**Regional Expert Workshop in Central Asia on the**

**Protection of Vulnerable Targets Against Terrorist Attacks**

**Tashkent, 16-18 November 2022**

**Session II: The International Legal Framework to Protect Vulnerable Targets**

**Statement of the mandate of the UN Special Rapporteur** **on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism[[1]](#footnote-1)\***

**Introduction**

1. I wish to thank the Organization for Security and Co-Operation in Europe for the invitation to address the regional expert workshop today here in Tashkent on behalf of the Mandate of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, and on behalf of the Mandate holder, Professor Fionnuala Ní Aoláin. This workshop addresses a key international priority, and I commend all who have facilitated it for their hard work to bring us here today – and I extend my gratitude to Uzbekistan for hosting us today.
2. Within this session, I want to consider **three** different aspects of the international legal framework regarding the protection of vulnerable targets:
	1. **First**, I want to focus on how human rights law and international humanitarian law complement the obligations of States in the protection of vulnerable targets and infrastructure, and how such protection is a necessary part of States discharging their international legal obligations;
	2. **Second**, I wish to sound a note of caution for States as they develop preventative strategies to ensure that in taking steps to protect infrastructure they do so in a manner which is consistent with the promotion and protection of human rights and fundamental freedoms – including with respect to economic, social and cultural rights; and
	3. **Third**, I wish to highlight the human rights implications which arise at the stage of crisis response and management.

**Protection of Vulnerable Targets and Infrastructure is a Human Rights and Humanitarian law Issue**

1. We have already in this session considered some of the basic legal instruments which oblige States to take steps to address the risk of attacks against critical infrastructure, such as Security Council Resolution 2341.
2. But the protection of vulnerable targets and infrastructure is also an inherent aspect of States’ compliance with their obligations to protect and promote human rights, humanitarian law and humanitarian interests. The Human Rights Committee has recognized that States’ obligation to protect the right to life,[[2]](#footnote-2) for instance, requires that States should develop strategic plans to protect against disruptions to health services, access to food, water, energy, sanitation and essential services fundamental to individual survival and safety.[[3]](#footnote-3) States’ obligations to take steps progressively to realize the human rights to food and an adequate standard of living[[4]](#footnote-4) and to the highest attainable standard of health[[5]](#footnote-5) also imply that States must take necessary and achievable actions to minimize the threats to infrastructure and resources on which health and human lives depend.
3. Similarly with respect to vulnerable targets other than critical infrastructure, such as public places and cultural sites, the obligation to take protective steps arises from human rights obligations to, among other things, protect and promote free assembly,[[6]](#footnote-6) free expression,[[7]](#footnote-7) and the freedom to manifest religious beliefs.[[8]](#footnote-8) If populations cannot be assured of a safe environment for the organizing and performance of civil society, these fundamental rights cannot be secured.
4. In addition, it is important to recall that even under conditions of armed conflict, States are subject to a range of crucial international legal obligations which imply protections for the infrastructure and places upon which civilian populations depend. Alongside international human rights law, which continues to apply in conflict settings,[[9]](#footnote-9) the specific rules of international humanitarian law -- acknowledging applicable treaty and customary international law -- require the protection of objects indispensable to the survival of the civilian population, such as food and water infrastructure,[[10]](#footnote-10) and of cultural objects and places of worship.[[11]](#footnote-11) The overlap with critical infrastructure is plain.
5. Accordingly, it is important that, when we approach the topic of protection of vulnerable targets and infrastructure from terrorist threats, we see it not as a separate bolt-on to human rights protection, but as an intrinsic element and a way in which States give effect to their governing human rights and humanitarian obligations, both in times of peace and in periods of conflict.

**Human Rights Concerns at the Preventative Stage**

1. That brings me to the second issue to consider, namely how States must ensure that, in their development of preventative strategies, they do so in a manner which is compliant with their human rights obligations. **Two points** are particularly relevant:
	1. Identification of priorities; and
	2. Methods of protection.

***Identification of priorities***

1. With respect to identification of priorities, the issue is that when States come to assess the relative importance of different aspects of critical infrastructure and different potential targets, they must be mindful of the assumptions and value judgments which inform those assessments. A key risk is that State decision-makers may make decisions which are discriminatory in their intent or effect, in violation of States’ obligations to ensure that the protection of human rights applies without distinction of any kind, including on the grounds of race, sex, or religion.[[12]](#footnote-12) Research in the field of preparedness for cyberattacks has noted, for instance, a consistent tendency to prioritize the interests of certain potential victims (commercial organizations, the military, central government) in favour of other institutions such as non-government organizations, educational institutions, and local healthcare.[[13]](#footnote-13) The former group of institutions are disproportionately populated by men, the latter by women. The UN Institute for Disarmament Research has observed that *‘[a]s schools, non-governmental organizations and individuals are more likely to be concerned with issues of social power, harm and equality, this prioritization has knock-on gender effects*.’[[14]](#footnote-14) As States develop their lists of priorities for critical infrastructure, they must take a broad view of the definition of what is *critical* for different persons, and must not make decisions which, even if neutral on their face, have the *purpose or effect[[15]](#footnote-15)* of discriminating between members of society on the basis of race, religion, sex, or other protected characteristics.
2. Similar concerns may be voiced about States’ determination of ‘soft targets’ – that is vulnerable sites whose open nature and high degree of accessibility make them especially vulnerable to terrorist attacks by virtue of the ease of the attack rather than the strategic significance of the target. States must conduct rigorous analyses which interrogate and challenge assumptions about what sort of public spaces, including what sort of cultural or religious spaces, are most at threat and most in need of protection.
3. As an aside, I would note that these concerns are not matters of academic or theoretical interest. On the contrary, the actual or perceived violation of non-discrimination norms by States in their attempts to give effect to counter-terrorism and national security policy has been, as the holders of this Mandate have consistently found, a key contributor to alienation, resistance, extremism, and terrorism worldwide.

***Methods of protection***

1. Having identified priorities for protection in a manner mindful of the prohibition on non-discrimination, it is important that States consider carefully the methods which they employ to give effect to their preventative strategies. States must resist the urge to prevent risks through taking actions which are so restrictive that the protective measures themselves violate the conditions of necessity and proportionality. Considering the protection of public spaces, for instance, solutions which rely upon bulk surveillance or heavy-handed restrictions upon protests or assemblies are almost certainly guaranteed to constitute unlawful interferences with human rights.
2. Bulk surveillance programmes have been repeatedly declared inconsistent with the rights to privacy and free expression by the UN High Commissioner for Human Rights,[[16]](#footnote-16) the European Court of Human Rights,[[17]](#footnote-17) and various Special Rapporteurs,[[18]](#footnote-18) not least because of the resulting chilling effect on public discourse. States must be anxious not to strangle civic space in order to protect it. Guided by the recent observations of the High Commissioner for Human Rights in the 2022 ‘Right to Privacy in the Digital Age’ report, States should, at a minimum, ensure that any surveillance measures are adopted as a last resort after all less intrusive measures have been exhausted or have been shown to be futile, and should be limited in scope, duration, and the type of communications or data which are obtained.[[19]](#footnote-19) (In this regard, we would also note that more ‘targeted’ surveillance of personal communication devices through spyware, for instance, can also violate international human rights law – in this regard, we note a forthcoming publication of the Mandate on this issue (which we would be very happy to share in due course).)
3. States may be considering deploying biometric identity monitoring as part of their protection of critical infrastructure or public spaces, including facial recognition technology, iris scans, gait recognition, etc. In doing so, as previously set out by the Mandate in its position paper on the use of biometric data collection technologies in counter-terrorism contexts, states should display extreme caution, mindful that the collection and analysis of such identity data is very unlikely to be a proportionate means of addressing potential threats, and that the limitations upon the accuracy and robustness of such identification technologies are well-known.

**Human Rights Implications of Crisis Response and Management**

1. The third and final issue I wish to raise concerns the interaction of human rights protection and crisis response and management. In the event that attacks against vulnerable targets or infrastructure do come to pass, and States mobilize resources to respond to those attacks, it is important to be clear on both the flexibility and the limitations arising from human rights law.
2. With regard to the flexibility that human rights affords, I note that human rights law allows flexibility for State responses to emergencies, providing a robust and specific mechanism by which States may derogate from certain obligations during times of public emergency which threaten the life of the nation.[[20]](#footnote-20) But that proviso is not a free rein (and this goes to the point about limitations arising from human rights law). Any derogations must be: 1) officially declared; 2) immediately notified to the UN Secretary General and the international community; and 3) justified with reasons.[[21]](#footnote-21) Additionally, and critically, I note that certain fundamental protections, including the protection of the right to life and the right to freedom from torture or cruel, inhuman or degrading treatment or punishment, **cannot** be subject to derogation.[[22]](#footnote-22)
3. Finally, as I conclude, I note that as part of their crisis response and management, States should ensure, consistent with their obligations to prevent discrimination and to facilitate rights such as adequate standards of living and health, that their practical responses to crises and terrorist attacks must pay particular attention to the special protection of women, children, and other vulnerable groups. There is an analogy here with the best practice approach in response to natural disasters, encapsulated for instance in the Resolution of the UN Human Rights Council in respect of a human rights approach to the recovery process after the Haiti earthquake in 2010 – the first Human Rights Council session devoted to a disaster.[[23]](#footnote-23) Here States can draw upon a wealth of guidance for crisis management developed in the context of natural and human made disasters which seeks to operationalize human rights protection. The Operational Guidelines on Human Rights and Natural Disasters adopted by the UN Inter-Agency Standing Committee are one such resource,[[24]](#footnote-24) as are the International Law Commission’s Draft Articles on the Protection of Persons in the Event of Disasters.[[25]](#footnote-25) Key points coming out of these Guidelines and Draft Articles include the paramount focus upon vulnerable people and the overriding obligation of States to address humanitarian priorities (including through a duty to seek assistance from other States, the UN, and/or other institutions).

**Conclusion**

1. As I conclude my presentation today, I say this. While we develop strategies to protect vulnerable targets and critical infrastructure from terrorist threats, we must ensure that all aspects of that work is fully informed by human rights law, which underpins the reasons why critical infrastructure is important, and how it should be dealt with, both at the planning and at the responsive stage.
1. \* Special Rapporteur Fionnuala Ní Aoláin, meeting attended by Adriana Edmeades Jones Legal Adviser to the Special Rapporteur. [↑](#footnote-ref-1)
2. ICCPR, Article 6. [↑](#footnote-ref-2)
3. *General Comment 36*, CCPR/C/GC/36, [26]. [↑](#footnote-ref-3)
4. ICESCR, Article 11. [↑](#footnote-ref-4)
5. ICESCR, Article 12. [↑](#footnote-ref-5)
6. ICCPR, Article 21. [↑](#footnote-ref-6)
7. ICCPR, Article 19. [↑](#footnote-ref-7)
8. ICCPR, Article 18. [↑](#footnote-ref-8)
9. As confirmed by the Human Rights Committee in *General Comment 36*, [64]. See also: *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, 1996 ICJ Rep p66, [24]-[25]. [↑](#footnote-ref-9)
10. Additional Protocol I to the Geneva Conventions, Article 54. [↑](#footnote-ref-10)
11. Additional Protocol I to the Geneva Conventions, Article 53. [↑](#footnote-ref-11)
12. ICCPR, Article 2(1); ICESCR, Article 2(2); CEDAW, Article 2. [↑](#footnote-ref-12)
13. L Maschmeyer et al., ‘A Tale of Two Cybers – How Threat Reporting by Cybersecurity Firms Systematically Underrepresents Threats to Civil Society’ (2020) 18(1) *Journal of Information Technology & Politics* 1. [↑](#footnote-ref-13)
14. K Millar et al., ‘Gender Approaches to Cybersecurity: Design, Defence, and Response,’ UN Institute for Disarmament Research (2021), p40. [↑](#footnote-ref-14)
15. The test for indirect discrimination: see *General Comment 18*, [7]. [↑](#footnote-ref-15)
16. OHCHR, ‘The Right to Privacy in the Digital Age,’ A/HRC/27/37 (30 June 2014), [25]. [↑](#footnote-ref-16)
17. E.g *Roman Zakharov v Russia* [2015] ECHR 1065; (2016) 63 EHRR 17; *Szabo and Vissy v Hungary* [2016] ECHR 579; (2016) 63 EHRR 3, [52]-[89]; and *Big Brother Watch v UK* [2021] ECHR 439. [↑](#footnote-ref-17)
18. A/69/397; and UN Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression and Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, ‘Joint Declaration on Surveillance Powers and their Impact on Freedom of Expression’ (21 June 2013). [↑](#footnote-ref-18)
19. A/HRC/51/17, [19]. [↑](#footnote-ref-19)
20. ICCPR, Article 4. [↑](#footnote-ref-20)
21. ICCPR, Article 4(3). [↑](#footnote-ref-21)
22. ICCPR, Article 4(2). [↑](#footnote-ref-22)
23. A/HRC/S-13/1. [↑](#footnote-ref-23)
24. A/HRC/16/43/Add.5 (2011). [↑](#footnote-ref-24)
25. Adopted by the ILC and submitted to the General Assembly in 2016: A/71/10, [48]. [↑](#footnote-ref-25)