law, or the additional grounds under human rights law such as colour, language, opinion, social origin, property, birth or other status; minority status; age; disability; marital status; place of residence; sexual orientation and so on.

It should also be noted that the counter-terrorism conventions do not mandate or refer to refusal of legal cooperation on certain other grounds that seek to safeguard human rights, and which appear in national law and treaty practice. Examples include double jeopardy, double criminality, "injustice", humanitarian considerations and so on.

Consent to transfer of detained witnesses

Fourthly, it should be mentioned that Article 17(1)(a) of the Convention requires that free, informed consent must be given by any detainee or prisoner in one state whose presence is sought to provide evidence in another state, thus preventing coercive witness transfers. Such witness enjoys immunity from prosecution or detention in the other state under article 17(3).

Savings clause

Fifthly, Article 4(1) of the Convention is a savings clause providing that “Nothing in this Convention shall affect other rights, obligations and responsibilities of States and individuals under international law, in particular the purposes and principles of the Charter of the United Nations and international humanitarian law.” Affirmations of international law are welcome. However, in many ways the clause is a creature of over-abundant drafting caution flowing from political tensions during the drafting, since it is difficult to identify any provisions in the Convention which would raise a conflict with other rules of international law.

The same is true of Article 21, requiring states to implement their obligations consistently with sovereign equality, territorial integrity and non-intervention in domestic affairs; and article 4(4) indicating the Convention does not address the legality of nuclear weapons.

Exemption for armed forces

Sixthly, Article 4(2), like under the other post-1997 instruments, excludes from the Convention “[t]he activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law”. It further excludes “the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law”.

Article 4(3) clarifies the obvious – that these exclusions do not condone unlawful acts or preclude prosecution under other laws. In other words, any violations of humanitarian law or human rights law by military forces or state officials can be dealt with under those frameworks and the Convention does not confer immunity or impunity.

Nuclear health and safety

Finally, I note that article 18(1)(c) of the Convention requires states that have seized or taken control of nuclear material to ensure it is held according to applicable health and safety standards of the International Atomic Energy Agency. In this respect, there are linkages to the right to “safe and healthy working conditions” under Article 7(b) of the ICESCR.

Conclusion

To conclude, the Convention highlights some key human rights protections that are essential when criminalizing nuclear terrorism, and its provisions improve on some of the earlier counter-terrorism conventions. Like the other instruments, the Convention’s references to human rights are nonetheless spartan and generalized. In national implementation, states must be careful to interpret and apply the Convention consistently with the wider corpus of international law, including human rights, humanitarian and refugee law – and should encourage states with whom they cooperate to do the same. Thank you.