Check Against Delivery

Mandate of the UN Special Rapporteur on the protection and promotion of human rights while countering terrorism

Opening Statement to the CT PHARE – Platform for Human Rights Engagement Expert group meeting

Human rights issues while countering terrorism

IIJ, Malta 21-22 March 2023

Ladies and Gentlemen,

Allow me to start by thanking the organisers, the IIJ for inviting the Mandate of the UN Special Rapporteur on the promotion and protection of human rights while countering terrorism to this first meeting of *CT Phare,* and for giving us the floor at such an early stage in the meeting, which we take as a sign of confidence to the work of Mandate. The Special Rapporteur, Ms. Fionnuala Ni Aolain, was unable to be here today due prior travel commitments, but she hopes to be able to engage with you in the next few months, before she leaves the mandate at the end of July.

I have been asked to speak to some of the key priorities and challenges as seen from the mandate's perspective in the numerous areas that this meeting aims to address. Today I would like to speak tothree overarching issues.

1. **The nomenclature of "terrorism" and "countering terrorism"**

The first of these issues pertains to the overuse of the nomenclature of "terrorism" and "violent extremism". Our starting point in the Mandateis to look at the question of definitions, and to question whether any issue addressed as a "terrorism" issue belongs in the terrorism box. And at the start of a three-year project, like the one you are launching today, which has as its starting point that "In the campaign to protect their populations and territory from the violence and upheaval caused by terrorism, many countries have adopted counter-terrorism measures designed to increase law enforcement and military powers and toughen criminal codes", we think it is important to go back to the basics, and question the use of the words, of categories, of nomenclature.

We all know that the continued lack of semantic clarity pertaining to terrorism and violent extremism at the international level has very serious impacts on how they are invoked at the national level. Overly broad and vague definitions, lack of adequate safeguards to ensure that counter-terrorism and prevent violent extremism measures are law-based, necessary, justified, proportionate and non-discriminatory, have allowed counter-terrorism and prevent violent extremism measures to be misused, to be overly used. The Mandate's legislative reviews – which are the only public reviews of counter-terrorism legislation from a rights perspective – absolutely show the sheer scale of the normative problem.

We all think here of the very serious impact of counter-terrorism and violent extremism measures on civil society, which I will not directly address today as many excellent civil society actors are in the room and will speak to this impact more ably than me.

But I will say that the challenges linked to the abuse of the nomenclature, the growth of the terrorism "box" and its consequence, which is that the response is to be found in the counter terrorism framework, a framework grounded in exceptionalities and combined with deference to, and empowerment of, the executive, clearly arise in the **context of the use of militarised counter-terrorism responses to complex conflicts and crises situations**. This wording is slightly different from that which the Working Group that will take place tomorrow entitled "Human rights protections in a context of militarised responses to terrorism" will address. And let me explain the slight re-framing with a very concrete example. In the report presented to the Human Rights Council following the Mandate's country visit to Kazakhstan in 2019, we called out Kazakhstan's legislative provisions relating to extensive "anti-terrorism operations", which allow for extremely broad emergency powers to stop, search, detain and arrest any individual without a warrant, and use lethal force against any individual determined to be a 'terrorist'. These are combined with an overreaching impunity clause for law enforcement officials which entirely shields them from accountability for violations committed during such operations. This over-permissive framework is, of course, combined with an overly broad definition of terrorism. And what we saw in 2022, and called out through a Press Release, is that it is this exact framework that was used during protests over soaring gas prices, when the President gave orders to security forces and the army to "open fire with lethal force" against protesters he qualified as "bandits and terrorists". This should give us all pause for thought when we think of increased powers to "counter-terrorism", and whether it is the correct box.

The Mandate focuses much of its work on conflict and crises situations where terrorism is a part of the discourse. We carried out a technical visit to Minusma last summer. We have addressed the situation in North-east Syria and Iraq. The Mandate's latest report to the General Assembly last Autumn addressed questions related to the impact of counter-terrorism on peacemaking, peacebuilding, sustaining peace, conflict prevention and resolution. Similarly, on these issues, we see that the nomenclature of 'terrorism' and 'extremism' and the encroachment of these terms and discourses in complex and fragile settings has a very powerful function. When they are opportunistically ill-used or mis-applied, they can constrain and fundamentally undermine States' and international actors' capacity to make and ensure peace and resolve conflicts. These terms are convenient, they lock actors into categories of legitimate and illegitimate, strengthen the legitimacy of existing regimes and governments, and call for securitized responses that are often counter-productive and sustain violence. This nomenclature enables the extensive provision of counter-terrorism support tools and assistance under various counter-terrorism capacity-building and technical assistance agreements, or in the form of political support, stabilisation mandates and even full-fledged counter-terrorism military

intervention. By imposing a unitary lens on harms and drivers to the conflict, they allow to displace the question of the responsibility and accountability of State actors, the consequences of which we painfully see in Mali. So, here again, the misuse of the language of terrorism and violent extremism, combined with the piling up of exceptional and sustained counter-terrorism measures, often means disabling the capacity to move towards peace and security.

Let me give you another example. In North-East Syria, there are still approximately 65,000 men, women and children who have been arbitrarily detained for four years for alleged association with a designated terrorist group, in various detention centres, prisons and closed camps. In the two main closed camps, Al Hol and Roj, over 60% of the population are children, of which 80% are under the age of 12 and 30% are under the age of five. There are also 750 boys, some as young as nine or ten, detained either in prisons or in closed rehabilitation centres. Here, the terrorism box serves to fundamentally displace the protection that children are entitled to under the Convention on the rights of the Child, a violation of the principle of non-discrimination to punish a child based on the "status, activities, expressed opinions, or beliefs" of their parents, which constitutes collective punishment. Children who are detained for association with armed groups should be first and foremost recognised as victims of grave abuses of human rights and humanitarian law. It also displaces other legal protection that individuals may be entitled to as victims of trafficking. I note here, for example, that in a recent case from the UK – namely the case of Shamima Begum to which the mandate was a party to the proceedings before the Court of Appeal – shows us that the full power of being placed in the terrorism box led a young woman to be vilified by public opinion, and stripped of her citizenship, likely rendered stateless, while in fact – as recognised by the most recent judicial decision - she had been groomed as a child, and that it is likely that she was trafficked for the purposes of sexual exploitation by ISIL.

In many parts of the world, the category of "extremism" is being used as a legal category alongside terrorism. This term has no purchase in binding international legal standards, and when operative as a criminal legal category, is irreconcilable with the principles of legal certainty, proportionality and necessity and is *per se* incompatible with the exercise of certain fundamental human rights and freedoms, particularly freedom of expression, religion, thought and belief.

In sum, whether it is civil society actors, demonstrators, the hard job of building peace, children in detention or recruited by a non-State armed group, or individuals legitimately exercising their fundamental freedoms, it is important to fundamentally question whether it is in fact terrorism, and whether the answer should be found in counter-terrorism, whether the issue truly belongs in that space. It is the Mandate's profound view that given the inherent exceptionalities of the counter-terrorism framework, that box should remain as small as possible.

2. Use of new technologies

Let me turn now to the second issue I want to raise, which is the subject of the last report presented by the Special Rapporteur to the HRC just last week, namely, the human rights implications of the development, use and transfer of new technologies in the context of counter-terrorism and violent extremism. The report highlights three trends that characterize the use of new technologies in this space.

The first is the leveraging of terrorism as a policy rationale to adopt high-risk technologies, with the justification of exceptionality contaminating legal and policy debates. This includes

the practice of applying national security or counter-terrorism exemptions in legislation regulating emerging technologies. The second relates to the absence of consistent human rights analysis and practice in the development, use and transfer of new technologies. Superficial and performative referencing to human rights is a feature in this arena. The result has been the abject failure to regulate high-risk technologies, with globally adverse human rights and international rule of law consequences. The third involves the predictable and insidious move from initial exceptional use of new technologies in narrow security contexts to general use, importing and normalizing the use of these technologies in everyday life.

From biometrics to airline passenger data collection, to the adoption of spyware, the justification that is proffered is a recurring one; that of exceptional security threats. And, at the same time, the promise is made of strictly limited application. In reality, and in practice, the adoption and use of such technologies is rarely short-lived and quickly moves from the margins to the mainstream. In the past five years, drone technology has moved from justification in the context of conflict and counter-terrorism, to "regular" law enforcement, tracking the consistent pattern whereby approaches originally justified by reference to exceptional counter-terrorism objectives reliably become incorporated into the local, domestic and "regular" legal system.

These high-risk technologies are under-regulated with either no or very little consideration of the governing human rights and international law standards. Some States with egregious human rights records, have been handed a carte blanche to access to high-risk technologies including API/PNR, biometric data collection, spyware, and drone technology. These technologies have been used by those same States to crack down on legitimate dissent, human rights advocacy, legal representation and journalistic expression. Counter-terrorism and security are used to provide political and legal justifications, or cover, for the adoption of high-risk and highly intrusive technologies and the costs to our greater collective freedom have been immense.

3. Gendered nature of countering terrorism

I now turn to the issue of gender mainstreaming as my last point as this is both an issue that has been identified by the project, and which has also been a key part of the work of the Mandate. And I want to start by stressing that the counter-terrorism arena is often viewed as gender-neutral, both in its practices and consequences. This view is mistaken. Counter-terrorism law and policy, in formal settings and institutions, and in implementation, is fundamentally informed by gendered stereotypes and has severe gender consequences.

We often think in this space of the impact of counter-terrorism and preventing and countering violent extremism law and practice on women and girls. In particular, counter-terrorism financing laws have been shown to negatively affect women's rights organizations. It is not only the "small scale" of women's civil society work that is perceived as a risk to donors and financial institutions, but also their "divergent voices", their challenging of traditional gender norms which can result in backlash and governmental efforts to curb women's freedom of expression and association. Similarly, the impact of counter-terrorism sanctions goes far beyond the effects on a particular listed individual and affect women, girls and families. Even where women are not listed, but their family members or spouses are listed, they may bear the brunt of many of the impacts, not least because, in many legal systems, or by virtue of the patriarchal construction of family finances, they may not have independent access to work, funds or bank accounts or independent sources of income.

But let me now turn to the gendered impact on boys and men of counter-terrorism as it is practiced in NES. From the moment they were captured by the de facto Kurdish authorities in the Spring of 2019, men and adolescent boys were placed in prisons, while women and small children were placed in closed camps. We have noticed a practice whereby boys are taken from the camps to male adult detention centres or closed rehabilitation centres, when they reach the age of 10-12, after being taken away from the care of their mothers, sometimes at gunpoint, in the middle of the night.

These transfers signal that all male children in this conflict zone are seen as terrorists or violent extremists; that they must not be protected but punished. Despite the fact these boys have been detained since they were approximately seven years old, they have aged out of victimhood, and aged into being considered a threat. The de facto culling, separation, and warehousing of adolescent boys from their mothers is an abhorrent practice inconsistent with the dignity of the child and inconsistent with the most essential of rights any child is entitled to in any circumstances. The indefinite, cradle-to-grave, camp-to-prison detention of boys, based on crimes allegedly committed by their family members, is a shocking form of gender discrimination that has dramatic and lasting consequences.

Conclusion

These are some of the issues that we wanted to put forward already at the beginning of the meeting, because they are trends that are noticeable across continents, given the global nature of the project. But to conclude: Twenty years of investment in counter-terrorism and counter violent extremism the way that it has been done - human rights “lite” and civil society absent, lacking independent oversight, and missing sustained monitoring and evaluation - has simply not delivered. This project, grounded in universal and EU values and human rights norms, is one way to try to get it right and repair some of the damage that has been done.