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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Promotion and protection of human rights and fundamental freedoms while countering terrorism

Note by the Secretary-General**

The Secretary-General has the honour to transmit to the General Assembly the report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, submitted in accordance with General Assembly resolution [72/180](#) and Human Rights Council resolution 40/16.

* [A/74/150](#).

** The present report was submitted to the conference services after the deadline as a result of consultations with Member States and other relevant stakeholders.



Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

Summary

In the present report, the Special Rapporteur addresses the role of “soft law” and new institutions in the creation, enforcement, oversight and regulation of counter-terrorism measures. The Special Rapporteur reflects on the increasing importance of the role of soft law instruments since September 2001. She notes that States increasingly use soft law standards to regulate the prevention and countering of terrorism and violent extremism. She identifies a range of soft law instruments and assesses their normative and practical importance for States. The Special Rapporteur identifies and maps a range of institutions and entities producing such norms, considering their membership, legal basis, terms of reference and working methods. She traces the movement of some soft law norms to hard law standards to illustrate the dense relationship between hard and soft law in that respect.

The Special Rapporteur pays particular attention to the role of and pathways by which human rights can be meaningfully integrated, accounted for and benchmarked in the creation of counter-terrorism soft law, instead of being marginalized. Building on her previous report ([A/73/361](#)), she underscores the importance of transparent and legitimate governance in the soft law arena.

The Special Rapporteur maps access for and engagement with civil society, non-governmental organizations and human rights experts in the making of counter-terrorism soft law by new entities focused on counter-terrorism. She provides two primary case studies to illustrate some of the broader patterns of inclusion and exclusion applied to States and civil society.

The Special Rapporteur makes concrete recommendations to further human rights compliance in the adoption and implementation of soft law norms in the counter-terrorism arena. She encourages the paying of greater attention to and the greater transparency of new counter-terrorism entities, which have an increasing role in, and influence on, counter-terrorism regulation. She affirms the necessity of thorough, expert and consistent human rights integration into the development of soft law, the adoption of soft law standards into hard law rules and the operation and functioning of new counter-terrorism entities that develop soft law and best practices.

I. Introduction

1. The present report is submitted to the General Assembly by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to General Assembly resolution [72/180](#) and Human Rights Council resolution [40/16](#). In the report, she analyses the impact on the protection and promotion of human rights in the light of the increased proliferation and use of “soft law” regulation in the counter-terrorism arena and the establishment of new entities and institutions that create, expand and consolidate soft law norms.

2. A report on the work undertaken by the Special Rapporteur in fulfilment of her mandate, in the period since her previous report to the General Assembly, is provided below.

II. Activities of the Special Rapporteur

3. The Special Rapporteur had a fruitful year, advancing positive and sustained dialogue with States concerning the protection and promotion of human rights. Since her appointment, the Special Rapporteur has sent requests to visit to Australia, Bosnia and Herzegovina, Honduras, Kenya, Mali, New Zealand, the Russian Federation, Tajikistan, Uganda and the United States of America. She presented to the Human Rights Council country visit reports on Belgium, France, Tunisia, Saudi Arabia and Sri Lanka. In May 2019, she conducted a visit to Kazakhstan. The Special Rapporteur welcomes the productive, collegial and well-organized visit and commends the Government on its willingness to engage in dialogue.

4. In her thematic report on the impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders ([A/HRC/40/52](#)), the Special Rapporteur affirmed that, since 2001, civil society space had been shrinking globally. Civil society actors faced the challenges of stigmatization and discrimination, were subjected to smear campaigns, defamation and physical harassment and were spuriously charged and sentenced under various laws. Between 2001 and 2018, at least 140 Governments had adopted counter-terrorism legislation. The adoption of new and multiple legislative and administrative measures was defended by reference to new or perceived threats or simply to compliance with new international requirements. The Special Rapporteur found that 66 per cent of communications sent by holders of the mandate between 2005 and 2018 concerned counter-terrorism measures directed at civil society actors or human rights defenders. In that regard, she urged States to prevent the misuse of counter-terrorism laws and practices and that States be held accountable for such abuses. She underscored the long-term negative effects on preventing violent extremism conducive to terrorism caused by the consistent misuse of counter-terrorism laws and practices.

5. The mandate holder is a signatory to the Global Counter-Terrorism Coordination Compact and an active member of multiple working groups. She has contributed substantively to several research and policy projects of those working groups, and, through the Office of Counter-Terrorism consolidated multi-year appeal, seeks to lead a project on human rights guidance on the use and sharing of biometrics in counter-terrorism, jointly with the United Nations Office on Drugs and Crime (UNODC). In July 2019, the mandate holder participated in the African Regional High-level Conference on Counter-Terrorism and the Prevention of Violent Extremism Conducive to Terrorism, held in Nairobi. The Special Rapporteur conducted a

working-level visit to the European Union in February 2019. She also participated in the forum on returning foreign fighters, held in Doha in October 2018.¹

6. The Special Rapporteur has continued her engagement with non-governmental organizations, human rights defenders and civil society. Meetings were held in Belfast, United Kingdom of Great Britain and Northern Ireland, Brussels, Dublin, Geneva, Milan, Italy, and New York. In the context of her country visits, she held extensive civil society consultations. She reiterates her commitment to integrating a gender perspective into the discharge of the mandate. She is deeply committed to the integration of the human rights of victims of terrorism into her work in fulfilment of the mandate.

7. The Special Rapporteur contributed to several national and regional debates concerning legislation on national security and combating terrorism, by offering expert views on draft legislation. She has issued multiple communications, including joint communications, concerning the use of legislation on national security and combating terrorism against civil society actors. The Special Rapporteur engaged extensively with Facebook to address the definitions and regulation of terrorism by non-State actors. She continues her constructive engagement with the Financial Action Task Force, the Office of the Counter-Terrorism Coordinator of the European Union and the Counter-Terrorism Committee Executive Directorate.

III. Soft law, informal lawmaking and soft institutions in the global counter-terrorism architecture: assessing the implications for human rights

8. The Special Rapporteur stresses the importance of transparent and participatory governance to the rule of law and the protection of human rights in global counter-terrorism regulation.² In her previous report (A/73/361), she provided an analysis of the augmented legislative role of the Security Council in counter-terrorism, tracking the expanding scope of that legislative capacity since 2001 and mapping a shift from treaty-making as the primary form of regulatory action in the counter-terrorism arena. The negative effects on human rights of those regulatory developments were noted. Such shifts in global counter-terrorism regulation do not occur in isolation. In the present report, she addresses two further aspects of global counter-terrorism governance, namely, the use and application of “soft law” norms and the proliferation of new institutions, many with selective membership whose regulatory scope is increasing and expanding. Recognizing that a large number of such entities have emerged in the past two decades, the present report will be focused in particular on the Global Counterterrorism Forum and the Financial Action Task Force.³ The most uncontroversial definition is that “soft law” constitutes those international norms, principles and procedures that are outside the formal sources of Article 38 (1) of the Statute of the International Court of Justice and lack the requisite degree of normative content to create enforceable rights and obligations but are still able to produce certain legal effects.

¹ See <https://thesoufancenter.org/foreign-fighters-forum/>.

² Christopher C. Joyner, *International Law in the 21st Century: Rules for Global Governance* (Lanham, Maryland, Rowman and Littlefield Publishers, 2005).

³ United Nations and non-United Nations bodies have produced a range of soft law instruments relevant to counter-terrorism, including the International Atomic Energy Agency and the United Nations Office on Drugs and Crime, but they are not examined herein.

9. The present report benefitted from a consultation process and written submissions from States, national human rights institutions, civil society organizations and other stakeholders.

10. The Special Rapporteur is of the view that soft law is increasingly essential to the production of global counter-terrorism norms and practices. The turn to soft law in counter-terrorism has many similarities to its use in other areas, including environmental protection and human rights. It provides the benefits of speed, informality and less onerous procedural limitations and is often produced by groups of States with similar views that have reasonable degrees of existing consensus on values, processes and outcomes. She observes several unique features to counter-terrorism soft law production. First, the scale of norm proliferation, although difficult to absolutely quantify, is exceptionally dense and produced in a relatively short period of time, compared with other regulatory arenas. Second, the nomenclature of “soft law” understates the extent to which many of those normative guidelines, declarations, good practices and technical rules function as distinctly hard in practice. Third, unlike many comparative areas of international law in which soft law holds less enforcement traction, the institutional landscape for counter-terrorism is distinct. States have reporting requirements to the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism (Counter-Terrorism Committee), which operates to leverage a portion of those norms and oversees their practical implementation. Many counter-terrorism soft law norms come with capacity-building, technical expertise and other support on a scale not found in other legal domains precisely because there is a United Nations architecture to aid in their direct implementation. Fourth, there is an important nexus between many of the normative soft law standards, which reinforce and build upon one another. They operate relationally in many areas, and their legal status is both interdependent and interconnected. The Special Rapporteur underscores that the relationship between various aspects of the soft law production terrain is undermapped and not well understood, which creates two opposing but intersecting trends: (a) fragmentation in international legal norms regulating the phenomenon of terrorism generating ineffectiveness and confusion, thereby limiting or disregarding the application of primary legal regimes, including international human rights, humanitarian and refugee law; and (b) the challenge of over-production with a concentration and exponential growth in one area of law, without the commensurate and equal development of others, specifically human rights law, to provide balance.

11. In addition to developments aimed at filling regulatory gaps, the events of 11 September 2001 triggered institutional growth, as evidenced by the establishment of dedicated subsidiary bodies of the Security Council and their supporting entities. That expansion, together with the consolidation of the existing institutional setting, led to a complex United Nations counter-terrorism architecture, now bound together through the Global Counter-Terrorism Coordination Compact, which comprises 41 member entities. In previous years, a variety of offshoots and decentralized initiatives of diverging nature have emerged, some utilitarian and functional, undertaking work that States prefer to remove from under the United Nations umbrella, and others more aptly described as profile-raising projects, with the aim of raising the status of a particular State or group of States by association with a leading role in countering and preventing terrorism, and as solidification. In addition to State-centred initiatives, the landscape is augmented by public-private partnerships, such as Tech Against Terrorism or institutions modelled after the Global Counterterrorism Forum,⁴ reflecting the increasingly crucial role of the private sector in the area of counter-

⁴ Tech Against Terrorism is a public-private partnership initiated by the Counter-Terrorism Committee Executive Directorate and the ICT4Peace Foundation and referenced in Security Council resolutions 2395 (2017) and 2396 (2017).

terrorism and underscoring the priority character of meaningful intersectoral cooperation in effectively tackling related threats. While few of those entities or initiatives have been set up with an explicit regulatory purpose in mind, their activities contribute to norm development in diverse, and at times inconspicuous, ways. As such, their individual and aggregated impact and influence remains underexplored.

A. Sources, status and process of making soft law

12. The concept of soft law is often viewed as controversial. The very term “soft law” may appear to be a contradiction between the term “soft” and the idea of law as a system of robust, enforceable rules.⁵ There is also controversy regarding the long-standing disputes over agreed definitions of the term, in particular that “soft” can relate to written compared with unwritten norms, softness from the status of the norm or softness as to the normative content of the obligation in question.

13. Soft law includes General Assembly resolutions, declarations, guidelines, technical manuals, opinions from quasi-judicial bodies and certain publications of United Nations entities.⁶ It is produced and driven by States through a variety of mechanisms, including in bilateral, multilateral and institutional settings. Increasingly, non-State actors shape, contribute to and drive the enforcement and recognition of soft law, underscoring the essential point that a substantial body of international law is not derived from formal institutions.

14. Recognition of and validation for the legal effects of soft law has been increasing for decades. The International Court of Justice has produced a small but important body of relevant jurisprudence. In its advisory opinion on reparation for injuries suffered in the service of the United Nations, the Court deduced principles of soft law from the Charter of the United Nations, which were broadly interpreted.⁷ Its 1951 judgment in the *Fisheries case*,⁸ 1971 advisory opinion on Namibia and 1975 advisory opinion on Western Sahara validated the legal significance of General Assembly resolutions.⁹ The Court’s approach has been restrained, underscoring the undulating importance of State consent to legal norms in the international legal order, in particular in the creation of customary international law standards.

15. Other international courts and bodies have used and validated the use of soft law standards, in particular the European, Inter-American and African regional courts and commissions. Soft law has played an important role in consolidating and developing international law, including international human rights law. It functions as a gap-filler in the absence of treaty agreements or customary international law consolidation and fleshes out existing norms by giving shape to the substance of obligations. Soft law gives guidance to States and other stakeholders in the absence of binding norms, providing useful and necessary legal frameworks to State action and cooperation. In developing areas, soft law norms are often the only norms available to guide, constrain or support regulatory action. The advantages of the process of soft law-making have been well canvassed. They include access by a

⁵ Francesco Francioni, “International ‘soft law’: a contemporary assessment”, in Vaughan Lowe and Malgosia Fitzmaurice, eds., *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (Cambridge, Cambridge University Press, 1996).

⁶ Certain general publications of United Nations entities are not considered as soft law, in the context of the present report.

⁷ *Reparation for injuries suffered in the service of the United Nations, Advisory Opinion, I.C.J. Reports 1949*, p. 174.

⁸ *Fisheries case, Judgment of December 18th, 1951: I.C.J. Reports 1951*, p. 116.

⁹ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, p. 16; *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12.

variety of stakeholders, informality in procedures and negotiation, innovative modalities of engagement and analysis and variety in the pathways to produce legal norms in new and challenging global contexts. In particular, several soft law norms develop and augment binding standards and authoritatively interpret them. Examples of such interaction include the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

B. Deepening role of soft law in counter-terrorism

16. A key feature of the legal landscape since 11 September 2001 has been the proliferation of terrorism-related regulation. A noticeable element of that legal terrain is a shift from a primary focus on treaty agreements to other forms of law-making and norm enforcement by States (see [A/73/361](#)). That does not mean that there has been no treaty engagement in that period. Prior to the passage of Security Council resolution [1373 \(2001\)](#), only Botswana, Sri Lanka, Uzbekistan and the United Kingdom of Great Britain and Northern Ireland had ratified the 1999 International Convention for the Suppression of the Financing of Terrorism.¹⁰ Between 11 September 2001 and 19 February 2002, 90 countries signed the Convention and 13 more ratified it, largely owing to resolution [1373 \(2001\)](#).¹¹ The counter-terrorism legal landscape deepened substantially, primarily through the expanded resort to Security Council resolutions, including [1373 \(2001\)](#), [1390 \(2002\)](#), [1540 \(2004\)](#) and [1566 \(2004\)](#). Normative developments were fast-tracked by the Security Council, leading towards multilateral institutionalization, specifically the creation and reinvigoration of subsidiary organs, including the establishment of special committees, such as the Counter-Terrorism Committee, and the Office of the Ombudsperson. The creation of that Committee and the Counter-Terrorism Committee Executive Directorate provided new forums and entities – an inter-institutional machinery whose production of a variety of soft instruments, including standards, compendiums, sanction instructions, technical information and guidance, proceeded apace.¹² Those norms range from formal legal and capacity-building engagement to highly informal advice.

17. While some classical distinctions apply as to what constitutes “soft law” in any traditional sense to those outputs, the Special Rapporteur takes a pragmatic approach to the assessment of legal status and primarily assesses State compliance, affirmation and enforcement as indicative of legal status, rather than the title of the norm per se. A distinguishing feature of the internal United Nations counter-terrorism architecture is its departure in practice from the traditional legal assumptions of what constitutes the authorities, formal and informal, legal and non-legal, with regard to deference and compliance in norm creation.¹³ The Special Rapporteur describes that architecture as one in which all of those entities, and many more outside the United Nations system,

¹⁰ Tim Daniel, “International cooperation in counteracting terrorist financing”, in Larissa Van Den Herik and Nico Shrijver, eds., *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (Cambridge, Cambridge University Press, 2013); International Convention for the Suppression of the Financing of Terrorism.

¹¹ Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (New York, Cambridge University Press, 2011).

¹² See www.un.org/sc/ctc/about-us/. See also for example, www.un.org/sc/ctc/resources/databases/recommended-international-practices-codes-and-standards/united-nations-security-council-resolution-1373-2001/, and the Counter-Terrorism Committee Executive Directorate, *Technical Guide to the Implementation of Security Council Resolution 1373 (2001) and Other Relevant Resolutions* (2017).

¹³ José E. Alvarez, *The Impact of International Organizations on International Law* (Leiden, The Netherlands, Koninklijke Brill, 2017).

can effectively shape an issue area, regardless of their formal legal pedigree. That is not to dismiss the importance of hierarchy to norm development, and to affirm that there may be upper and lower thresholds of soft law related to the legitimacy and membership of the source institution, but the production space in counter-terrorism has a curious tendency to disrupt hierarchy that deserves consideration.

18. In addition to the subsidiary architecture of the Security Council, the establishment of the Counter-Terrorism Implementation Task Force provided a parallel forum in which new forms of legal instruments designed to regulate, support, advance and manage the counter-terrorism arena were produced. The Task Force evolved into the Global Counter-Terrorism Coordination Compact. The consolidation of counter-terrorism capacity is also evidenced by the establishment of the Office of Counter-Terrorism. The United Nations Counter-Terrorism Centre is also a relevant player in capacity-building and norm enforcement.

19. That regulatory landscape is complex, but understanding its function is essential to assessing the governance and human rights integration challenges. The interplay of the Global Counter-Terrorism Coordination Compact with Security Council subsidiaries, as well as the creation of and relationship with new public-private partnerships, is critical to mapping the architecture's overall functioning and the effects of norm production within it. The architecture enables coalitions of States with similar views and global multi-stakeholder networks which are not formally legally constituted under international law and which operate on a stated voluntary basis to often entirely avoid the pathways of rule and obligation creation, in particular but not solely with regard to human rights.¹⁴ Distinctions around legal powers and normative hierarchies have been replaced in that terrain by coordinated efforts of different forms to streamline the different parts of the regulatory landscape to produce coherence, with lesser regard to the legitimacy, sovereignty and relevance of other legal regimes.¹⁵ The landscape between 2001 and 2019 might be described as a rather disorganized and uncoordinated proliferation of new legal practices, principles, rules and institutions, but, in fact, the landscape has substantially altered the governance landscape of global security and the effects have been substantial, if generally unrecorded.¹⁶ The Special Rapporteur notes the importance of the applicability of, and the interrelationship between, salient branches of international law and the new formal and informal counter-terrorism architecture. She highlights below some implications of that architecture and the norms it produces for the integrity and legitimacy of international norms and international law-making.

20. The Special Rapporteur is acutely aware of the need to disaggregate different forms of soft law and to avoid an analysis that paints all forms of soft law from a highly crowded landscape as being the same in effect or normative status. She acknowledges that there is a sliding scale of hardness and softness in all international legal norms.¹⁷ The Special Rapporteur therefore distinguishes between the source entities for soft law in assessing the status of contributions to normative developments which are endowed with defined authority and legitimacy, generally by a treaty or more infrequently by a resolution of the Security Council invoking Chapter VII of the Charter of the United Nations, such as the Counter-Terrorism Committee or the Human Rights Committee, as compared with the normative documents produced by

¹⁴ Alejandro Rodiles, "The design of UN sanctions through the interplay with informal arrangements", in Larissa Van Den Herik, ed., *Research Handbook on UN Sanctions and International Law* (Cheltenham, United Kingdom, Edward Elgar Publishing, 2017).

¹⁵ Ibid.

¹⁶ International Federation for Human Rights, "The United Nations counter-terrorism complex: bureaucracy, political influence, civil liberties", 26 September 2017.

¹⁷ W. Michael Reisman, "A hard look at soft law: remarks", *American Society of International Law Proceedings*, vol. 82 (1988).

working groups of the Global Counter-Terrorism Coordination Compact or United Nations entities. Despite those distinctions, the Special Rapporteur makes the following observations. The scale and density of norm production on issues related to counter-terrorism creates a unique set of pathways with a specific soft law ecosystem. Norms have a foundational quality, and steady norm proliferation builds upon and reinforces rule development, thereby consolidating the regulatory landscape in ways that are not seen in other international law arenas. The resource mobilization supporting the implementation of norms at the domestic level is considerable. In addition, the particular enforcement pressures that follow from State reporting under Security Council resolution 1373 (2001) and other relevant resolutions and the role of various entities, such as the Office of Counter-Terrorism, the Counter-Terrorism Committee Executive Directorate, the Global Counterterrorism Forum and the Financial Action Task Force, in engaging with States for their cooperation with and acceptance of those norms, and to report on their implementation, is unique in the international legal order. There is a clear osmosis to be observed in the creation of hard law obligations, such as those under Security Council resolution 1373 (2001), and the role of soft law in filling in the inevitable constructive ambiguity in politically negotiated documents as a predictable level of generality among States. One observes cross-fertilization, cross-referencing, message duplication and recurrent invocations of the same rules, formulated in processes that are non-transparent and not accessible to all States, in order to present as regular conduct and practices that which would previously have been considered a challenge to State sovereignty. In almost all of those arenas, human rights are visibly sidelined or marginalized in the norm production phase, as well as in oversight and implementation.

C. Marginalization of human rights

21. Why are human rights marginalized in the soft law terrain? Norm production occurs in several institutional settings in which the presence and capacity of human rights entities are limited or constrained or lack adequate resources. Counter-terrorism norm production is happening in the entities and institutions with a light human rights footprint, which includes the sustained work of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. However, the Special Rapporteur fulfils those responsibilities within the Global Counter-Terrorism Coordination Compact of the counter-terrorism architecture, as the only entity within the global architecture responsible for the oversight of the intersection between human rights and counter-terrorism without a corresponding budget or adequate staff to carry out the additional task of the mandate. The nature and form of much of counter-terrorism soft law is highly technical, and its intrusions on rights require distinct, technical and highly specific disaggregation. Many of the counter-terrorism standards reviewed by the Special Rapporteur employ a standard phrase, namely, “in compliance with international law, including human rights, humanitarian and refugee law”, which specifies nothing about specific impingements on specific human rights, how they are to be minimized, what law and obligations guide States to that end and what hard or soft human rights norms could guide them. Moreover, counter-terrorism soft law does not lead with the presumptions that the maximization and front-loading of human rights functions prevents terrorism, that law should be crafted to avoid repetitive patterns in the production of violence and that human rights constitute an essential bedrock in the fragile States and conflict and post-conflict situations in which a sizeable portion of counter-terrorism work is being carried out in practice.¹⁸ In the United Nations context, the fourth pillar of the

¹⁸ United Nations and World Bank, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict* (Washington, D.C., World Bank, 2018).

Global Counter-Terrorism Strategy, namely, ensuring human rights and the rule of law, remains the least developed, in terms of projects undertaken and guidance produced for States (see [A/72/840](#)). Given the repeat player quality of soft law production – who is in the room negotiating, writing and shaping the standards being produced and who is not – and because norm production in counter-terrorism is a “build-on” model, the pathways that exclude meaningful human rights protections are hardwired into many of the systems currently in operation.

22. The Special Rapporteur acknowledges the existence of a fundamental paradox regarding compliance with soft law and informal norms in the counter-terrorism arena. While recognizing that counter-terrorism compliance is imperfect, and that many States remain frustrated by the inability or unwillingness of States to fully execute their obligations under suppression treaties and/or resolution [1373 \(2001\)](#) and other relevant resolutions, there is a surprisingly high compliance rate, compared with compliance in other arenas of international law and specifically compared with human rights law compliance. In particular, the indirect adoption of soft counter-terrorism norms in national legislation, judicial decision-making and administrative practice has been understudied and constitutes a circularity which hardens soft norms.¹⁹ Therefore, contrary to general assumptions about the tendency of States to prioritize hard norms, specifically treaty and customary law norms, in enforcement, the pattern in the counter-terrorism arena subsequent to 11 September 2001 has been State augmentation and observance of soft law.

Institutions

23. The Special Rapporteur restates the negative effects of the exclusion of human rights entities, experts and capacity in the global counter-terrorism architecture, as benchmarked in her previous report ([A/73/361](#)). Multiple effects follow from such exclusion, but specifically because the counter-terrorism architecture is producing an increasing corpus of soft law norms, the absence of meaningful human rights expertise in the norms production is notable. It exacerbates the broader trickle-down effects that the lack of a structural, sustained and well-funded human rights input to the global counter-terrorism architecture have on the overall protection of human rights.

24. In parallel, there is a spider’s web of soft law standards coming from new “soft” counter-terrorism institutions. The establishment of new global, regional and selective institutions, many of novel legal status, created with limited reference to human rights in their constitutive documents, is due to the lack of structured, consistent and well-defined human rights inputs in those settings. Access to such institutions has proven difficult and inconsistent for many human rights entities, including the Special Rapporteur. Those bodies have no formal accreditation mechanism, leading to ad hoc and inconsistent access for civil society and human rights organizations. The norm production process itself is ad hoc, not announced in advance and in some cases moves so swiftly that external human rights experts are left with virtually no time or capacity to mobilize input. Not infrequently, United Nations human rights entities and non-governmental organizations will be brought in only at a late stage to give their views on almost fully finalized norms. At that stage, if their views are critical of the lack of human rights substance or their advice is to bolster human rights content, they will be viewed as unhelpful or out of sync with the thinking of States and unconstructive to the process. That sets up human rights interventions for failure or irrelevance. In addition, there are a host of State-established and quasi-independent think tanks and outsource arenas busily producing a range of advice, standards and inputs, often at the behest of or funded by States, to

¹⁹ See Financial Action Task Force, “Mandate”, 12 April 2019.

the counter-terrorism arena. There is little transparency to the funding, terms of reference or relationship of those entities to State interests, creating circular and rapid production cycles for soft law that inadequately address the formal human rights obligations of States in new norm-making.

25. Another significant trend is the transposition of soft law norms into formal and binding legal frameworks. That process occurs in several ways. The first way is the straightforward adoption and acknowledgement of soft law norms into hard law standards, for example from guidance, principles or recommendations on a technical aspect of counter-terrorism into a Security Council resolution addressing the same issue (see sect. D below). The second is the adoption of soft law norms with the same language and substance from a soft counter-terrorism source or institution without acknowledging the source explicitly (see sect. E below). Third, in the reporting requirements by States under Security Council resolution 1373 (2001), advice to States in the review process, which is not public and not shared with other States or any human rights oversight entity, produces consistency of normative expectations that are so harmonious and precise that they are evolving into “hard” norms. The role of the Counter-Terrorism Committee Executive Directorate in the development of the soft to hard law continuum is noted below. The fourth way is through the provision by the Office of Counter-Terrorism and other entities of well-funded technical assistance to States in the implementation of soft and hard counter-terrorism standards. In the assistance and reporting arenas, there is a strong articulation of the non-legal character of the products involved, often expressly denying any role, or intent, in the creation of legal rules.²⁰ The Special Rapporteur is of the view that such informal standards and practices do affect international legal norms and regimes, primarily through coordinated interactions among informal bodies and formal international organization entities. The functioning and sub-legalities of the sanctions regime is a case in point.²¹ From the point of view of the legitimacy and transparency of normative legal developments in international law, those mechanisms are problematic.²² The lack of full State participation in the making and oversight of the law is regrettable, as is the multilayered, systematic and sustained exclusion of human rights from all levels of norm development, through norm translation and enforcement. The Special Rapporteur underscores that human rights treaties must remain the baseline in normative developments in order to maintain the effectiveness of the enforcement model in international law.

26. The Special Rapporteur notes that, in practice, such legal norms, which are often produced by a small group of States or non-global institutions, are treated with the status of hard law by the same group of States creating or supporting such norms. Several interesting patterns can be discerned, the first of which is the norm production process itself and its self-referential quality. For example, a particular kind of legal requirement may be set in a Security Council resolution, such as the collection of biometric data or establishing advanced passenger information or passenger name record capacities. It is then translated through a production cycle involving the Global Counter-Terrorism Coordination Compact into a compendium of best practices, guidelines or technical advice for States. The process of production is closed – few States are involved, civil society actors are often excluded, or included in an ad hoc manner, and human rights and international law experts play a limited role, if at all.

²⁰ States also do not make assertions about custom in that context, at least not yet.

²¹ Gavin Sullivan, “Transnational legal assemblages and global security law: topologies and temporalities of the list”, *Transnational Legal Theory*, vol. 5, No. 1 (2014).

²² Given the relationship of soft law to the development of customary international law, exclusion practices have disproportionate effects on historically underrepresented States. See B.S. Chimni, “Customary international law: a third world perspective”, *American Journal of International Law*, vol. 112, No. 1 (January 2018).

These so-called “best practices” are then referenced in State evaluation processes to assess compliance with Security Council resolution 1373 (2001). The Special Rapporteur has participated in meetings at which representatives of States tell her how well their States are in compliance with said international “best practices” standards, which has put her in the unenviable position of pointing out that the so-called “best practices” may be objectively insufficient in terms of international human rights obligations. The second pattern, which is an emerging one, is “soft” standards being fast-tracked into binding legal standards. Security Council resolution 2462 (2019) on terrorism financing, for example, is highly problematic in several ways. In the resolution, the Council endorses several problematic standards related to the risks associated with the non-profit organization sector, with broad effect for humanitarian actors and civil society. It specifically gold-plates the Financial Action Task Force and its norm production process by urging all States to implement the comprehensive international standards embodied in the revised 40 recommendations of the Task Force on combating money-laundering and the financing of terrorism and proliferation and their interpretive notes. The Task Force is an exclusive, non-transparent, State-created forum to which civil society and United Nations human rights entities have little or no consistent access. It has, in the terrorism financing context, become the shortcut mechanism for rule-setting, involving few constraints for States. That evolving process has significant effects on the legitimacy of the traditional consensus required to create international law and the intrusions into State sovereignty that follow the shift from hard to soft law proliferation in counter-terrorism regulation. The Special Rapporteur is of the view that the interests of a sizeable number of (non-dominant) States are being neglected in the emerging regulatory practice of forum-shopping. There are grave dangers that informal and selective institutions drive law-making in ways that oust the, admittedly challenging, political contestation that characterizes multilateral diplomatic negotiations. There is also an obvious lack of opportunity for input from and consultation with civil society and international law experts in such new norm-production contexts.

27. Even in contexts in which human rights guidance exists, it is being overtaken or often ignored in an emerging hierarchy within the soft law field itself. For example, with regard to foreign fighters, the Office of the United Nations High Commissioner for Human Rights (OHCHR) produced important and timely guidance to States on human rights-compliant approaches to the foreign fighter phenomenon.²³ Shortly thereafter, purportedly new guidance was stewarded through the Security Council to shape States responses to foreign terrorist fighters, through an addendum to the guiding principles on foreign terrorist fighters (Madrid Guiding Principles) (S/2018/1177, annex). The development of the addendum was an important opportunity to provide a deep, complementary approach, strengthening and enhancing the detailed human rights guidance, but in practice there is hierarchical dissonance between the OHCHR guidance to States and the Madrid Guiding Principles. While recognizing that the addendum goes further in its consistent references to human rights than do other documents, there remains an enormous gap for human rights guidance to be adopted with the same enthusiasm as security-focused guidance, notwithstanding the sustained rhetoric by many States affirming the essential importance of human rights to preventing the cycles of violence and terrorism.

D. Financial Action Task Force

28. The Financial Action Task Force was founded in 1989, at the initiative of the Group of Seven, and was aimed at developing standards and policies to combat

²³ OHCHR, *Guidance to States, on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters* (New York, United Nations, 2018).

money-laundering. The mandate of the Task Force was broadened to encompass terrorism financing in the aftermath of the attacks of 11 September 2001. Its mandate²⁴ designates the Task Force as “the global standard-setter for combatting money-laundering, terrorism financing and the financing of proliferation of weapons of mass destruction”, working towards “strengthening jurisdictions’ capacity to prosecute terrorism financing; developing the understanding of the nature of terrorism financing risk; and supporting the development of countering the financing of terrorism regimes and enhancing dialogue in higher-risk regions”.

29. In that role, the Financial Action Task Force has developed a set of recommendations²⁵ forming the basis of a coordinated response to the threat posed by money-laundering, the financing of terrorism and weapons of mass destruction. It promotes and monitors the implementation of those standards by developing guidance documents to inform domestic measures aimed at transposing the recommendations²⁶ and by conducting periodic peer review to assess relevant progress at the country level. Although the recommendations and related guidance material are not legally binding,²⁷ States strive towards compliance, owing to the benefits linked to membership and the financial and economic disadvantages that non-compliance may trigger.

30. In 2019, the mandate of the Financial Action Task Force was changed into an open-ended one, marking the evolution of the Task Force from a temporary forum into a standing body. The change has not led to the formal establishment of the Task Force as an international organization.

31. The Financial Action Task Force currently has 39 members, including 37 jurisdictions comprising the world’s largest economies²⁸ and two regional organizations, the European Commission and the Gulf Cooperation Council. A further 30 countries and organizations have been accorded observer status, including the International Monetary Fund, the World Bank, the Organization for Economic Cooperation and Development and United Nations entities such as UNODC, the Counter-Terrorism Committee Executive Directorate and the Analytical Support and Sanctions Monitoring Team pursuant to resolutions 1526 (2004) and 2253 (2015). The Task Force is at the centre of a very complex ecosystem comprising entities from most major international and regional organizations whose mandate and activities intersect with that of the Task Force, as well as other entities, even those set up with the aim of furthering the implementation of Task Force standards, such as the Egmont Group of Financial Intelligence Units.²⁹

32. Inspired by the Financial Action Task Force, nine Task Force-style regional bodies have been established in the style of the Task Force and recognized by the its plenary.³⁰ Those regional bodies, together with the Task Force, constitute a global

²⁴ Financial Action Task Force, “Mandate”.

²⁵ Financial Action Task Force, *International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation: The FATF Recommendations* (Paris, 2019).

²⁶ Most importantly, see the interpretive notes, providing an official interpretation of the scope and requirements contained in the Financial Action Task Force recommendations.

²⁷ The Financial Action Task Force mandate explicitly states that it is “not intended to create any legal rights or obligations”.

²⁸ See www.fatf-gafi.org/about/membersandobservers/fatfmembershippolicy.html.

²⁹ See Egmont Group of Financial Intelligence Units, “Charter”, 30 May 2019.

³⁰ While most regional bodies set up in the style of the Financial Action Task Force function as intergovernmental task forces, without legal personality, similarly to the Task Force, some of them have legal personality. For example, the Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism is a permanent body of the Council of Europe and the Eurasian Group has been established as a regional intergovernmental organization.

network encompassing over 190 member jurisdictions. Task Force-style regional bodies are associate members of the Task Force and commit to endorsing its recommendations, guidance and other policy and promoting the effective implementation of those standards in their member jurisdictions through the use of the Task Force assessment methodology and procedures, including mutual evaluations.³¹ While Task Force-style regional bodies, as associate members, “participate” – without decision-making or voting powers – in the development of Task Force standards, the Task Force is recognized as “the only standard-setting body and the guardian and arbiter of the application of its standards”.³² The Task Force plays an important role in ensuring consistency in the interpretation and application of its recommendations. However, the lack of a formal organizational hierarchy governing the relationship between Task Force-style regional bodies and the Task Force³³ poses challenges to achieving such consistency in practice.

1. Standard-setting work of the Financial Action Task Force and relevant implications for human rights

33. The mandate of the Financial Action Task Force contains no references to international law, international human rights law or international humanitarian law. However, laws and policies related to the standards established by the Task Force address such issues as criminalizing and prosecuting terrorism financing, targeted financial sanctions, tackling the risk of abuse of the not-for-profit sector for terrorism financing purposes and thereby engage human rights at multiple levels. Their impact is all the more significant, given that States generally adopt domestic laws and policies that enable them to implement Task Force standards, thereby leading to national “hardening” of those otherwise soft law standards. In the Special Rapporteur’s view, human rights implications linked to the development and implementation of those standards require sustained and in-depth attention.

34. Whereas Financial Action Task Force standards have, in general, not undergone meaningful human rights scrutiny, the Special Rapporteur notes that recommendation 8 on addressing the abuse of non-profit organizations for terrorism financing purposes has been subject to detailed human rights analysis (see [A/HRC/40/52](#)), including by former mandate holders (see [A/70/371](#)), other human rights mechanisms and civil society.³⁴ She reiterates the concerns expressed with regard to the adverse impact of relevant laws and policies on the legitimate functioning of civil society organizations and their contribution to restricting civic space in many jurisdictions.

35. In response to those concerns, the Financial Action Task Force revised recommendation 8.³⁵ The amended recommendation embraces a risk-based approach and calls for the application of effective and proportionate measures in response to identified threats of terrorism financing abuse, targeting non-profit organizations that have been found to be at risk. In the interpretive note to recommendation 8, which is also employed as a benchmark for the evaluation process, emphasis is placed on the vital role played by non-profit organizations that are “providing essential services, comfort and hope to those in need around the world” and the need to ensure that “legitimate charitable activity continues to flourish” and is not unduly restricted by

³¹ Financial Action Task Force, “Mandate”, para. 12.

³² Financial Action Task Force, “High-level principles for the relationship between the FATF and the FATF-style regional bodies”, February 2019.

³³ Ibid.

³⁴ See [A/HRC/23/39](#); and Ben Hayes, *Counter-Terrorism, ‘Policy Laundering’ and the FATF: Legalizing Surveillance, Regulating Civil Society* (Transnational Institute and Statewatch, 2012).

³⁵ Specifically, by removing the labelling of non-profit organizations as “particularly vulnerable” to abuse for terrorism financing purposes.

measures taken to counter terrorism.³⁶ Importantly, in the interpretive note, it is emphasized that relevant measures must be “implemented in a manner which respects countries’ obligations” under the Charter of the United Nations and international human rights law.³⁷

36. The Special Rapporteur appreciates the responsiveness demonstrated by the Financial Action Task Force to concerns expressed by her, by previous mandate holders and by other stakeholders. She welcomes assessment proceedings being used to address not only problems caused by underregulation of the sector, but also to tackle shortcomings linked to overregulation, a phenomenon negatively affecting civil society globally.³⁸ Acknowledging the potential implications for civil society and humanitarian action, she emphasizes the importance of taking a human rights-minded evaluation approach, applied consistently throughout the jurisdictions of the members of the Task Force and of Task Force-style regional bodies. She further notes the concerns raised by relevant stakeholders that the consistent implementation of the revised rules by Governments and evaluators needs further improvement, given in particular the effects of such rules and practices on the perceived and actual legal obligations and practices of States.³⁹

37. The Special Rapporteur welcomes the introduction of an explicit reference to obligations under the Charter and international human rights law in the interpretive notes but observes with concern that relevant references are limited. While the interpretive notes recognize that, “in determining the limits of, or fostering widespread support for, an effective counter-terrorist financing regime, countries must also respect human rights, respect the rule of law, and recognize the rights of innocent third parties”,⁴⁰ and highlights that human rights are to play a part in designation processes,⁴¹ it does not elucidate how those standards are to be effectively complied with by implementing jurisdictions or how compliance is to be assessed by peer-review based evaluation. She reiterates the need for human rights benchmarking and guidance of similar levels of specificity and comprehensiveness as the recommendations addressing financial measures to facilitate human rights-compliant implementation.

38. The Special Rapporteur highlights that Financial Action Task Force member jurisdictions are bound by their relevant obligations under international law, specifically international human rights and humanitarian law, including during participation in Task Force standard-setting processes and assessment proceedings, as well as when transposing relevant standards domestically. The lack of human rights and international humanitarian law as a reference point in the mandate of the Task Force therefore presents a significant shortcoming, with far-reaching implications for human rights protection in the area of counter-terrorism financing at the global, regional and domestic levels and may lead to the de facto undermining of binding international law norms through the application of soft law.

39. Furthermore, the Special Rapporteur notes that, in addition to member jurisdictions of the Financial Action Task Force, member jurisdictions of Task Force-style regional bodies have also committed to implementing the standards developed

³⁶ See “Interpretive note to recommendation 8”, in Financial Action Task Force, *International Standards on Combating Money Laundering*, pp. 52 and 53.

³⁷ Ibid.

³⁸ See for example, [A/HRC/40/52](#); and European Centre for Non-Profit Law and Human Security Collective, “How can civil society effectively engage in counter-terrorism processes?”, 2017.

³⁹ Submission by the Global NPO Coalition on FATF.

⁴⁰ See “Interpretive note to recommendation 6”, in Financial Action Task Force, *International Standards on Combating Money Laundering*, p. 41.

⁴¹ See “Interpretive note to recommendation 7”, in Financial Action Task Force, *International Standards on Combating Money Laundering*, p. 51.

by the Task Force, effectively rendering those standards global. That role underscores the point made above concerning the distinctiveness of counter-terrorism soft law, namely, the substantive institutional architecture and capacity to implement its norms globally, regionally and nationally. Furthermore, while the standards are not legally binding and can therefore be characterized as soft law, the consequences of non-compliance can be onerous and may have a negative impact on, among other things, a country's access to financial markets, trade and investment. That puts considerable pressure on jurisdictions to ensure compliance and may incentivize a deprioritization of human rights considerations.

40. The Special Rapporteur highlights that taking a “human rights lite” approach risks undermining the efficiency of counter-terrorism measures. Human rights compliance serves as a precondition for efficient counter-terrorism laws and policies. For example, overly broad definitions of terrorism and terrorism-related offences, including that of terrorism financing, can lead to relevant laws targeting conduct protected under international human rights law or, at least, that which is not terrorist in nature and thereby to the misapplication of law and of resources. Furthermore, violations of human rights have been shown to contribute to conditions conducive to radicalization to violence and terrorism, thereby boosting the risk of terrorism, rather than countering it.⁴² As the first “global standard-setter” to assess “not only whether countries have the necessary legal and institutional frameworks in place but also how effectively countries are implementing these frameworks”, the Financial Action Task Force is eminently placed to meaningfully incorporate human rights considerations in its standard-setting and evaluation.

2. Inclusiveness and transparency of standard-setting and related processes of the Financial Action Task Force

41. The Special Rapporteur reiterates that the Financial Action Task Force functions as a global standard-setter in the area of counter-terrorism financing and money-laundering, with decision-making powers assigned to its members. While associate members (Task Force-style regional bodies) and observers are involved in relevant processes, they have limited leeway to influence standards that they eventually must implement.

42. According to the Financial Action Task Force rules, observer status can be granted to organizations that are “inter-governmental and international/regional in nature” and do not work “according to private sector mechanisms”.⁴³ The policy excludes civil society organizations from becoming observers. The Special Rapporteur notes that the mandate of the Task Force lists “engaging and consulting with the private sector and civil society on matters related to the overall work of the Task Force” among the functions of the Task Force and that such engagement should be conducted “through the annual consultative forum and other methods for maintaining regular contact to foster transparency and dialogue”.⁴⁴ The annual Private Sector Consultative Forum provides a platform for the Task Force to engage directly with the private sector. Since 2016, the Global NPO Coalition on FATF⁴⁵ has been permitted to nominate four organizations to participate in the Forum, ensuring some human rights and humanitarian presence in the proceedings. In addition, the Task Force committed to enhancing engagement with non-profit organizations by holding annual meetings on specific issues of common interest and organizing ad hoc

⁴² See A/70/674; and United Nations Development Programme, *Journey to Extremism in Africa: Drivers, Incentives and the Tipping Point for Recruitment* (New York, 2017).

⁴³ See www.fatf-gafi.org/about/membersandobservers/fatfpolicyonobservers.html.

⁴⁴ Financial Action Task Force, “Mandate”, part I, para. 3 (i).

⁴⁵ See <http://fatfplatform.org>.

exchanges on technical matters.⁴⁶ The Special Rapporteur welcomes those developments as a step in the right direction. She notes however that much of the engagement of the Task Force with civil society is conducted on an ad hoc basis, which provides for considerable flexibility for the Task Force but leaves civil society with no expectations of formalized participation. She recommends that a consultative process be undertaken, with the full engagement and participation of civil society, to advance its full, consistent and meaningful participation.

43. The Special Rapporteur wishes to emphasize that the right to take part in the conduct of public affairs, guaranteed under article 25 the International Covenant on Civil and Political Rights, extends to standard-setting processes and forums at the international and regional levels.⁴⁷ Recalling the significant impact that Financial Action Task Force processes have on the protection of human rights, it is imperative that standard-setting and implementation processes are conducted transparently by ensuring the participation of those affected by the relevant laws and policies.

44. The Special Rapporteur highlights that this includes the obligation of Financial Action Task Force member jurisdictions to organize inclusive consultations at the national level, in line with their domestic processes and with due consideration of their human rights obligations. She urges the Task Force to take steps towards making their processes more participatory, recommending that it be guided by international human rights standards, as authoritatively interpreted by international human rights mechanisms, including the Human Rights Committee, and by the OHCHR guidelines on the effective implementation on the right to participate in public affairs (A/HRC/39/28).⁴⁸ She notes that the Task Force engages in a range of activities that directly impinge upon, and may limit, fundamental human rights, including data collection, sharing and processing, and that its recommendations may result in the diminution of individual rights at the national level. Substantial consideration is required in order to ensure that entities such as the Task Force fulfil their obligations to respect human rights in their engagement with, and directions given to, States.

45. In the analysis set out above, the Special Rapporteur noted that de facto, universally enforced rules are effectively imposed by a rather small core group of States representing the globe's most advanced economies. Given the weight of financial and economic power underpinning the (technically) legally non-binding set of standards, following the direction set by the Financial Action Task Force is not merely optional for States with lower levels of financial and economic development. Such circumstances inevitably raise concerns related to State sovereignty and the legitimacy of regulatory processes.

46. The Special Rapporteur notes that Financial Action Task Force standards have been referenced and endorsed in documents produced by United Nations entities and organs, most recently – and prominently – by the Security Council.⁴⁹ Such endorsement should motivate the Task Force to step up measures towards ensuring that its standards are designed and implemented in compliance with the norms and standards adopted under the aegis of the United Nations, including international human rights law. Having soft law standards endorsed by the United Nations fall short of those recognized binding norms would send a dangerous message that would risk undermining globally recognized human rights norms.

⁴⁶ Submission by the Global NPO Coalition on FATF.

⁴⁷ See Human Rights Committee, general comment No. 25 (1996) on participation in public affairs and the right to vote, para. 5; and [A/HRC/39/28](#).

⁴⁸ As requested by the Human Rights Council in its resolution 33/22.

⁴⁹ Security Council resolutions [2462 \(2019\)](#) and [2482 \(2019\)](#).

E. Global Counterterrorism Forum

47. The Global Counterterrorism Forum was launched jointly by Turkey and the United States in September 2011 as an “informal, action-oriented and flexible platform” with the stated mission to “reduce the vulnerability of people everywhere to terrorism by effectively preventing, combating and prosecuting terrorist acts and countering incitement and recruitment to terrorism”⁵⁰ by bringing together experts and practitioners from countries and regions to share their experiences, expertise, tools and strategies on countering the evolving threat of terrorism. Founding States realized the need for an informal forum to troubleshoot pressing issues, provide quick solutions to regulatory gaps that could subsequently be shared with formal inter-State forums or with States directly and streamline solutions from a wide range of security actors in evolving security-challenged contexts. Its establishment also corresponded with the increasing view that existing institutional discursive forums, such as the Group of Seven, were too narrow in scope and that regional organizations lacked the capacity to address broader multilateral challenges. The Forum functions as an intergovernmental platform (of uncertain legal status) for policymakers and selected practitioners. The 30 founding members (29 States and the European Union) included the five permanent members of the Security Council, in addition to a range of countries confronting terrorism and new donors to counter-terrorism efforts.⁵¹ The Forum’s primary external modality appears to be issuing good practices and recommendations on the implementation of selected counter-terrorism policies. Those documents are developed by working groups⁵² or in the context of standalone initiatives, with the help of a series of implementing partners. The Special Rapporteur notes that it was particularly difficult to acquire access to detailed information on the working practices and modalities of the Forum’s operation, and her office only partially succeeded in obtaining relevant information. Information found on the Forum’s website is highly generic and gives little insight to the form, procedure and working methods of the Forum. She notes that, if her office found such information difficult to access, other actors, including civil society actors, national parliaments or national human rights institutions would find it even more challenging. The lack of transparency and information-sharing underscores a broader conundrum in the global counter-terrorism architecture with participation and access to new institutions.

48. With regard to the Global Counterterrorism Forum’s internal workings, a Coordinating Committee, chaired by the Forum’s Chairs, oversees the mandates and activities of the Forum’s working groups, initiatives and administrative unit and provides guidance on the prioritization of initiatives and projects.⁵³ The Special Rapporteur notes that the Forum’s principles recognize the need for all counter-terrorism measures to be “fully consistent with international law, in particular the Charter of the United Nations, as well as international human rights, refugee and humanitarian law”. They also underscore that respect for human rights and the rule of law are “an essential part of a successful counter-terrorism effort”.⁵⁴ However, the Coordinating Committee’s methods for priority selection, and the role of human rights and compliance with international law in the choice of initiatives and projects, is extremely difficult to discern. The Committee consists of Forum members, represented by their national counter-terrorism coordinator or other senior counter-terrorism policymaker. It is unclear whether any national human rights experts consistently interface with the Coordinating Committee, whether national terrorism

⁵⁰ See Global Counterterrorism Forum, “Political declaration”, 22 September 2011. Available from www.thegctf.org/About-us/GCTF-documents.

⁵¹ See www.thegctf.org/About-us/Members-and-partners.

⁵² See www.thegctf.org/Working-Groups/Structure.

⁵³ See Global Counterterrorism Forum, “Terms of reference”, 2017.

⁵⁴ See Global Counterterrorism Forum, “Political declaration”, 22 September 2011.

coordinators are requested to provide human rights-related data points in the context of their engagement or whether there is any active outreach to national human rights institutions in the development of strategy or new projects. The Forum's Administrative Unit provides analytical, administrative and logistical support to the Coordinating Committee and the working groups and initiatives.⁵⁵ It is unclear whether there is any human rights expertise built into the Administrative Unit or what pathways exist to garner such data for analytical work in a consistent and rigorous manner. The Forum currently acts through five working groups⁵⁶ and eleven initiatives.

49. In addition to the Global Counterterrorism Forum structure set out above, three “inspired institutions”⁵⁷ serve as implementing offshoots, operationalizing good practices and memorandums. Hedayah⁵⁸ and the Global Community Engagement and Resilience Fund are active in the area of the prevention and countering of violent extremism, while the International Institute of Justice and Rule of Law⁵⁹ supports the development and implementation of Forum initiatives including by providing training to domestic security sector actors.⁶⁰ All three constitute distinct parts and entities to the sprawling global counter-terrorism landscape, with diverging levels of transparency. This poses a challenge to the assessment of how human rights law is benchmarked or integrated into all relevant activities and whether, and by what means, input from independent civil society is meaningfully included in their work.

50. The Global Counterterrorism Forum formally sits outside the presumed perimeters of international law norm production. Nonetheless, it is a significant site for counter-terrorism soft law development. Clearly, not all its recommendations, practices and outputs affirmatively constitute soft law. Nonetheless, given the multipronged test of affirmation, use and transfer of those norms and informal practices, the Forum therefore constitutes an evolving site of soft law production and makes its membership, functioning and transparency important per se.

Soft law and informal law influence of the Global Counterterrorism Forum

51. As a formal matter, the Global Counterterrorism Forum would likely dispute its influence in legal development, while holding that the tools developed are practically very useful to States fighting terrorism.⁶¹ Close examination of the exportation and integration pattern of soft law movement in counter-terrorism, however, reveals otherwise. For example, the Forum's The Hague-Marrakesh memorandum on good practices for a more effective response to the phenomenon of foreign terrorist fighters was crucial to the design of Security Council measures aimed at containing the phenomenon, notably resolution 2178 (2014), adopted only a day after the issuance of the memorandum.

52. The principles of the Global Counterterrorism Forum include supporting the “balanced implementation of the Global Counter-Terrorism Strategy and the United Nations counter-terrorism framework more broadly” and developing a “close and mutually reinforcing relationship with the United Nations system”.⁶² As a result,

⁵⁵ Ibid.

⁵⁶ See www.thegctf.org/Working-Groups/Structure.

⁵⁷ See www.thegctf.org/About-us/Inspired_Institutions.

⁵⁸ See www.hedayahcenter.org/about-us/271/vision-and-mission.

⁵⁹ See <https://theijj.org>.

⁶⁰ See <https://theijj.org/about-us/>; and International Institute for Justice and the Rule of Law, “Annual report 2018”.

⁶¹ Global Counterterrorism Forum, “Political declaration”, part III, para. 4, as well as its “Terms of reference”. Formally the Global Counterterrorism Forum speaks against a ‘presumption of binding force’. Political rhetoric aside this does not mean that no legal effects follow.

⁶² Global Counterterrorism Forum, “Political declaration”, part II, paras. 7–9.

Forum good practices documents have influenced the outputs of United Nations organs and entities. For example, the Counter-Terrorism Committee Executive Directorate technical guide to the implementation of Security Council resolution [1373 \(2001\)](#) and other relevant resolutions,⁶³ a reference tool aimed at ensuring consistent analysis of State implementation efforts, consistently references Forum good practices documents as assessment benchmarks.

53. As an entity that encompasses an informal coalition and network, the influence of the Global Counterterrorism Forum should not be underestimated. Informal entities tend to be less transparent than international organizations; often lacking formal rules of procedure, they are highly flexible in the definition and adoption of their mandates over time and, precisely due to their informality, can more easily evade issues of responsibility. Notably, informal coalitions, networks and entities consist of selective groups of like-minded actors, and the selectivity is part of their creation rationale. The Special Rapporteur expresses significant concern that, while the norms produced by the Forum may appear to be entirely voluntary commitments, rather than legal obligations, in fact, informal standards produced within selective clubs often have universal outreach, given that they are addressed to non-participating States as well. While formally legally non-binding, they come attached, in some cases, to incentives – most frequently technical assistance to security sector actors – and there may be a growing negative effect from non-compliance. Such “good practices” should therefore not be underestimated, as the reach of those growing and increasingly effective governance tools extends beyond the limited number of participants in their making.

54. Despite reassurance from some States that are strong human rights standard-bearers that human rights are fully taken into account in Global Counterterrorism Forum “good practices” creation, that claim is objectively hard to measure. If measured solely on detailed, sustained human rights benchmarking and expectations – not merely selective exhortations to respect human rights – Forum guidance and recommendations contain little external evidence of sustained integration. It is not evident how the values and principles that inform the rule of law, as well as the dignity, equality and due process values that infuse international human rights treaties, are systematically included into those “good practices” guidelines and tools. How the procedures generating such documents, such as the silence procedure, encourage and support human rights integration into and prioritization in effective counter-terrorism efforts is not well defined. Moreover, if specialized, technical “shovel-ready” expertise is the Forum’s “brand”, it should also integrate specialist, specific and expert human rights technical knowledge that demonstrates the “how to” of counter-terrorism in a precise and well-defined human rights-compliant manner. Guidelines and recommendations cannot be considered valuable counter-terrorism tools because they are practice-focused, when they omit the same kind of human rights specificity that is needed to be treaty law-compliant. As noted in the report on the negative effects of counter-terrorism measures on civil society ([A/HRC/40/52](#)) and affirmed in the consultations undertaken in preparation of the present report, independent civil society has little knowledge of the inner workings of the Forum, beyond what is provided on its bare-bones website. Civil society organizations that have sought to acquire such access and bring information to States have not been consistently welcomed. Some that have participated have reported hostility to human rights language and to issues being raised in that regard, in particular when brought in late in the day to incorporate into draft documents or in the context of the surrounding conversations that appear to be weak in terms of human rights content. The Special Rapporteur reiterates that the right to take part in the conduct of public

⁶³ Counter-Terrorism Committee Executive Directorate, *Technical Guide to the Implementation of Security Council Resolution 1373 (2001)*.

affairs extends to the standard-setting processes of the Forum⁶⁴ and recommends that the Forum be guided in that respect by relevant international human rights standards.⁶⁵ The Special Rapporteur, fully recognizing the importance and value of practical, “on-the-ground” solutions to new and old counter-terrorism problems, is equally adamant that such solutions must be human rights-compliant, and that can only happen if human rights norms are integrated explicitly into good practices development.

IV. Recommendations

55. **The Special Rapporteur makes the following recommendations:**

Soft law

(a) **The production of “soft law” counter-terrorism instruments by United Nations entities should be benchmarked against human rights treaty obligations, and comprehensive, detailed and relevant inclusion of human rights standards should be consistently applied in counter-terrorism soft norm-making;**

(b) **Technical assistance to States implementing United Nations guidelines, standards and best practices in counter-terrorism should substantively and meaningfully include human rights. All United Nations counter-terrorism entities should fully implement the United Nations human rights due diligence policy;**

(c) **United Nations entities should only endorse non-United Nations standards in the counter-terrorism arena when they are consistent with international law, human rights and international humanitarian law;**

(d) **States should consider undertaking a comprehensive mapping and review of all counter-terrorism “soft law” instruments, specifically addressing their human rights lacunae, using the ample resources and capacity available to the Office of Counter-Terrorism and the Counter-Terrorism Committee, addressing in part the considerable gaps identified in the implementation of the fourth pillar of the Global Counter-Terrorism Strategy and providing a road map for augmenting human rights implementation in the counter-terrorism arena;**

(e) **To remedy the human rights deficits evident in the production of “soft law” norms within the United Nations counter-terrorism architecture, increased financial and institutional support should be given to building human rights capacity, including by strengthening support for OHCHR and the Special Rapporteur;**

(f) **United Nations human rights entities must be consistently and meaningfully included in counter-terrorism norm creation that has an impact on human rights;**

(g) **Human rights capacity within the Office of Counter-Terrorism should be augmented, ensuring permanent and sufficient human rights expertise to support human rights-compliant standard-setting by the Office, entities of the Global Counter-Terrorism Coordination Compact and its working groups, as well as implementing human rights-compliant technical assistance at the national level;**

⁶⁴ International Covenant on Civil and Political Rights, art. 25.

⁶⁵ Human Rights Committee, general comment No. 25, para. 5; and [A/HRC/39/28](#).

(h) States should pay close attention to the importation of “soft law” produced in closed and non-transparent settings into hard law norm production at the Security Council;

(i) Civil society and human rights experts must be meaningfully and consistently given access to the United Nations counter-terrorism architecture. In this context, the establishment of a civil society unit within the Office of Counter-Terrorism is to be commended and encouraged;

Institutions

(j) The Special Rapporteur encourages greater transparency and openness in the work of counter-terrorism entities, including, but not limited to, the Financial Action Task Force and the Global Counterterrorism Forum;

(k) All counter-terrorism entities should explicitly and consistently address the human rights obligations of States in the development of their norm-setting work and integrate such obligations consistently into their standards, norms and best practices;

(l) All counter-terrorism entities should take steps towards making standard-setting and evaluation processes more participatory, including by making them consistently accessible to a diverse representation of States and civil society stakeholders. They should be guided in this respect by relevant international human rights standards and the OHCHR guidelines on the effective implementation on the right to participate in public affairs;

Financial Action Task Force

(m) Amend the mandate of the Financial Action Task Force to include among its objectives and functions the task of ensuring that Task Force standards are developed and implemented in compliance with international law, including international human rights law, international humanitarian law and refugee law;

(n) Meaningfully incorporate human rights norms into the recommendations elaborated by the Task Force;

(o) Include in Financial Action Task Force guidance documents human rights benchmarking and detailed guidance for the human rights-compliant implementation of its standards;

(p) Establish processes to ensure that Financial Action Task Force-style regional bodies implement Task Force standards in compliance with international law and work towards furthering consistency aimed at a human rights-sensitive global application of the standards;

(q) Ensure that the Financial Action Task Force secretariat has relevant expertise by adding specialized staff with proven expertise in international human rights law, international humanitarian law and refugee law. Encourage Task Force-style regional bodies to develop specialized expertise in these areas and provide support in this respect. The Special Rapporteur recommends seeking out and establishing cooperative arrangements with international and regional specialized mechanisms, including United Nations human rights mechanisms, to ensure that the Task Force and Task Force-style regional bodies can benefit from specialized input and advice;

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(r) Provide greater transparency and information to a wide range of interested stakeholders on the operation of the Global Counterterrorism Forum

and its general working methods and approach to integrating human rights standards and oversight into its production of good practices;

(s) Enable the full, regular and meaningful participation of civil society and human rights experts, including United Nations experts, in the regular work of the Global Counterterrorism Forum.
