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# 'Soft Law', Informal Lawmaking and 'New Institutions' in the Global Counter-Terrorism Architecture

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## Abstract

*This article assesses the increasingly important and diverse role undertaken by a range of 'soft-law' counter-terrorism instruments since September 2001. It starts from the proposition that states increasingly use soft-law standards to regulate in the counter-terrorism, countering violent extremism and preventing violent extremism arenas. The article identifies a broad range of soft-law instruments and assesses their normative and practical importance for states. In parallel, the analysis identifies and maps a range of new institutions and entities producing such norms, paying particular attention to their membership, legal basis, terms of reference and working methods. The role and importance of these new institutions is broadly addressed. The article argues that soft-law production in counter-terrorism has weakened human rights protections across the globe and provided cover for sustained rights violations in multiple national contexts. As a result, human rights norms are not meaningfully included in the creation and implementation of these norms. The article pays particular attention to the lack of pathways for human rights standards to be meaningfully integrated, accounted for and benchmarked in the creation of counter-terrorism soft law. It identifies the ways in which new institutions have inter alia been established precisely to avoid the normative and institutional application of these standards to the counter-terrorism norm creation process. The article starts to trace the movement of some 'soft-law' norms to hard-law standards, illustrating the dense relationship between 'hard' and 'soft' law in the counter-terrorism arena.*

## 1 Introduction

Counter-terrorism law and implementation remains a highly opaque arena of state practice, where both the institutions of governance and the law-making process

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are subject to much less scrutiny than one might expect on the part of scholars and policy-makers, given the rhetorical and political prominence of counter-terrorism discourse and practice. As Ben Saul affirms in the *Handbook on International Law and Terrorism*, it is no ‘longer unreasonable to speak of a discernible body of “international counter-terrorism law”, even if such a regime may not be as unified, centralized or coherent as some others’.<sup>1</sup> While the global counter-terrorism architecture remains, in some parts, open-textured, fragmented and subject to change, essential parts of it have solidified, institutionalized and function quite pedantically and predictably. This article examines one particular part of the normative framework of international counter-terrorism law, namely the use (and abuse) of soft law to advance cooperation, coherence and new frontiers and to avoid the requirements of hard-law rule-making among states. Soft law advances the interests of some states<sup>2</sup> and issues at identifiable costs to other states and other competing interests – including, but not limited to, the rule of law and human rights.<sup>3</sup> The costs of soft-law ascendancy in this arena are multiple. They include the production of human rights ‘lite’ or human rights-deficient legal norms that compete with, and function in practice to overtake and diminish the standing of, binding treaty and customary law standards; the diminishment of established multilateral institutions and the ‘give and take’ that comes with collective norm creation in contested legal fields; the impingement on legal certainty and predictability, as states create *à la carte* menus of legal rules to regulate terrorism; and the circumvention of legal restraints favouring those states who have the resources to impose or export their preferred standards.

Governance questions have periodically emerged to disrupt comfortable acquiescence by states on their law-making processes by raising thorny questions about the rule of law and the protection of human rights in global counter-terrorism regulation.<sup>4</sup> Governance, transparency and sovereignty have been substantively addressed by scholars in trenchant critiques of the augmented ‘legislative’ role of the Security Council in counter-terrorism.<sup>5</sup> Governance concerns have tracked the expanding scope of Security Council legislative capacity since 2001, mapping a shift from treaty-making as the primary form of regulatory action in the counter-terrorism arena to Security Council action under both Chapters VII and VI of the UN Charter.<sup>6</sup> These shifts are significant but are not occurring in isolation from other institutional and

<sup>1</sup> Saul, ‘Preface’, in B. Saul, *Research Handbook on International Law and Terrorism* (2014) xxiii, at xxiv.

<sup>2</sup> On the importance and pitfalls of sovereign equality, see Kingsbury, ‘Sovereignty and Inequality’, 9 *European Journal of International Law* (1998) 599.

<sup>3</sup> On the political and legal costs of these forms of law-making including but not limited to soft law, see A. Rodiles, *Coalitions of the Willing and International Law: The Interplay Between Formality and Informality* (2018), at 210–249.

<sup>4</sup> See C. Joyner, *International Law in the 21st Century: Rules for Global Governance* (2005).

<sup>5</sup> UN General Assembly, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/73/361, 3 September 2018 (hereinafter ‘UNGA Human Rights Report’); Talmon, ‘The Security Council as World Legislature’, 99 *American Journal of International Law (AJIL)* (2005) 175.

<sup>6</sup> Ní Aoláin, ‘How Can States Counter Terrorism While Protecting Human Rights?’, 45 *Ohio Northern University Law Review* (2019) 389.

normative developments. In this respect, this article observes the increased use and application of ‘soft-law’ norms in counter-terrorism, as well as the proliferation of new counter-terrorism institutions, many with highly selective membership whose regulatory scope is increasing and expanding.<sup>7</sup>

What is singular about the development of these soft-law counter-terrorism norms is the complementary and entrenched global counter-terrorism architecture standing ready to translate them into practice. Moreover, the permissive legal and political environment empowered by expansive Security Council legislative action enables states to translate rule of law and human rights deficient counter-terrorism soft law into practice with little meaningful scrutiny or oversight. This practice is correlated with sustained human rights violations in national settings.<sup>8</sup> The article proceeds by addressing the definitional scope of soft law in the counter-terrorism arena as well as identifying the (to date) generally accepted perimeters of ‘soft-law’ production (Section 2). It follows by assessing the manner in which ‘soft law’ has developed in the counter-terrorism realm, and the unique aspects of soft law and informal legal mechanisms in the post-9/11 security landscape (Section 3). The analysis then proceeds to address the marginalization of human rights institutionally and procedurally in the counter-terrorism arena. The implications for multi-lateral engagement on an equal footing by all states in the security realm are also explored (Section 4). The article concludes by reflecting on the broader implications of these shifts on governance, accountability and transparency in international law in general, and global security law in particular.

## 2 The Sources, Status and Process of Making Soft Law

Soft law is increasingly essential to the production of global counter-terrorism norms and practice. The turn to soft law in counter-terrorism has many similarities to the use of soft law in other areas, including environmental protection, human rights, refugee law and arbitration.<sup>9</sup> Counter-terrorism’s embrace of soft law both interprets and amplifies pre-existing hard law as well as enabling norm development that is novel and operates as a ‘gap-filler’.<sup>10</sup> Soft law provides the benefits of speed, informality and

<sup>7</sup> A number of both UN and non-UN bodies have produced a range of soft-law instruments relevant to counter-terrorism, including the International Atomic Energy Administration, the International Civil Aviation Organization, the International Maritime Organization and the UN Office on Drugs and Crime (UNODC). See, e.g., UNODC, *International Law Aspects of Countering Terrorism* (2009), available at [www.unodc.org/documents/terrorism/Publications/FAQ/English.pdf](http://www.unodc.org/documents/terrorism/Publications/FAQ/English.pdf).

<sup>8</sup> UN Human Rights Council, Reports of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN Docs. A/HRC/40/52 1 March 2019, A/HRC/43/46 22 February 2020, A/HRC/46/36, 22 January 2021.

<sup>9</sup> A. Boyle and C. Chinkin, *The Making of International Law* (2007), at 210–229; Dupuy, ‘Soft Law and the International Law of the Environment’, 12 *Michigan Journal of International Law* (1991) 420.

<sup>10</sup> Compare Security Council, Guiding Principles on Foreign Fighters: 2015 Madrid Guiding Principles and 2018 Addendum, S/2018/1177, 28 December 2018 (hereinafter ‘2015 Madrid Guiding Principles and 2018 Addendum’), with the Global Counter-Terrorism Forum (GCTF), *The Hague – Marrakech Memorandum on Good Practices for a More Effective Response to the Foreign Terrorist Fighters Phenomenon*, 23 September 2014; SC Res. 2178, 24 September 2014.

less onerous procedural limitations, and is often produced by ‘like-minded’ groups of states with predictable degrees of existing consensus on values, process and outcomes.

The concept of ‘soft’ law is viewed by some legal scholars as controversial.<sup>11</sup> There are many reasons for this. First is the instinct that the very expression ‘soft’ law may appear to be an oxymoron, ‘a contradiction between the term “soft” and the idea of law as a system of robust enforceable rules’.<sup>12</sup> The second relates to long-standing disputes over agreed definitions of the term ‘soft’ law, most particularly that ‘soft’ can relate to the comparison between written versus unwritten norms, softness from the status of the norm or softness as to the normative content of the obligation in question. The most uncontroversial definition of soft law is that it constitutes those international norms, principles and procedures that are outside the formal sources of international law enumerated in Article 38 of the International Court of Justice (ICJ) Statute and that lack the requisite degree of normative content to create enforceable rights and obligations but are still able to produce certain legal effects. I use this definition of ‘soft’ law in this article.

‘Soft’ law comes in multiple forms. It can include General Assembly resolutions, declarations, guidelines, technical manuals,<sup>13</sup> opinions from quasi-judicial bodies (including UN Special Procedures Working Groups) and certain (but not all) publications from United Nations entities and other international entities such as the International Committee of the Red Cross (ICRC).<sup>14</sup> ‘Soft’ law is produced and driven by states through a variety of mechanisms including in bilateral, multilateral and institutional settings. Increasingly, non-state actors produce, shape, contribute to and drive the enforcement and recognition of ‘soft’ law. The production of soft law underscores the essential point that a substantial body of international law is not derived from formal international legal persons (states or international organizations), nor from formal legal processes.

Recognition and validation for the legal effects of ‘soft’ law has been increasing over many decades. The ICJ has produced an important body of jurisprudence relevant to this analysis. In the Advisory Opinion on *Reparations for Injuries Suffered in the Service of the United Nations*, the Court deduced the principle of soft law from the Charter, broadly interpreted.<sup>15</sup> Other cases in this early formative period of the Court’s work

<sup>11</sup> Weil, ‘Towards Relative Normativity in International Law’, 77 *AJIL* (1988) 413, at 414.

<sup>12</sup> Francioni, ‘International “Soft Law”: A Contemporary Assessment’, in V. Lowe and M. Fitzmaurice (eds), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996) 167, at 167.

<sup>13</sup> For example, the International Atomic Energy Agency (IAEA) Recommendations on Physical Protection, Rev. 1 (1977) are substantially more detailed than the Convention on the Physical Protection of Nuclear Material, 3 March 1980, 1456 UNTS 101, and function as highly influential ‘gap-filling’ for that Convention.

<sup>14</sup> I make the case that certain publications by specialized UN entities might fall within the category of soft law should they meet criteria of recognition, use and compliance but, in general, that generic UN publications from entities such as the United Nations Development Programme (UNDP), the United Nations Office on Drugs and Crime (UNODC), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and others are not considered as ‘soft law’.

<sup>15</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, ICJ Reports (1949) 174.

included the *Anglo-Norwegian Fisheries* judgment,<sup>16</sup> the 1971 Advisory Opinion on *Namibia* and the 1975 Advisory Opinion on *Western Sahara*, all of which confirmed a validation of the legal significance of General Assembly resolutions.<sup>17</sup> Further decisions, including the 1986 *Nicaragua* case, affirm that the Court has applied certain soft-law norms, notably General Assembly resolutions, when they reflect general principles found in the UN Charter and/or reinforce treaty obligations.<sup>18</sup> 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.

Other international courts and bodies have validated the use of soft-law standards. These include regional human rights mechanisms such as the European, Inter-American and African regional courts and commissions.<sup>19</sup> In these judicial contexts, soft-law standards have played an important role in expounding and augmenting the applicable treaty standards. 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. Soft law gives guidance to states and other stakeholders in the absence of specifically formulated norms,<sup>20</sup> providing useful and necessary legal frames to state action and cooperation. A key aspect of soft law is the interaction between hard and soft-law standards to shape the substance of obligations. In particular, a number of soft-law norms develop and augment binding standards and authoritatively interpret them.<sup>21</sup> In developing areas of policy and practice, soft-law norms are often the only norms available to guide, constrain and support regulatory action by states. The advantages of the various kinds of soft-law-producing processes have been well canvassed. They include access by a variety of stakeholders, informality in process as well

<sup>16</sup> *Fisheries (United Kingdom v. Norway)*, Judgment, 18 December 1951, ICJ Reports (1951) 116, at 128.

<sup>17</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports (1971) 16, at 50 ('[I]t would not be correct to assume that because the General Assembly is in principle vested with recommendatory powers, it is debarred from adopting in specific cases within its framework of competence, resolutions which make determinations or have operative design'); *Western Sahara*, Advisory Opinion, 16 October 1975, ICJ Reports (1975) 12, at 22–24, paras 52–56.

<sup>18</sup> *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States) ICJ Reports, 1986.

<sup>19</sup> See, e.g., ECtHR, *O'Keefe v. Ireland*, Appl. no. 35810/09, Judgment of 28 January 2014, at 21 (utilizing the Council of Europe's *Protection of Minors against Ill-treatment* recommendation 561 of 30 September 1968 (<https://pace.coe.int/en/files/14597>) to establish a positive obligation to protect children at school); IACtHR, Advisory Opinion OC 10–89, Judgment, 14 July 1989, para. 47 (recognizing the Court's authority to interpret the American Declaration of the Rights and Duties of Man, stating, 'That the Declaration is not a treaty does not, then, lead to the conclusion that it does not have legal effect').

<sup>20</sup> Circumscribed by the obvious limitation that soft law remains grounded in norms of customary international law, general principles of international law or general principles of law, and is not produced in a vacuum.

<sup>21</sup> Examples of this interaction in the human rights field include: UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, UN Doc. E/ST/CSDHA/.12 (1991); Office of the United Nations High Commissioner for Human Rights (OHCHR), The Istanbul Protocol, HR/P/PT/8/Rev., 9 August 1999; UNODC, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Economic and Social Council Resolution 1989/61, Annex, 9 September 1990.

as in negotiation, innovative modalities of engagement and analysis and a variety of pathways to produce legal norms in new and challenging global contexts.

### 3 From General to Specific: Soft Law's Deepening Role in Counter-terrorism

A key feature of the post-9/11 legal landscape has been the proliferation of multi-level terrorism-related regulation. This is enabled by an augmented UN internal architecture, complimented by the creation of external specialized entities responding to perceived counter-terrorism regulatory gaps and by augmented capacity at regional and national levels.<sup>22</sup> 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.<sup>23</sup> This does not mean that there has not been treaty engagement during this period.<sup>24</sup> Prior to the passage of Security Council Resolution 1373,<sup>25</sup> only Sri Lanka, Botswana, Uzbekistan and the United Kingdom had ratified the International Convention for the Suppression of the Financing of Terrorism.<sup>26</sup> Between 11 September 2001 and 19 February 2002, 90 countries had signed this Convention, and 13 more had ratified it, in large part due to the pressure provided by Security Council Resolution 1373.<sup>27</sup> Here, one can discern a convergence of traditional state implementation in the counter-terrorism arena and this propulsion to compliance in one arena prompting and supporting action in other arenas.

After 9/11, the counter-terrorism legal landscape expanded substantially, primarily through the increased resort to Security Council resolutions including Resolutions

<sup>22</sup> An example of regional development is the Shanghai Cooperation Organisation (SCO), which is a permanent intergovernmental international organization founded on 15 June 2001. Core members include the People's Republic of China, the Republic of Kazakhstan, the Kyrgyz Republic, the Russian Federation, the Republic of Tajikistan and the Republic of Uzbekistan. See Gisela Grieger, *Briefing: The Shanghai Cooperation Organisation*, June 2015, at 2, available at [www.europarl.europa.eu/RegData/etudes/BRIE/2015/564368/EPRS\\_BRI%282015%29564368\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2015/564368/EPRS_BRI%282015%29564368_EN.pdf).

<sup>23</sup> UNGA Human Rights Report, *supra* note 5. Underscoring the lack of agreement on a comprehensive multilateral treaty on terrorism which remains in negotiation among States.

<sup>24</sup> See, e.g., Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 10 March, 1988, 1678 UNTS 221; Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, 10 September, 2010, ICAO Doc. 9960 (hereinafter 'Beijing Convention'); Protocol Supplementary to the Convention for the Suppression of Unlawful Seizure of Aircraft, 10 September, 2010, ICAO Doc 9959 (hereinafter 'Beijing Protocol'); International Convention for the Suppression of Acts of Nuclear Terrorism, annexed to G.A. Res. 59/240, U.N. Doc. A/RES/59/240 (24 February, 2005), 44 I.L.M. 815 (2005) (hereinafter 'Nuclear Terrorism Convention').

<sup>25</sup> SC Res. 1373, 28 September 2001.

<sup>26</sup> International Convention for the Suppression of the Financing of Terrorism ('Terrorism Financing Convention'), 9 December, 1999, 2178 UNTS 197; Daniel, 'International Cooperation in Counteracting Terrorist Financing', in L. van den Herik and N. Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (2013) 240, at 248.

<sup>27</sup> *Ibid.* On the link between Resolution 1373 and the ratification of the International Convention on the Suppression of Terrorism, *supra* note 26. See K. Roach, *The 9/11 Effect: Comparative Counter-Terrorism* (2011), at 34.

1373, 1390, 1540 and 1566. Security Council resolutions have developed a distinct and problematic 'legislative' character engaging in regulatory action across a range of substantive areas including sanctions, foreign fighters, regulation of travel between states, organized crime, biometrics, data collection and data sharing.<sup>28</sup> 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. the Counter Terrorism Committee, CTC) and the procedurally circumscribed Office of the Ombudsperson which constitute unprecedented institutional innovations. The creation of the UN Counter-Terrorism Committee Executive Directorate (CTED) and the CTC 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.<sup>29</sup> These norms range from formal legal and capacity-building engagements, to highly informal advice, and lots in between. Central to the normative landscape has been counter-terrorism soft law.

Despite the common characteristics of soft law across a number of international legal fields, one can observe some unique features to counter-terrorism soft-law production. These include, first, the scale of norm proliferation (while difficult to absolutely quantify), which is exceptionally dense and has been produced in a relatively short period of time,<sup>30</sup> compared with other regulatory arenas.<sup>31</sup> Evidence of this augmented production is found in the outputs of the United Nations counter-terrorism architecture, emanating from individual counter-terrorism entities,<sup>32</sup> as well as

<sup>28</sup> See, e.g., SC Res. 2396, 21 December 2017, paras 11–15.

<sup>29</sup> CTED was established by SC Res. 1535, 26 March 2004. See CTC, *About the Counter-Terrorism Committee*, available at <https://www.un.org/securitycouncil/ctc/content/about-us-0> (last visited 7 August 2021). The Secretary-General established the Counter-Terrorism Implementation Task Force in June 2005 as a coordination framework. It was institutionalized through GA Res. 64/235, 14 January 2010. Examples of outputs that may fit into the soft-law or informal law category include: CTC /Security Council, Policy Guidance, <https://www.un.org/securitycouncil/ctc/content/security-councilctc-policy-guidance> (last visited 7 August 2021); CTED, UN Security Council, *Technical Guide to the Implementation of Security Council Resolution 1373 (2001) and Other Relevant Resolutions* (2017), available at <https://www.un.org/security-council/ctc/content/security-councilctc-policy-guidance> (hereinafter 'SC Technical Guide to Resolution 1373'); and Other Relevant Resolutions, S/2017/716 (2017), <https://undocs.org/en/S/2017/716>.

<sup>30</sup> A full mapping of the scale and quantity of soft-law production remains to be undertaken, but I note that the categories of work listed by the Office of Counter-Terrorism that map onto standard setting and guidance include border security and management; chemical, biological, radiological and nuclear terrorism; countering terrorist travel; cybersecurity; foreign terrorist fighters; gender equality; human rights; preventing violent extremism; sports and security; victims of terrorism; and vulnerable targets. See UN Office of Counter-Terrorism, UN Documents, [www.un.org/counterterrorism/un-documents](http://www.un.org/counterterrorism/un-documents) (last visited 7 August 2021). New areas of evidenced interest in norm production include maritime law, cyber security, artificial intelligence, data collection and biometrics.

<sup>31</sup> Noting that standards are emerging from bodies including the Global Counter-Terrorism Coordination Compact, the Financial Action Task Force (FATF), the Shanghai Framework Agreement, the Global Counter-Terrorism Forum, the United Nations Office on Drugs and Crime (UNODC), the United Nations Entity for Gender Equality and the Empowerment of Women ('UN Women') and the United Nations Development Programme (UNDP).

<sup>32</sup> Forty-three entities are current members of the Global Counter-Terrorism Coordination Compact, 40 being UN entities plus observers INTERPOL, the World Customs Organization and the Inter-Parliamentary Union.

composite internal structures.<sup>33</sup> It is bolstered by the normative outputs of a plethora of new counter-terrorism entities at global and regional levels, including, but not limited to, the Global Counter-Terrorism Forum (GCTF) and the Financial Action Task Force (FATF).<sup>34</sup> In parallel, soft-law production intersects with, and elevates, other global counter-terrorism assemblages,<sup>35</sup> or what Rodiles has termed ‘coalitions of the willing’, whose performative and practical engagement functions to produce de facto legal and political norms in the counter-terrorism arena.<sup>36</sup>

Second, the nomenclature of ‘soft’ law appears to understate the extent to which many of these normative guidelines, declarations, ‘good practices’ and technical rules function as distinctly hard in counter-terrorism practice. In this context, it is worth observing the behaviour of states in the negotiation of soft-law counter-terrorism instruments, including delegations taking extreme care in the negotiation of provisions, exactly as if they were negotiating treaty provisions. An illustrative example is the biannual negotiation on the Global Counter-Terrorism Strategy and the watchfulness and attention to every phrase in a document that concludes formally as a (soft) strategy endorsed by a General Assembly resolution. This underscores a broader point that in defining the exact nature of soft law it matters that precise behaviour is requested by states,<sup>37</sup> and in turn that the compliance to the resulting regulatory provision is viewed as binding at the national level, and subsequently supervised by bodies such as CTED and the FATE. The ‘compliance’ pathway of global counter-terrorism norms will be further canvassed below.

Third, unlike many comparative areas of international law, where soft law holds less enforcement traction overall, the institutional landscape for counter-terrorism is quite unique. As a primarily coercive regulator of behaviour, counter-terrorism soft law has a repressive quality distinct from other soft-law arenas. Thus, following the establishment of the United Nations counter-terrorism architecture post-9/11, states have reporting requirements to the UN Counter-Terrorism Committee, which de facto operates to leverage a portion of these norms into domestic law and oversee their practical implementation. The CTED functions as the supervision entity with an array of capacities including country visits, technical assistance in the form of ‘deep dives’ on national practice and assessments to enable its oversight role. Many counter-terrorism soft-law norms come with capacity building, technical expertise and support on a

<sup>33</sup> For details its work of its Working Group structures, see UN Office of Counter-Terrorism, *UN Global Counter-Terrorism Coordination Compact*, see [www.un.org/counterterrorism/global-ct-compact](http://www.un.org/counterterrorism/global-ct-compact) (last visited 7 August 2021).

<sup>34</sup> GCTF, *Members and Partners*, available at [www.thegctf.org/About-us/Members-and-partners](http://www.thegctf.org/About-us/Members-and-partners) (last visited 7 August 2021).

<sup>35</sup> de Londras, ‘The Transnational Counter-Terrorism Order: A Problématique’, 72 *Current Legal Problems* (2019) 203.

<sup>36</sup> A. Rodiles, *Coalitions of the Willing and International Law: The Interplay Between Formality and Informality* (2018), at 168–202.

<sup>37</sup> It is worth recalling cases in which a formally non-binding instrument has been designed and formulated so precisely that, aside from the precaution of using ‘should’ instead of ‘shall’ in order to determine the behaviour of the concerned states, some of its provisions could be integrated into the treaty perfectly. See Dupuy, ‘Remarks’, 82 *American Society of International Law Proceedings (ASILP)* (1988) 371, at 385.



scale not found in other legal domains, precisely because there is a powerful UN architecture to aid their direct implementation.<sup>38</sup>

Fourth, there is an important nexus between many of these normative soft-law standards, reinforcing and building upon one another. They operate relationally in many areas and their legal status is both independent *and* interconnected. Thus, for example, the reporting requirements for all states under Security Council Resolution 1373 are reinforced by the Global Counter-Terrorism Strategy, and by various normative declarations and obligations from the UN Counter-Terrorism Committee, the CTED and entities such as the EATF, in a range of regulatory areas from terrorism financing to intelligence sharing cooperation.<sup>39</sup>

This article underscores that the relationship between various aspects of the counter-terrorism soft-law production terrain is under-mapped and not fully understood. This creates two opposing but intersectional trends. The first trend is fragmentation in international legal norms regulating the phenomena of terrorism, which creates both ineffectiveness and confusion, as well as limiting the application of primary legal regimes including international human rights, humanitarian law and refugee law. The second trend is the challenge of overproduction, whereby one discerns a concentration and exponential growth in one area of law without commensurate and equal development of other necessary bodies of law (equally specialized human rights norms) to provide balance.

While some classical distinctions apply as to what constitutes counter-terrorism 'soft law', my analysis takes a pragmatic approach to assessment of legal status, and primarily assesses state compliance, affirmation and enforcement as indicative of legal status rather than the title of the norm *per se*. This is consistent with assessing 'norms' found outside the formal sources of Article 38 of the ICJ Statute in an open-ended and inclusive way. The reason for this method is to avoid an overly formalistic approach to the status of a norm, at the expense of assessing real-time state use and compliance. The danger of formalism in this space is that it misses the way in which counter-terrorism regulation follows a particular and unique pathway that is not replicated in other law-making arenas. A distinguishing feature of the internal UN counter-terrorism architecture lies in its departure in practice from the traditional legal assumptions of 'authorities' formal and informal, legal and non-legal in deference and compliance.<sup>40</sup> One can view this architecture as a locale in which all these entities (and many more outside the UN system) can effectively shape an issue area regardless of their formal legal pedigree.<sup>41</sup> This is not to dismiss the importance of hierarchy to

<sup>38</sup> Roele, 'Side-lining Subsidiarity: UN Security Council "Legislation" and Its Infra-Law', 79 *Law and Contemporary Problems* (2016) 189.

<sup>39</sup> A. Rodiles, *Coalitions of the Willing and International Law: The Interplay Between Formality and Informality* (2018), at 158–167 (noting that EATF recommendations 'have proved to have a high degree of efficacy as they are implemented at the transnational plane through their incorporation into national law and regulations'; *ibid.* at 158).

<sup>40</sup> J. Alvarez, *The Impact of International Organizations on International Law* (2016).

<sup>41</sup> Daniel, 'International Cooperation in Counteracting Terrorist Financing', in L. van den Herik and N. Schrijver (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order: Meeting the Challenges* (2013) 240, at 260–263.

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 in unexpected ways.

In addition to the Security Council sub-architecture, the establishment of the UN Counter-Terrorism Implementation Task Force (CTITF) from General Assembly Resolution 64/235 provided a parallel forum in which 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 formally agreed in December 2018. The Compact, through its Working Group structure,<sup>42</sup> is an important (if new) site of norm production; although it remains debatable what precise proportion of its outputs will evolve into soft law and hold the same kind of consideration in practice as norms produced by CTED or by external entities such as FAFT. The consolidation of counter-terrorism capacity is also evidenced by the establishment of the fast-growing Office of Counter-Terrorism (OCT) through General Assembly Resolution 71/291. While this Office is relatively new, it has sizeable potential to exponentially grow informal legal norms, technical advice that has ‘hard’ dimensions and ‘soft’ law. The influence of the Global Compact may be more keenly felt in the technical support and capacity-building work it undertakes, which may shape the actions of states and the security sector on the ground in immediate ways. The move by the OCT to establish a field presence in multiple countries underscores the institutional power plays in motion. The UN Counter-Terrorism Centre (UNCCT) founded in 2011 is a relevant player in capacity building and norm enforcement, not least because of its formidable budget capacity.<sup>43</sup> The UN Office on Drugs and Crime, through its Terrorism Prevention Branch, also plays an important role in producing, inter alia, technical publications, legislative guides, model laws and training curricula.

This regulatory landscape is complex, but understanding its multiple functions and influence is essential to assessing the governance and human rights integration challenges identified here. The interplay between the Global Compact and the Counter-Terrorism Committee subsidiaries (e.g. 1267 Sanctions Committee), as well as the relationships of new public–private partnerships (e.g. Tech Against Terrorism, TAT)<sup>44</sup>

<sup>42</sup> Working Groups on Preventing and Countering Violent Extremism; Emerging Threats and Critical Infrastructure; National and Regional Counter-Terrorism Strategies; Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism and Supporting Victims of Terrorism; Gender Sensitive Approaches to Preventing and Countering Terrorism; Criminal Justice, Legal Responses and Countering the Financing of Terrorism; and the Working Group on Resource Mobilization, Monitoring and Evaluation.

<sup>43</sup> GA Res. 66/10, 18 November 2011. UNCCT projects include the development of five Basic Human Rights Reference Guides, providing guidance to member states on human rights-compliant measures in counter-terrorism, the Board Security Initiative and creation of the UNCCT Network Against Terrorism. See UN Office of Counter-Terrorism, *Main Projects*, available at [www.un.org/counterterrorism/ctitf/en/uncct/main-projects](http://www.un.org/counterterrorism/ctitf/en/uncct/main-projects) (last visited 7 August 2021).

<sup>44</sup> TAT is a public–private partnership initiated by CTED and ICT4Peace, noting its recognition in SC Res. 2395, 21 December 2017, and SC Res. 2396, 21 December 2017.

with CTC subsidiaries, is critical to mapping the architecture's overall functioning, in addition to the effects of norm production within it.

The architecture as a whole enables coalitions of like-minded states as well as global multi-stakeholder networks, which are not legally constituted under international law and which operate on a stated voluntary basis, to entirely avoid the creation of formal legal rules and obligations via traditional pathways (particularly but not solely as regards to human rights).<sup>45</sup> Here, distinctions around formal legal powers and normative hierarchies have been replaced by searching for methods and means to coordinate and streamline different parts of the regulatory landscape to produce coherence with lesser regard to other criteria of legitimacy, sovereignty and relevance of other legal regimes.<sup>46</sup> The landscape between 2001 and 2021 might be described as a rather disorganized and uncoordinated proliferation of possible new legal practices, principles, rules and institutions. Yet, in fact, the evolving landscape has substantially altered the global governance of international security and the effects have been substantial if generally unrecorded.<sup>47</sup> It remains crucial to appreciate the importance of the applicability and interrelationship between relevant branches of international law and this new formal and informal terrorism and counter-terrorism architecture. This article highlights the implications of this architecture, and the norms it produces, for the integrity and legitimacy of international norms and international law-making, as well as the downstream effects on the protection of individual and group rights.<sup>48</sup>

While this article focuses in a general way on 'soft' law, there is an acute need to disaggregate different forms of 'soft law' and avoid a crude analysis that paints all forms of soft law, from a highly crowded landscape, as being the same in effect or normative status. Besides, there is a sliding scale of hardness and softness in all international legal norms.<sup>49</sup> For this purpose, I distinguish between source entities for soft law in assessing the status of contribution to normative developments that are endowed with defined authority and legitimacy, generally by treaty or more infrequently by Chapter VII Security Council resolution (e.g. the Counter-Terrorism Committee or the United Nations Human Rights Committee), as compared with the normative documents produced by Global Compact Working Groups or UN entities.

<sup>45</sup> Rodiles, 'The Design of UN Sanctions Through the Interplay with Informal Arrangements', in L.J. van den Herik (ed.), *Research Handbook on UN Sanctions and International Law* (2017) 177, at 180.

<sup>46</sup> *Ibid.*, at 177.

<sup>47</sup> International Federation for Human Rights (FIDH), *The United Nations Counter-Terrorism Complex: Bureaucracy, Political Influence, Civil Liberties* (6 September 2017), at 6, available at [www.fidh.org/en/international-advocacy/united-nations/united-nations-the-global-fight-against-terrorism-hampered-by-sullivan](http://www.fidh.org/en/international-advocacy/united-nations/united-nations-the-global-fight-against-terrorism-hampered-by-sullivan); Sullivan, 'Transnational Legal Assemblages and Global Security Law: Topologies and Temporalities of the List', 5 *Transnational Legal Theory* (2014) 81, at 81–127.

<sup>48</sup> In this I take a contrary position to Higgins and Flory (pre-9/11) and Brownlie that no separate and discrete body of law exists to regulate terrorism in the international arena. See Higgins, 'General International Law of Terrorism', in Higgins and Flory, *Terrorism and International Law* (1998) 13, at 13–14; I. Brownlie, *Principles of Public International Law* (7th ed., 2008), at 745.

<sup>49</sup> Reisman, 'Remarks', 8 *ASILP* (1988) 371, at 373–375.

Despite these distinctions, there are some relevant clarifying observations to be made. 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 ecosystem.<sup>50</sup> The norms have a foundational quality, and steady norm proliferation builds upon and reinforces rule development, thereby consolidating the regulatory landscape in ways unseen in other international law arenas. They also have a ‘piggy-back’ quality, leveraging existing regulatory pathways in contexts as diverse as global finance regulation (FATF) and airline regulation (International Civil Aviation Organization, IACO). These distinct aspects include: the considerable resource mobilization to support the implementation of norms at the domestic level via counter-terrorism law and practice; the manifest enforcement pressures following from state reporting under SC Resolution 1373 and other relevant resolutions; and the role of various entities (OCT, CTED, GCTE, FATF) in engaging states to cooperate and accept these norms and report on their implementation. Moreover, there is a clear osmosis to be observed in the creation of hard-law obligations, such as those under SC Resolution 1373, and the role that ‘soft law’ plays in the inevitable ambiguity one finds in politically negotiated documents as a predictable level of generality among states. Terrorism resolutions are quickly followed by a rush to produce guidance, technical advice, manuals, principles and addendums for states by OCT, the Global Compact, CTED and the GCTE. The extent to which all of the standards faithfully and narrowly hew to the language and intent of Security Council resolutions requires closer scrutiny. Moreover, one observes cross-fertilization, cross-referencing, message duplication and recurrent invocations of the same rules, formulated in processes that are non-transparent and non-accessible to all states, in order to present as regular conduct practices that would previously have been considered an overt 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. Human rights violations that result from the prior deployment of soft and hard counter-terrorism measures do not figure in the norm production conversation in any meaningful way.

## 4 The Marginalization of Human Rights

Why are human rights marginalized in this soft-law terrain and why does it matter? Human rights-deficient counter-terrorism practices grounded in soft-law norms result in sustained human rights violations across the globe,<sup>51</sup> and have been identified as a

<sup>50</sup> To mention but some: airline passenger information, soft targets, battlefield evidence, the treatment of foreign fighters, biometric data use in counter-terrorism, border security, databases, information sharing between states on counter-terrorism including individual data, criminal prosecution of women and children associated with ISIS and listing. Compare, for example, environment law where similar examples of transfer can be discerned.

<sup>51</sup> UN Human Rights Council, *Human Rights Impact of Policies and Practices Aimed at Preventing and Countering Violent Extremism*, UN Doc. A/HRC/43/46, 21 February 2020; and UN Human Rights Council, *Impact of Measures to Address Terrorism and Violent Extremism on Civil Space and the Rights of Civil Society Actors and Human Rights Defenders*, UN Doc. A/HRC/40/52, 1 March 2019.

substantial factor conducive to the production of violence and extremism at the national level.<sup>52</sup> Counter-terrorism practice premised on 'soft'-law standards, from countering terrorism financing to deradicalization programming, has provided convenient and tolerated cover for unrelenting restrictions on human rights, including, but not limited to, freedom of expression, association, fair trial, privacy, religious belief, non-discrimination, participation in political affairs, family life, and socio-economic rights violations.<sup>53</sup>

Counter-terrorism norm production occurs in a number of institutional settings where human-rights entity presence and capacity are limited, constrained or lack adequate resourcing.<sup>54</sup> Counter-terrorism norm production is happening in the entities and institutions with the 'lightest' human-rights footprint. That light footprint includes a part-time, unfunded UN Special Rapporteur on the Protection and Promotion of Human Rights while Countering Terrorism (with no staffing for its specific responsibilities in the Global Counter-Terrorism Coordination Compact) as the only entity within the global architecture given specific responsibility for the oversight of the intersection between human rights and counter-terrorism.<sup>55</sup> The gaps also include a limited Office of the United Nations High Commissioner for Human Rights (OHCHR) presence in New York, which is the epicentre of the global counter-terrorism architecture. That limited presence has a political component given the political barriers placed on the expansion of the OHCHR footprint in New York. This human rights presence is insufficient in numbers and resources to match the sizeable counter-terrorism expertise spread out across multiple UN entities, thereby making it difficult to remedy the human rights deficits in soft-law norm production.<sup>56</sup>

It is hard to argue that there is zero human-rights referencing in the plethora of counter-terrorism guidance, standards and technical advice produced by this architecture. But close scrutiny reveals a consistent pattern, namely the deployment of a standard decorative phrase broadly obligating that a particular action, requirement or mandate be taken 'in compliance with international law, including human rights, humanitarian and refugee law'.<sup>57</sup> Specificity on which human rights and how they

<sup>52</sup> UNDP, *Journey to Extremism in Africa: Drivers, Incentives and the Tipping Point for Recruitment* (2017), available at <https://journey-to-extremism.undp.org/content/downloads/UNDP-JourneyToExtremism-report-2017-english.pdf>.

<sup>53</sup> Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, *Human Rights Impact of Policies and Practices Aimed at Preventing and Countering Violent Extremism, Human Rights Impact of Counter-Terrorism and Countering (Violent) Extremism Policies and Practices on the Rights of Women, Girls and the Family*, UN Doc. A/HRC/46/36, 22 January 2021.

<sup>54</sup> Global Center on Cooperative Security, *Blue Sky IV Report: Clouds Dispersing: An Independent Analysis of UN Counterterrorism Efforts in Advance of the Sixth Review of the UN Global Counter-Terrorism Strategy in 2018* (May 2018), available at [www.globalcenter.org/wp-content/uploads/2018/07/GC\\_2018-May\\_Blue-Sky.pdf](http://www.globalcenter.org/wp-content/uploads/2018/07/GC_2018-May_Blue-Sky.pdf); Global Center on Cooperative Security, *Blue Sky V Report: An Independent Analysis of UN Counter-Terrorism Efforts* (November 2020), available at <https://www.globalcenter.org/publications/blue-sky-v-an-independent-analysis-of-un-counterterrorism-efforts/>.

<sup>55</sup> UNGA Human Rights Report, *supra* note 5, paras 34–45.

<sup>56</sup> Saferworld, *A Fourth Pillar for the United Nations? The Rise of Counter-Terrorism* (2020).

<sup>57</sup> UN General Assembly, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN Doc. A/74/335, 29 August 2019, para. 21.

might be specifically protected is generally lacking. 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 specific ‘hard’ or ‘soft’ human-rights norms could guide them. Given the sustained documentation of human-rights violations in counter-terrorism practice, this single decorative phrase has no claim on preventing the negative impact of counter-terrorism and extremism measures.

Notably, and by contrast, counter-terrorism guidance is highly specific and technical in its content, exacerbating the disparity between the character of human rights in this arena and the status and ascribed value of counter-terrorism norms. Moreover, counter-terrorism soft law does not ‘lead’ with the presumption that the maximization and front-loading of human rights is the best and proven way 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.<sup>58</sup> The human rights-focused fourth pillar of the Global Counter-Terrorism Strategy remains the least developed both in terms of projects undertaken and guidance produced to states.<sup>59</sup>

Human-rights practice and guidance in the global counter-terrorism space is undeniably marginal and seems likely to remain so. 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. The repeat-player quality is exacerbated by the weakness of the human-rights footprint, resulting in human-rights expertise being frequently excluded from the conception, consultation, delivery and training on counter-terrorism soft law or lacking the manpower to be present in multiple norm development arenas simultaneously. Even when in the room, human rights actors often can do little more than comment on the inadequacy of human rights protections with minimal expectation that the articulation of deficits will result in their remedy.

There is a fundamental paradox in compliance with soft law in the counter-terrorism arena. While recognizing that counter-terrorism compliance is not perfect,<sup>60</sup> and many states remain frustrated by the inability or unwillingness of states to fully execute their obligations under the Suppression Treaties and/or SC Resolution 1373 and

<sup>58</sup> See, e.g., Office of U.S. Foreign Assistance Resources, *Strategic Prevention Project: Assessing the Role of Foreign Assistance in Preventing Violent Conflict in Fragile States* (2019); OECD, *States of Fragility 2018: Highlights* (2016); United Nations and World Bank, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict* (2018).

<sup>59</sup> UN General Assembly, Report of the Secretary-General: Activities of the United Nations System in Implementing the United Nations Global Counter-Terrorism Strategy, UN Doc. A/72/840, 20 April 2018, at 8–11.

<sup>60</sup> Cf. UN Security Council, Letter dated 30 December 2020 from the Permanent Representative of Tunisia to the United Nations addressed to the Secretary-General, UN Doc. S/2020/1315, 31 December 2020.

other relevant resolutions,<sup>61</sup> there is surprisingly high compliance as compared with other arenas of international law practice, specifically states' human rights law compliance.<sup>62</sup> In particular, the indirect adoption of soft-law counter-terrorism norms via national legislation, judicial decision-making and administrative practice has been understudied, and constitutes a circularity which hardens soft norms.<sup>63</sup> 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 counter-terrorism arena post 9/11 has been state augmentation and observance of soft law as well as the push for soft law which is not required by hard law. The corollary is that adherence has been at the cost of human rights enforcement and protection.

## 5 New Institutions, Human Rights and the Production of Soft Law in Counter-Terrorism

The combined challenges of a light 'footprint', limited resources and the direct exclusion of human rights entities from the global counter-terrorism architecture have been systematically benchmarked elsewhere.<sup>64</sup> A multitude of effects follows 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, and content on the norms production has particular downstream consequences. While further tracing is needed to link specific measures with the practices of counter-terrorism-related human rights violations, closing civic space and attacks on human rights defenders, we have an emerging corpus of data that demonstrates correlation.<sup>65</sup>

There is a spider's web of soft-law standards coming from new counter-terrorism institutions. The establishment of new global, regional and selective institutions, many of novel legal status, created with limited reference to human rights in their terms of reference, means that structured, consistent and well-defined human rights inputs are also lacking in these institutional settings.<sup>66</sup> Examples include the 39-member

<sup>61</sup> See, e.g., 'Terrorism Financing Convention' *supra* note 26; International Convention for the Suppression of Acts of Nuclear Terrorism, *supra* note 24; International Convention for the Suppression of Terrorist Bombings, 15 December 1997, 2149 UNTS 256.

<sup>62</sup> Compare, for example, reporting practices around delay in submitting reports to the Human Rights Committee with the promptness on timelines evidenced on state reporting to the Counter-Terrorism Committee.

<sup>63</sup> On the point concerning national adoption of soft law standards, see Chinkin, 'Remarks', 8 *ASILP* (1988) 371, at 391.

<sup>64</sup> UNGA Human Rights Report, *supra* note 5, para. 38.

<sup>65</sup> UN Human Rights Council, Impact of Measures to Address Terrorism and Violent Extremism on Civil Space and the Rights of Civil Society Actors and Human Rights Defenders, UN Doc. A/HRC/40/52, 1 March 2019; 'Survey of Trends Affecting Civic Space: 2015–16', 7 (4) *Global Trends in NGO Law* (2016) 1.

<sup>66</sup> The scope of the FATF's mandate was broadened to encompass terrorist financing in the aftermath of the attacks of 11 September 2001. FATF, *Mandate (2012–2020)* (19 April 2019), at 2, available at <https://www.fatf-gafi.org/about/whatwedo/#:~:text=The%20objectives%20of%20the%20FATF,of%20the%20international%20financial%20system> (last visited 7 August 2021) (hereinafter 'FATF, *Mandate*').

Financial Action Task Force.<sup>67</sup> FATF was founded in 1989, at the initiative of the Group of Seven (G7), with the aim of developing standards and policies to combat money laundering but was substantially expanded and redirected post-9/11. Another example is the Global Counter-Terrorism Forum.<sup>68</sup> The GCTF was launched by Turkish Foreign Minister Ahmet Davutoglu and US Secretary of State Hillary Clinton on 22 September 2011.<sup>69</sup>

Access to such institutions has proven difficult and inconsistent for institutional human rights entities. In parallel, independent civil society and human rights organizations have no formal accreditation mechanism to such bodies, so their presence is equally ad hoc and inconsistent.<sup>70</sup> Some states resist the presence of independent human-rights organizations in these spaces, precisely because they are robustly critiquing state misuse of counter-terrorism law and practice at the national level. The operative assumption of such entities is that more norm production is imperative, and there has been little attention to the fundamental question of whether the existing normative framework is working. 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 is virtually nil. Not infrequently, institutional human rights entities and the civil society sector are 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 both 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) for the counter-terrorism, violent extremism and extremism arenas.<sup>71</sup> There is little transparency to the funding, terms of reference and relationship of these entities to state interests, creating circular production cycles for soft law that inadequately addresses the formal human rights obligations of states in new norm-making, undermining treaty and customary norms insidiously and opaquely.

All of these patterns of institutional practice within the global counter-terrorism architecture are complimented by another emerging trend – namely, the transposition

<sup>67</sup> Comprised of 37 member states and two regional organizations.

<sup>68</sup> Rodiles, *supra* note 39, at 155.

<sup>69</sup> The GCTF was established 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 around the world to share their experiences, expertise, tools and strategies on countering the evolving threat of terrorism. GCTF, *Background and Mission*, available at [www.thegctf.org/Who-we-are/Background-and-Mission](http://www.thegctf.org/Who-we-are/Background-and-Mission) (last visited 7 August 2021).

<sup>70</sup> The broader issues of informality and governance are also relevant to this discussion and have been explored by others: see, e.g., J. Pauwelyn, R. Wessel and J. Wouters, *Informal International Lawmaking: Framing the Concept and the Research Questions* (2012).

<sup>71</sup> Note particularly GCTF Inspired Institutions such as the Global Community Engagement and Resilience Fund (GCERF); Heyadah; and the International Institute for Justice and the Rule of Law.



of soft-law norms from ‘new’ counter-terrorism entities 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 can be seen in the operation of the FATF and the GCTF. For instance, FATF standards have been referenced and endorsed in documents produced by UN entities and organs, most recently – and prominently – by the Security Council.<sup>72</sup> With the GCTF, the translation effect is more muted, but potentially no less significant in practice. As a formal matter, the GCTF disputes its influence in legal development while holding that the tools developed are practically very useful to states fighting terrorism.<sup>73</sup> But close examination of the exportation/integration pattern of soft-law movement in counter-terrorism reveals otherwise. 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’.<sup>74</sup> As a result, GCTF good practice documents have influenced outputs of UN organs, as well as a number of UN entities. For example, CTED’s *Technical Guide to the Implementation of Security Council Resolution 1373 (2001) and Other Relevant Resolutions*,<sup>75</sup> a reference tool aimed at ensuring dependable analysis of states’ implementation efforts, consistently references GCTF good-practice documents as assessment benchmarks. A vital insight here is the double-layered effect of a ‘new’ institution producing norms outside the formal multilateral framework, the influence and/or adoption of those same norms by an authoritative counter-terrorism entity and the route by which those same norms end up driving or informing ‘hard’ state engagement through an equally unrepresentative Security Council acting under Chapter VI or VII of the UN Charter.

A second pattern of note is the adoption of hard-law norms with the same language and substance from a soft counter-terrorism source or institution without acknowledging the source explicitly. For example, the GCTF *Hague–Marrakech Memorandum on Good Practices for a More Effective Response to the Foreign Terrorist Fighters Phenomenon* was crucial for the design of Security Council measures aimed at containing this issue, notably SC Resolution 2178 adopted only a day after the GCTF Memorandum.<sup>76</sup>

<sup>72</sup> SC Res. 2462, 28 March 2019; SC Res. 2482, 19 July 2019, paras. 3–9.

<sup>73</sup> GCTF, *Political Declaration*, 22 December 2001, sec. 3, para. 4, available at [www.thegctf.org/Portals/1/Documents/Foundational%20Documents/GCTF-Political-Declaration\\_ENG.pdf](http://www.thegctf.org/Portals/1/Documents/Foundational%20Documents/GCTF-Political-Declaration_ENG.pdf) (hereinafter ‘GCTF, *Political Declaration*’); GCTF, *Terms of Reference*, sec. 4, available at <https://www.thegctf.org/Portals/1/Documents/Foundational%20Documents/GCTF%20Revised%20Terms%20of%20Reference%202017.pdf?ver=2020-01-21-095304-547> (last visited 7 August 2021). Formally, the GCTF speaking through its member states generally argues that there is no presumption of binding force in its work. *Ibid.* <https://www.thegctf.org/Home/ArtMID/491/ArticleID/46/Eighth-GCTF-Ministerial-Plenary-Meeting-and-delivered-Statements> (last visited 7 August 2021). Political rhetoric aside, this does not mean that no effects follow.

<sup>74</sup> GCTF, *Political Declaration*, *supra* note 73, sec. 2, paras. 7–9.

<sup>75</sup> SC Technical Guide to Resolution 1373, *supra* note 29.

<sup>76</sup> GCTF, *The Hague–Marrakech Memorandum on Good Practices for a More Effective Response to the Foreign Terrorist Fighters Phenomenon*, 23 September 2014; SC Res. 2178, 24 September 2014.

Another example showing similar matters of norm migration is the regulation of kidnapping for ransom by terrorist groups or those affiliated with them, where the GCTF (and FATF) started to raise the profile of kidnapping for ransom as a terrorist financing measure, resulting in the adoption of the Algiers Memorandum laying the regulatory framework framing SC Resolution 2133 on kidnapping for ransom.<sup>77</sup> Here, the translation from ‘soft’ to ‘hard’ has a muted quality and requires careful tracing to be fully understood, underscoring how invisible the pathways of movement between soft and hard norms are in the counter-terrorism context. It is worth noting that this pattern of multi-layered norm movement has its roots in the adoption of SC Resolution 1373, whereby chapter VII was the basis of a shortcut to ‘harden’ (and then substantially expand) the then ‘soft’ source of a non-ratified treaty (the Terrorism Financing Convention) into hard-law binding on all member states.<sup>78</sup>

Third, in the reporting requirements by states under SC Resolution 1373, advice to states in the review process (which is not public and not shared with other states or any human rights oversight entity) and the consistency of normative expectations appear to be so harmonious and precise that they seem to be evolving and hardening in status and effect.<sup>79</sup> Here, the role of CTED in the development of the ‘soft-to-hard’ law continuum requires further study. Notably, the absence of any transparent access to the feedback loop to states makes it challenging for researchers, policy-makers or other UN entities to evaluate the scale of informal compliance occurring and the de facto norm development that occurs through reporting and technical assistance to states.

A fourth example is the role of the OCT and other entities in providing well-funded technical assistance to states in the implementation of soft counter-terrorism standards.<sup>80</sup> Notably, in both the technical assistance and capacity-building 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.<sup>81</sup> This analysis claims that such informal standards and practices do affect international legal norms and regimes, affirming Rodiles’s insights that this process occurs through coordinated interactions among informal bodies and formal international organization entities.<sup>82</sup> The functioning and sub-legalities of the sanctions regime is a case in point.<sup>83</sup> From

<sup>77</sup> GCTF, *Algiers Memorandum on Good Practices on Preventing and Denying the Benefits of Kidnapping for Ransom by Terrorists* (2012), available at [www.thegctf.org/Portals/1/Documents/Framework Documents/2016 and before/GCTF-Algiers-Memorandum-Eng.pdf](http://www.thegctf.org/Portals/1/Documents/Framework Documents/2016 and before/GCTF-Algiers-Memorandum-Eng.pdf); SC Res. 2133, 27 January 2014.

<sup>78</sup> Ginsborg and Scheinin, ‘You Can’t Always Get What You Want: The Kadi II Conundrum and the Security Council 1267 Terrorism Sanctions Regime’, 8(1) *Essex Human Rights Review* (2011) 7. See also Terrorism Financing Convention, *supra* note 61.

<sup>79</sup> SC Res. 1373, 28 September 2001. It is relevant to recall that the non-transparency of the CTC reporting process since 2006 (when reports were no longer publicly available) means that policy-makers and scholars are at a disadvantage in assessing the consistency and precision of the advice to states.

<sup>80</sup> The funding is derived primarily from two states, the Kingdom of Saudi Arabia and Qatar.

<sup>81</sup> FATF, *Mandate*, *supra* note 66, at 8. States also do not make assertions about custom in this context (at least not yet).

<sup>82</sup> Rodiles, *supra* note 39.

<sup>83</sup> G. Sullivan, *The Law of the List: UN Counterterrorism Sanctions and the Politics of Global Security Law* (2020).

the point of view of the legitimacy and transparency of normative legal developments in international law, all of these mechanisms are problematic.<sup>84</sup> The lack of full and equal state participation in the making and oversight of the law is regrettable, raising fundamental questions about consent and legitimacy. Moreover, the multi-layered exclusion of human rights from all levels of norm development, through norm translation and enforcement, demonstrates a systematic and sustained exclusion of rights thinking and enforcement from the soft-law production process. One would expect that treaties, including human rights treaties, would constitute the baseline in normative developments to maintain the effectiveness of the bilateral enforcement model in international law, but counter-terrorism regulation has moved away from that model.<sup>85</sup>

In this regard, it is notable how in practice such legal norms, often produced by a small group of states or new (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 by every state or advancing airline passenger information or passenger name record requirements.<sup>86</sup> It is then translated through a production cycle involving another part of the architecture, for example through a United Nations Global Compact Working Group, 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, non-governmental organizations (NGOs) and civil society are often excluded (and if included, are done so in an ad hoc and patchy manner) and experts in the human rights and international law field play a limited role, if any at all.<sup>87</sup> These 'best practices' then find themselves referenced in state evaluation processes to assess state compliance with SC Resolution 1373. There is an odd disjunction when the same 'best practices' turn out to be entirely sub-optimal in terms of human rights and rule of law protections, and few structural pathways exist to remedy any deficits. Perhaps unsurprisingly, soft law has been absent on the issue of greatest imprecision, the definition of terrorism, where freedom of self-definition is most highly prized by states.

Second is an emerging pattern of these 'soft' standards being fast-tracked into binding legal standards.<sup>88</sup> A useful illustration follows from the most recent UN Security Council Resolution on Terrorism Financing passed in March 2019. SC Resolution 2462 addresses a range of issues related to terrorism financing and is

<sup>84</sup> Given the relationship of soft law to the development of customary international law, exclusion practices have a disproportionate effect on certain historically under-represented States. See Chimni, 'Customary International Law: A Third World Perspective', 112 *AJIL* (2018) 1, at 22–27.

<sup>85</sup> Simma, 'Remarks', 8 *ASILP* (1988) 371, at 377–378.

<sup>86</sup> SC Res. 2396, 21 December 2017, paras 10–15.

<sup>87</sup> Expert inputs tend to be captured by military, intelligence or counter-terrorism voices.

<sup>88</sup> An early warning on this exigency approach to 'soft' law development was voiced by Michael Reisman who noted that law 'which is dictated by certain compelling exigency' may ultimately weaken the entire international law-making system. Reisman, *supra* note 49, at 377.

highly problematic on a number of bases from a human rights perspective.<sup>89</sup> This includes no references to human-rights oversight in the text of the resolution, but rather the invocation of the generic term ‘human rights’ in the context of a highly technical and expansive text obliging states to take concrete steps in regulation of terrorist financing.<sup>90</sup> Human rights in this invocation constitutes merely a decorative fringe with little substance in practice. The odd disjunction between highly specific advice on counter-terrorism measures with direct and specific human rights consequences in a Security Council resolution counter-posed with few and then highly generic references to human rights underscores the larger side-lining of human rights and rule of law mainstreaming in the counter-terrorism arena. It is not by accident that human-rights norms receive lofty invocation and no concrete specificity, and by contrast, states get precise and exact legal guidance on the expectations of legal action on counter-terrorism measures. What is notable is that SC Resolution 2462 adopts and endorses a number of problematic standards related to the risks associated with the non-profit sector, with broad effect for humanitarians and civil society, specifically the elevation of risk assumptions about that sector, with little sustained empirical evidence to prove these claims of risks comprehensively and coherently. The resolution specifically gold-plates the formally soft-law guidance of the FATF and its norm-production process by advocating for its standards as the endorsed practice for and the basis of state action in this arena.<sup>91</sup> In paragraph 4 of the resolution the Security Council urges ‘[A]ll 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’. All to say that 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 shortcut 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

<sup>89</sup> SC Res. 2462, 28 March 2019.

<sup>90</sup> A similar pattern is found in SC Res. 2482, 19 July 2019, on organized crime and terrorism (although SC Res. 2462, 28 March, 2019 is not adopted under Chapter VII of the UN Charter). Moreover, the lack of definition for core terms such as ‘organized crime’, ‘serious criminal offence’ and ‘organized criminal network/group’ in this resolution will leave states entirely free to craft their own definitions of these terms and pursue regulation with a counter-terrorism framework.

<sup>91</sup> SC Res. 2462, 28 March 2019, at 2:

*Underscoring* the central role of the United Nations, in particular its Security Council, in the fight against terrorism and *stressing* the essential role of the Financial Action Task Force (FATF) in setting global standards for preventing and combatting money laundering, terrorist financing and proliferation financing and its Global Network of FATF-style regional bodies (FSRBs), and *taking note* with appreciation of the ‘FATF Consolidated Strategy on Combating Terrorist Financing’ and its operational plan, *Encouraging* Member States to actively cooperate with FATF, including by contributing to its monitoring of terrorist financing risks, *Expressing* its commitment to continue supporting efforts to deny terrorist groups’ access to funding and financial services through the ongoing work of the United Nations counter-terrorism bodies and the FATF and its FSRBs to improve anti-money laundering and counter terrorist financing frameworks worldwide, particularly their implementation.

shift from 'hard'- to 'soft'-law proliferation in counter-terrorism regulation. I believe there is a neglect of the interests of a sizeable number of (non-dominant) states in this emerging regulatory practice and forum shopping and an absence of meaningful consent in the production of the legal norms to which states will be held in practice. There is a grave danger that informal and selective institutions drive law-making in ways that ouster the (albeit challenging) political contestation that characterizes multilateral diplomatic negotiations.

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 to foreign fighters, the Office of the High Commissioner for Human Rights produced an important and timely Guidance to States on Human Rights Complaint Approaches to the Foreign Fighter phenomena in 2018, which was produced through the CTITF Working Group on Human Rights and Rule of Law and signed off on by all members of that Working Group, giving a thorny regulatory issue a meaningful and substantial human rights-based baseline.<sup>92</sup> Shortly thereafter, new guidance was stewarded through the Security Council to shape state responses to 'foreign terrorist fighters', via the Addendum to the Madrid Guiding Principles, creating within the hierarchy a higher placed soft-law framework to regulate the same challenge of returning fighters and their dependent families.<sup>93</sup> The development of the Addendum was a significant opportunity to provide a deep complementary approach, strengthening and enhancing the detailed human rights Guidance to be in sync with the Addendum. However, in practice, there is a competition between the two sources. 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 which affirms the essential importance of human rights to preventing a cycle of violence and terrorism.

## 6 Conclusion

Soft law in counter-terrorism, with some notable exceptions, has been largely ignored by scholars and policy-makers.<sup>94</sup> Even as the pace of soft-law production has intensified since 9/11, information on the dissemination and use of these instruments and standards and on the ways in which they influence policy and norm-making in other domestic, regional or international fora including the United Nations is limited. This article has sought to fill that gap, by clarifying the unique aspects of counter-terrorism soft law as compared to soft-law production in other international arenas. Tracking

<sup>92</sup> OHCHR, *Guidance to States on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters* (2018), available at [www.ohchr.org/EN/newyork/Documents/Human-Rights-Responses-to-Foreign-Fighters-web%20final.pdf](http://www.ohchr.org/EN/newyork/Documents/Human-Rights-Responses-to-Foreign-Fighters-web%20final.pdf).

<sup>93</sup> 2015 Madrid Guiding Principles and 2018 Addendum, *supra* note 10.

<sup>94</sup> G. Sullivan, *The Law of the List: UN Counter-Terrorism Sanctions and the Politics of Global Security Law* (2020); Rodiles, *supra* note 45; Ginsburg, 'Authoritarian International Law?' 114 *AJIL* (2020) 221.

the osmosis between an embedded and powerful counter-terrorism architecture within and beyond the United Nations with abusive national practice,<sup>95</sup> as the fertile ground into which this soft law is injected, affirms the singularity of this legal and political terrain. This analysis emphasizes that soft-law and hard-law standards interact to shape the substance of counter-terrorism obligations, which is something different than soft law filling gaps, or soft law fleshing out existing hard norms with more specific guidance.<sup>96</sup> This article also affirms the permissive effect of soft law on state practice, given that in many counter-terrorism contexts (e.g. preventing and countering violent extremism, the use of certain specialized technologies) the absence of binding treaty norms gives enormous latitude to soft-law emergence and to the stickiness of those norms once they materialize.

In contrast to the UN counter-terrorism state-based framework which is – despite transparency, funding and legitimacy flaws – an inclusive regulatory structure including all UN member states and operating within the legal structure of the UN Charter, these new institutions, including but not limited to the FATF and GCTF, are opaque, inaccessible and lack parallel global legitimacy. Nonetheless, they have consolidated as essential regulatory spaces promoted and supported by certain states within the global counter-terrorism architecture. The states that created and lead them remain deeply invested in their value as elite spaces,<sup>97</sup> where policy and politics are done without the challenges or necessary accommodations of the UN or regional multilateral structures. As these entities – initially and still – respond to the particular counter-terrorism interests of selected states, they include a narrower set of perspectives and inputs, while being decisively under-informed by human rights law, and without meaningful input from civil society. The virtual exclusion of civil society from these highly influential regulatory bodies underscores the patterns of exclusion and accountability gaps evident across the counter-terrorism architecture but acute in these settings. Via a process of ‘exportation/integration’ to other UN structures and through national-level implementation, these entities have facilitated highly problematic global regulation that might not have emerged had formal law-making processes been fully complied with. These processes raise fundamental concerns about transparency, fairness, sovereignty and oversight. The proliferation of these bodies and norms – importing language and practices from one another – contributes simultaneously to increased fragmentation and consolidation of global counter-terrorism regulation in underappreciated ways.

The intersection of soft-law norm production and powerful new institutions produces a number of challenges, including maintaining the integrity of multilateral law-making, ensuring transparency in norm obligation and weakening human rights

<sup>95</sup> UN Special Rapporteur reviews on counter-terrorism national laws, regulations and policies found at: OHCHR, *Comments on Legislation and Policy* [www.ohchr.org/EN/Issues/Terrorism/Pages/LegislationPolicy.aspx](http://www.ohchr.org/EN/Issues/Terrorism/Pages/LegislationPolicy.aspx) (last visited 7 August 2021).

<sup>96</sup> This soft-law/hard-law dynamic is most clearly seen in the human rights arena.

<sup>97</sup> A.-M. Slaughter, *A New World Order* (2004); D.W. Drezner, *All Politics Is Global: Explaining International Regulatory Regimes* (2007); N. Krisch, ‘The Decay of Consent: International Law in an Age of Global Public Goods’, 108 *AJIL* (2014) 1.

protection in the counter-terrorism action. This occurs notwithstanding a strong rhetorical commitment to human rights in the United Nations' Global Counter-Terrorism Strategy allied with foundational human rights protections contained in the UN Charter and the importance of human rights to the institutional identity and 'brand' of the United Nations. There are no quick fixes for the gaps identified here but a number of positive changes to procedure and substance might lessen some of the legitimacy challenges that currently attach to the soft-law counter-terrorism arena. They include that, as a starting point, UN entities only endorse non-UN standards in the counter-terrorism arena when they are consistent and in line with international law, human rights and international humanitarian law. This would avoid the current seepage from new entities into traditional hard-law arenas that have a sizeable deficit in the sovereign consent and engagement of states. There is also an urgent need for a comprehensive mapping and review of all counter-terrorism soft-law instruments, specifically addressing their human rights lacunae. The broader and unresolved challenge remains the marginal status of human rights and rule of law standard setting in the global counter-terrorism architecture as a whole. Unless there is a transformative fix of the structure that enables, produces and implements counter-terrorism law, practice to address the absence of human rights compliant standard setting and a meaningful capacity to review state behaviour against such standards, we will continue to see a counter-terrorism architecture that side-lines and ignores human rights, with predictable rule of law deficits and human rights violations being enabled in national contexts. Marginalizing human rights in counter terrorism not only inflicts systemic and specific harms on individuals and groups but delivers a chimera of security that can be likened to a colossus with clay feet – security that is both tenuous and illusionary. Twenty years after 9/11, we can and should do better.

