

‘Designing and Enhancing Human Rights-based and Gender Sensitive Border Security Management Policies and Practices’

Global Counter-terrorism Forum, Border Security Management (BSM) Initiative Workshop: Approaches to Border Security and Management – Best Practices in Responding to Transnational Strategic Cross-Border Security Issues

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

Excellencies, Distinguished Participants,

1. Good evening from Sydney and I am sorry not to be with you in person to enjoy the delightful city of Rome. I am grateful for the opportunity to speak today at this Workshop, following the remarks of my predecessor, Professor Ní Aoláin at an earlier Exploratory Dialogue. I extend my particular thanks to the GCTF BSM Initiative Co-leads, Jordan, the United States and the UN Office of Counter-Terrorism (UNOCT) for the invitation to reflect on integrating human rights-based and gender-sensitive approaches in border security management.
2. The emergence of mass international air travel since the Second World War has transformed global economic growth and prosperity, cultural exchange and migration, leisure and family life. But the ubiquity of air travel also brought hijacking and other terrorist threats to international civil aviation, criminal trafficking in persons and illegal contraband, and the transport of criminal and terrorist fugitives. States have legitimately developed strict protocols for border, passenger and customs manifest checks to respond to, and prevent, terrorism and other serious crimes. The terrorist attacks of 11 September 2001 stimulated the United Nations Security Council to pay greater attention to border security. In more recent years, the threat of the Islamic State in the Levant (ISIL), including the movement of foreign terrorist fighters to Syria and Iraq, prompted the Council adopt resolutions specifically requiring states to collect and share certain data from international travellers – both Advance Passenger Information (‘API’) and Passenger Name Record (‘PNR’), thus strengthening the earlier standard setting of the International Civil Aviation Organization. API and PNR are clearly useful as standardised means of establishing passenger identity accurately and efficiently. Border management and criminal investigations are facilitated by timely access to reliable personal identity data, which can easily be checked against both approved entrant lists and existing watchlists.

3. Border management in general, and the deployment of API and PNR datasets in particular, are sites of relentless change. The United Nations Countering Terrorist Travel Programme is currently being implemented in many countries through UNOCT, the Counter-terrorism Executive Directorate, the UN Office on Drugs and Crime, the International Civil Aviation Organization, the UN Office of Information and Communication Technology, Interpol, and the International Organization for Migration. The cornerstone of that Programme is the provision and use of the UN-owned software program known as goTravel.
4. Under my predecessor, late last year my mandate published its *Position Paper on the Countering Terrorist Travel Programme and the goTravel Software Solution*. I commend it to you. I also wish to highlight a number of points which are generalizable to all counter-terrorism measures and criminal investigations involving border management and which are crucial to the design of an effective and human-rights compliant border security system.
5. **First, in the rush to delve into the detail of policies and technology governing the border, it should not be forgotten that the operation of any data-driven system of identity verification at borders engages a very wide range of human rights obligations.** These include the obligations to respect individuals' rights to privacy, other civil rights (particularly free expression), political participation, freedom of assembly, of association, and religion, the free movement rights of persons to leave any country and to return to their country, and to seek and enjoy asylum from persecution and other serious violations of human rights. Where so many fundamental rights are potentially affected, states must exercise special care or heightened diligence to avoid violations. As the Court of Justice of the European Union has said, the collection and processing of passenger data will only qualify as lawful if it is *only* carried out for the purposes of '*preventing and investigating terrorism and serious criminal offences*'.¹ The lawful purposes for processing this data must also be according to pre-determined non-discriminatory criteria which are reviewed regularly so as to minimize false positives.²
6. **Second, it is important to consider more closely the specific issue of the use of gender markers in traveller identity data.** The presence of these markers (and border security encounters which interrogate individuals in relation to them) is causing significant distress to transgender, non-binary, and otherwise gender non-conforming persons. The historic justification of the use of gender markers in travel documentation was that the additional datapoint allowed for efficient sub-categorization between persons sharing surnames and initials in old database systems. Modern databases are capable of differentiating by full names and other biometric data, such that the presence of gender markers in travel documents has negligible impacts on search efficiency. Further, the greater biometric sophistication of modern e-passport technology does away with the need for generalized narrative descriptive markers to verify the holder's identity. In that context, there is a

¹ Case C-817/19 *Ligue des Droits Humains v Conseil des Ministres*, [141]ff.

² *Ligue des Droits Humains*, [193]-[201].

growing push for the removal of gender markers altogether from official documentation, as noted by the UN Independent Expert on Sexual Orientation and Gender Identity in 2018³ and the 2017 Yogyakarta Principles Plus 10.⁴ It is time to consider whether the future of traveller data, and border management, still requires the traditional recourse to gender as a datapoint, or whether doing so (and its attendant downsides) may be avoided in the future.

7. **Third, a worldwide system for data collection, processing, and sharing relies upon a worldwide commitment to high, and largely uniform, human rights standards in relation to those datasets.** Any system which is facilitating the provision of datasets on billions of international travellers to national authorities necessitates rigorous due diligence to avoid abuse. Insofar as the UN is involved in expanding this worldwide system, there must be compliance with the Human Rights Due Diligence Policy on United Nations Support to Non-UN Security Forces. That Policy imposes a mandatory risk assessment including consideration of the prior human rights record of recipient States. It is imperative that, to the extent that UN agencies are to take further steps to roll out systems to collect, process, and share passenger data worldwide, they must carry out rigorous *ex ante* assessments of recipient states. The United Nations should not facilitate the intensification of human rights violations at national borders. Counter-terrorism does not trump human rights. The United Nations may need to refuse to provide software or technical assistance where it would not be used responsibly.

8. **Fourth, there is a temptation to ascribe to advanced border management technology greater insight than it realistically can have.** The goTravel software provided to states as part of the United Nations Countering Terrorist Travel Programme has been designed to support two types of functionality. The first is the bare identification of persons already recognized as suspected of terrorist offences or serious crimes. The second is the prior identification of persons who *may* foreseeably be of interest in relation to such crimes. Any such use of traveller datasets for a predictive or profiling purpose needs to be treated with extreme care. The promise of algorithmic identification of new persons of interest based on learned ‘risk factors’ derived from existing suspects cannot as yet be empirically substantiated to the necessary level of certainty required to justify the intrusions on human rights it entails. And with billions of air travellers each year, even a miniscule error rate of a tenth of one percent would mean millions of false positives/negatives. As one researcher has put it: *‘While there appear to be some discernible trends in characteristics common to terrorists, the tiny number of terrorists within the general population renders broad characteristics based on profiling of no predictive value’*.⁵ Meanwhile the false identification of a person as a terrorist can have profoundly negative cascading effects on their human rights in the real world, from arbitrary detention to torture to denial of asylum to debilitating public stigmatization.

³ A/73/152, [37].

⁴ ICJ, Yogyakarta Principles, Principle 31.

⁵ K McKendrick, ‘Artificial Intelligence Prediction and Counterterrorism,’ Chatham House Research Paper (August 2019).

9. **Fifth, even as new technology develops to facilitate border management decisions,** obstacles remain to the right to an effective remedy for human rights violations resulting from erroneous or abusive decisions at the border.— The right to an effective remedy, including compensation, is one of the fundamental principles of international human rights law. Technically speaking, individuals subject to border screening decisions prior to admission into a country should be seen as being under the jurisdiction of the State responsible for the screening. In practice, however, the reality is that individuals will commonly face considerable obstacles to obtaining a remedy in respect of an adverse decision across or at a national border. Those obstacles include: (a) lack of legal representation (which may be exacerbated by ineligibility for legal aid due to foreign nationality); (b) lack of awareness of the relevant State’s administrative or legal system; (c) lack of transparency and disclosure of the basis of the decision, including regarding data and computer systems; and (d) language barriers. Insofar as the UN and States are expanding the capacity for States to make border management decisions, there must be conditions attached to ensure timely access to justice for those affected by them, including the provision of a straightforward procedure or mechanism for complaints, adequate resources to liaise with the complainant and consider complaints, an assurance of timeliness, and adequate and effective remedies.

10. I am grateful for the opportunity to engage in this session on the essential elements in designing human-rights compliant border security management systems. I look forward to continued constructive engagement with Member States and UN Global Counter-terrorism Coordination Compact members on this critical and timely issue. Thank you.