

SOFT LAW, HARD CONSEQUENCES

This briefing is a summary of the 2019 General Assembly report (A/74/335) of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. The report analyses the impact of the increased proliferation and use of “soft law” regulation in the counter-terrorism arena on the protection and promotion of human rights.

THE PROBLEM



Global and regional counter-terrorism institutions are producing increasing amounts of soft law norms. States are using these standards to regulate terrorism, violent extremism and extremism. Soft law norms are pervasively transforming into formal and binding legal frameworks. However, there is an absence of meaningful human rights expertise and assessment in adopting soft law norms - these are produced through processes that are neither transparent nor accessible.

What is Soft Law?

Soft law constitutes international norms, principals, and procedures that lack the requisite degree of normative content to create enforceable rights and obligations but are still able to produce certain legal effects. Soft law functions as a gap-filler, giving guidance to States and other stakeholders in the absence of binding legal norms.

THE CAUSE



Since 11 September 2001, the UN and various global, regional, and selective institutions, such as FATF, have contributed to steady norm production on counter-terrorism, creating a specific “soft law ecosystem.” Most are produced by a only a small group of States, without consistent and well-defined human rights inputs. Within these entities, the process of norm production is closed – excluding or severely limiting the role of civil society actors and human rights and international law experts.

THE IMPACT

Soft law produced in the counter-terrorism arena inadequately addresses formal human rights obligations of States. In general, these norms do not undergo meaningful human rights scrutiny. Moreover, counter-terrorism norms often employ only the standard phrase, “in compliance with international law, including human rights, humanitarian and refugee law,” instead of substantive human rights content. In general, there is nothing about specific impingements on human rights, how they are to be minimized, and what law and obligations guide States to that end.

These human rights gaps are then formalized when soft law norms are referenced and endorsed in documents produced by the UN entities, such as the Security Council. This result is particularly harmful as weak norms can lead to serious human rights violations undermining security for all. Security and human rights are fundamentally entwined and co-dependent. Security without human rights protections is only an illusion. Human rights violations do not make the world safer or more secure, they undermine the security of all.

HOW SOFT LAW BECOMES HARD LAW



A WEB OF SOFT LAW NORMS

There is a spider's web of soft law counter-terrorism standards being produced by new "soft" counter-terrorism institutions. Access to such institutions has proven difficult and inconsistent for many human rights entities, including the Special Rapporteur - meaning many soft law policies are formulated without a meaningful assessment of their human rights impact. Key institutions include:



FINANCIAL ACTION TASK FORCE (FATF)
Founded in 1989, FATF is considered the global standard setter for policies combating money-laundering and terrorism financing. Its recommendations are not legally binding, but States strive towards compliance due to the benefits linked to membership. Its mandate contains no references to international law or international human rights law.



GLOBAL COUNTERTERRORISM FORUM (GCTF)
Launched in 2011 as an "informal, action-oriented and flexible platform" to combat vulnerability to terrorism, the Forum issues good practices and recommendations on the implementation of counter-terrorism policies. It is unclear whether any national human rights experts consistently interface with the Forum. Access is limited for human rights entities and civil society.



UN OFFICE OF COUNTER-TERRORISM (UNOCT)
Established in 2017 through UN General Assembly Resolution 71/291. It provides leadership on General Assembly counter-terrorism mandates across the United Nations system.



COUNTER-TERRORISM COMMITTEE EXECUTIVE DIRECTORATE (CTED)
Carries out policy decisions of the UN Security Council's Counter-Terrorism Committee, conducts expert assessments of Member States and facilitates counter-terrorism technical assistance to countries.

RECOMMENDATIONS

In sum: More human rights, more participation = more effective and human rights compliant counter-terrorism policies

- 1. Apply human rights standards consistently and unequivocally to counter-terrorism policies:** "Soft law" counter-terrorism instruments should be benchmarked against human rights obligations; comprehensive, detailed, and relevant inclusion of human rights standards should be consistently applied in counter-terrorism soft norm-making.
- 2. Do not endorse counter-terrorism standards without human rights and international law safeguards:** United Nations entities should only endorse non-United Nations counter-terrorism standards when they are consistent with international law, human rights, and international humanitarian law.
- 3. Review and address gaps in counter-terrorism instruments on State level:** States should consider undertaking a comprehensive mapping and review of counter-terrorism "soft law" instruments, addressing their human rights gaps, and providing a road map for enhancing human rights implementation.
- 4. More inclusion of civil society:** All counter-terrorism entities should make standard-setting and evaluation processes more participatory and consistently accessible to a diverse representation of States and civil society stakeholders.