POSITION OF THE UNITED NATIONS SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WHILE COUNTERING TERRORISM ON THE USE OF "BATTLEFIELD" OR MILITARY PRODUCED EVIDENCE IN THE CONTEXT OF INVESTIGATIONS OR TRIALS INVOLVING TERRORISM OFFENCES

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Position of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism on the use of "Battlefield" or military produced evidence in the context of investigations or trials involving terrorism offences

This document sets out the position of the UN Special Rapporteur on the risks posed by various recently produced documents and positions relating to the use of "battlefield" or military produced evidence in the context of investigation or trials involving terrorism offences.[1]

I. Introduction

In the last two years, a number of initiatives regarding the use of such "battlefield" evidence have been drafted or are in the process of being developed. They include:

- The United Nations Counter-Terrorism Executive Directorate (CTED) "Guidelines to facilitate the use and admissibility as evidence in national criminal courts of information collected, handled, preserved and shared by the military to prosecute terrorist offences", developed within the UN Global Counter-Terrorism Coordination Compact Task Force Working Group on Criminal-Justice, Legal Responses and Countering the Financing of Terrorism;[2]
- Non-Binding Guiding Principles on Use of Battlefield Evidence in Civilian Criminal Proceedings, co-produced by the United State Departments of State, Justice and Defence;[3]
- NATO Policy on Battlefield Evidence;[4]
- The Global Counter-Terrorism Forum (GCTF) Abuja Recommendations on the Collection, Use and Sharing of Evidence for Purposes of Criminal Prosecution of Terrorist Suspects;[5]
- The EUROJUST 2020 Memorandum on Battlefield Evidence;[6] and the Council of Europe Committee on Counter-Terrorism Draft Recommendation CM/Rec (202XX)XX of the Committee of Ministers to Member States on the use of information collected in conflict zones as evidence in criminal proceedings related to terrorist offences.[7]

This position paper focuses on global and regional documents.

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[1] A/74/335 (concerning the broader position of the Special Rapporteur on the production of guidelines and other 'soft law' standards in the counter-terrorism arena.
[2] https://www.un.org/sc/ctc/wp-content/uploads/2020/01/Battlefield_Evidence_Final.pdf.
[3] https://theiij.org/wp-content/uploads/Non-Binding-Guiding-Principles-on-Use-of-Battlefield-Evidence-EN.pdf.
[4] https://www.nato.int/cps/en/natohq/news_179194.htm.
[5] https://www.thegctf.org/Working-Groups/Criminal-Justice-and-Rule-of-Law.
[6] https://www.eurojust.europa.eu/battlefield-evidence-increasingly-used-prosecute-foreign-terrorist-fighters-eu.
[7] https://rm.coe.int/cdct-ge-2020-03-rev-draft-recommendation-on-the-gathering-of-evidence-/1680a032f0.

This position paper sets out areas of key concerns to the mandate of the Special Rapporteur concerning the collective impacts of these policy developments on the protection and promotion of human rights. In particular, the Special Rapporteur affirms the centrality of fair trial to the successful prosecution of terrorist acts; the necessity of maintaining the integrity of civilian trials for offences of terrorism; the balance that inheres in rules of evidence or procedure in national legal systems to the overall protection of fair trials; and the importance of distinct spheres of competence for military and civilian authorities in the discharge and operation of the criminal law.

Prosecution of persons who have committed serious violations of international law including international humanitarian law, international criminal law and international human rights law is a priority for the Special Rapporteur.[8] The necessity for prosecutions of serious terrorist offences also remains a critical dimension of accountability at the national level. The Special Rapporteur stresses that there is significant experience of prosecuting terrorism offences in national legal systems across a range of serious criminal acts, as well as extensive experience of prosecuting serious crimes in international and hybrid criminal tribunals.[9] It is important to underscore that many jurisdictions have functioned admirably and effectively within the rules requiring adherence to due process of law on the admissibility and standards of proof for the use of evidence in criminal trials involving terrorist acts. She also acknowledges that, by virtue of the nature of certain criminal acts, the methods and means of producing and using evidence particularly elevate the importance of maintaining the rigor of human rights protections so as not to undermine the rule of law which can be particularly determinantal to thereafter addressing the underlying factors and causalities to terrorism.[10]

The Special Rapporteur recognizes the significance of fair and human rights compliant trials, the need for professionalism and protection of key actors engaged in the prosecution of acts of terrorism, and the necessary prosecution of acts that constitute serious violations of international law, including international humanitarian law and human rights law. The mandate stresses the centrality of fair trial as protected by international law, including for those charged with acts of terrorism,

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[8] A/75/337, paras. 37–41 & para 47.

[9] Noting for example that in the United States "federal civilian criminal courts have convicted more than 660 individuals on terrorism-related charges since 9/11." Military commissions have resulted in only eight convictions, "three of which have been overturned completely and one partially". See https://www.humanrightsfirst.org/resource/myth-v-fact-trying-terror-suspects-federal-courts. Further, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda convicted and sentenced a combined 152 individuals for serious violations of international law (https://www.icty.org/en/content/infographic-icty-facts-figures & https://unictr.irmct.org/en/tribunal). Hybrid tribunals have also seen success in prosecuting violations of international law. These include the Special Court for Sierra Leone (9 individuals convicted and sentenced, http://www.rscsl.org/), the Extraordinary Chambers in the Courts of Cambodia (https://www.eccc.gov.kh/en/case-load) (3), the Special Tribunal for Lebanon (https://www.stl-tsl.org/en/the-cases) (1) and the Extraordinary African Chambers (1) (http://www.chambresafricaines.org/)

[10] Joint Study on Global Practices in Relation to Secret Detention in the Context of Countering Terrorism of the Special Rapporteur on the promotion and protection of human rights while countering terrorism; the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the Working Group on Arbitrary Detention; and the Working Group on Enforced or Involuntary Disappearances, A/HRC/13/42; and Report of the Senate Select Committee on Intelligence, Committee Study of the CIA's Detention and Interrogation Program, available at https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf.

notably under Article 10 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights. Fair trial is not only a legal obligation. In the mandate's view, the abrogation of fair trial, or short-cuts around it prompted by counter-terrorism regulation, have long-term and serious consequences for the rule of law, and these consequences are often hardwired into the negative cycle of grievance and alienation from fairness and the rule of law that perpetuates violence in many societies.

The right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law. Fundamental principles of fair trial, such as the presumption of innocence, can never be derogated from, and the guarantees of fair trial may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights. This includes any trial leading to the imposition of the death penalty, the use of statements or confessions or other evidence obtained in violation of the absolute prohibition of torture and other ill-treatment (except if used as evidence that torture or other ill-treatment occurred). Further, the collection of evidence can implicate a range of other non-derogable rights that are key to a fair trial, such as the absolute prohibition of torture and ill-treatment and the absolute prohibition of arbitrary detention. Respect for the right to a fair trial is multifaceted and engages a number of rights beyond those that apply directly to trial proceedings. Because the fair trial guarantees of a suspect must be respected in **all** stages of any criminal proceedings, and the rights of victims and witnesses must be guaranteed from the beginning of a criminal procedure, a number of other fundamental rights are engaged by the use of "battlefield" evidence, which have an important and co-dependent relationship with the right to a fair trial.

The Special Rapporteur stresses the importance of protecting and ensuring the independence and impartiality of judges, particularly those involved in trials of terrorism, given the unique challenges and pressures they may face. She underscores the particular challenges being faced by defense lawyers in the discharge of their professional and ethical obligations to persons charged with terrorism across the globe,[11] including the challenges of access to persons detained for and charged with terrorism offences, the conflation of lawyers defending persons charged with terrorism with their clients, the challenges of equality of arms including access to evidence, and the exclusions of independent lawyers from many terrorism courts on the grounds of national security.

The Special Rapporteur cautions that the use of "battlefield" evidence is being pressed in response to the urgent need to address deficits of legal accountability for crimes that have been committed in Iraq and Syria. Yet, for legal systems that appear to be pressing for the admissibility of evidence which may not currently be lawfully admissible under their national law, the rationale to construct extraordinary and exceptional rules of admissibility are premised on an undefined caseload that in some

[11] Memorandum by Yale Law School's Allard K. Lowenstein International Human Rights Clinic on Threats to the Right of Access to Counsel in the Context of Counter-Terrorism, available at https://law.yale.edu/system/files/area/center/schell/2020.10.04_memo_access_to_counsel.pdf. See also UN Human Rights Committee, General Comment 32, para. 23.

countries amounts to less than a hundred cases.[12] In many of these same countries, it remains unclear what meaningful efforts have been made to bring prosecutions based on national law or universal jurisdiction (where applicable). The Special Rapporteur identifies a more profound failure to use existing and established methods and capacity to prosecute war crimes under domestic law in multiple countries that are capable of doing so.

Similar to other exceptional measures introduced to address seemingly difficult challenges in prosecuting terrorism crimes,[13] the use of "battlefield" evidence contains a number of defined and well-trodden risks to fair trial. These include ensuring the extra-territorial application of the human rights regime to military actions and intelligence actors operating abroad. Reliance on military actors, whose training and experience is inconsistent with law enforcement training and whose knowledge and methods in bringing complex criminal cases through criminal justice systems is generally nil; or on intelligence actors whose methods of evidence and information gathering is regulated by specific rules, often lacking independent oversight and deficient in human rights adherence,[14] can also be particularly problematic. Collection of evidence often engages the arrest, detention and interrogation of suspects which, in turn, engages questions related to the right to detain, the length of detention and the review of detention, as well as to the treatment of individuals during detention. Any lowering of the guarantees regarding these requirements can lead to evidence collected in violation of basic human rights. When this is combined with the lowering of standards relating to chain of custody, it can eventually lead to its use as evidence in trials, violating the principle of exclusion. Other risks include the reliance on information collected by other partners through information–sharing agreements lacking in oversight and control, the abandonment of specific requirements such as prohibitions on hearsay,[15] or the use of classified information, all of which violate the principle of equality of arms.[16]

The Special Rapporteur highlights that, in addition to General Comments and case law by international and regional bodies, there is also a wealth of highly professional and well-regarded expertly produced guidance and other resources relating to investigation and trial proceedings in highly fraught contexts. Some key examples include:

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[12] According to the latest report of the UN SG on the threat posed by ISIL to international peace and Security, there are 2,000 male foreign fighters (of fighting age) currently held in Syria. S/2020/95, para. 9.

[13] For example, the right to silence in the UK, was first used in prosecuting terrorism crimes and then expanded to organized and other crimes. See, e.g., the Criminal Evidence (Northern Ireland) Order 1988 resulted in the abrogation of the right to silence for paramilitary defendants in the jurisdiction, and subsequently Northern Ireland's Police and Criminal Evidence Order 1989 (PACE (NI)) introduced four-day pre-charging detention (previously only forty-eight hours were allowed), and altered rules on admissibility of confessions, which were ultimately applied to the UK as a whole and to non-terrorism trials.

[14] See A/HRC/37/62; and A/HRC/34/60.

[15] D Glazier, 'Precedents Lost: The Neglected History of the Military Commission' (2005) 46 *Virginia Journal of International Law* 5, 54–55.

[16] Article 13, European Convention on Human Rights; and Article 14, International Covenant on Civil and Political Rights. See also UN Human Rights Committee, General Comment 32, paras. 8, 13 and 32.

- International Committee of the Red Cross and the Geneva Academy, "Guidelines on investigating violations of international law: Law, policy and good practice";[17]
- ICJ, Counter-Terrorism and Human Rights in the Courts: Guidance for Judges, Prosecutors and Lawyers on Application of EU Directive 2017/541 on Combatting Terrorism;[18]
- International Standards relation to promotion of truth, justice, reparation & guarantees of non-recurrence;[19]
- Rule-of-Law Tools for Post-Conflict States, OHCHR;[20]
- Joint study on the contribution of transitional justice to the prevention of gross violations and abuses of human rights and serious violations of international humanitarian law, including genocide, war crimes, ethnic cleansing and crimes against humanity, and their recurrence;[21]
- Transitional Justice after Oppression: Complexity and Effectiveness;[22]
- Gender and Transitional Justice Training Modules, UN Women & ICTJ;[23]
- Reports of the Special Rapporteur on promotion of truth, justice, reparation and guarantees of non-recurrence;[24] and
- Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups.[25]

II. Key issues with existing documents relating to evidence collected by the military (battlefield evidence)

A. General Concerns

(1) Creation of exceptionalities

One of the most concerning aspects of these documents as a whole is that they relate to evidence collection in the context of offences committed abroad by foreign fighters and that they encourage the creation of new exceptionalities in the investigation, prosecution and trials related to offences of terrorism. These documents as a group appear to encourage and support State adoption of national legislation or practice related to "battlefield" evidence with little meaningful reflection on the human rights or rule of law implications of this move. As noted above, the empirical case justifying this move has not been adequately made. As the Special Rapporteur has already

[17] Guidelines on Investigating Violations of International Humanitarian Law: Law, Policy, and Good Practice (2019).
[18] Available at https://www.icj.org/wp-content/uploads/2020/11/Guidance-counter-terrorism-ENG-2020.pdf.
[19] Available at https://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/InternationalInstruments.aspx.
[20] Available at https://www.ohchr.org/Documents/Publications/HR_PUB_14_4_Archives_en.pdf.
[21] A/HRC/37/65.
[22] Available at https://unu.edu/publications/articles/transitional-justice-after-oppression-complexity-and-effectiveness.html.
[23] Available at https://www.ictj.org/multimedia/interactive/gender-and-transitional-justice-training-module-series.
[24] Notably, A/HRC/36/50, paras. 27 and 64; A/HRC/27/56, para. 86; A/72/523, paras. 35 and 89.
[25] Available at https://www.unicef.org/mali/media/1561/file/ParisPrinciples.pdf.

explained,[26] where States adopt counter-terrorism laws that directly and substantially impinge on the full and equal enjoyment of human rights, both restrictions on rights and emergency law are implicated.

There is a very real risk that national legislation adopted hastily to address what is presented as 'exceptional situations' linked to the prosecution of foreign fighters require substantive restrictions, limitations or even derogations under the international human rights framework. None of the documents explicitly make that point, nor do they bring any justification regarding the legitimacy, necessity and proportionality of the envisaged measures. This is true as regards justifying a lowering of human rights protection for those offences **and** to differentiate them from the prosecution and trial of other international or transnational crimes (other acts of terrorism, such as terrorism financing), or other serious crimes, such as war crimes and crimes against humanity.

This risk is not mitigated by broad statements to the effect that all measures must "comply with human rights". The mandate has consistently critiqued the inadequacy of this phrase to address the specific and substantial human rights obligations of states with regard to new or modified counter-terrorism practice. This superficial human rights statement takes no account of the broader effect that cumulative measures that gnaw away at the rights to fair trial and due process can have on non-derogable rights, or of the macro impact that the many exceptional counter-terrorism measures have on the general legal economy at the national or international level.

The documents addressed in this position paper all use the language of 'exceptions'. Guideline 1 of the UN CTED "Guidelines" refers both to "exceptions" and to "genuinely exceptional circumstances" caused by conflict, post conflict and high-risk situations.[27] The GCTF's Abuja Recommendations refer to the "especially acute" challenge of collecting evidence in relation to the "growing threat posed by FTFs and returnees" (Part V of the recommendations). In turn, the language of exceptions is then used to justify a lowering of human rights protection. The Special Rapporteur takes this opportunity to underscore the essential point that exceptional or emergency measures are required to meet a specific legal threshold under international law, and any measures taken in response must be necessary, proportionate, and non-discriminatory.[28] None of these documents take due account of this obligation.

Further examples of an exceptionality approach are found in the GCTF Recommendation 19, on respecting international law and human rights, which states that "some flexibility may be needed to take into account the valid security concerns that come with using classified or sensitive information . . . Some out of the box thinking and non-traditional methods may be required" as well as in the chapeau to Part V which refers to "chaotic and insecure" situations rendering the use of normal procedures and judicial cooperation "very difficult" or "not possible" (Part V). Examples are also found in the CoE draft Recommendations which state that "the general requirements of fairness" should apply to all criminal proceedings, but that "[n]ational security considerations may, in certain circumstances, call for procedural restrictions to be imposed in cases involving highly sensitive information" and that

[26] A/HRC/37/52.
[27] See also GCTF Abuja Recommendation 20.
[28] A/HRC/37/52.

"in assessing the overall fairness of criminal proceedings in relation to the prosecution of terrorist offences, the exceptional circumstances under which the information has been collected in conflict zones should be taken into account".[29]

Importantly, the documents call for States to adopt legislation or amend existing legislation[30] to recognise the "unique" circumstances of collecting information in conflict, immediate post-conflict and high-risk situations.[31] "High-risk situations", as used in the CTED "Guidelines", the CoE draft Recommendations[32] and in the GCTF Recommendations,[33] are defined as situations that "might include, inter alia, a State or region in which a state of emergency applies or a State or region that is plagued by, or under the control of, a terrorist organization".[34] Clearly, this will not always meet the "exceptional situation" threshold that justifies the imposition of a state of emergency. The Special Rapporteur notes her concern at the development of a new nomenclature that appears to circumvent the treaty obligations of States with respect to the appropriate use of derogation or reliance on limitations. The CoE's definition of "conflict zone" as "an area affected by armed conflict or an area in an immediate post conflict or a high-risk situation, where terrorist offences have been perpetrated"[35] is not only overly broad so as to go beyond any "exceptional situation" to which emergency measures can be applied, but it also denotes an unhelpful circularity with the definition of "high-risk situations" in other documents. It remains unclear entirely how this language of "conflict zone" is to be reconciled with the parallel due process obligations of States under international humanitarian law, which further provides specific guidance to States in respect of fair trial and the observance of 'essential judicial guarantees'.[36]

(2) Legal nature and status of the documents

The ambiguous legal nature and status of the documents examined in this position paper is also a cause for concern. The Special Rapporteur has addressed elsewhere the increasingly important role of "soft law" standards and new institutions in the regulation of terrorism since 2001.[37] The use of this legal practice in the realm of global security has substantially altered the law-making landscape and undermined the relevance of other legal regimes. In almost all of the arenas in which soft law regulates counter-terrorism, human rights are visibly side-lined and marginalized in the norm production, oversight and implementation phases. Many of the documents examined in the present brief, of unclear legal status and issued by a Special Political mission of the Security Council,[38] or regional or sui-generis organisations, bodies or groups, contain similar shortcomings and challenges as those posed by the development of soft law for the regulation of counter-terrorism.

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[29] Chapter II, sects. 4 and 5
[30] GCTF Abuja recommendation 20; CoE Draft Recommendation Chapter III, sects. 6 and 7; CTED "Guideline" 5.
[31] CTED "Guideline" 5
[32] Chapter I, sect. 2.
[33] GCTF Abuja Recommendation 20.
[34] CTED "Guidelines" Annex 2, Glossary of terms.
[35] Chapter I, sect. 2.
[36] A/75/337, paras. 15, 16 and 40.
[37] A/74/335.
[38] U.N. Security Council Resolution 2395 (2017), para. 2.

The starting point is a purported gap in national legislations, which the documents' suggestions and recommendations aim to fill without any of the legitimate law-making processes at play. This suggests that the objective (and the likely outcome for many States) is for the documents identified here to be transposed into formal and binding legal frameworks at the national level; indeed, many of them request that specific legislation and other measures be adopted.[39] Given the gaps of legal precision, clarity, and, in respect of some of the documents, the weakness of the legal analysis provided, this move is highly concerning to the Special Rapporteur.[40]

The documents' use of cross-fertilization, cross-referencing, message duplication and recurrent invocations of the same rules, often formulated in processes that are non-transparent and not accessible to all States, aims to present as regular conduct and practices that would have previously have been considered a challenge to State sovereignty. Similarly, multiple references to binding and existing legal human rights and humanitarian law norms and UN Security Council resolutions suggest that the "guidelines", recommendations and memorandum are no more than an authoritative re-statement and re-purposing of the existing state of the law, and they seemingly present the transposition into national frameworks as un-challenging and international law-compliant. The Special Rapporteur does not accept this to be the case, and rather views these documents in sum as seriously undermining existing international treaty and customary law with respect to fair trial.

For example, although the CTED "Guidelines" state their consistency with hard law, they often substantially deviate from established norms and standards:

- They suggest the inclusion of evidence-gathering mandates into highly regulated Status of Force Agreements without referring to that body of law,[41] or the constraints that exist on the role of military operating under state of force agreements in participating in or contributing to domestic or international legal proceedings. The key point here, of course, is that the military's role in criminal law proceedings is set not by battlefield evidence advice but by the overarching bodies of IHL, ICL and IHRL.
- They accept that the military may need reduced procedural safeguards and standards relating to chain of custody requirements, and that States should provide clear guidance on "what constitutes *reasonable requirements* to preserve the chain of custody" (emphasis added) (Guideline 24). This advice is on its face inconsistent with the treaty obligations of States in respect of fair trial.
- They suggest that a "good practice for handling [reliability and admissibility] issues is that the more serious the irregularity, the more serious the consequences", which is a non-existing principle under human rights law, and so it is unclear as a matter of law what basis is claimed for this position.[42]

[39] E.g. CoE Draft Recommendation Chapter III, sects. 6 and 7; GCTF Recommendations 19 and 20; CTED "Guideline" 5.
[40] Rob Cryer, The UN Guidelines on "Battlefield" Evidence and Terrorist Offences: A Frame, A Monet, or a Patchwork? available at https://www.justsecurity.org/72094/the-un-guidelines-on-battlefield-evidence-and-terrorist-offences-a-frame-a-monet-or-a-patchwork/.
[41] Guideline 13.
[42] Guideline 22.

- While they purport to respect UN positions on non-cooperation with judicial processes that may lead to capital punishment, they also promote the use of diplomatic assurances or the establishment of guidance to implement safeguards as a basis for such cooperation.[43] The Special Rapporteur and other Special Procedure mechanisms have identified substantial weaknesses in the reliance on diplomatic assurances in particular as regards the protection of the customary international law principle of non-refoulement.[44]

These vague rules not only deviate from accepted human rights norms and standards, they also imply that such deviation is a necessary requirement in these circumstances. As such, they are inconsistent with established international law standards.

Questions of due diligence are also raised by production of these documents. This is particularly notable in the case of the UN CTED "Guidelines", which state in their preface that the document "is a first attempt at the international level to address this complex issue" and "will require future review by relevant stakeholders, Member States, civil society, and academics". Contrary to this statement, which should entail that the document be referred to as a "Working" or "Discussion" Paper, it is published and made publicly available as "Guidelines",[45] and it seemingly provides guidance and makes recommendations to States on a number of issues, including on the possibility of adopting legislation and modifying current rules on the use and admissibility of evidence in criminal procedures. If the document was not so intended, it should have been transparently recorded and categorized as such.

This obviously poses a risk that Member States will use and reference these "Guidelines" for their practice.[46] Such materialisation can already be found in the September 2020 Eurojust Memorandum,[47] in the GCTF Abuja Recommendations,[48] and in the US Non-Binding Guiding Principles on Use of Battlefield Evidence in Civilian Criminal Proceedings.[49] The Special Rapporteur is deeply concerned about

[43] Introduction, p. 10 and "Guideline" 11.
[44] See e.g. https://undocs.org/en/CAT/C/31/D/199/2002; https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=25403 https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=18925
[45] This document developed within the UN Global Counter-Terrorism Coordination Compact Task Force Working Group on Criminal-Justice, Legal Responses and Countering the Financing of Terrorism has not been endorsed by the Special Rapporteur or by OHCHR, two members of the Working Group.
[46] The UN Secretary-General has noted, in relation to the "Guidelines", that the "first edition of the guidelines is intended to serve as the basis for discussions with Member States on their development of domestic policies and legal frameworks. Member States are encouraged to make full use of the document and contribute to its subsequent review in order to comprehensively cover new issues, such as the need to develop detailed guidance for the detention, arrest and questioning of witnesses and victims", S/2020/95, para 65.
[47] The 2020 Eurojust Memorandum, p. 10, refers to these "Guidelines" as notably "launched" in response to UN SC resolution 2396.
[48] Section V of the Recommendations note that "[s]everal international initiatives are currently being developed to support the role of the military, provide guidance and clarify the mandate that would be needed, as well as the modalities that can be used. In a UN context, the 'UN Guidelines to facilitate the use of and the admissibility as evidence of information preserved, collected and shared by the military' will be able to provide such guidance".
[49] Which notes that "these non-binding principles may complement and augment similar battlefield evidence efforts undertaken by the United Nations Counterterrorism Executive Directorate and the Global Counterterrorism Forum". Section B "Background", p. 3.

the possibility that these Guidelines may be referred and acknowledged in UN Security Council resolutions, giving them a status wholly contrary to their stated aim.[50] Given the profoundly political context in which counter-terrorism entities operate, it is likely that norm establishment would yield to possible tensions or conflicts between international human rights and humanitarian law norms, on the one hand, and the counter-terrorism framework, on the other.

(3) Respect for international human rights and humanitarian law norms

There is a serious overarching concern with these documents relating to their approach to, consideration for and inclusion of international human rights and humanitarian law. Despite numerous references to the need to respect international humanitarian law and international human rights law,[51] and the need to observe the key principle of the rule of law, it is clear that beyond general exhortations, all of these documents fail to provide a sufficiently granular human rights-based analysis of the impact of the recommendations on human rights and humanitarian law, as well as specific and well-defined ways in which the recommendations ought to be implemented in a human rights-compliant manner.

The CoE draft Recommendations contain a very generic clause on safeguards, which broadly states that States must act in accordance to the European Convention on Human Rights and other international human rights standards and that all measures must be proportionate, in accordance with the rule of law, and non-discriminatory. Specific references are made to the rights to a fair trial, with a caveat relating to procedural restrictions for reasons of national security, and to the prohibition of torture.[52] It is clear that this is wholly insufficient in light of the possible restrictions that can result from the draft recommendations, which would certainly have benefited from a more granular human rights assessment of the measures that are envisaged.

Similarly, some specific concerns pertaining to the CTED "Guidelines" include:

- References to "respect" for human rights law rather than language reflecting affirmative state obligation.
- Reliance on the ICCPR, with little to no reference to other universal obligations, notably international criminal law or customary international law, which artificially and inaccurately limits the scope of human rights obligations and results in an incomplete picture of the fully applicable body of law.
- Specific references to some rights (including fair trial rights, prohibitions on torture and inhumane treatment, and detention) while information relating to these rights is often separated into text boxes and footnotes, which can result in a disjointed analysis of the applicable human rights standards.

[50] Noting this concerns is also shared by some States see e.g. Statement by representative of the Russian Federation Mikhail Shabaltas at the virtual open briefing of the Security Council Counter-Terrorism Committee on "The role of judges, prosecutors and defence counsel in bringing terrorists to justice, including the effective use of battlefield or military-collected evidence", 12 Nov. 2020, available at https://russiaun.ru/en/news/ctc_1211#!.

[51] For example, 'human rights' are referred to over 15 times in the body of the UN CTED Guidelines", and over 20 times in the GCTF's Abuja Recommendations.

[52] Chapter II, sects. 3, 4 and 5

- No specific and clear articulation of the ways in which the use of evidence collected by the military would be in breach of international human rights, international humanitarian law and international criminal law obligations.

Assessing the scope and content of State obligations under international human rights law and international humanitarian law in the context of counter-terrorism requires grappling with complex questions. Despite the challenges, it is critical to address the compatibility of counter-terrorism efforts with international human rights and humanitarian law. Expert and impartial human rights and humanitarian law practice is imperative to avoid the increased politicisation, fragmentation and diminution of norms in this space through the conflicting interpretation of norms that regulate the prevention and countering of terrorism. UN entities, as well as regional organisations and other initiatives and groups aimed at supporting Member States, should strive to provide nuanced and accurate assistance and advice, consistent with authoritative interpretations and implementation of international humanitarian law and international human rights law by UN judicial and quasi-judicial mechanisms, including human rights treaty monitoring bodies and regional law, while taking into account the pre-eminent role of ICRC in the field of humanitarian law. Such an approach appears to be largely lacking in the documents examined.

Specifically, as a member of the Global Compact Working Group in which the "Guidelines" were drafted, it remains unclear to the Special Rapporteur how the values and principles that inform the rule of law and international human rights treaties, including dignity, equality and due process, were taken into systematic consideration and included therein. It is clear that input from a broad and diverse range of independent civil society actors was neither sought nor included in the drafting or reviewing process. Such concerns are also salient to the way in which other such documents are being drafted,[53] with the result that they all fail to provide the kind of human rights specificity that is needed to be treaty-law compliant.

(4) Ambiguities around the scope of application

The documents relating to the collection and use of battlefield evidence aim to address various types of scenarios in which the military and intelligence bodies may be brought to collect or process information that could subsequently be used as evidence in criminal proceedings. Several of these involve the military of one government deployed on the territory of another State, as part of a regional force or not. The absence of deployment standards combined with frequent endorsement of military participation in evidence-gathering leaves an unclear standard for when forces can or should be deployed and involved in evidence collection. It is worth noting that none of the documents specify what types of forces count as military and do not articulate whether states should apply the principles to contractors and others outside of the chain of command in addition to regular armed forces.[54]

[53] The mandate of the Special Rapporteur has sought engagement with the CoE Committee on Counter-Terrorism in charge of drafting the Recommendations, but has, thus far, not received a reply.
[54] CoE draft Recommendation 15 (Chapter V) notes that States are encouraged to develop their cooperation with, inter alia, private companies and contractors, which raises a host of serious concerns given the past record of some military and intelligence contractors.

A very serious and overarching concern relates to the extraterritorial application of human rights law, which is implied by all the documents as a sine qua non for the collection of evidence abroad and its use in a national context. For example, the UN CTED "Guidelines" state that "the military must respect IHL and IHRL, as applicable, when collecting, handling, preserving and sharing information",[55] while the GCTF Abuja Recommendations state that "because of their presence on the battlefield, the military personnel may be able to contribute to the collection of relevant information that can be used as evidence in court. Such activities must be conducted consistent with international law".[56]

Most documents, in exhorting States to respect international human rights law in the collection of evidence abroad, fail to consider the numerous past and current examples of States attempting to circumvent the applicability of their human rights obligations when operating abroad in military, counter-terrorism or security operations in fragile conflict or post-conflict environments. Where States have adopted the position according to which a State can do abroad what it cannot do within its territory, there are very grave risks to encouraging the military to be involved in the process of collecting, processing, handling and sharing information to be used in criminal proceedings. Ultimately, evidence collected in violation of human rights law, including the prohibition of arbitrary detention, torture and other ill-treatment, could be used in criminal proceedings absent any possibility for this to be contested given a State's position on the extraterritorial application of its human rights obligations, notwithstanding the documents' exhortations regarding human rights.

On the question of establishment of jurisdiction addressed by the CTED "Guidelines", the Special Rapporteur notes that they fail to address serious human rights concerns arising from the pre-determined 'distribution' of jurisdiction. Guideline 13, which stresses that "States should also consider informing other States whether and to what extent the troop receiving State has authorised the troop-sending State to conduct law-enforcement functions" fails to consider the very real possibility that a State may attempt to limit its extraterritorial jurisdiction. Similarly, Guideline 15, which refers to setting up an "efficient distribution system, with different States taking responsibility for various suspects and cases", fails to take into consideration that some countries, both troop-sending and troop-receiving, have very low fair trial standards and guarantees. The Guidelines also do not recognise the immense benefits that arise from multiple jurisdictional options, as well as from the introduction of universal jurisdiction for serious crimes. Further, the Guidelines fail to address possible sovereignty concerns in the transnational criminalization of terrorism in conflicts, which may establish an expansive jurisdiction that breaks the critical nexus between the State's territorial sovereign rights in relation to criminal and constitutional norms.

Finally, and extremely worryingly, the draft CoE Recommendations envisage that "where appropriate" States should make "full use of the information that may be used as evidence collected in conflict zones to prosecute suspected terrorists for offences other than terrorism",[57] thereby paving the way for lower fair trial standards in

[55] "Guideline" 2.
[56] Chapeau, Section V.
[57] Chapter VII, sect. 21.

application of violations of international criminal law, international humanitarian law and gross and serious violations of human rights.

(5) Challenges to legal certainty and legality

The Special Rapporteur is also gravely concerned that the documents contain vague and broad terms that have no or unclear grounding in international law. The CTED "Guidelines" are designed to apply to the prosecution of "terrorism-related crimes as criminalized in national legislation and as described in the relevant international instruments and Security Council resolutions, including offences committed by [Foreign Terrorist Fighters] and sexual-violence crimes committed with a terrorist intent, whether committed against women or men".[58] They reference the "terrorism conventions" and Security Council Resolutions and direct the reader to the United Nations website (footnotes 21 and 22). In a document purporting to focus on and specify rules regarding terrorism evidence, this reference is, in the Special Rapporteur's view, wholly insufficient. The mandate of the Special Rapporteur has already addressed on numerous occasions the dangers of relying on national definitions of terrorism, which are often too broad, too imprecise and vague, and too ambiguous, and which fail to comply with the principles of legality and legal certainty, necessity, proportionality and non-discrimination.[59]

The reference to "Foreign Terrorist Fighters" in all of the documents is also a cause for deep concern. The description contained in Security Council resolution 2178 (2014) has no broader grounding in international law, and such *sui generis* regulation appears to disregard the fact that the totality of international law (and not cherry-picked aspects of it) apply to their treatment and that of their families. The term and the nomenclature that has emerged with it attached to family members of foreign fighters, the majority of whom are women and children (such as "affiliated" or "associated"), has no protective basis, thereby leaving individuals caught up in the maelstrom of armed conflict profoundly vulnerable.[60] These individuals are not "beyond" the protection of the law, as that view is inconsistent with the elemental basis of both human rights and humanitarian law. No existent rule of human rights and humanitarian law (whether treaty or customary law) excludes their protection; the opposite is true, given that both bodies of law demand it.[61]

Similarly problematic is the reference to "sexual-violence crimes committed with a terrorist intent, whether committed against women or men".[62] The Special Rapporteur notes that although this term is used six times in the CTED "Guidelines", at no point is a definition given or reference made to any international law document that would contain such a definition. It is clear that in the international arena, studies and reports are emerging that show a link between conflict-related sexual violence and terrorism. This is notably the case with UN Security Council resolution 2331 (2016), the first to address the nexus between trafficking, sexual violence, terrorism and transnational

[58] Introduction, p. 10.
[59] A/HRC/43/46.Add.1, para. 14 (Kazakhstan); A/HRC/40/52/Add.5, paras. 16–23 (Belgium); A/HRC/40/52/Add.2, paras. 14–20 (SR Emmerson Saudi Arabia report); A/HRC/25/59.Add.2, paras. 43–44 (SR Emmerson Chile report); A/HRC/13/37/Add.2, para. 11 (SR Scheinin Egypt report)
[60] A/75/337.
[61] A/75/337, paras. 37–41.
[62] See also the reference in the GCTF Recommendation 6.

organized crime. However, this is meant to pave the way for more systematic monitoring and reporting, as well as for the eligibility of victims of sexual violence committed by terrorist groups for official redress as victims of terrorism. Similarly, since 2014, the acknowledgement of sexual violence as a tactic of terrorism, integral to recruitment, resourcing and radicalization strategies, links this issue formally to global action aimed at curbing terrorist financing, including the work of relevant sanctions regimes.[63] Seven of the non-State actors listed by the Secretary-General under this framework are also designated as terrorist groups pursuant to Security Council resolutions 1267 (1999), 1989 (2011) and 2253 (2015), the ISIL (Da'esh) and Al-Qaida sanctions list.[64] However, the expression "sexual-violence crimes committed with a terrorist intent, whether committed against women or men" simply does not exist as a legal category in international law. Even more worrying is the reference to a "terrorist intent", which again, has no legal meaning nor legal definition and is problematic given the absence of an international definition of terrorism. The creation of a legal category in a "Guideline" of unclear legal status, endorsed by one UN entity, cannot replace, and should never be seen to replace, sovereign international law-making processes.

Similarly, the term "high-risk situations", included in the "Guidelines", the CoE draft Recommendations and the Abuja Recommendations and defined by the Guidelines as "situations of high insecurity, yet not meeting the threshold of an armed conflict, making it impossible for civilian law-enforcement actors to perform their tasks of investigating crimes, collecting evidence, and arresting suspects without risking their own life, or without proper protection from security forces", has no grounding in international law. It points to the manufacture of new categories of action which have neither the consent nor the consideration of all States.

The Special Rapporteur recalls that counter-terrorism legislation must be limited to the criminalization of conduct that is properly and precisely defined on the basis of the provisions of international counter-terrorism instruments and is strictly guided by the principles of legality, necessity and proportionality. The definition of terrorism in national legislation should be guided by the acts defined in the Suppression Conventions,[65] the definition found in Security Council resolution 1566 (2004) and also by the Declaration on Measures to Eliminate International Terrorism and the Declaration to Supplement the 1994 Declaration on Measures to Eliminate International Terrorism, which were approved by the General Assembly.[66] The model

[63] Report of the Secretary-General on conflict-related sexual violence, S/2017/249, para. 2. See also para. 8: "For [violent extremist groups] actors, sexual violence advances not only such objectives as incentivizing recruitment, terrorizing populations into compliance, displacing civilians from strategic areas, eliciting operational intelligence and forcing conversions through marriage, but also entrenches an ideology based on suppressing women's rights and controlling their sexuality and reproduction. It is further used to generate revenue, as part of the shadow economy of conflict and terrorism, through sex trafficking, sexual slavery, enforced prostitution and the extortion of ransoms from desperate families".
[64] Report of the Secretary-General on conflict-related sexual violence, S/2017/249, para. 3.
[65] See, e.g., the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo Convention) of 1963; the Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention) (1970); the International Convention on the Taking of Hostages (Hostages Convention) of 1979; the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971; and the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, of 1973; E/CN.4/2006/98 paras. 25–50.
[66] S/RES/1566 (2004); A/RES/51/210.

definition of terrorism advanced by the mandate provides clear guidance to States on appropriate conduct to be proscribed and best practice.[67]

B. Specific negative impact on due process and fair trial rights

The documents can have a range of deleterious impacts on rights that are fundamental to due process and fair trial.

(1) Evidence obtained in violation of non-derogable rights and secret evidence

Extremely worryingly, these documents appear to facilitate the use of secret evidence. Specifically, the CTED "Guidelines" limit the scope of "equality of arms" obligations to the equal opportunity to question witnesses, propose judicial standards accepting classified evidence with heavy prosecutorial and third-party discretion, and support the consideration of "alternate options" in the face of witness intimidation and ultimately the possible use of anonymous witnesses. Further, they propose allowing the prosecution to work with the military to arrange a variety of methods to facilitate military personnel testimony. These methods include testimony by videoconference, partial concealment of witness identity, use of written statements, and the appointment of legal representatives to present evidence on behalf of the collecting military.[68] They do not explore limitations to the use of intelligence information in judicial settings and safeguards to protect fundamental fair trial principles with any depth, but instead engage in a discussion about how to facilitate the blurring of these lines. This ignores practical issues with "dual purpose" interviews or the questioning of suspects for judicial purposes after suspects have given information for intelligence purposes. In sum, the "Guidelines" appear to support and endorse largely removing existing separation principles without a proportional discussion of safeguards.

Such concerns also arise from the CoE draft Recommendations, according to which States should take "all necessary measures" in order to make information collected by military personnel and by intelligence services in conflict zones admissible as evidence under national procedure laws and regulations.[69] They also call for the development of legal frameworks for the sharing of information collected in conflict zones.[70] No specific references to any limitations to the use of such evidence in a trial nor to any safeguards are made, save for the generic respect for human rights clauses.

The GCTF Abuja Recommendations explicitly refer to an increased role for both civilian and military intelligence agencies, particularly in situations of conflict, and call for mechanisms and procedures, including more "informal cooperation mechanisms", for the sharing of intelligence information, taking into account national security concerns and right to a fair trial.[71] They recommend that States establish "mechanisms" that can "turn intelligence into usable evidence".[72] In addition to recommending "flexibility" to "take into account the valid security concerns that come with using classified or sensitive intelligence information", they also

[67] A/59/565 (2004), para. 164(d).
[68] "Guidelines" 20 and 21.
[69] Chapter III, sects. 6 and 11.
[70] Chapter III, sects. 7 and 12.
[71] Chapeau to Part IV and Recommendation 16.
[72] Recommendation 18.

recommend that States formulate guidelines that judges can take into account when assessing certain (pre-) trial violations of human rights and international law and that officials should consider whether 'tainted' evidence obtained in serious violation of international law should be shared, bilaterally or multilaterally.[73] In addition, the Recommendations encourage States to develop guiding principles to assist criminal justice actors in assessing the balance that needs to be found between the circumstances under which information or evidence has been collected and the observance of the chain of custody, as well as the integrity of the criminal proceedings.[74] On the question of sharing intelligence information, the document simply notes that "it is understandable" that States will especially share intelligence with only those countries whose services they trust and that some States require in their legislation and regulation that sharing is conditional on human rights requirements, and it recommends that sharing is done on strict assurances that the information provided will not result in any human rights violations. The Special Rapporteur is deeply concerned that no clear red lines, consistent with States' international human rights obligations, are placed regarding sharing with States whose human rights record is problematic.[75]

The CoE draft Recommendations note that in cases of missing links in the chain of custody, States are encouraged to take legislative or other measures to ensure that evidence can be used, taking into consideration the exceptional circumstances under which relevant stakeholders collect information in conflict zones.[76] Such language absolutely undermines key principles relating to the need to respect fundamental principles of international human rights law when collecting evidence so as to procure any individual with a fair trial. The Special Rapporteur anticipates such a position to be *prima facia* incompatible with the obligations contained in the European Convention on Human Rights.

(2) Absolute prohibition of arbitrary detention, torture and ill-treatment

Central to collection of evidence are questions surrounding the arrest, detention and treatment of individuals suspected of acts of terrorism. This fundamental aspect of the collection of evidence by both the military and intelligence services is not treated in any detail by the documents examined, the exception being the UN CTED "Guidelines". These acknowledge that "terrorists may also be captured [by], or surrender [to]" the military who may then "question or interrogate" them.[77] Further, Guideline 19, which is fully dedicated to the questioning of terrorist suspects, states that "questioning for intelligence purposes may frequently precede efforts to obtain a confession for admission in court. It is recommended that States develop procedures that would identify what additional steps may be taken by criminal investigators to enhance the likelihood of admissibility of a statement where the suspect has already been interrogated for intelligence purposes".

The Special Rapporteur is extremely worried at the underlying assumptions used as a basis for the development of the "Guidelines", despite their statements that

[73] Recommendation 19.
[74] Recommendation 21.
[75] Recommendation 17.
[76] Chapter VI, sect. 20.
[77] "Guideline" 18.

international human rights law and international humanitarian law need to be respected. The use of the word "terrorist" in this context reveals the extent to which the document fails to comply with basic human rights principles including the non-derogable presumption of innocence. Further, and extremely worryingly, Guideline 19 seems to accept not only that "confessions" made to intelligence bodies following "questioning for intelligence purposes" could be admissible as evidence in a court, but that this could be done simply where "additional steps" are taken by investigators to "enhance the likelihood of admissibility of a statement where the suspect has already been interrogated for intelligence purposes".

An entire CTED "Guideline" is dedicated to the development of policies, Standard Operating Procedures (SOPs) and other instructions on how the military can carry out, assist in, or facilitate the collection, handling, preservation and sharing of information with civilian-criminal justice actors for civilian proceedings.[78] Past experience in areas such as Iraq, Afghanistan, Syria and the Sahel show the complexity of finding or adopting clear legal bases for detention by international forces and for ensuring that rights-compliant procedures are respected in such theatres, even when status of force agreements (SoFA) have been signed and SOPs exist.[79] Similarly, the integration of criminal justice actors with the military has also shown its limits, often due to a lack of trust of between partners. In the Special Rapporteur's view, the Guidelines should be more objective and transparent about the inherent limitations of SoFAs and SOPs, particularly when combined with attempts to limit the extraterritorial application of international human rights law.

A more granular analysis of the human rights impact of these statements, informed by practice, should have led the "Guidelines" to weigh in more carefully, and to refer specifically to the large amount of work done by UN Human Rights bodies, including quasi-judicial bodies, on this issue.[80] The ability to convict a suspect on the basis of a confession, without any further supporting evidence, is a key contributing element to the pervasive use of torture. Therefore, the inadmissibility of evidence obtained under torture, enshrined in article 15 of the Convention Against Torture, is one of the most crucial safeguards against abuse in the criminal justice system. It not only removes a prime incentive for torture but, as evidence obtained under torture is highly unreliable concerning the veracity of the statements, it also helps ensure that no innocent person is convicted. The Special Rapporteur notes that confessions alone should never be sufficient for a conviction and should always be supported by further evidence. Additional safeguards should also be included, such as the presence of counsel during all interviews, and their systematic videotaping, as practical, effective technical safeguards against torture.

While the "Guidelines" do refer to clear human rights prohibitions concerning detention and acknowledge that more comprehensive and detailed guidelines on detention are required (footnote 50), it remains that the legal basis and procedures for arrest and detention are often patchy in situations that the Guidelines aim to cater for.

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[78] "Guideline" 7.
[79] Helene Cissé et Allan Ngari, "Garantir un procès équitable aux présumés terroristes au Mali", ISS, Mars 2020.
[80] See, e.g., Special Rapporteur on torture, A/HRC/13/39/Add.5, para. 98. Special Rapporteur on Torture, Universal protocol for interviews, "States must carry the burden of proving that confessions were obtained without duress, intimidation or inducements", A/71/298, para. 98.

The prohibition of arbitrary detention[81] is recognised both in times of peace and armed conflict and, together with the right of anyone deprived of liberty to bring proceedings before a court in order to challenge the legality of the detention, are non-derogable[82] under both treaty law and customary international law. Arbitrary deprivation of liberty can never be a necessary or proportionate measure, given that the considerations that a State may invoke pursuant to derogation are already factored into the arbitrariness standard itself. Further, administrative security detention presents severe risks of arbitrary deprivation of liberty.[83] In times of international armed conflict, internment or detention outside the framework of criminal justice is authorised and regulated by IHL.[84] In situations of non-international armed conflict, IHL provides for the humane treatment of those individuals detained, but does not provide precise rules regarding the circumstances in which individuals who are an alleged threat to safety can be detained. As human rights law continues to apply in these circumstances, the guarantees afforded by article 9 ICCPR remain applicable.

(3) Use of special or military courts

This concern also arises from the CTED "Guidelines". By failing clearly to put forward a preference for regularly constituted courts, a key danger inherent to the "Guidelines" document is that it implies that a clear option is the creation of special rules for military evidence collection that will be used in special or military courts with special or military judges. The "Guidelines" acknowledge that international law recognizes the danger of military or special courts.[85] However, the reference is undercut by its context. The "Guidelines" intertwine their discussion of regularly constituted courts with statements regarding the UN's position on capital punishment, apparently narrowing the scope of those concerns to situations involving capital punishment. Finally, even though the "Guidelines" acknowledge the application of ICCPR Article 14 and Common Article 3, they also appear to endorse the use of military or special tribunals in exceptional circumstances. The "Guidelines" bury much of the nature of courts discussion in footnotes, where it is less accessible, and they simply note that "[t]rials by the military or special tribunals must comply with IHRL and IHL",[86] although one of the fundamental concerns with such tribunals is the sheer difficulty of ensuring compliance with basic principles relating to fair trial, notably those relating to independence, impartiality and equality of arms. Revealingly, the "Guidelines" also argue that "[s]tates should consider adopting legislation which recognizes [the] unique circumstances [under which the military collects information] to enable the introduction as evidence of information collected, handled, preserved or shared by the military before national criminal courts in terrorism-related cases".[87] The Guidelines' reference to the potentially acceptable use of special courts in "exceptional circumstances" and emphasis on the "unique nature" of military evidence suggests an implicit endorsement of the use of military evidence in special tribunals. There appears to be a logical link, which is not disavowed by the

[81] UN Human Rights Committee, General Comment 35, para. 12.
[82] UN Human Rights Committee, General Comment No 29 (2001), paras. 11 and 16.
[83] UN Human Rights Committee, General Comment 35, para. 15.
[84] Articles 42, 43, and 78 GC IV.
[85] Introduction, p. 10.
[86] Introduction, p. 10.
[87] "Guideline" 5.

"Guidelines", between the "exceptional" nature of military evidence and the "exceptional" use of special courts.[88]

The "Guidelines" propose altering the historic separation of militaries from judicial mechanisms without addressing or recognizing the rationales for the divide. The "Guidelines" seem to suggest that national prohibitions on the use of military evidence are products of a failure of those systems to evolve and meet modern needs for counterterrorism tools.[89] The "Guidelines" do not acknowledge that the limitations on the use of military evidence are a result of legitimate concerns about relying on information gained during military operations in civilian mechanisms. This is particularly glaring in its statement that "law enforcement tasks . . . are [historically] assigned to civilian criminal-justice actors" without discussion about the reasons. The "Guidelines" endorse sharing of information between military actors and civilian justice mechanisms without corollary discussion of appropriate oversight mechanisms or safeguards.[90]

C. Sharing of information and use of databases

This issue is an important aspect of the documents examined. The Special Rapporteur recalls that data collection must be examined with a holistic regard to appropriate human rights and legal safeguards at all stages. Biometric and other data provides for a singularly useful tool for accurate and efficient identification and authentication of a person and is therefore particularly sensitive.[91] There are human rights implications at each stage of data usage, including collection, retention, processing and sharing. Mass collection also creates a need for secure systems for data storage and processing to mitigate the risk of unauthorized access. The unique trans-border aspects of data collection, use, storage and transfer make the obligations of states of nationality in respect of their citizens' rights particularly acute; they also implicate sovereignty concerns, such as the consent of territorial states about the collection of such evidence.

Further, due to its sensitive character, biometric data should always be collected and handled in line with recognized data protection principles, including the principles of lawfulness and fairness, transparency in collection and processing, purpose limitation, data minimization, accuracy, storage limitation, security of data and accountability for data handling. While applying data protection rules in an amended format to national security processes may be warranted, such adjustments must not lead to curtailed safeguards, insufficient transparency or inadequate oversight. Importantly, the principle of purpose limitation must be respected. Purpose limitation requires data to be collected with a specific, defined and legitimate purpose in mind (purpose specification) and not

[88] On exceptional courts see generally Fionnuala Ní Aoláin & Oren Gross, Guantanamo and Beyond: Exceptional Courts and Military Commissions in Comparative Perspective (2013).
[89] "Currently, many criminal-justice systems do not accept the introduction as evidence of information collected, handled, preserved or shared by military personnel . . . before national criminal courts in terrorism-related cases. Legislators and courts should consider reviewing their domestic legal systems to . . . understand the bars to admissibility for such information and discuss whether and how to ensure that such evidence can meet the admissibility requirements". Introduction, p. 9.
[90] Section III.B, pp. 14–16.
[91] Krisztina Huszti-Orbán and Fionnuala Ní Aoláin, "Use of Biometric Data to Identify Terrorists: Best Practice or Risky Business?" https://www.ohchr.org/Documents/Issues/Terrorism/biometricsreport.pdf.

used for a purpose that is different from or incompatible with the original purpose (compatible use). Furthermore, relevant authorities must pay due regard to data minimization by restricting collection and processing measures to data that is necessary or relevant for accomplishing the legitimate purpose for which data was collected.

The "Guidelines" document's reference to data fails to consider the relevant human rights implications, including on the right to privacy (Article 17 ICCPR), which functions as a gateway right to the protection of a range of fundamental rights. As one of the foundations of democratic societies, it plays an important role for the realization of the rights to freedom of expression, opinion, peaceful assembly and association.[92] It can also have adverse impacts on the right to equal protection of the law without discrimination, the rights to life, to liberty and security of person, fair trial and due process, the right to freedom of movement, the right to enjoy the highest attainable standard of health, and the right to have access to work and social security. As such, any such interference to the right to privacy must be implemented pursuant to a domestic legal basis that is sufficiently foreseeable, accessible and which provides for adequate safeguards against abuse. Any restriction must be aimed at protecting a legitimate aim and respect the principles of necessity, proportionality, and non-discrimination.

Conclusion

The Special Rapporteur reaffirms the urgent need for justice, truth and reparation for all victims of the very serious violations of human rights and humanitarian law that have occurred in countries and contexts profoundly affected by terrorism. States that can deliver justice in accordance with international human rights law therefore have a responsibility to prosecute individuals against whom there is sufficient evidence of criminal behaviour, and sanction them appropriately through fair trials that comply with due process. Yet the necessary accountability for serious violations of international law will only be meaningful if delivered in compliance with international law. The proliferation of these various recommendations and Guidelines do not advance that objective and are regrettably likely to undermine human rights and the rule of law. The Special Rapporteur urges States to pay close attention to these developments and engage proactively to protect and support the rule of law and human rights. She raises her singular concerns about the encroachments on State consent and the principles of full engagement in the legal processes that affect all states that follow from the production methods used for some of these documents. She urges regional and UN human rights entities to engage fully on the further use or development of these documents, and for civil society and human rights organizations to be fully aware of the menace to the protection of fair trial embedded in these exceptional approaches to counter-terrorism.

[92] General Assembly resolution A/RES/68/167 (2013); and General Assembly resolution A/RES/73/179, which stresses in particular that there may be particular effects on women and children and those who are vulnerable and marginalized. See also report of the UN High Commissioner for Human Rights, A/HRC/27/37.