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**Seventy-fourth session**

Item 72(b) of the provisional agenda[[1]](#footnote-1)\*

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

Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism[[2]](#footnote-2)\*\*

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 General Assembly resolution [72/180](http://undocs.org/a/res/72/180) and Human Rights Council resolution 40/16.

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| *Summary* |
| This report addresses the role of ‘soft law’ and new institutions in the creation, enforcement, oversight and regulation of counter-terrorism. The Special Rapporteur reflects on the increasingly important role of ‘soft law’ instruments since September 2001. She notes that States increasingly use soft law standards to regulate preventing and countering terrorism and violent extremism. She identifies a range of soft law instruments assessing 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 this respect. |
| The Special Rapporteur pays particular attention to the role and pathways for human rights to be meaningfully integrated, accounted for and benchmarked in the creation of counter-terrorism soft law instead of being marginalized. Building on last year’s 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 counter-terrorism focused entities. The report provides two primary case studies to illustrate some of the broader patterns of inclusion and exclusion applied to States and civil society broadly defined. |
| 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. This report encourages greater attention to and transparency for new counter-terrorism entities, with increasing role and influence in counter-terrorism regulation. She affirms the necessity of thorough, expert and consistent human rights integration in the development of soft law, in the adoption of soft law standards into hard law rules, and in the operation and functioning of new counter-terrorism entities developing soft law and ‘best’ practices. |
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I. Introduction

1. This 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 resolution 72/180 of the General Assembly and Human Rights Council resolution 40/16. The report analyses the impact on the protection and promotion of human rights following from the increased proliferation and use of ‘soft law’ regulation in the counter-terrorism arena as well as the establishment of new entities and institutions to create, expand and consolidate inter alia soft law norms.

2. A report on the work of the Special Rapporteur, undertaken since her last 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 visit requests to Australia, Bosnia and Herzegovina, Honduras, Kenya, Tajikistan, Mali, New Zealand, Russian Federation, Uganda, and the United States of America. She presented 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 dialogue.

4. In March 2019, the Special Rapporteur presented 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 report affirms that since 2001, civil society space is shrinking globally. Civil society faces challenges of stigmatization and discrimination. Its actors are subjected to smear campaigns, defamation and physical harassment, spuriously charged and sentenced under various laws. Between 2001-2018, at least 140 Governments adopted counter-terrorism legislation. New and multiple legislative and administrative measures are defended by reference to new or perceived threats, or simply to comply with new international requirements. The Special Rapporteur found that 66% of communications sent by her mandate between 2005-2018 concerned counter-terrorism measures directed at civil society actors or human rights defenders. In this regard, she urged States to prevent the misuse of counter-terrorism laws and practice and to hold States accountable for such abuse. She underscored the long-term negative effects on preventing violent extremism conducive to terrorism when the law and practice of counter-terrorism was consistently misused.

5. The mandate is a signatory to the Global Counter-Terrorism Coordination Compact and an active member of multiple working groups. The mandate has contributed substantively to a number of research and policy projects of the working groups and through the United Nations Office of Counter-Terrorism (UNOCT) Consolidated Multi-Year Appeal seeks to co-lead a project on Human Rights Guidance on the Use and Sharing of Biometrics in Counter-Terrorism with the United Nations Office on Drugs and Crime (UNODC). In July 2019, the mandate participated in the African Regional High-Level Conference on Counter-Terrorism and the Prevention of Violent Extremism Conducive to Terrorism in Nairobi, Kenya. The Special Rapporteur conducted a working-level visit to the European Union in February 2019.She participated in the Forum on Returning Foreign Fighters in Doha, Qatar in October 2018.[[3]](#footnote-3)

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

7. The Special Rapporteur contributed to a number of national and regional debates concerning national security/terrorism legislation by offering expert views on draft legislation. She has issued/co-issued multiple communications concerning the use of national security/terrorism legislation against civil society. The Special Rapporteur had extensive engagement with Facebook addressing the definitions and regulation of terrorism by non-State actors. She continues her constructive engagement with the Financial Action Task Force (FATF), the EU Counter-Terrorism Coordinator’s Office, and the UN’s Counter-Terrorism Executive Directorate (CTED).

III. “Soft law”, Informal Lawmaking and “Soft Institutions” in the Global Counter-Terrorism Architecture: Assessing 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.[[4]](#footnote-4) In her last report to the General Assembly (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 these regulatory developments are noted. These shifts in global counter-terrorism regulation do not occur in isolation. The present report addresses two further aspects of global counter-terrorism governance, 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 large number of such entities have emerged in the past two decades, this report will focus particularly on the Global Counter-Terrorism Forum (GCTF) and the Financial Action Task Force (FATF).[[5]](#footnote-5) As a definitional departure point 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 International Court of Justice Statute and lack the requisite degree of normative content to create enforceable rights and obligations but are still able to produce certain legal effects.

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

10. The Special Rapporteur takes the view that soft law is essential, increasingly so, to the production of global counter-terrorism norms and practice. 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, less onerous procedural limitations, and is often produced by ‘like-minded’ groups of States with reasonable degrees of existing consensus on values, processes and outcomes. She observes a number of unique features to counter-terrorism soft law production. First, the scale of norm proliferation (while 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 appears to understate the extent to which many of these normative guidelines, declarations, ‘good practice’, and technical rules function as distinctly hard in practice. Third, unlike many comparative areas of international law where soft law holds less enforcement traction, the institutional landscape for counter-terrorism is distinct. States have reporting requirements to the UN Counter-Terrorism Committee (CTC) that de facto operates to leverage a portion of these norms and oversees their practical implementation. Many counter-terrorism soft law norms come with capacity-building, technical expertise and support on a scale not found in other legal domains precisely because there is a UN architecture to aid their direct implementation. Fourth, there is an important nexus between many of these normative soft-law standards, which reinforce and build upon one another. They operate relationally in many areas and their legal status is both independent and inter-connected. The Special Rapporteur underscores that the relationship between various aspects of the soft law production terrain is under-mapped and not well-understood. This creates two opposing but intersectional trends. First, fragmentation in international legal norms regulating both the phenomenon of terrorism generating ineffectiveness and confusion thereby limiting or disregarding the application of primary legal regimes including international human rights, humanitarian law and refugee law. Second, the challenge of over-production with a concentration and exponential growth in one area of law without commensurate and equal development of others (specifically human rights) to provide balance.

11. In addition to developments aimed at filling regulatory gaps, the events of 9/11 triggered institutional growth, as evidenced by the establishment of dedicated subsidiary bodies of the Security Council and their supporting entities. This expansion, together with the consolidation of the existing institutional setting, led to a complex UN counter-terrorism architecture, now bound together through the Global Counter-Terrorism Coordination Compact. The Compact counts 41 member entities. Past years have seen the sprouting of a variety of offshoots and decentralized initiatives of diverging nature: some utilitarian and functional (undertaking work that States prefer to remove from under the UN umbrella); 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/preventing terrorism); and solidification. In addition to state-centred initiatives, the landscape is augmented by public-private partnerships (such as Tech Against Terrorism or GCTF-inspired institutions),[[6]](#footnote-6) reflecting the increasingly crucial role of the private sector in the area of counter-terrorism and underscoring the priority character of meaningful intersectoral cooperation in order to effectively tackle related threats. While few of these entities or initiatives have been set up with an explicit regulatory purpose in mind, their activities contribute to norm development in diverse, at times inconspicuous, ways. As such, their individual and aggregated impact and influence remains underexplored.

A. The sources, status and process of making soft law

12. The concept of ‘soft’ law is often viewed as controversial. The very expression “soft” law may appear to be ‘a contradiction between the term “soft” and the idea of law as a system of robust enforceable rules.[[7]](#footnote-7) Controversy also relates to long-standing disputes over agreed definitions of the term ‘soft’ law, most particularly that “soft” can relate to written v. 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 from UN entities.[[8]](#footnote-8) It is produced and driven by States through a variety of mechanisms including in bi-lateral, 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 and validation for the legal effects of ‘soft’ law has been increasing over decades. The International Court of Justice has produced a small but important body of relevant jurisprudence. In the Advisory opinion on Reparations for Injuries Suffered in the Service of the United Nations´, the Court deduced principle of soft law from the Charter broadly interpreted.[[9]](#footnote-9) The Anglo-Norwegian Fisheries judgment,[[10]](#footnote-10) the 1971 Advisory Opinion on Namibia and the 1975 Advisory Opinion on Western Sahara validated the legal significance of General Assembly resolutions.[[11]](#footnote-11) The ICJ’s approach has been restrained, underscoring the undulating importance of State consent to legal norms in the international legal order, particularly in the creation of customary international law standards.

15. Other international courts and bodies have used and validated the use of soft law standards particularly 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 agreement 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 frames to State action and co-operation. In developing areas soft law norms are often the only norms available to guide, constrain and support regulatory action. The advantages of the process of soft law-making have been well-canvassed. They include access by a variety of stakeholders, informality in procedures and negotiation, innovative modalities of engagement and analysis, and a variety of pathways to produce legal norms in new and challenging global contexts. In particular, a number of soft law norms develop and augment binding standards and authoritatively interpret them. Examples of this interaction include the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions,[[12]](#footnote-12) and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. [[13]](#footnote-13)

B. Soft Law’s Deepening Role in Counter-Terrorism

16. A key feature of the post-9/11 legal landscape 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 (A/73/361). This does not mean that there has been no treaty engagement in this period. Prior to the passage of UNSCR 1373, only Sri Lanka, Botswana, Uzbekistan and the United Kingdom had ratified the 1999 International Convention on the Suppression of Terrorism.[[14]](#footnote-14) Between 9/11 and 19 February 2002, 90 countries signed this Convention, and 13 more ratified it, largely due to resolution 1373.[[15]](#footnote-15) The counter-terrorism legal landscape deepened substantially, primarily through the expanded resort to Security Council resolutions including 1373, 1390, 1540, and 1566. 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 (e.g. CTC) and the Office of the Ombudsperson. The creation of CTC and CTED provided new fora 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.[[16]](#footnote-16) These norms range from formal legal and capacity-building engagement and highly informal advice.

17. While some classical distinctions apply as to what constitute ‘soft law’ in any traditional sense to these outputs, the Special Rapporteur takes a pragmatic approach to assessment of legal status, and primarily assesses state compliance, affirmation and enforcement as indicative of legal status rather than title of the norm per se. A distinguishing feature of this internal UN counter-terrorism (UNCT) architecture is its departure in practice from the traditional legal assumptions of ‘authorities’ formal and informal, legal and non-legal in deference and compliance in norm creation.[[17]](#footnote-17) The Special Rapporteur describes this architecture as one in which all these entities (and many more outside the UN system) can effectively shape an issue area regardless of their formal legal pedigree. This 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 the consideration given to it in this report.

18. In addition to the Security Council sub-architecture, the establishment of Counter-Terrorism Implementation Task Force (CTITF) provided a parallel forum where new forms of legal instruments designed to regulate, support, advance and manage the counter-terrorism arena were produced. CTITF has evolved into the Global Counter-Terrorism Coordination Compact. The consolidation of counter-terrorism capacity is also evidenced by the establishment of the UNOCT. The UN Counter-Terrorism Center is a relevant player in capacity-building and norm enforcement.

19. This regulatory landscape is complex but understanding its function is essential to assessing the governance and human rights integration challenges. The interplay of the Global 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, as well as the effects of norm production within it. The architecture enables coalitions of like-minded States as well as 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, particularly but not solely as regards human rights.[[18]](#footnote-18) Distinctions around legal powers and normative hierarchies have been replaced in this terrain by searching for methods and means to coordinate and streamline the different parts of the regulatory landscape to produce coherence with lesser regard to legitimacy, sovereignty and relevance of other legal regimes.[[19]](#footnote-19) This landscape between 2001-2019 might be described as a rather disorganized and uncoordinated proliferation of possible new legal practices, principles, rules and institutions. Yet, in fact, the landscape has substantially altered the governance landscape of global security and the effects have been substantial if generally unrecorded.[[20]](#footnote-20) The Special Rapporteur notes the importance of the applicability of, as well as the interrelationship between, salient branches of international law and this new formal and informal counter-terrorism architecture. This report highlights 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 also acutely aware of the need to dis-aggregate different forms of ‘soft-law’ and avoid a lumpen 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.[[21]](#footnote-21) Thus, the Special Rapporteur distinguishes between the source entities for soft law in assessing the status of contribution to normative developments which are endowed with defined authority and legitimacy generally by treaty or more infrequently by Chapter VII Security Council resolution (such as the CTC or the UN Human Rights Committee as compared with the normative documents produced by Global Compact Working Groups or UN entities). Despite these 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 and has a specific soft law eco-system. 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 domestic level is considerable. Also, the particular enforcement pressures that follow from State reporting under UNSCR 1373 and other relevant resolutions and the role of various entities (UNOCT, UNCTED, GCTF, FATF) in engaging States to cooperate and accept these norms and 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 UNSCR 1373 and the role of ‘soft law’ to fill 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, non-accessible to all States in order to present as regular conducts and practices that would previously have been considered a challenge to state sovereignty. In almost all of these arenas human rights are visibly side-lined or marginal to the norm production phase, as well as in oversight and implementation.

C. The Marginalization of Human Rights

21. Why are human rights marginalized in this soft law terrain? Norm production occurs in a number of institutional settings where human rights entity presence and capacity is limited, constrained or lacks adequate resourcing. Counter-terrorism norm production is happening in the entities and institutions with a ‘light’ human rights footprint. This light footprint 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 these responsibilities within the Global Compact/CT architecture, 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 staffing to carry out this additional task in her mandate. The nature and form of much of counter-terrorism ‘soft’ law is highly technical and its intrusions on rights need distinct, technical and highly specific disaggregation. In many of these CT standards reviewed by the Special Rapporteur there is a standard phrase utilized, namely ‘in compliance with international law, including human rights, humanitarian and refugee law’. To state the obvious, the phrase says nothing as to what specific impingements on specific human rights will follow, 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 presumption that the maximization and front-loading of human rights function to prevent terrorism, that law ought to be crafted to avoid repetitive patterns in the production of violence, and that human rights constitute an essential bedrock in fragile states and conflict/post-conflict sites where a sizeable portion of counter-terrorism work is being carried out in practice.[[22]](#footnote-22) Within the UN, the 4th pillar remains the least developed both in terms of projects undertaken and guidance produced to States of the Global Counter-Terrorism Strategy.[[23]](#footnote-23) 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 inclusion are hard-wired into many of the systems currently in operation.

22. This report acknowledges a fundamental paradox about compliance with ‘soft-law’ and informal norms in the counter-terrorism arena. While recognizing that counter-terrorism compliance is imperfect, and many States remain frustrated by the inability or unwillingness of States to fully execute their obligations under suppression treaties and/or resolution 1373 and other relevant resolutions, there is surprisingly high compliance as compared with other arenas of international law and specifically as compared to human rights law compliance. In particular, the indirect adoption of soft CT norms in national legislation, judicial decision-making and administrative practice has been understudied, and constitutes a circularity which hardens soft norms.[[24]](#footnote-24) The takeaway here is that contrary to general assumptions about the tendency of States to prioritize ‘hard’ (specifically treaty and customary law) norms in enforcement, the pattern in the CT arena post-9/11 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 General Assembly 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. This 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 has on the overall protection of human rights.

24. In parallel, there is a spider’s web of soft law standards coming from new “soft” CT 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 means that structured, consistent and well-defined human rights inputs are lacking in these settings. Access to such institutions has proven difficult and inconsistent for many human rights entities, including the Special Rapporteur. These 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 the capacity for external human rights experts to mobilize input will be virtually nil. Not infrequently, UN human rights entities and NGOs will be brought in ‘late in the game’ to give views on almost fully finalized norms. At this stage, their views if critical of the lack of human rights substance or advice to bolster human rights content, will be viewed as unhelpful, or out of sync with the thinking of States, and unconstructive to the process. This of course, sets human rights interventions up for failure or irrelevance. To boot, 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 the counter-terrorism arena. There is little transparency to the funding, terms of reference and relationship of these 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. This report identifies yet another significant trend ⎯ namely the transposition of soft law norms into formal and binding legal frameworks. This process occurs in a number of ways. First, the straightforward adoption and acknowledgement of soft law norms into ‘hard’ law standards, for example from guidance/principles/recommendations on a technical aspect of counter-terrorism into a Security Council resolution addressing the same issue. Examples of this translation effect are analysed in the evaluation of the FATF below. Second, adoption of soft law norms with the same language and substance from a soft CT source or institution without acknowledging the source explicitly. Examples of this subtler translation effect are noted with respect to GCTF below. Third, in the reporting requirements by States under UNSCR 1373, 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 they are evolving to ‘hard’ norm status. The role of CTED in the development of the ‘soft to hard’ law continuum is noted below. Forth, is the role of UNOCT and other entities in providing well-funded technical assistance to States in the implementation of soft and hard CT standards. Notably, in both the assistance and reporting arenas there is a strong articulation of the ‘non-legal’ character of the products involved, often expressly denying any role (and intent) in the creation of legal rules.[[25]](#footnote-25) The Special Rapporteur takes 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.[[26]](#footnote-26) From the point of view of the legitimacy and transparency of normative legal developments in international law, these mechanisms are problematic.[[27]](#footnote-27) The lack of full State participation in the making and oversight of the law is regrettable, as is the multi-layered, systematic and sustained exclusion of human rights from all levels of the norm development, through norm translation and enforcement. The Special Rapporteur underscores that human rights treaties must remain the baseline in normative developments to maintain the effectiveness of the enforcement model in international law.

26. The Special Rapporteur notes how in practice such legal norms, 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. A couple of interesting patterns can be discerned. First, 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 (API) or Passenger Name Record (PNR) capacities. It is then translated through a production cycle involving the Global Compact into a compendium of ‘best practices’, guidelines, or technical advice for States. To state the obvious, the process of production is closed, few States are involved, civil society are often excluded (or included in an ad hoc manner), and human rights and international law experts play a limited role, if at all. These ‘best practices’ then find themselves referenced in State evaluation process to assess with UNSCR 1373. The Special Rapporteur finds herself in meetings with States telling her how well they are in compliance with said international “best practice” standards, and in the unenviable position of pointing out that the “best” practices may be objectively insufficient in terms of international human rights obligations. Second, an emerging pattern of these “soft” standards being fast-tracked into binding legal standards. A useful illustration follows the UNSCR 2462 on terrorism financing passed in March 2019, which is highly problematic on a number of dimensions. The resolution endorses a number of problematic standards related to the risks associated with the Non-Profit Organisation (NPO) sector with broad effect for humanitarian actors and civil society. It specifically gold-plates the FATF and its norm production process by urging all States to implement the comprehensive international standards embodied in the revised Forty FATF recommendations on Combating Money Laundering, and the Financing of Terrorism and Proliferation and its interpretive notes. The FATF is an exclusive, non-transparent, State-created forum to which civil society and UN human rights entities have little or no consistent access. It has, in the financing terrorism context, become the short-cut to rule-setting, involving few constraints for States. This evolving process has significant legitimacy effects on the traditional consensus required to create international law and state sovereignty intrusions that follow the shift from ‘hard’ to ‘soft’ law proliferation in counter-terrorism regulation. The Special Rapporteur believes there is neglect of the interests of a sizeable number of (non-dominant) States in this emerging regulatory practice of forum-shopping. There are grave dangers that informal and selective institutions drive law-making in ways that ouster the (albeit challenging) political contestation that characterizes multilateral diplomatic negotiations. There is also an obvious lack of opportunity for input to and consultation with civil society and international law experts in new norm-production contexts.

27. Even where human rights guidance exists, it is being overtaken or often ignored in an emerging hierarchy within the ‘soft’ law field itself. For example, in respect of foreign fighters, OHCHR produced an important and timely Guidance to States on Human Rights Complaint Approaches to the Foreign Fighter phenomenon.[[28]](#footnote-28) Shortly thereafter, ‘new’ guidance was stewarded through the Security Council to shape States responses to foreign terrorist fighters (FTF), via the Addendum to the Madrid Guiding Principles.[[29]](#footnote-29) The Addendum’s development was an important opportunity to provide a deep complementary approach strengthening and enhancing the detailed human rights guidance but in practice there is hierarchical competition between the two. While positively recognizing that the Addendum goes further in its consistent references to human rights than other documents, there remains an enormous gap for human rights guidance to be adopted with the same enthusiasm as security-dominated guidance. This is notwithstanding a sustained rhetoric by many States affirming the essential importance of human rights to preventing cycle of violence and terrorism.

A. The Financial Action Task Force

28. The Financial Action Task Force (FATF) was founded in 1989, at the initiative of the G7, aiming to develop standards and policies to combat money laundering. The FATF’s mandate was broadened to encompass terrorist financing in the aftermath of the attacks of 9/11. Its mandate[[30]](#footnote-30) designates the FATF as “the global standard-setter for combatting money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction”, working towards “strengthening jurisdictions’ capacity to prosecute terrorist financing; developing the understanding of the nature of terrorist financing (TF) risk; and supporting the development of countering the financing of terrorism (CFT) regimes and enhancing dialogue in higher-risk regions.”

29. In this role, the FATF has developed a set of recommendations[[31]](#footnote-31) 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 these standards by developing guidance documents to inform domestic measures aimed at transposing the recommendations[[32]](#footnote-32) and by conducting periodic peer review to assess relevant progress at the country level. Though the recommendations and related guidance material are not legally binding,[[33]](#footnote-33) States strive towards compliance due to the benefits linked to membership and the financial and economic disadvantages that non-compliance may trigger.

30. In 2019, FATF Ministers changed the mandate of the body into an open-ended one, marking the evolution of the FATF from a temporary forum into a standing body. This change has not led to the formal establishment of the FATF as an international organization.

31. The Task Force currently counts 39 members, including 37 jurisdictions comprising the world’s largest economies[[34]](#footnote-34) as well as 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, Organisation for Economic Co-operation and Development and United Nations entities such as UNODC, CTED and the Sanctions Monitoring Team pursuant to resolutions 1526 (2004) and 2253 (2015). The FATF 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 FATF, as well as other entities, even ones set up with the aim of furthering the implementation of FATF standards, such as the Egmont Group of Financial Intelligence Units.[[35]](#footnote-35)

32. Inspired by the FATF, nine FATF-style regional bodies (FSRBs) have been established and recognized by the FATF Plenary.[[36]](#footnote-36) These regional bodies, together with the FATF, constitute the Global Network and encompass over 190 member jurisdictions. FSRBs are associate members of the FATF and commit to endorsing FATF Recommendations, guidance and other policy and promoting the “effective implementation” of these standards in their member jurisdictions through the use of the FATF assessment methodology and procedures, including mutual evaluations.[[37]](#footnote-37) While FSRBs, as associate members, ‘participate’ in the development of FATF standards (without decision-making/ voting powers), the FATF is recognized as “the only standard-setting body and the guardian and arbiter of the application of its standard”.[[38]](#footnote-38) The FATF 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 FSRBs, on the one hand, and the FATF, on the other,[[39]](#footnote-39) poses challenges to achieving such consistency in practice.

The FATF’s standard-setting work and relevant implications on human rights

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

34. Whereas FATF standards have in general not undergone meaningful human rights scrutiny, the Special Rapporteur notes that Recommendation 8 on addressing abuse of NPOs for terrorist financing purposes has been subject to detailed human rights analysis by her mandate,[[40]](#footnote-40) other human rights mechanisms and civil society[[41]](#footnote-41) and reiterates the concerns expressed in respect of 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 these concerns, the FATF revised Recommendation 8.[[42]](#footnote-42) The amended recommendation embraces a risk-based approach calling for the application of effective and proportionate measures responding to identified threats of terrorist financing abuse, targeting NPOs that have been found at risk. The Interpretive Note to Recommendation 8—also employed as benchmark for the evaluation process—stresses the vital role played by NPOs “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 measures taken to counter terrorism.[[43]](#footnote-43) Importantly, the Interpretive Note emphasizes that relevant measures must be “implemented in a manner which respects countries’ obligations” under the UN Charter and international human rights law.[[44]](#footnote-44)

36. The Special Rapporteur appreciates the responsiveness demonstrated by the FATF to concerns expressed by her mandate and other stakeholders. She welcomes that assessment proceedings are to address not only problems caused by under-regulation of the sector but also tackle shortcomings linked to over-regulation, a phenomenon negatively affecting civil society globally.[[45]](#footnote-45) Acknowledging the potential implications on civil society and humanitarian action, she emphasizes the importance of a human rights-minded evaluation approach, applied consistently throughout FATF and FSRB member jurisdictions. She further notes 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 practice on the perceived and actual legal obligations and practices of States.[[46]](#footnote-46)

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 “[i]n 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”[[47]](#footnote-47) and highlights that “human rights” are to play a part in designation processes,[[48]](#footnote-48) it does not elucidate how these 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 recommendations addressing financial measures to facilitate human rights compliant implementation.

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

39. Furthermore, the Special Rapporteur notes that in addition to member jurisdictions of the FATF, member jurisdictions of FATF-style regional bodies have also committed to implementing the standards developed by the FATF, effectively rendering these standards global. This role underscores the institutional 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’, consequences of non-compliance can be onerous and may negatively impact, among others, the respective country’s access to financial markets, trade, and investment. This puts considerable pressure on jurisdictions to ensure compliance and may incentivize a de-prioritization of human rights considerations.

40. The Special Rapporteur highlights that 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, overbroad definitions of terrorism and terrorism-related offences including that of terrorist financing can lead to relevant laws targeting conduct protected under international human rights law or, at least, 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.[[49]](#footnote-49) 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 FATF is eminently placed to meaningfully incorporate human rights considerations in its standard-setting and evaluation.

Inclusiveness and transparency of FATF standard-setting and related processes

41. The Special Rapporteur reiterates that the FATF 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 (FSRBs) and observers are involved in relevant processes, they have limited leeway to influence standards that they eventually have to implement.

42. According to FATF 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”.[[50]](#footnote-50) This policy excludes civil society organizations from becoming observers. The Special Rapporteur notes that the FATF’s mandate lists “[e]ngaging and consulting with the private sector and civil society on matters related to the overall work of the FATF” among the functions of the Task Force and states that such engagement should be conducted “through the annual consultative forum and other methods for maintaining regular contact to foster transparency and dialogue”.[[51]](#footnote-51) The Private Sector Consultative Forum, provides a yearly platform for the FATF to engage directly with the private sector. Since 2016, the Global NPO Coalition on the FATF[[52]](#footnote-52) has been permitted to nominate four organizations to participate in the Forum ensuring some human rights/humanitarian presence in the room. In addition, the FATF committed to enhance engagement with NPOs by holding annual meetings on specific issues of common interest and organizing ad hoc exchanges on technical matters.[[53]](#footnote-53) The Special Rapporteur welcomes these developments as a step in the right direction. She however notes that much of the FATF’s engagement with civil society is conducted on an ad hoc basis. This setting provides for considerable flexibility for the FATF but also means that civil society have no formalized expectations of participation. She recommends a consultative process be undertaken with the full engagement and participation of civil society to advance full, consistent and meaningful participation for civil society.

43. The Special Rapporteur wishes to emphasize that the right to take part in the conduct of public affairs, guaranteed in Article 25 ICCPR extends to standard-setting processes and fora at the international and regional levels.[[54]](#footnote-54) Recalling the significant impact FATF processes have on human rights protection, it is imperative that standard-setting and implementation processes are conducted transparently by ensuring the participation of those affected by relevant laws and policies.

44. The Special Rapporteur highlights that this includes the obligation of FATF 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 FATF to take steps towards making their processes more participatory recommending that the FATF be guided by international human rights standards as authoritatively interpreted by international human rights mechanisms, including the Human Rights Committee and the OHCHR Guidelines on the effective implementation on the right to participate in public affairs.[[55]](#footnote-55) She notes that FATF itself engages in a range of activities that directly impinge and may limit fundamental human rights including data collection, sharing and processing and its recommendations may result in individual rights diminution at the national level. The obligations of entities such as FAFT to human rights-proof their engagement with and directions to States requires substantial consideration.

45. The above analysis demonstrates that de facto universally enforced rules are effectively imposed by a rather small core group of States representing the globe’s most advanced economies. The weight of financial and economic power underpinning the (technically) legally non-binding set of standards means that following the direction set by the FATF is not merely optional for States with lower levels of financial and economic development. Such circumstances inevitably raise concerns related to state sovereignty and legitimacy of regulatory processes.

46. The Special Rapporteur notes that FATF standards have been referenced and endorsed in documents produced by UN entities and organs, most recently - and prominently - by the Security Council.[[56]](#footnote-56) Such endorsement should motivate the FATF to step up measures towards ensuring that its standards are designed and implemented in compliance with norms and standards adopted under the aegis of the UN, including international human rights law. Having UN-endorsed soft law standards fall short of these recognized binding norms would send a dangerous message that risks undermining globally recognized human rights norms.

The Global Counter-Terrorism Forum

47. The GCTF was jointly launched 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 worldwide to terrorism by preventing, combating, and prosecuting terrorist acts and countering incitement and recruitment to terrorism” 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 saw the need for an informal forum to trouble-shoot pressing issues, provide quick solutions to regulatory gaps that could then be shared with formal inter-state fora or with States directly, and streamline solutions from a wide range of security actors in evolving security-challenged contexts. Its establishment also corresponded with a view that existing institutional discursive fora (e.g. G7) were too narrow and that regional organizations lacked capacity to address broader multilateral challenges. GCTF functions as an intergovernmental platform (of uncertain legal status) for policymakers and some select practitioners. The 30 founding members (29 States and the EU) included all P5 members, plus a range of countries dealing with terrorism and new counter-terrorism donors.[[57]](#footnote-57) The GCTF primarily external modality appears to be good practices and recommendations on implementation for selected counterterrorism policies. These documents are developed under the auspices of working groups[[58]](#footnote-58) 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 access detailed information on the working practices and modalities of GCTF operation and her mandate only partially succeeded in obtaining relevant information. Information found on the GCTF website is highly generic and gives little insight to the form, procedure and working methods of the GCTF. She notes that if her mandate finds such information difficult to access, other actors including civil society actors, national parliaments or NHRIs would find it even more challenging. The lack of transparency and information-sharing underscores a broader conundrum in the CT global architecture with participation and access to new institutions.

48. As regards the GCTF’s internal working, a Coordinating Committee, chaired by the GCTF co-chairs, oversees the mandates and activities of GCTF’s working groups, Initiatives and its Administrative Unit and provides guidance on the prioritization of GCTF initiatives and projects.[[59]](#footnote-59) The Special Rapporteur notes that the GCTF’s principles recognize the need for all counter-terrorism measures to be “fully consistent with international law, in particular the UN Charter, 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 counterterrorism effort”.[[60]](#footnote-60) However, the Coordinating Committee’s methods for priority selection and the role of human rights and international law compliance in the choice of initiatives and projects, is extremely difficult to discern. The Committee consists of all GCTF members, represented by their national counterterrorism coordinator/other senior counterterrorism policy-maker. It is unclear if any national human rights experts consistently interface with the Coordinating Committee, if national terrorism coordinators are requested to provide human rights related data points in their engagement, or if there is any active outreach to NHRIs in the development of strategy or new projects. The GCTF Administrative Unit provides analytical, administrative, and logistical support to the Coordinating Committee, Working Groups, and Initiatives.[[61]](#footnote-61) It is unclear if 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. GCTF currently acts through five working groups[[62]](#footnote-62) and eleven Initiatives.

49. In addition to the GCTF structure set out above, three “inspired institutions”[[63]](#footnote-63) serve as implementing offshoots operationalizing good practices and memoranda. Hedayah[[64]](#footnote-64) and the Global Community Engagement and Resilience Fund are active in the area of preventing and countering violent extremism, while the International Institute of Justice and Rule of Law[[65]](#footnote-65) supports development and implementation of GCTF initiatives including through providing training to domestic security sector actors.[[66]](#footnote-66) All three constitute distinct parts and entities to the sprawling global counter-terrorism landscape with diverging levels of transparency posing a challenge to assessing how human rights law is benchmarked or integrated into all relevant activities and if and how independent civil society is meaningfully included in their work.

50. It states the obvious that the GCTF 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, the multipronged test of affirmation, use and transfer of these norms and informal practices means that GCTF 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 GCTF

51. As a formal matter, GCTF would likely dispute its influence in legal development while holding that the tools developed are practically very useful to States fighting terrorism.[[67]](#footnote-67) But close examination of the exportation/integration pattern of soft law movement in CT reveals otherwise. For example, The Hague-Marrakesh Memorandum on Good Practices for a More Effective Response to the Phenomenon of FTFs was crucial for the design of Security Council measures aimed at containing this phenomenon, notably resolution 2178 (2014) adopted only a day after the GCTF Memorandum.

52. The Principles of the GCTF include supporting the “balanced implementation of the UN Global Counter-Terrorism Strategy and the UN counterterrorism framework more broadly” and developing a “close and mutually reinforcing relationship with the UN system”.[[68]](#footnote-68) Resultantly, GCTF good practice documents have influenced outputs of UN organs (e.g. UNSCR 2178), as well as a number of UN entities. For example, CTED’s Technical guide to the implementation of UNSCR 1373 (2001) and other relevant resolutions,[[69]](#footnote-69) a reference tool aimed at ensuring consistent analysis of States’ implementation efforts, consistently references GCTF good practice documents as assessment benchmarks.

53. As an entity that encompasses an informal coalition and network, the influence of the GCTF 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/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 GCTF may appear to be entirely voluntary commitments rather than legal obligations, in fact informal standards produced within selective clubs often have universal outreach as they are addressed to non-participating States as well. And while formally legally non-binding they come attached in some cases to incentives (here most likely technical assistance to security sector actors), and there may be a growing negative effect from non-compliance. In short, ‘good practice’ should not be under-estimated as a growing and increasingly effective governance tool beyond the limited participants in their making.

54. Despite reassurance from some States who are strong human rights standard-bearers that human rights are fully taken into account in GCTF ‘good practice’ creation, that claim is objectively hard to measure. If measured solely on detailed, sustained human rights benchmarking and expectations (not merely selective exhortations to human rights), GCTF 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 dignitary, equality and process values that infuse international human rights treaties are systematically included into ‘good practice’ guidelines and tools. How the procedures generating such documents (e.g. silence procedure) encourage and support human rights integration and prioritization in effective countering-terrorism, is not well-defined. Moreover, if specialist technical ‘shovel-ready’ expertise is the GCTF’s brand, that 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 both valuable as CT tools because they are practice-focused and somehow omit having the same kind of human rights specificity as is needed to be treaty law compliant. As noted in the report on the negative effects of CT on civil society (A/HRC/40/52), and affirmed by the consultation accompanying this present report, independent civil society has little knowledge of the inner workings of GCTF, beyond a bare- bones website. CSO’s that have sought to access and bring information to States and have not been consistently welcomed. Some who have participated, have reported hostility to human rights language and issue-raising (particularly when brought in late in the day to draft documents or conversation 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 affairs extends to standard-setting processes of the GCTF[[70]](#footnote-70) and recommends that the GCTF be guided in this respect by relevant international human rights standards.[[71]](#footnote-71) The Special Rapporteur, in 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 practice development.

Recommendations

55. The Special Rapporteur makes the following recommendations:

Soft Law

(1) **The production of ‘soft law’ counter-terrorism instruments by UN entities should be benchmarked against human rights treaty obligations and comprehensive, detailed and relevant inclusion of human rights standards be consistently applied in counter-terrorism soft norm-making.**

(2) **Technical assistance to States implementing UN guidelines, standards, and best practices in counter-terrorism should substantively and meaningfully include human rights. All UN counter-terrorism entities should fully implement the UN’s Human Rights Due Diligence Policy.**

(3) **UN entities should only endorse non-UN standards in the counter-terrorism arena when they are consistent with international law, human rights and international humanitarian law.**

(4) **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 OCT and the CTC, addressing in part the considerable gaps identified in the implementation of the 4th Pillar of the Global Counter-Terrorism Strategy and providing a road-map forward augmenting human rights implementation in the counter-terrorism arena.**

(5) **To remedy the human rights deficits evident in the production of ‘soft law’ norms within the UN counter-terrorism architecture, increased financial and institutional support be given to building human rights capacity including by strengthening support for OHCHR and the Special Rapporteur.**

(6) **UN human rights entities must be consistently and meaningfully included in counter-terrorism norm-creation that impact human rights.**

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

(8) **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.**

(9) **Civil society and human rights experts must be meaningfully and consistently given access to the UN counter-terrorism architecture. In this context, the establishment of a civil society unit within OCT is to be commended and encouraged.**

Institutions

(10) **The Special Rapporteur encourages greater transparency and openness in the work of counter-terrorism entities including but not limited to FATF and GCTF.**

(11) **All CT 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 practice.**

(12) **All CT 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.**

FATF

(13) **Amend the FATF’s mandate to include among its objectives and functions the task of ensuring that FATF standards are developed and implemented in compliance with international law, including international human rights law, international humanitarian law and refugee law.**

(14) **Meaningfully incorporate human rights norms in the Recommendations elaborated by the Task Force;**

(15) **Include human rights benchmarking and detailed guidance towards a human rights-compliant implementation of FATF standards in Task Force guidance documents.**

(16) **Establish processes to ensure that FATF-style regional bodies implement FATF standards in compliance with international law and work towards furthering consistency aimed at a human rights-sensitive global application of these standards.**

(17) **Ensure that the FATF Secretariat has relevant expertise by adding specialized staff with proven expertise in international human rights law, international humanitarian law and refugee law. Encourage FATF-style regional bodies to develop specialized expertise in these areas and provide support in this respect. The SR recommends seeking out and establishing cooperative arrangements with international and regional specialized mechanisms, including UN human rights mechanisms to ensure that the FATF and FSRBs can benefit from specialized input and advice.**

GCTF

(18) **Provide greater transparency and information to a wide range of interested stakeholders on its operation, general working methods, and its approach to integrating human rights standards and oversight into its production of good practices.**

(19) **Enable full, regular and meaningful participation for civil society, human rights experts including UN experts in its regular work**

1. \* A/74/50 [↑](#footnote-ref-1)
2. \*\* The present report was submitted after the deadline as a result of consultations with Member States and other relevant stakeholders. [↑](#footnote-ref-2)
3. https://thesoufancenter.org/foreign-fighters-forum/. [↑](#footnote-ref-3)
4. Christopher C. Joyner, International Law in the 21st Century: Rules for Global Governance (2005). [↑](#footnote-ref-4)
5. Both UN and non-UN bodies have produced a range of soft law instruments relevant to counter-terrorism but are not examined, e.g. the International Atomic Energy Administration and UNODC. [↑](#footnote-ref-5)
6. TAT is a public-private partnership initiated by CTED and ICT4Peace and referenced in UNSCR 2395 and 2396. [↑](#footnote-ref-6)
7. Francesco Francioni, *International ‘Soft Law’: A Contemporary Assessment*, *in* Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings 167 (1996). [↑](#footnote-ref-7)
8. Certain publications by UN entities found in general UN publications are not considered as ‘soft law’ by this report. [↑](#footnote-ref-8)
9. Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports 1949, p. 174. [↑](#footnote-ref-9)
10. Fisheries Case (U.K. v. Nor.), Judgment, I.C.J. Reports 1951, p. 116, 128. [↑](#footnote-ref-10)
11. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding UNSCR 276 (1970),Advisory Opinion, I.C.J. Reports1971, p. 16, 50, para. 105; Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12, 22–24, paras. 52–56. [↑](#footnote-ref-11)
12. A/RES/2993. [↑](#footnote-ref-12)
13. A/RES/14/121. [↑](#footnote-ref-13)
14. Tim Daniel, *International Cooperation in Counteracting Terrorist Financing*, *in* Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges 240, 248 (Larissa J. van den Herik & Nico Schrijver eds., 2013). https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\_no=XVIII-11&chapter=18&lang=en. [↑](#footnote-ref-14)
15. Kent Roach, The 9/11 Effect: Comparative Counter-Terrorism 34 (2011). [↑](#footnote-ref-15)
16. See <https://www.un.org/sc/ctc/about-us/> See also e.g. CTC, Directory of Best Practice (1373) and CTED, Technical Guide (1373). [↑](#footnote-ref-16)
17. José E. Alvarez, The Impact of International Organizations on International Law (2016). [↑](#footnote-ref-17)
18. Alejandro Rodiles, *The Design of UN Sanctions Through the Interplay with Informal Arrangements*, *in* Research Handbook on UN Sanctions and International Law 180 (Larissa J. van den Herik ed., 2017). [↑](#footnote-ref-18)
19. *Id*, at 177. [↑](#footnote-ref-19)
20. FIDH, The United Nations Counter-Terrorism Complex (2017): <https://www.fidh.org/en/international-advocacy/united-nations/united-nations-the-global-fight-against-terrorism-hampered-by>. [↑](#footnote-ref-20)
21. Michael Reisman, 8 Am Soc’y Int’l Proc 373-4 (1982). [↑](#footnote-ref-21)
22. United Nations & World Bank, Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict(2018). [↑](#footnote-ref-22)
23. A/72/840. [↑](#footnote-ref-23)
24. See FATF infra. [↑](#footnote-ref-24)
25. States also do not make assertions about custom in this context (at least not yet). [↑](#footnote-ref-25)
26. Gavin Sullivan, *Transnational Legal Assemblages and Global Security Law: Topologies and Temporalities of the List*, 5 Transnat’l Legal Theory 81–127 (2014). [↑](#footnote-ref-26)
27. Given the relationship of soft law to the development of customary international law exclusion practices have disproportionate effects on historically under-represented States, B.S. Chimni, *Customary International Law: A Third World Perspective*, 112 Am. J. Int’l L. 1, 22–27 (2018). [↑](#footnote-ref-27)
28. https://www.ohchr.org/EN/newyork/Documents/Human-Rights-Responses-to-Foreign-Fighters-web%20final.pdf. [↑](#footnote-ref-28)
29. <https://www.un.org/sc/ctc/wp-content/uploads/2016/10/Madrid-Guiding-Principles_EN.pdf>. [↑](#footnote-ref-29)
30. FATF, Mandate, 19 April 2019, Washington, DC. [↑](#footnote-ref-30)
31. <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20>  
    Recommendations%202012.pdf. [↑](#footnote-ref-31)
32. Most importantly the Interpretive Notes, providing an official interpretation of the scope and requirements contained in the Recommendations. [↑](#footnote-ref-32)
33. The FATF mandate explicitly states that it is “not intended to create any legal rights or obligations”. [↑](#footnote-ref-33)
34. <http://www.fatf-gafi.org/about/membersandobservers/fatfmembershippolicy.html>. [↑](#footnote-ref-34)
35. See the Egmont Group of Financial Intelligence Units Charter. [↑](#footnote-ref-35)
36. While most FSRBs function as inter-governmental task forces without legal personality, similarly to the FATF, some FSRBs have legal personality. For example, MONEYVAL is a permanent body of the Council of Europe and the Eurasian Group has been established as a ‘regional intergovernmental organization’. [↑](#footnote-ref-36)
37. FATF, Mandate, para. 12. [↑](#footnote-ref-37)
38. FATF (2012), *High-Level Principles for the relationship between the FATF and the FATF-style regional bodies,* updated February 2019, FATF, Paris, France, [www.fatf-gafi.org/publications/fatfgeneral/documents/high-levelprinciplesfortherelationshipbetween  
    thefatfandthefatf-styleregionalbodies.html](http://www.fatf-gafi.org/publications/fatfgeneral/documents/high-levelprinciplesfortherelationshipbetweenthefatfandthefatf-styleregionalbodies.html). [↑](#footnote-ref-38)
39. Ibid. Ibid. [↑](#footnote-ref-39)
40. A/HRC/40/52 and A/70/371. [↑](#footnote-ref-40)
41. See, A/HRC/23/39 and Ben Hayes, Transnational Institute/Statewatch “Counterterrorism, Policy Laundering and the FATF: Legalizing Surveillance, Regulating Civil Society” available at <http://www.statewatch.org/analyses/no-171-fafp-report.pdf>. [↑](#footnote-ref-41)
42. Specifically, by removing the labelling of NPOs as “particularly vulnerable” to terrorist financing abuse. [↑](#footnote-ref-42)
43. Interpretive Notes to Recommendation 8, p. 52-53. [↑](#footnote-ref-43)
44. *Ibid*. p. 52. [↑](#footnote-ref-44)
45. See e.g. A/HRC/40/52; Human Sec. Collective, How Can Civil Society Effectively Engage in Counter-Terrorism Processes? 3 (2017). [↑](#footnote-ref-45)
46. Submission by the Global NPO Coalition on FATF. [↑](#footnote-ref-46)
47. Interpretive Note to Recommendation 6, p. 41. [↑](#footnote-ref-47)
48. Interpretive Note to Recommendation 7, p. 51. [↑](#footnote-ref-48)
49. See A/70/674; UNDP, Journey to Extremism in Africa: Drivers, Incentives and the Tipping Point for Recruitment(2017). [↑](#footnote-ref-49)
50. <http://www.fatf-gafi.org/about/membersandobservers/fatfpolicyonobservers.html>. [↑](#footnote-ref-50)
51. Mandate, Tasks and functions of the FATF (3.i). [↑](#footnote-ref-51)
52. <http://fatfplatform.org>. [↑](#footnote-ref-52)
53. Submission by the Global NPO Coalition on FATF. [↑](#footnote-ref-53)
54. See Human Rights Committee, General Comment No. 25, para. 5 and OHCHR, *Guidelines on the effective implementation on the right to participate in public affairs*. [↑](#footnote-ref-54)
55. Requested A/HRC/RES/33/22. [↑](#footnote-ref-55)
56. S/RES/2462, S/RES/2482. [↑](#footnote-ref-56)
57. https://www.thegctf.org/About-us/Members-and-partners. [↑](#footnote-ref-57)
58. <https://www.thegctf.org/Working-Groups/Structure>. [↑](#footnote-ref-58)
59. [https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/  
    GCTF%20Revised%20Terms%20of%20Reference%202017.pdf?ver=2017-09-16-092916-863](https://www.thegctf.org/Portals/1/Documents/Framework%20Documents/A/GCTF%20Revised%20Terms%20of%20Reference%202017.pdf?ver=2017-09-16-092916-863). [↑](#footnote-ref-59)
60. <https://www.thegctf.org/Portals/1/Documents/Foundational%20Documents/GCTF-Political-Declaration_ENG.pdf>, Principles 4-5. [↑](#footnote-ref-60)
61. *Id.* [↑](#footnote-ref-61)
62. <https://www.thegctf.org/Working-Groups/Structure>. [↑](#footnote-ref-62)
63. <https://www.thegctf.org/About-us/Inspired_Institutions>. [↑](#footnote-ref-63)
64. <http://www.hedayahcenter.org/about-us/271/vision-and-mission>. [↑](#footnote-ref-64)
65. <https://theiij.org>. [↑](#footnote-ref-65)
66. https://theiij.org/about-us/; https://theiij.org/wp-content/uploads/IIJ\_Annual-Report\_EN\_2018\_Final\_Digital\_LowRes.pdf. [↑](#footnote-ref-66)
67. GCTF, *Political Declaration,* III.4, as well as Terms of Reference. Formally GCTF speaks against a ‘presumption of binding force’. Political rhetoric aside this does not mean that no legal effects follow. [↑](#footnote-ref-67)
68. <https://www.thegctf.org/Portals/1/Documents/Foundational%20Documents/GCTF-Political-Declaration_ENG.pdf>, Principles 7-9. [↑](#footnote-ref-68)
69. <https://www.un.org/sc/ctc/wp-content/uploads/2017/08/CTED-Technical-Guide-2017.pdf>. [↑](#footnote-ref-69)
70. Article 25 ICCPR. [↑](#footnote-ref-70)
71. Human Rights Committee, General Comment No. 25, para. 5 and OHCHR, *Guidelines on the effective implementation on the right to participate in public affairs*. [↑](#footnote-ref-71)