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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 of the Human Rights Council on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Fionnuala Ní Aoláin, submitted in accordance with Assembly resolution 72/180 and Human Rights Council resolution 31/3.

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** The present report was submitted after the deadline in order to reflect the most recent developments.

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

Summary

This report is the second annual report submitted to the General Assembly by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. A brief introduction (sect. I) is followed by a description of the Special Rapporteur's activities (sect. II). The report broadly addresses the effects of thematic Security Council Resolutions concerning terrorism on the promotion and protection of human rights since September 2001. The Special Rapporteur reflects on the important regulatory and gap-filling role played by the Security Council in respect of peace and security (sect. III), in the counter-terrorism domain including terrorist financing and co-operation between States. The Special Rapporteur addresses new regulatory elements in counter-terrorism regulation evidenced by post-9/11 Security Council resolutions, and their broad impact on State practice, implementation and sovereignty (sect. IV). The particular effects on human rights protections are outlined (sect. V). The parallel effects on the promotion and protection of international humanitarian law are also briefly canvassed (sect. VI). The Special Rapporteur makes a number of concrete recommendations to enable best practice on human rights and international humanitarian law compliance in the context of counter-terrorism regulation applicable to the adoption and implementation of Security Council resolutions. The Special Rapporteur affirms the essential role of the Security Council in maintaining peace and security as set out in the United Nations Charter informed by the Charter's essential and profound commitment to human rights as the bedrock of international institutional practice. The Report also affirms the important complementary role of the General Assembly in the counter-terrorism sphere, and encourages the General Assembly to use its capacities to the full to ensure that human rights remain an enforced and indispensable element of regulating the challenge of terrorism, as well as in addressing the conditions conducive to terrorism.

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I. Introduction

1. This is the second report submitted to the General Assembly by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. It is submitted pursuant to General Assembly resolution 72/180 and Human Rights Council resolution 31/3. The report analyses the impact on the protection and promotion of human rights and *inter alia* international humanitarian law following from the passage of multiple Security Council resolutions regulating terrorism post-9/11.
2. A report on the work of the Special Rapporteur, undertaken since her last report to the General Assembly (sect. II) is provided.

II. Activities of the Special Rapporteur

3. The Special Rapporteur has had a fruitful year advancing positive and sustained dialogue with states concerning the protection and promotion of human rights. The Special Rapporteur is pleased to report that she has received invitations from Australia, Belgium, Bosnia and Herzegovina, France, Kazakhstan, Kenya, Tajikistan, Mali, Uganda, and the United States of America to conduct country visits. Country reports have been issued in respect of Tunisia, Saudi Arabia and Sri Lanka completing the mandate commitments of the former Special Rapporteur Ben Emmerson. Country visits were undertaken to Belgium and France in May 2018, and the Special Rapporteur notes the productive, collegial, and highly engaged character of those visits and the openness of both governments to dialogue. Two further country visits are pending to Qatar (October 2018) and Kazakhstan (May 2019).
4. The Special Rapporteur presented her thematic report on *de facto*, permanent and complex states of emergency occasioned by terrorism to the Human Rights Council in March 2018. That report urged States to ensure that the resort to counter-terrorism regulation was commensurate with State obligations, specifically identifying the high cross-over between terrorism regulation and *de facto* states of emergency. States were reminded of their obligations of proclamation, notification and derogation; encouraged to make better use of ordinary law to address legal challenges; reminded of the high cross-over between *de facto* and permanent states of emergency with sustained and serious human rights violations; and urged to institute independent oversight of counter-terrorism legislation and administrative practice to ensure that counter-terrorism measures were not seriously detrimental to human rights obligations.
5. As one of 38 Counter-Terrorism Implementation Task Force (CTITF) entities within the United Nations counter-terrorism architecture, the Special Rapporteur has made working within the United Nations itself a high priority.¹ She is deeply committed to the “all of UN” approach to countering terrorism, with human rights as an essential pillar of that approach affirmed in the Global Counter-Terrorism Strategy.² The mandate is an active participant in multiple CTITF working groups (e.g. the Working Groups on Victims of Terrorism; Gender; Promoting and Protecting Human Rights and Rule of Law While Countering Terrorism; Foreign Terrorist Fighters; National and Regional Counter-Terrorism Strategies) and has contributed substantively to a number of research and policy projects emanating from the working groups.³ The mandate has strong and supportive relationships with the Office of Counter-Terrorism (OCT), under the leadership of Under-Secretary-General Voronkov. The mandate is one of the signatories to the Global Counter-Terrorism Coordination Compact, and was fully engaged with the OCT in its drafting and agreement.⁴ The Special Rapporteur participated in the High-Level Conference of Heads of Counter-Terrorism Agencies convened by the Secretary-General in June 2018, and addressed the gathering on the

¹ <https://www.un.org/counterterrorism/ctif/en/structure>.

² A/RES/60/288; <https://www.un.org/counterterrorism/ctif/en/un-global-counter-terrorism-strategy>.

³ e.g. The Protection of Critical Infrastructure Against Terrorist Attacks: Compendium of Good Practices (2018), available at https://www.un.org/sc/ctc/wp-content/uploads/2018/06/Compendium-CIP-final-version-120618_new_fonts_18_june_2018_optimized.pdf.

⁴ <http://www.un.org/en/counterterrorism/hlc/un-global-compact.shtml>.

importance of integrating human rights into the co-ordination of intelligence gathering and intelligence sharing activities.

6. The Special Rapporteur has engaged extensively with non-governmental organizations, human rights defenders, and civil society activities throughout the past year. Convenings have included Chatham House (London), CSIS (Washington, D.C.), Palais de Nations (Geneva), and extensive civil society consultations during country-visits to France and Belgium. The Special Rapporteur highlights ongoing work with NGOs to ensure greater access to and transparency from the UN counter-terrorism architecture for NGOs and human rights defenders. The Special Rapporteur emphasizes her commitment to integrating gender by including organizations working on issues related to women's rights into counter-terrorism focused convenings undertaken under the auspices of her mandate.

7. The Special Rapporteur has contributed to a number of national debates concerning national security/terrorism legislation by offering expert views on draft legislation including in the United Kingdom (July 2018) and Australia (February 2018). The Special Rapporteur has issued multiple communications concerning the use of national security/terrorism legislation against civil society activists in multiple countries. She warns about the ongoing misuse of counter-terrorism law and administrative practice to quell legitimate dissent and limit freedom of expression. The Special Rapporteur has had ongoing and constructive engagement with the Financial Action Task Force (FATF), the EU Counter-Terrorism Coordinator's Office, and the UN's Counter-Terrorism Executive Directorate.

III. The UN Charter and the Role of the Security Council in Regulating Terrorism

8. The legal regulation of terrorism has posed significant challenges to the global legal order for many decades. States have responded at domestic, regional and international levels through multiple legal and political avenues.⁵ The Security Council has been reasonably active on counter-terrorism issues, but, historically, relevant resolutions were specifically linked to particular situations,⁶ with one exception.⁷ Notably, prior to 9/11 no Chapter VII resolutions existed which imposed a legal duty on states to introduce specific kinds of domestic counter-terrorism legislation.

9. Internationally, multilateral regulation of terrorism until 9/11 was primarily engaged by concluding treaties. These suppression treaties (focused on responding to certain threats or actions) ranged from agreements that are sweeping in scope to those with more specific aims. These treaties illustrate State's capacity to adopt a quasi-legislative model in response to terrorism with the multilateral engagement of multiple States. Some of the earliest agreements include the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention),⁸ The Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention),⁹ the International Convention on the Taking of Hostages (Hostages Convention),¹⁰ the Convention for the Suppression of Unlawful Acts Against the

⁵ Oversight of such activities is undertaken *inter alia* by human rights courts, e.g. Ana Salinas de Frias, *Counter-Terrorism and Human Rights in the Case Law of the European Court of Human Rights* (2013; Council of Europe).

⁶ See, e.g., S/RES/748 on Libya (1992), S/RES/1054 and S/RES/1070 on Sudan (1996), S/RES/1267 on Afghanistan.

⁷ Unusually, UNSCR 1269 does not refer to any particular country situation but rather "[u]nequivocally condemns all acts, methods and practices of terrorism as criminal and unjustifiable, regardless of their motivation, in all their forms and manifestations, wherever and by whomever committed, in particular those which could threaten international peace and security". S/RES/1269, para. 1.

⁸ Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, entered into force Dec. 4, 1969, 20 U.S.T. 2941.

⁹ Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, entered into force Oct. 14, 1971, 22 U.S.T. 1641.

¹⁰ International Convention Against the Taking of Hostages, A/RESA/34/146 (1979), Dec. 17, 1979, entered into force June 3, 1983.

Safety of Civil Aviation,¹¹ and the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons.¹² The treaties constitute an important reservoir of multi-lateral agreement on the scope of terrorist acts, and the specific agreed obligations of States to act. Clearly, agreement on the Draft Comprehensive Convention on International Terrorism with a definition of terrorism contained therein has been elusive.¹³ The General Assembly's Sixth Committee remains constrained by a lack of State consensus on this treaty. Yet, the lack of agreement in the Sixth Committee should not be understood as evidencing no agreement between States regarding the scope of their obligations and capacities in regulating terrorism. The lack of one broad treaty, should not distract from the substantial agreement among States and the breadth and scope of legal regulation. Critically, negotiations on an expansive multi-lateral terrorism treaty have enabled agreement on specific aspects of global counter-terrorism regulation in important but largely under-acknowledged ways.

10. While treaty-making was dominant in the regulation of terrorism pre-9/11, and remains important today,¹⁴ it has, in the Special Rapporteur's view, been overtaken by the assertive role taken by the Security Council regulating State responses to terrorism through Security Council resolutions.¹⁵ The shift in regulatory approach is complemented by the increased role of some regional regulatory processes,¹⁶ in tandem with the establishment of specialized regulatory entities to address specific aspects of State practice as it intersects with counter-terrorism.¹⁷ These combined shifts have had, in the Special Rapporteur's view, a distinctly negative effect on the overall advancement of meaningful protection for human rights in the counter-terrorism sphere. Moreover, the Special Rapporteur articulates a grave concern that the well-entrenched constitutional and domestic protections for human rights embedded in national legal systems in many countries, are being rendered irrelevant or powerless in the new regulatory landscape. Taking a macro view of Security Council resolutions, they have broadly urged, and sometimes required, States to implement sanctions regimes and counter-terrorism measures.¹⁸ It is the scope and the effect of those regimes and measures that concerns this report. It is also the process and procedures of this shift and its effect on human rights protections that engages this report. This report affirms the value of multilateral and reciprocal state engagement in regulating terrorism while concurrently ensuring the effective protection of human rights.

11. The Special Rapporteur recalls that the United Nations Charter ascribes to the Security Council the 'primary responsibility for the maintenance of peace and security',¹⁹ and it is granted an impressive array of powers under Chapters VI and VII of the Charter.²⁰ In parallel, the General Assembly has express competence to make recommendations to the Security Council and Member States on "any question or any matter within the scope of the present

¹¹ Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, entered into force Jan. 26, 1973.

¹² Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973; entered into force Feb. 20, 1977.

¹³ Danja Blöcher, 'Terrorism as an International Crime: The Definitional Problem' (2011) 8 *Eyes on the ICC* 107, 113.

¹⁴ E.g. 2014 Protocol to Amend the Convention on Offences and Certain Acts Committed on Board Aircraft.

¹⁵ P.C. Szasz, 'The Security Council Starts Legislating' (2002) 96 *American Journal of International Law* 901.

¹⁶ E.g. Council of Europe Convention on Combating Terrorism, adopted in 2005, and its Additional Protocol (2015); EU Directive 2017/541 on combating terrorism.

¹⁷ See e.g. Financial Action Task Force (<http://www.fatf-gafi.org>) and Global Counter-Terrorism Forum (<https://www.thegctf.org>).

¹⁸ See discussion *infra*. The Special Rapporteur notes that the Security Council's actions may also incidentally function to enforce these multilateral conventions on the basis that the violation of the norms contained in them constitute a threat to peace and security.

¹⁹ United Nations Charter, Article 24(1).

²⁰ B. Fassbender, *The United Nations Charter as the Constitution of the International Community* (Nijhoff, 2009).

Charter”,²¹ affirming its separate competence in peace and security matters. The Charter also expressly recognizes human rights as foundational to its purposes and principles. Article 1 of the Charter, setting out the purposes of the United Nations affirms the promotion and encouragement of “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language and religion”. This affirmation is specifically defined in Article 55. This provision connects conditions of stability and well-being enabling peaceful and friendly relations among nations to ‘respect for the principle of equal rights and self-determination of peoples’, consecrating ‘universal respect for, and observance of human rights and fundamental freedoms for all without distinction’.²² The Special Rapporteur notes, self-evidently, that such principles of respect and observance of human rights are not merely outward-facing obligations but also inward-facing. They guide all of the institutions and entities created and regulated by the Charter in the discharge of their powers under the Charter, and the action of all UN institutions and entities are grounding in the requirement to respect and promote human rights in all their actions, complemented by the obligations of customary international law to respect and promote certain fundamental human rights as grounded in the international legal personality of the United Nations.

IV. The Role of the Security Council post-9/11

12. Contextualizing the role and practice of the Security Council post-9/11 requires a brief reflection on the expansion of Security Council action in the aftermath of the Cold War. A reinvigorated Security Council regulated forcefully in a broader array of war and peace arenas. A notable change was the Council’s practical enlargement of the notion of ‘threat to international peace and security’. This move, prompted by new challenges to global peace and security, included situations that would have traditionally fallen outside of the understanding of the scope of collective action under the Charter.²³ This included situations of non-international armed conflict, gross violations of human rights amounting to crimes against humanity, humanitarian crises, coups d’état, or other serious threats to the democratic order of a state. In obvious ways, the broadening of ‘threats to peace and security’ laid the groundwork for the expansion of such threats to include global, regional and national experiences of terrorism. In the decade leading to the events of 9/11, the Security Council further broadened its playing field by focusing on issues that point beyond any particular conflict or situation²⁴, addressing, among others, the protection of children²⁵ and civilians²⁶ in situations of armed conflict, the role of women in the context of peace and security,²⁷ flows of small arms and light weapons to Africa²⁸, HIV/AIDS²⁹ as well as international terrorism in resolution 1269.³⁰ However, the Special Rapporteur underscores that notwithstanding commonalities with post-Cold War expansions of Security Council competence, the regulation of terrorism by the Security Council has unique and specific dimensions. These elements also pose significant challenges to the meaningful protection and promotion of human rights while countering terrorism.

13. Since the tragic and devastating events of 9/11, the Security Council has issued sweeping and important statements of principle on the prevention of terrorism: they are clear, at least in their rhetorical sense, and undeniably enhance States’ duties to prevent and repress terrorism. These developments align with an increasingly important law-making function being carried out by international organizations, more broadly, but in particular by the

²¹ United Nations Charter, Article 10.

²² United Nations Charter, Article 55(c).

²³ An early example is S/RES/688 (1991) where the Council stated that the consequence of “the repression of the Iraqi civilian population [...] threaten international peace and security in the region”.

²⁴ S. Lamb, ‘Legal Limits to United Nations Security Council Powers’, in: Goodwin-Gill and S. Talmon (eds.), *The Reality of International Law* (OUP, 1999), 361.

²⁵ S/RES/1261 (1999); S/RES/1265 (1999); S/RES/1296 (2000), S/RES/1314 (2000).

²⁶ S/RES/1265 (1999); S/RES/1296 (1999).

²⁷ S/RES/1325 (2000).

²⁸ S/RES/1209 (1998).

²⁹ S/RES/1308 (2000).

³⁰ S/RES/1269 (1999).

Security Council in counter-terrorism contexts. The Special Rapporteur cautions that such broad law-making has the capacity to impinge on the legitimate sovereignty of States, may override national constitutional and legislative protections for human rights, and operates to exclude broad and sustained debate among States, citizens and civil society concerning ways to safeguard human rights and security in the context of terrorism. The resolutions are characterized by a number of common elements. They include significant speed in the drafting, debate and agreement of resolutions; a lack of engagement with civil society actors in the determination of legal, political, social and cultural effects of such resolutions; a lack of benchmarking of, or accountability for, human rights and humanitarian law violations that may follow from implementation and no attention to the disproportionately detrimental enjoyment of specific human rights triggered by targeted forms of terrorism regulation. Finally, as the resolutions have lacked an agreed and comprehensive definition of terrorism consistently applied across all regulatory measures, States and regional organisations have been left free to craft their own definitions in implementation, resulting in a wide variety of groups, persons and activity being targeted by counter-terrorism regulation.³¹

A. United Nations Security Council Resolution 1373

14. Primarily among these resolutions is Security Council resolution 1373. Many commentators have inferred that resolution 1373 enhanced States' counterterrorism obligations which, before the adoption of that resolution, rested upon a "low threshold [of] due-diligence".³² When examining Security Council action following 9/11, two stages become evident. Immediately after the attacks, the Council passed resolution 1373³³ and expanded the targeted sanctions regime set up under resolution 1267 (1999).³⁴ Subsequent resolutions in the area of counter-terrorism built on these two thematic legs until the rise of the Islamic State in Iraq and the Levant (ISIL) caused the Security Council to pass an extensive set of new measures deemed necessary for addressing the threat posed by ISIL and the 'foreign fighters' phenomenon.³⁵ This second phase of Security Council legislative action is still ongoing, with the Council having passed a record number of thematically diverse terrorism-related resolutions in 2017.³⁶

15. On 12 September 2001, the Security Council adopted resolution 1368, condemning the 9/11 terrorist attacks and calling upon the international community to "redouble its efforts" to prevent and suppress terrorist acts.³⁷ Close on its heels came resolution 1373 which was adopted on 28 September 2001 under Chapter VII of the United Nations Charter.³⁸ 1373 is one of the most wide-ranging Security Council resolutions ever passed, placing mandatory obligations upon States, and with an enormous weight of international political consensus behind it.³⁹ As a prominent scholar notes, resolution 1373 also manifests unusual legislative character as it mandates compulsory action of a general nature for States with binding intent. Further, while its adoption was triggered by 9/11, the action mandated is not limited to a specific situation or conflict affecting international peace and security, nor includes any explicit or implicit time limitation.⁴⁰ The resolution has been heralded as a historic event⁴¹

³¹ See A/72/495.

³² J.T. Gathii, *War, Commerce, and International Law* (OUP, 2010) 235.

³³ S/RES/1373 (2001).

³⁴ S/RES/1390 (2001).

³⁵ S/RES/2170; S/RES/2178; S/RES/2396.

³⁶ S/RES/2341, S/RES/2354, S/RES/2368, S/RES/2370, S/RES/2395, S/RES/2396.

³⁷ S/RES/1368 (2001).

³⁸ S/RES/1373 (2001).

³⁹ W. Kassa, 'Rethinking the No Definition Consensus and the Would Have Been Binding Assumption Pertaining to the Security Council Resolution 1373' (2015) 17 *Flinders L.J.* 127, 128.

⁴⁰ P.C. Szasz, *op. cit.*, 901-902.

⁴¹ S/PV.4413 (2001), at 15 (intervention by the United Kingdom).

whereby the Security Council has taken the “unprecedented step”⁴² of enacting “legislation for the rest of the international community”.⁴³

16. The resolution requires States, among other things, to criminalize terrorist activities, to freeze the financial assets of terrorists and those participating in or facilitating terrorist acts, to ban others from making funds available to terrorists, and to deny safe haven to such persons or groups. It asks States to bring terrorists to justice, assist each other with respect to criminal prosecutions of terrorist offenders, institute effective border security measures and exchange information related to movements of terrorist persons or networks and forged or falsified travel documents. The resolution draws attention to the link between international terrorism and “transnational organized crime, illicit drugs, money-laundering, illegal arms trafficking, and illegal movement of nuclear, chemical, biological and other potentially deadly materials” and stresses the need for international coordination in addressing this challenge. It uniquely establishes a new mechanism in the form of the Counter-Terrorism Committee to monitor the implementation of the resolution by Member States. The language used by the Council (“decides that all States shall”) indicates that various provisions contain mandatory directions in a style characteristic of legislation, as also confirmed in subsequent resolutions referring to “obligations” established under resolution 1373.⁴⁴

17. Resolution 1373 and follow-up resolutions place particular emphasis on suppressing the sources of finance and support for terrorism. Paragraph 1 of resolution 1373 imposes binding obligations on States to prohibit and criminalize terrorist financing, prevent and suppress such acts, and freeze the funds and assets of those committing or supporting terrorism. These obligations are based on provisions of the Convention for the Suppression of the Financing of Terrorism.⁴⁵ With the Convention adopted in 1999 but not yet in force at the time, the Council made certain of its substantive provisions binding on all Member States under Chapter VII of the Charter. While the Convention was adopted by the General Assembly without a vote, the Security Council’s action nonetheless effectively bypassed domestic processes of ratification of international legal instruments, at least with respect of the provisions reflected in resolution 1373. It is also notable that the Security Council chose not to explicitly adopt the definition of terrorist acts from the Convention.

18. The Council has reaffirmed these 1373 obligations and made further recommendations in subsequent resolutions. Notably, it addressed the issue of “justification or glorification (apology)” and “incitement of terrorist acts motivated by extremism and intolerance” in resolution 1624 (2005) calling upon all States to prohibit incitement to commit a terrorist act and prevent such conduct. Once again, the Council does not provide a definition of relevant terms. The Special Rapporteur notes that this 2005 resolution stresses for the first time in an operative paragraph that States “must comply” with their obligations under international law, in particular international human rights law, refugee law, and humanitarian law. Specific reference is made to Articles 19 of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. The Special Rapporteur points out the obvious and lengthy time gap between 2001-2005 in the articulation of specific human rights obligations in counter-terrorism regulation by the Security Council. She recalls again the UN Charter and the human rights provisions contained therein and their inwards as well as outward facing dimensions.

B. Sanctions Resolutions by the Security Council

19. In parallel to the thematic leg of resolution 1373, the aftermath of 9/11 also saw the Security Council bolster the sanctions regime set up under resolution 1267 (1999) targeting the Taliban leadership in Afghanistan and reframed sanctions as a global, open-ended regime

⁴² Angola’s representative declared that “[b]y adopting resolution 1373 (2001), the Security Council took the unprecedented step of bringing into force legislation binding on all States on the issue of combating terrorism.” S/PV.4950 (2004), at 9-10.

⁴³ A/56/PV.25 (2001), at 3 (intervention by Costa Rica).

⁴⁴ S/RES/1611, S/RES/1618; S/RES/2133, S/RES/2178.

⁴⁵ A/RES/54/109, Annex (Dec. 9, 1999), 39 ILM 270 (2000).

focused on any “individual, group, undertaking, or entity associated with Al-Qaida, Usama bin Laden or the Taliban”, not linked to a particular situation or conflict.⁴⁶ Resolution 1617 (2005), enacted under Chapter VII, defines “associated with” to include “participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of; supplying, selling or transferring arms and related materiel to; recruiting for; or otherwise supporting acts or activities of; Al-Qaida, Usama bin Laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof”.⁴⁷ The addition of “otherwise supporting acts or activities” broadens the notion, opening the door to expansive definitions of [material] support to terrorism and terrorist acts under domestic law that have at times led to sanctioning or even criminalizing the activities of civil society organizations, humanitarian actors or criminalizing private or family relationships.⁴⁸

20. The sanctions regime has been criticized for infringing upon a series of human rights, including the right to due process and effective remedy, its lack of transparency, and lack of safeguards against arbitrary application.⁴⁹ While improvements including the inclusion of humanitarian exemptions, publication of listing guidelines and narrative summaries of listing rationales, national court review as well as the creation of the Office of the Ombudsperson (as limited to the Da’esh and Al-Qaida list) have mitigated some of these shortcomings, concerns remain. As my predecessor warned, the process remains ‘unnecessarily opaque’ and access to information problematic,⁵⁰ including for the Ombudsperson. The previous Ombudsperson expressed concerns about the insufficient transparency in the process and inadequate guarantees of independence granted to the Ombudsperson’s office.⁵¹

21. The Special Rapporteur notes the difficult and lengthy process it took to ameliorate the adverse human rights implications of the sanctions regime which was set up without prior due consideration of its effects on a broad range of human rights and without any meaningful *ex post facto* human rights impact assessment. The Special Rapporteur observes that sanctions resolutions have far fewer direct references to human rights and humanitarian law obligations than other counter-terrorism resolutions, a matter that is not merely cosmetic but points to an important regulatory difference and contextualization for these resolutions. In the Special Rapporteur’s view this distinction is not justified.

C. Security Council Process and Counter-Terrorism Resolutions

22. The Special Rapporteur is distinctly aware that the Security Council does not operate at arms-length from situations threatening peace and security. As the events of 9/11 demonstrate, States and the international community must, at times, mobilize quickly and effectively to combat new threats and address regulatory lacunae that threaten global security. But, Security Council procedure has, in other contexts, functioned to give broad and meaningful capacity for State engagement, and consultation with various actors including civil society and experts to determine and review the likely consequences of Security Council exhortations and requirements.⁵² Security Council resolutions on counter-terrorism measured over a 17-year period manifest a distinct pattern of fast-tracked creation, and a notable absence of broad consultation and engagement. This is compounded by the almost complete exclusion of civil society actors from the global counter-terrorism architecture at the UN.⁵³

⁴⁶ See S/RES/1390 (and subsequent resolutions).

⁴⁷ S/RES/1617 (2005), para. 2.

⁴⁸ *Tightening the Purse Strings; What Countering Terrorism Financing Costs Gender Equality and Security* (2017). Resolution 1373 has led to States preparing their own terrorist lists. This auto-interpretive approach is arguably more detrimental to human rights than the specific lists adopted by the Security Council as such processes lack collective mediation and discussion.

⁴⁹ A/65/268; A/HRC/34/61, A/65/268.

⁵⁰ A/HRC/34/61, paras. 17-20.

⁵¹ https://www.un.org/sc/suborg/sites/www.un.org.sc.suborg/files/20151123openbriefing_1.pdf.

⁵² L. Sievers & S. Dawes, *The Procedure of the UN Security Council*, 4th ed. (OUP, 2014).

⁵³ FIDH, *The United Nations Counter-Terrorism Complex* (2017).

23. The Special Rapporteur highlights this expedited policy process has significant implications for public scrutiny, debate and input from relevant actors, including non-Security Council Member States and civil society. As this report highlights, resolutions such as 2178 many of whose provisions are overbroad and vague, including terms such as ‘terrorist act’ that are unconnected to any specific definition or description of prohibited conduct, may create broadly-defined criminal offences that fail to satisfy the principle of legality. Breaches of the proportionality principle are also implicated by broadly-defined criminal offences. Moreover, recent resolutions have moved squarely to express criminal law regulation, with often tenuous links between ancillary and inchoate offences and principal offences associated with acts of terrorism. This move has momentous consequences for the regulation of conduct, and expressly infringes on the due process rights of persons in countries implementing Security Council resolutions as mandated by the Charter. The Special Rapporteur notes that meaningful consultation with criminal law and human rights experts across different legal systems, including those within the United Nations system, at drafting and negotiation stage would reveal and potentially ameliorate these regulatory consequences. The speed and closed nature of the drafting process for Security Council counter-terrorism resolutions makes such inputs currently unlikely.

D. Security Council Resolutions and Foreign Fighters

24. The activities of ISIL and other armed groups in Syria and Iraq and the flow of foreign fighters to the region led to the adoption of resolution 2170 on 15 August 2014, swiftly followed by resolution 2178 on 24 September 2014. While both resolutions have been adopted under Chapter VII of the Charter, 2178 specifically builds on the model set by resolution 1373 establishing a set of far-reaching legislative obligations on all Member States.

25. The Council defines ‘foreign terrorist fighters’ as “individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict”.⁵⁴ In response, it requires States to suppress and prevent the recruitment, organization, transport and equipment of such foreign terrorist fighters, including by preventing their departure, entry and transit. Such obligations need to be carried out in line with international human rights law, refugee law and international humanitarian law. The resolutions requires States to enact the necessary legislation to prosecute persons who travel or attempt to travel to another State to perpetrate, plan, prepare or participate in terrorist acts or to provide or receive terrorist training; as well as persons who finance, organize the travel of or recruit ‘foreign terrorist fighters’.⁵⁵ It is not specified how such international law compliance will be assessed, nor is any specific guidance given to States in a resolution which provides concrete specifics in other aspects. Critically, ongoing debates pervade this arena concerning the application of international humanitarian law; how the material fields of application for Article 3 common to the Four Geneva Conventions and of Additional Protocol II intersect in real-time and territorial space with definitions contained in the resolutions; and how these resolutions affect the still-relevant legal norm of self-determination.

26. In addition to the above, the Council calls on States to take measures aimed at countering violent extremism, which can be conducive to terrorism, including by preventing radicalization, recruitment, and mobilization and engage relevant local communities and non-governmental actors. States are further required to cooperate when addressing the threat posed by the foreign fighters phenomenon, in accordance with their obligations under international law, enhance the effectiveness of mutual legal assistance agreements in criminal

⁵⁴ S/RES/2178.

⁵⁵ *Ibid.*, para. 6 (a)-(c).

matters,⁵⁶ and intensify and accelerate the exchange of operational information to prevent the entry into or transit through their territories of persons believed to be foreign terrorist fighters.⁵⁷ The Council also calls upon States to require that airlines operating in their territories provide advance passenger information (API) to the appropriate national authorities; improve international, regional, and sub-regional cooperation to facilitate uncovering patterns of travel by foreign terrorist fighters and to prevent terrorists from exploiting technology. The human rights consequences of such regulatory requirements are immense, impinging on the non-refoulement principle, freedom of movement, expression, and the right to private and family life.

27. The obligation to share information have been extended to cover not only those who can qualify as foreign terrorist fighters in accordance with resolution 2178 but also their families “travelling back to their countries of origin or nationality, or to third countries, from conflict zones”.⁵⁸ The Council’s focus on family members represents a significant normative and procedural move, even more so in light of the Council’s demonstrated interest in regulating the “pre-criminal space”. The array of actors implicated in these resolutions creates a ripple effect in human rights terms, whereby human rights repercussions concern a much larger group than then title of the resolutions suggest, and have disproportionate effect on vulnerable and disadvantaged groups, particularly women and children.

28. Building on the previous body of recommendations and binding measures, Security Council resolution 2396 (2017) called on States to strengthen efforts in ways that may have further serious implications for domestic legal regimes, including by turning recommendations contained in previous resolutions into binding obligations by acting under Chapter VII. These domestic legal effects directly implicate the human rights obligations of States, and may *de facto* neutralize the capacity of domestic human rights norms and institutions to operate effectively in protecting citizens and non-citizens alike.

29. The resolution requires States to establish API systems “in order to detect the departure from their territories, or attempted travel to, entry into or transit through their territories, by means of civil aircraft”, of foreign terrorist fighters and other designated individuals,⁵⁹ and to collect, process and analyse passenger name record (PNR) data.⁶⁰ Such information is to be used by and shared with all relevant national authorities, “with full respect for human rights and fundamental freedoms for the purpose of preventing, detecting and investigating terrorist offenses and related travel”.⁶¹

30. The Council further imposed an obligation to develop “watch lists or databases of known and suspected terrorists, including foreign terrorist fighters, for use by law enforcement, border security, customs, military, and intelligence agencies to screen travellers and conduct risk assessments and investigations”⁶² and to “develop and implement systems to collect biometric data, which could include fingerprints, photographs, facial recognition, and other relevant identifying biometric data, in order to responsibly and properly identify terrorists, including foreign terrorist fighters”.⁶³ Relevant obligations are to be formally implemented in compliance with international human rights law. The Special Rapporteur is deeply concerned that doing so in practice may be arduous given the lack of specific guidance on protecting the implicated human rights. Moreover, it remains entirely unclear which mechanisms resolve conflicts between instruments and processes protecting human rights domestically and Security Council mandates to regulate. In these debates, the exhortations to compliance and the perceived costs of non-compliance may far outweigh (regrettably) the compulsion to human rights protection.

⁵⁶ Resolution 2396 recommends that “in the absence of applicable conventions or provisions” States “cooperate when possible on the basis of reciprocity or on a case by case basis”. S/RES/2396 (2017), para. 24.

⁵⁷ S/RES/2178 (2014), para. 9; S/RES/2322 (2016); S/RES/2396 (2017), paras. 3 and 22.

⁵⁸ S/RES/2396 (2017), para. 5.

⁵⁹ *Ibid.*, para. 11.

⁶⁰ *Ibid.*, para. 12.

⁶¹ *Ibid.*, paras. 11 and 12.

⁶² *Ibid.*, para. 13.

⁶³ *Ibid.*, para. 15, S/RES/2322 (2016), para. 3.

31. While resolutions 2178 and 2396 appear to follow the same model of mandating compulsory action of a general nature as resolution 1373, close analysis shows that we are dealing with even further-reaching instruments. Resolution 1373 criminalized conduct that has already been included in a convention negotiated under the aegis of the General Assembly and adopted without a vote. Conversely, the conduct criminalized in accordance with para. 6(a) of resolution 2178 was not reflected in any instrument negotiated in the context of a multilateral process. Hence, other than the resolution, States had no basis in international law to criminalize traveling abroad with a ‘terrorist’ intent. Similarly, States had no previous obligation under international law to set up watch lists, develop biometric databases and API systems, or to develop PNR capacity, as required in line with paras. 11-15 of resolution 2396. The resulting challenges in implementing resolution 2178 in a manner compliant with international human rights obligations have been addressed by numerous stakeholders, including my mandate⁶⁴ and the Office of the United Nations High Commissioner for Human Rights (OHCHR).⁶⁵ Comparable granularity in analysis will also be needed in relation to the extensive obligations established more recently by resolution 2396, but preliminary analysis suggests pervasive degrading of human rights protection as well as process concerns for transposition of these obligations domestically.

32. It is not clear if any rights-related proportionality analysis was undertaken with respect to resolution 2178. There was no engagement with civil society about the rights-related impact of the resolution. Some of the human rights gaps evidenced in the resolution have been admirably filled by the CTITF Working Group on Rule of Law and Human Rights, under the lead of OHCHR, providing specific and concrete direction to states on how human rights may be negatively impacted by measures taken, and how such measures can be implemented in a human rights compliant manner.⁶⁶ I express strong concern that the scope and breath of this resolution constitutes a broad encroachment on the regulation of criminal law broadly defined, without corresponding protection for rights and liberties as would be the norm if the same kind of legislation emanated within many national legal systems.

E. Human Rights Protection and Counter-Terrorism Resolutions

33. The expansion of institutional and legal counter-terrorism frameworks, policies and practices following the events of 9/11 has been formidable.⁶⁷ Through its post-9/11 resolutions, particularly resolutions 1373, 2178 and 2396, the Security Council ensured that the obligation to prevent terrorism, coupled with other important ancillary duties are now incumbent upon *all* States. Moreover, in a revolutionary stroke of the pen, the Council did not fix any geographical limits or prescribe any specific timeframe as regards the imposition of these norms in resolution 1373.⁶⁸ More recently, resolution 2178 adopted under Chapter VII, is described as “one of the most important quasi-legislative efforts of the Council since resolution 1373 (2001)”.

⁶⁴ A/HRC/29/51.

⁶⁵ A/HRC/28/28.

⁶⁶ CTITF, Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism, *Guidance to States on human rights-compliant responses to the threat posed by foreign fighters* (July 2018), available at <https://www.ohchr.org/EN/newyork/Documents/Human-Rights-Responses-to-Foreign-Fighters-web%20final.pdf>.

⁶⁷ An extensive structure was created to support these norms. The Counter-Terrorism Committee (CTC) was established by Security Council Resolution 1373 (2001) and bolstered by Security Council Resolution 1624 (2005). The CTC’s implementation capacity was enabled by the Counter-Terrorism Committee Executive Directorate (CTED). Sequentially, the Counter-Terrorism Implementation Task Force (CTITF) was established by the Secretary-General in 2005 and endorsed by the General Assembly via the UN Global Counter Terrorism Strategy, adopted in 2006. CTITF organizes its work through working groups and counter-terrorism related projects. The Office of Counter-Terrorism (OCT) was established through General Assembly resolution 71/291 of 15 June 2017.

⁶⁸ V-J Proulx, *An Incomplete Revolution: Enhancing the Security Council’s Role in Enforcing Counterterrorism Obligations*, 8 J. Int’l Disp. Settlement 303 (May 2017).

34. The Special Rapporteur emphasizes the fundamental challenges to human rights promotion and protection which follow from a lack of agreed and precise definition of terrorism applied across all counter-terrorism resolutions. This definitional gap has persisted to the present. Some attempts at clarity have been undertaken but they are insufficient to address the human rights gaps and violations implicated. For example, resolution 1566 (2004) eventually adopted a definition of terrorist acts.⁶⁹ However, the Special Rapporteur considers that the early absence of a definition enabled the development of the deference doctrine to State counter-terrorism practices in the formative period of Security Council action on counter-terrorism. She notes, in particular, that the terminology provided in resolution 1566 seems to have been interpreted by States as *de minimis* threshold, allowing for the adoption of broad domestic definitions in many jurisdictions. Such definitions may in turn lead to broadening the applicability of measures mandated under Security Council resolutions beyond what can legitimately be characterized as a threat to international peace and security and thus beyond what the Council intended. This also puts in question the legality of measures taken pursuant to expansive definitions, particularly when relevant measures limit human rights. By broadening the categories of conduct and groups or persons that such measures are applicable to, they risk becoming disjointed from the original legitimating purpose contained in Security Council resolutions.

35. The measures contemplated by resolution 1373 had far-reaching implications for the protection of human rights, but the resolution made no comprehensive or even specific reference to the need for States to comply with human rights standards in the suppression of terrorism.⁷⁰ Instead, the preamble to the resolution affirms the need to combat terrorist acts “by all means, in accordance with the Charter of the United Nations”. As the Charter makes substantial references to human rights protection, this would constitute an implicit reference to the need to promote and respect human rights norms. However, the obliqueness of this positive interpretation only serves to highlight the lack of an explicit statement in the resolution, and “leaves the impression that human rights protection is a secondary consideration in the campaign against terrorism, instead of an essential component of any counter-terrorism strategy”.⁷¹ Further, the only explicit reference to human rights norms in the operative paragraphs of the resolution arises in the context of refugees and asylum-seekers where States are required to take appropriate measures, to ensure that such persons have not been involved in the commission of terrorist acts.⁷²

36. Subsequent resolutions began to include language on the need for States to ensure that “any measures taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.”⁷³ More recently, resolutions have started to incorporate language according to which “effective counterterrorism measures and respect for [...] the rule of law are complementary and mutually reinforcing” and that they are “an essential part of a successful counter-terrorism effort.”⁷⁴ Furthermore, some resolutions emphasize the need to address the conditions conducive to the spread of terrorism,⁷⁵ including, but not limited to, (...) the need to promote the rule of law, the protection of human rights and fundamental freedoms ...”⁷⁶

37. While references to international human rights law have multiplied, the actual impact of such generic mentions, without clear and explicit human rights guidance contained in the

⁶⁹ S/RES/1566 (2004), para. 3. The Special Rapporteur underscores that para. 5 of this resolution suggests that this definition is not intended to replace the one adopted via a comprehensive multilateral process.

⁷⁰ International Helsinki Federation for Human Rights, *Anti-Terrorism Measures, Security and Human Rights* (2003), 41-42.

⁷¹ *Id.*, 42.

⁷² S/RES/1373, para. 3(f).

⁷³ S/RES/1535 (2004), S/RES/1456 (2003), para. 6, S/RES/1624 (2005), para. 4.

⁷⁴ S/RES/2129 (2013); S/RES/2170 (2014), S/RES/2178 (2014); S/RES/2395 (2017); S/RES/2396 (2017).

⁷⁵ See Pillar I of the UN Global Counter-Terrorism Strategy (A/RES/60/288).

⁷⁶ S/RES/1963 (2010); S/RES/2129 (2013).

text, is questionable. Such concerns are particularly pertinent recalling the extensive human rights implications of actions mandated by some of these resolutions. In the absence of a comprehensive assessment of human rights impact allowing for a meaningful integration of human rights considerations, language stressing the importance of compliance with human rights standards rings hollow and artificial.

38. The UN counter-terrorism architecture has been consistently critiqued for its lack of attention to the human rights implications of counter-terrorism. Despite increasing references to human rights treaties in recent Security Council resolutions,⁷⁷ human rights are in practice “minimized to a generic line in a resolution, reduced to a few questions on a country visit survey, comprised of a small staff sprinkled throughout the Secretariat and Security Council bodies, securitized in the PVE agenda, and under-funded in its programming.”⁷⁸ The early assault on human rights traces to the immediate aftermath of 9/11, including: the lack of any formal institutional counter-balance to support mainstreaming human rights oversight of country action, reporting and assessment through the CTC and CTED;⁷⁹ the lack of access in any meaningful and systematic way for civil society actors and human rights defenders to the counter-terrorism architecture; the minimal capacity of existing human rights entities within the counter-terrorism architecture.⁸⁰ The Special Rapporteur affirms that the process and substance concerns concerning human rights are pressing and substantial, and require meaningful engagement by the UN counter-terrorism architecture as a whole.

V. The Promotion and Protection of Human Rights while Countering Terrorism

39. Security is a human right, guaranteed in its most fundamental articulation in the UDHR which guarantees the right to life, liberty and security of person without distinction under Article 3. This principle was translated into a universal norm in articles 6 and 9 of the ICCPR to which 172 States are parties. Security and human rights are not two practices or concepts at odds with one another. Rather, the two are fundamentally entwined and co-dependent. Security without human rights protections is an illusion, a colossus with clay feet. Rights without security is also a chimera, as having all rights theoretically means nothing in practice if you are not safe in your home, your streets, your community and country.

40. The role of the Security Council in maintaining and protecting peace and security is critical. Equally critical to security is the role of the Council in protecting the human rights of persons subject to its regulatory scope. As the regulatory capacity of Security Council action in the counter-terrorism sphere has expanded, in parallel, the scope of its obligations to protect and ensure respect for human rights has enlarged. The Special Rapporteur articulates profound concern that as counter-terrorism regulation expands in ways that do harm to the most essential human rights (freedom from torture, freedom of religion or belief, freedom of opinion and expression, freedom of peaceful assembly, freedom of association); that has particular effects on historically dis-advantaged groups including women; that lays the foundation for profound and unaccountable human rights violations in the name of security; and that gives unfettered free rein to States to use Security Council resolutions as a defence mechanism for widespread human rights violations in the name of security, it is time for the Council to engage the totality of the UN Charter’s purposes and remain seized of its human rights obligations.

41. The vulnerability of human rights protections is laid bare in close examination of domestic counter-terrorism practices. The Special Rapporteur and other mandate-holders are

⁷⁷ S/RES/2396 (2017); S/RES/2170 (2014).

⁷⁸ FIDH, op. cit., 78.

⁷⁹ The addition of human rights advisors at CTED is an improvement, but in the overall the organization does not adopt a human rights mainstreaming approach, has limited access to NGOs in consultation generally and specifically when it conducts in-country assessments, and human rights compliance is not a benchmarked element of assessment in state practice. *Human Rights*, (CTED) <https://www.un.org/sc/ctc/focus-areas/human-rights/>.

⁸⁰ A/HRC/31/65; E/CN.4/RES/2005/80.

increasingly finding that multiple communications to our offices involve the use of counter-terrorism law and administrative practice against civil society and human rights defenders.⁸¹ Human rights violations do not make the world safer or more secure, they undermine the security of all.

42. A key principle of domestic procedures is that they satisfy and enable the principle of legality and proclamation within the State (particularly where legislative enactments may engage emergency or exceptional law),⁸² giving (ideally) ample and sufficient information to the public at large about the existence of exceptional regulation and the specific legal means being used to address the challenges faced by States. The Special Rapporteur has noted in a recent report to the Human Rights Council that counter-terrorism legislation (premised on the requirements of resolution 1373) engages *de facto* emergency powers, and may in many cases trigger the necessity for derogation under international human rights treaty law obligations.⁸³ A clear corollary of this assessment is that Security Council resolutions may themselves constitute a form of emergency power authorization without engaging the safeguards that would normally follow at domestic level from the instigation of emergency powers under most national legal systems. The absence of safety or review mechanisms on the exceptional implications of Security Council mandates constitutes fundamental lacunae in the existing regulatory pattern for global counter-terrorism regulation. These gaps have adverse implications for the protections of human rights, and on the integrity of the human rights treaty system as a whole. In practice then, the operationalization of such protections for exceptional legal regulation falls entirely to the domestic arena but domestic procedural protections may be insufficient when the trigger to regulation comes from the Security Council.

43. The Special Rapporteur points out that supranational legal regulation including such devices as Security Council resolutions and European Union directives can impinge on the prerogatives of national legal systems and undermine procedural and rights-based protections entrenched in national law designed precisely to protect against overreach by emergency powers. The Special Rapporteur affirms that international practice by supranational bodies addressing terrorism must not impinge on the protection of rights contained within national constitutions and procedures and must themselves be human rights compliant. This caution needs to be borne in mind given the increasingly dense production of global regulation connected to counter-terrorism and violent extremism, which is often tone-deaf to domestic human rights protections and procedures amplifying and supporting rights. Moreover, the Special Rapporteur notes her concern about the ways in which international obligations are used as a rationale for failing to conform to domestic legal requirements; new forms of counter-terrorism regulation that expressly work-around or limit the full operation of domestic legal constraints including supranational legal dictates that fail to pay attention to the legality requirements of national legal systems; as well as the use of ordinary law as a vehicle for substantive and far-reaching counter-terrorism regulation circumventing the requirements of notification and proclamation. It should also be remarked that governments are regularly fast-tracking extensive counter-terrorism legislation, leaving little time for consideration of the impact on rights, obfuscating the obligations to notify international treaty bodies of the measures, and entrenching permanent securitization.

44. The Special Rapporteur explicitly pinpoints the link between the human rights gaps found in multiple Security Council resolutions, and the human rights gaps that are evident at the domestic level. She makes that obvious point, that as the Global Counter-Terrorism Strategy affirms, and the increased attention to preventing and countering violent extremism within the UN system affirms, serious human rights violations, allied with rule of law deficits are an integral part of the conditions conducive to terrorism.⁸⁴ The Security Council does not serve its own peace and security interests well if it ignores this fundamental connection, and

⁸¹ <https://spcommreports.ohchr.org>.

⁸² A/HRC/37/52.

⁸³ *Ibid.*

⁸⁴ UNDP, *Journey to Extremism in Africa: Drivers, Incentives and the Tipping point for Recruitment* (2017), available at <http://journey-to-extremism.undp.org/content/downloads/UNDP-JourneyToExtremism-report-2017-english.pdf>.

is not fully cognizant of the relationship between repressive counter-terrorism measures and those same conditions conducive.

45. The Special Rapporteur underscores the specific tensions inherent in criminal law regulation by international organs and institutions. These tensions have been well-recognized in regional contexts, and the establishment of rights-bearing norms within those systems (e.g. the EU Charter of Fundamental Rights), as well as active judicial oversight (e.g. the fundamental rights jurisprudence of the European Court of Justice) is testament to the necessity of mainstreaming rights in contexts where supranational legislative mechanisms impinge on individual and group rights.⁸⁵ These regional arrangements and the deep integration of rights into their operation underscores further the evident gaps in Security Council regulation, and the distinct and unmistakable human rights gaps in the supranational counter-terrorism sphere. The Special Rapporteur notes that while the process of Universal Periodic Review, the oversight of treaty monitoring bodies, and the role of independent mandate-holders are important human rights processes intersecting with the downstream effects of counter-terrorism, they collectively operate with significant limitations in providing timely, enforceable, and sustained oversight of human rights violations that may follow from counter-terrorism regulation.

VI. The Observance and Enforcement of International Humanitarian Law

46. Counter-terrorism operations and measures are frequently undertaken in the context of armed conflict where international humanitarian law applies. This reality is illustrated by the number of non-international armed conflicts involving armed groups subject to United Nations terrorist designation and targeted sanctions regime or included on regional and national terrorist sanctions lists. Against this background, the International Committee of the Red Cross (ICRC) and other stakeholders have warned that the lack of sufficient consideration to the interaction between international humanitarian law and the norms and standards relevant to countering terrorism was leading to a troubling conflation of the two.⁸⁶

47. Whereas Security Council resolutions enacted in recent years stress the importance for State measures taken in response to terrorism to be in line with obligations under international humanitarian law,⁸⁷ such generic mentions fall short of meaningfully addressing concerns about counter-terrorism measures undermining the multilaterally agreed protection of international humanitarian law. Here, the Special Rapporteur notes the tendency on part of some States to equate any use of force by a non-state actor to terrorism, even if the respective conduct occurs in the context of an armed conflict as defined by international humanitarian law and is not in violation of the international norms governing such conflicts. Indeed, numerous jurisdictions resort to counterterrorism legislation to criminalize acts that are either not prohibited or are protected under international humanitarian law.⁸⁸ The Special Rapporteur underscores the importance of a universally accepted definition of terrorism and terrorism-related offenses that duly considers the interplay of obligations under different bodies of law, with particular emphasis on the law governing armed conflicts.

48. Security Council-mandated measures addressing the foreign fighter phenomenon, in particular resolution 2178, have arguably further contributed to the blurring of the lines between terrorism and international humanitarian law. The resolution addresses persons who qualify as ‘foreign terrorist fighters’ recruited by terrorist groups including, but not limited to, entities listed in the context of the 1267 sanctions regime.⁸⁹ While using the word ‘fighter’, a term commonly employed to describe a person with a combat role belonging to an

⁸⁵ See e.g. *Kadi and Al Barakaat International Foundation v Council and Commission* (2008) C-402/05 and 415/05; Fiona de Londras, *Accounting for Rights in EU Counter-Terrorism: Towards Effective Review* (2016) 22(2) *Columbia Journal of European Law* 237.

⁸⁶ ICRC, *International humanitarian law and the challenges of contemporary armed conflicts*, 32IC/15/11, Geneva, October 2015.

⁸⁷ E.g. S/RES/1535, S/RES/1456, para. 6, S/RES/1624, para. 4.

⁸⁸ S. Ojeda, ‘Out of balance: Global counter-terrorism & the laws of war’, ICRC Law and Policy, (2017)

⁸⁹ S/RES/2178, para. 10.

organized non-state armed group, party to a non-international armed conflict,⁹⁰ the scope of the resolution is not restricted to addressing such conflicts nor is the definition of a ‘foreign terrorist fighter’ limited to persons taking direct part in hostilities as members of terrorist groups party to an armed conflict. By referring to these persons as ‘terrorist fighters’, the resolution reinforces the problematic assumption that taking direct part in hostilities automatically amounts to a terrorist offense.⁹¹ Furthermore, the unintended results may include an expanded application of international humanitarian law to situations that fall below the threshold of an armed conflict. Considering the lower protection level resulting from the application of the law of armed conflict, including the rules governing use of force and deprivation of liberty, the related human rights concerns are evident. The diverging domestic definitions of terrorism and terrorist groups may further exacerbate the above-described negative effects.

49. The presence of designated terrorist organizations may have a chilling effect on the activities of humanitarian organizations carried out in armed conflict contexts. Sweeping definitions of ‘association with’, ‘support’ or ‘assistance’ to terrorist organizations has been highlighted as potentially criminalizing a broad range of conduct, including that of organizations carrying out activities that are exclusively humanitarian and impartial in nature.⁹² The Special Rapporteur notes that the General Assembly has repeatedly urged States, including in the recent review of the UN Global Counter-Terrorism Strategy, “to ensure, in accordance with their obligations under international law and national regulations, and whenever international humanitarian law is applicable, that counter-terrorism legislation and measures do not impede humanitarian and medical activities or engagement with all relevant actors as foreseen by international humanitarian law.”⁹³ The Security Council has so far not established a sector-wide humanitarian exemption in relevant counter-terrorism resolutions. While the regime established pursuant to resolution 1267 provides for the possibility of limited “individual exemptions” for humanitarian action,⁹⁴ resolution 1373 and subsequent resolutions do not provide an exemption. The Special Rapporteur warns of the unreflective adoption of measures lacking meaningful impact assessment and considers that humanitarian exemption clauses should be a consistent feature in relevant resolutions.

VII. Recommendations

50. The Special Rapporteur makes the following recommendations to safeguard the critical regulatory role of the Security Council in addressing and regulating the peace and security implications of terrorism, complemented by an active and sustained commitment to the meaningful enforcement of human rights in the same sphere.

(a) States are encouraged to move beyond using the oft repeated mechanical phrase of commitment to observe human rights generically (“... should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law”) and to adopt specific and directive human rights obligations for States in legislative resolutions, to ensure that specific obligations to legislate in specific arenas are linked to the protection and promotion of specific enumerated rights implicated by particular measures. Respect for human rights and the rule of law must be the bedrock of the global fight against terrorism, and beyond rhetoric this principle must be reflected in practice, procedure, and institutional culture;

(b) The absence of a consistent definition of terrorism across Security Council resolutions cedes extra-ordinary latitude to States and supranational organisations to define

⁹⁰ ICRC, *How does law protect in war*, ‘Fighters’ at <https://casebook.icrc.org/glossary/fighters>.

⁹¹ E.g. S. Krähenmann, ‘The Obligations under International Law of the Foreign Fighter’s State of Nationality or Habitual Residence, State of Transit and State of Destination’, in: A. de Guttry, F. Capone, Ch. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, (T.M.C. Asser Press, The Hague, 2016), 240.

⁹² ICRC, *International humanitarian law and the challenges of contemporary armed conflicts*, 31IC/11/5.1.2, Geneva, October 2011, 52; S/2016/827, para. 19.

⁹³ A/RES/72/284 (2018), para. 79; A/RES/70/148 (2016).

⁹⁴ S/RES/1452, para. 1.

terrorism broadly, vaguely, and in ways that unduly limit the exercise of human rights at national levels. Closing this gap is essential to prevent nefarious definitions of terrorism proliferating at the domestic level, undoing and undermining the broader security interests of the international community as well as impacting negatively on the protection of human rights;

(c) States are encouraged to use precise and defined terminology when quasi-legislative requirements are being advanced by Security Council resolutions. Terms such as ‘incitement’, ‘material support’ must be given precise legal meaning, consistent with the principles of legality and proportionality. The absence of such precision creates the conditions in which counter-terrorism norms can be abused domestically, undermining human rights protections for individuals and groups;

(d) Given the sensitivity of an expanded quasi-regulatory role for the Security Council, and the natural concerns of States regarding their sovereignty, the Special Rapporteur encourages broader consultation and transparency with UN membership in respect of ‘legislative’ resolutions. The Special Rapporteur notes that resolution 1373 was adopted within 48 hours, there was no Security Council debate before the adoption of resolution 2178 and there was tightly constrained consultation in respect of resolution 2396. A commitment to transparency would include open debate. In general, and where possible fast-track legislative process by the Security Council implicating human rights should be avoided. Where it occurs, a meaningful commitment to human rights would include innovative procedural responses, for example an *ex ante* rights impact analysis. When general, binding rules are being deliberated, all States should be considered as affected States in the sense of Article 31 of the Charter. Greater and transparent consultation may prevent downstream legal jeopardy in the process of regional or national transposition, as well as addressing some of the implementation and coordination challenges faced in the implementation of resolution 1373;

(e) The Special Rapporteur encourages States to consider a form of *a priori* human rights review for Security Council resolutions in the counter-terrorism domain that have a quasi-legislative character, and mandate criminal law regulation at the domestic level. The procedural capacity of the Security Council to set its own terms of regulation is considerable. Advancement on an internal procedural mechanism agreed among States, to ensure that the object and purpose of the Charter is met would go a considerable way to satisfy legitimacy, legality and proportionality concerns that have been raised in respect of post-9/11 Security Council resolutions;

(f) The Special Rapporteur affirms that the Security Council is the preeminent body best placed to set exemplary human rights compliance criteria as states advance their counter-terrorism goals. The Security Council is best placed to model most effectively State duty to respect, promote and fulfil human rights. This is enabled through the operational capacity of the Counter-Terrorism Committee as supported by the Counter-Terrorism Executive Directorate that are well-placed to assess if States are in full and meaningful compliance with their human rights obligations in the implementation of multiple counter-terrorism resolutions. Human rights compliance must be centralized in counter-terrorism compliance assessments based on rigorous criteria, drawing upon the standards and assessment tools developed by OHCHR, complemented by the expertise of human rights bodies including the Human Rights Committee, and taking into account the country reporting of the United Nations Special Rapporteur on the Protection and Promotion of Human Rights while Countering Terrorism (also a CTITF entity), as well as the developing expertise of the CTITF Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism;

(g) The Special Rapporteur reminds states that human rights compliance under the UN Charter’s principles and purposes is not merely an externally facing obligation but is also internally facing. Benchmarking and assessing the Council’s own performance in advancing human rights should be a reflective practice, encouraged and supported by the multiple entities that constitute the UN counter-terrorism architecture;

(h) The Special Rapporteur reminds States that when extra-ordinary legislative measures are taken at the domestic level in respect of terrorism or other security challenges,

they contain sunset clauses, and/or mechanisms of periodic review of such provisions. These elements constitute explicit recognition of the exceptionality of regulation in the context of particular threats, acknowledge that such powers often only need to be used for finite periods, and that the scope and impact requires human rights benchmarking and oversight. It is notable that such procedural protections are entirely absent from Security Council resolutions that may have the character of emergency powers in their own right. The Special Rapporteur encourages States to reflect seriously on this gap, and to remedy it by adopting best practice at national level (sunset clauses and review) to parallel regulation internationally;

(i) Recalling that all Member States are obliged to take joint and separate action in cooperation with the UN for the achievement of the purposes set out in Article 55 of its Charter, the Special Rapporteur encourages the General Assembly to remained seized of the opportunity and obligation to promote and ensure respect for human rights, particularly through deepening the rule of law capacity of the Office of Counter-Terrorism, supporting the oversight and expertise of the Office of the High Commissioner for Human Rights, and making the commitment to mainstreaming human rights as affirmed in the 4th Pillar of the Global Counter-Terrorism Strategy honoured in practice.
