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UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism

By email only: srct@ohchr.org

Dear Ms Ní Aoláin

Call for submissions: 'Soft law' and informal lawmaking in the global counter-terrorism architecture

I am writing further to your request for submissions on the above topic, to assist in the drafting of your upcoming report to the 74th session of the General Assembly in September 2019.

I am a Lecturer at Kent Law School, University of Kent (UK) with a research focus on international security law and governance and a practising solicitor with experience representing individuals in delisting proceedings before the UN Office of the Ombudsperson to the ISIL and Al-Qaida Sanctions Committee. I have previously worked as a consultant researcher for the UN Office of the High Commissioner on Human Rights, helping draft the best-practices document, Guidance to States on Human Rights-compliant responses to the threat posed by Foreign Fighters (launched in May 2018). My forthcoming book (*The Law of the List: UN Counterterrorism Sanctions and the Politics of Global Security Law*) will be published with Cambridge University Press in 2020.

I am currently undertaking research (funded by the British Academy) with Dr Alejandro Rodiles (ITAM University, Mexico) on the role of informal 'platforms' in international security law. Our project – entitled *Global Security Assemblages and International Law: A Socio-legal Study of Emergency in Motion* – analyses the Global Counterterrorism Forum (GCTF) and the Global Internet Forum to Counter Terrorism (GIFCT). It is based on interviews with experts and policy practitioners involved in these informal platforms. A journal article based on this research will be submitted for publication in July 2019. Further details about the project are available at: globalassemblages.org.

My research and practice over the last 10 years has closely followed two interrelated trends – (i) the role of technical experts in creating and shaping global security law and governance; and (ii) the ways informal governance techniques, standards and practices are extending the scope of collective security and weakening international human rights norms. As such, I am suitably qualified to participate in this submission process and am grateful for the opportunity to share my research.

Most academic material on the UN Security Council's post-9/11 governance focuses on the 'global legislation' of particular Chapter VII measures adopted by the Council - including Resolutions 1373 (2001) and 2178 (2014) – and their adverse effects on human rights. This literature is important, but it speaks to only one part of the UN counterterrorism architecture and focuses on the powers of the Council under the Charter. Yet some of the most far-reaching global counterterrorism measures are not contained in Security Council Resolutions, but implemented by technical experts and informal bodies in the shadows of where we usually think international law-making usually takes place.

The Global Counterterrorism Forum and power of informal norms

Although not international law in the conventional sense or binding, the good practices of the GCTF, for example, are nonetheless extremely powerful informal norms. They are increasingly referenced in Chapter VII Resolutions of the UN Security Council and sometimes indirectly shape their content. GCTF good practices align the interests of diverse actors on politically contentious issues (from the use of intelligence in judicial proceedings to the transnational exchange of battlefield evidence) via norm production processes that are opaque and difficult for those inside the GCTF club to influence. The GCTF provides a flexible space for bypassing the multilateral politics of the General Assembly and the veto powers of the Council – which are increasingly seen as being too slow and insufficiently agile to deal with counterterrorist threats to international peace and security. For many of those I have interviewed, including individuals who help found the GCTF, this circumvention was identified as the raison *d'être* of the GCTF as an informal decision-making forum.[1]

Much of the GCTF's work engages issues that affect individual human rights. Yet the protection of human rights is still not embedded in the work of the GCTF in the same way that implementation of security norms is. A relatively narrow group of think-tanks and civil society organisations (CSOs) are contracted to implement GCTF projects and prepare GCTF documents for internal debate and discussion. Despite its 'global' title, almost all research participants interviewed about the GCTF acknowledge that it's agenda and outputs are disproportionately shaped by powerful western states, such the US. Yet because the work of the GCTF is commonly perceived as technical (not political) and soft or informal (not legal), it has not been widely studied, discussed or subjected to scrutiny by lawyers, IR scholars and human rights advocates. Your upcoming report to the 74th meeting of the General Assembly presents a long-awaited opportunity to open a debate on these important issues.

There is an increasing acknowledgement in the academic literature that much current international law-making has become informal, that international authority is exercised by a diverse array of actors, beyond states and international organisations (IOs)[2] and that informal mechanisms (like best practice guidelines, lists and indicators) have can powerful legal and political effects.[3] The rise of informality goes hand in hand with the fragmentation of international law, the proliferation of regimes and relative decline of treaties as the classical form of international law.[4] This turn to informality and private authority has important consequences for the accountability of international organisations (IOs), the legitimacy of international law, the changing nature of collective security and the increasing marginalisation of human rights.[5] To address these issues, there is an urgent need to expand our understanding of international law-making to encompass the full spectrum of formal and informal norm-making activities currently unfolding across the broader UN counterterrorism architecture.

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[1] Interview with former senior US counterterrorism official, New York (September 2018)

[2] See, for example: Alejandro Rodiles and Gavin Sullivan, 'Global Security Assemblages: Studying International Counterterrorism Law in Motion' (draft paper on file with author); Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds.) *Informal international lawmaking* (Oxford University Press, 2012).

[3] Gavin Sullivan, *The Law of the List: UN Counterterrorism Sanctions and the Politics of Global Security Law* (forthcoming Cambridge University Press, 2020); Kevin Davis, Angelina Fisher, Benedict Kingsbury and Sally Engle Merry (eds.) *Governance by Indicators: global power through classification and rankings* (Oxford University Press, 2012).

[4] See respectively: Martti Koskenniemi, 'Fragmentation of international law: difficulties arising from the diversification and expansion of international law: report of the study group of the International Law Commission'. UN Doc. A/CN.4/L.682 (13 April 2006); Margaret Young (ed.), *Regime interaction in international law: Facing fragmentation* (Cambridge University Press, 2012); Joost Pauwelyn, Ramses A. Wessel and Jan Wouters, 'When structures become shackles: stagnation and dynamics in international lawmaking' (2014) 25(3) *European Journal of International Law* 733.

[5] Alejandro Rodiles, *Coalitions of the willing and international law: the interplay between formality and informality* (Cambridge University Press, 2018); Nico Krisch, 'Liquid authority in global governance', (2017) 9(2) *International Theory* 237.

Global Counterterrorism Capacity Building and the Marginalisation of Human Rights

The technical work of implementing counterterrorism norms has powerful legal and political effects. The collection and analysis of aviation data provides a useful example. UN Security Council Resolution 2178 (2014) requires all states to require airlines to provide them with advance passenger information (API) to detect the departure, attempted entry or transit of individuals on the ISIL and Al-Qaeda sanctions list. UN Security Council Resolution 2396 (2017) significantly broadened this requirement to include developing the capability to collect, process and analyse Passenger Name Record (PNR) data, in a manner that respects human rights and fundamental freedoms, to detect the travel of listed individuals as well as foreign terrorist fighters more generally. Implementation of these measures will be assisted through the UN Countering Terrorist Travel Programme (UNCTTP) recently launched by the UN Office of Counter-Terrorism. Despite the profound human rights consequences of processing and sharing aviation data for security purposes, no human rights bodies (such as OHCHR) are this far involved in the UNCTTP project. UN officials I have interviewed about the implementation of these measures have confirmed that they do not incorporate human rights issues into their global capacity building work with states on this issue. Instead, they 'sort of present the facts on issues that they need to be aware of and leave it up to them to make sure that they make an informed decision'.[6] Human rights concerns are simply seen as something that fall outside the scope of the UN counterterrorism bodies actively engaged on this issue. There is no systematic monitoring of whether or how human rights concerns in this area are addressed by states and IOs. This imbalance between the implementation of security measures and the protection of human rights runs through the entire UN counterterrorism architecture, as has been observed by the previous UN Special Rapporteur, Mr. Ben Emmerson QC.[7] The turn towards 'soft law' and informal standard-setting to incentivize compliance in this area only exacerbates this process and further weakens human rights protections.

Global Internet Forum to Counter Terrorism and increasing deferral to private actors

Another area of informal global security governance that I research is the countering of terrorism and extremism online. The GIFCT was set up by Facebook, Microsoft, Twitter, and YouTube in 2017 as an industry-led, self-regulatory approach to countering terrorism and extremism on the internet. It aims to 'disrupt terrorists' ability to promote terrorism, disseminate violent extremist propaganda, and exploit or glorify real-world acts of violence' by 'employing and leveraging technology, sharing knowledge, information and best practices'.[8] The problem of whether (and how) the content moderation practices of social media platforms should be regulated is a deeply contested issue. The fact the UN Security Council and UN Counter-Terrorism Executive Directorate (UNCTED) have repeatedly supported self-regulation by large internet platforms through the GIFCT whilst eschewing a more international and multilateral approach to this issue is problematic. The working practices of the large platforms in this area are incredibly opaque and complex. Facebook, Twitter and Google, for example, all have divergent approaches to what constitutes terrorism and extremism on their platforms shaped by their diverse terms of service and private rules, and some have been criticised as overtly broad.[9] The processes through which machine learning algorithms identify content as terrorist or extremist remain 'black-boxed'.[10] There are limited means for individuals whose rights have been adversely affected by content moderation practices to have meaningful redress. There is little knowledge about how material flagged as terrorist or extremist by GIFCT platforms is subsequently shared with state authorities and security services around the world, nor how states and security

[6] Interview with UN counterterrorism official, London (November 2016).
[7] UN Doc. A/HRC/34/61, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* (21 February 2017), at 15 – 21.
[8] See: https://www.gifct.org/about/
[9] 'UN human rights expert says Facebook's 'terrorism' definition is too broad' (3 September 2018). Available at: http://bit.ly/3221OOg
[10] Frank Pasquale, *The Black Box Society* (Harvard University Press, 2015).

services can flag problematic content for private platforms to action outside the scope of judicial review. In short, informal governance by private actors using artificial intelligence in this area has potentially profound consequences for the protection of human rights. Yet self-regulation continues to be endorsed by leading UN institutions and we have little insight into whether (or how) the large platforms that comprise the GIFCT are taking human rights concerns seriously in their work. Previous interventions undertaken in the course of your mandate, for example, have urged Facebook to adhere to the UN Guiding Principles on Business and Human Rights. Yet there is no indication that this has been taken on board or even considered by Facebook or any other of the GIFCT platforms.

Counterterrorism Lists and Databases

Another area of my research relevant to this enquiry is the UN ISIL and Al-Qaeda listing regime and use of watchlists and databases to counter terrorism, foreign terrorist fighters and extremism.[11] I do not have space in this submission to go into detail on this issue. So, I have enclosed relevant materials and have limited myself here to making three brief comments by way of conclusion.

First, counterterrorism listing is an incredibly opaque process lacking in transparency and due process. There are limited means available for individuals enrolled on counterterrorism lists and databases to challenge their said inclusion, delete the data (if shown to be incorrect) or track with whom such information is shared. The fact that the UN Security Council is currently encouraging states to build watchlists and share watchlist data more broadly without providing any details of appropriate human rights safeguards to be adopted is extremely troubling. It remains wholly unclear how individuals who believe they have been wrongly included in lists and databases can challenge their inclusion and/or delete their data cross different jurisdictions. Greater attention to informal data sharing arrangements between states and IOs on this issue could shed light on this problem.

Second, private risk-management databases (such as *World-Check*) operate alongside the UN ISIL and Al-Qaeda listing regime. When individuals are removed from the UN ISIL and Al-Qaeda list through the Office of the Ombudsperson they remain included on these private databases and continue to experience difficulties opening bank accounts and travelling. Little is known about how private databases interact with and extend public counterterrorism lists, nor how affected individuals might have redress. I am currently representing numerous individuals, for example, who were delisted by the Office of the Ombudsperson but continue to experience grave interferences with their rights and freedoms as a result of the original listing decisions and cannot open bank accounts or work. This points to the urgent need to pay closer attention to the ways UN listing data is shared and extended in scope by private actors and underscores the importance of introducing more robust due process mechanisms at the UN, within states and within private bodies for individuals to challenge their listing and effectively expunge their data. Otherwise, preventative UN listing decisions run the risk of being indefinite in their coercive effects.

Finally, one insight drawn from my research is that the movement of counterterrorism data from one site or format to another is not a neutral process of 'implementation'. Rather, when information

[11] See, for example: Gavin Sullivan and Ben Hayes, *Blacklisted: Targeted sanctions, preemptive security and fundamental rights* (ECCHR, 2011); Gavin Sullivan and Marieke de Goede, Sullivan, 'Between law and the exception: The UN 1267 Ombudsperson as a hybrid model of legal expertise' (2013) 26(4) *Leiden Journal of International Law* 833; Gavin Sullivan, 'Transnational legal assemblages and global security law: topologies and temporalities of the list', (2014) 5(1) *Transnational Legal Theory* 81; Marieke de Goede and Gavin Sullivan, 'The Politics of Security Lists', (2016) 34(1) *Environment and Planning D: Society and Space* 67; Sullivan (n. 3).

moves between sites and formats it *changes* in important ways, enabling new kinds of security action to take place.[12] For example, when the UN ISIL and Al-Qaeda list is made interoperable with API and PNR data used by the global aviation industry to ensure the travel ban is effectively implemented, it not only enables states to identify UN listed persons but also enables the identification of as yet, unknown potential terrorists and persons of interest (through the use of machine learning and AI). Similarly, when information is included in the 'hash-sharing database' of the GIFCT, a new category of information (defined as the most 'extreme and *egregious'* terrorist and extremist material) is created.[13] How that new information is then used, and with whom it is shared, is currently unknown.

I argue that much of the work currently undertaken to *implement* global security norms through the UN counterterrorism architecture is actually *expanding* the scope of international security law through informal means, often with important consequences for the protection of human rights. The jurisgenerative nature of security implementation work needs to be more closely examined. Only by broadening our lens to examine informal governance processes can we get an understanding of how such technical practices are shaping and extending international counterterrorism law in significant ways. Doing so is important and long overdue. To that end I enclose the following publications to assist in your report:

- Gavin Sullivan and Marieke de Goede, Sullivan, 'Between law and the exception: The UN 1267 Ombudsperson as a hybrid model of legal expertise' (2013) 26(4) *Leiden Journal of International Law* 833
- Gavin Sullivan, 'Transnational legal assemblages and global security law: topologies and temporalities of the list', (2014) 5(1) *Transnational Legal Theory* 81
- Marieke de Goede and Gavin Sullivan, 'The Politics of Security Lists', (2016) 34(1) *Environment and Planning D: Society and Space* 67
- Gavin Sullivan, The Law of the List: *UN Counterterrorism Sanctions and the Politics of Global Security Law* (draft monograph, forthcoming Cambridge University Press, 2020)
- Alejandro Rodiles and Gavin Sullivan, 'Global Security Assemblages: Studying International Counterterrorism Law in Motion' (unfinished draft paper)

The final two publications are forthcoming and/or works in progress, so I would be grateful if they were not circulated or published in any way at this time. Both will be updated by mid-August 2019. I would be happy to provide updated versions of both texts at that time, if that would be helpful.

Thank you for the opportunity to participate in this submissions process. If you require anything further, or have any questions, please do not hesitate to get in contact.

Yours faithfully

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[12] Ibid, de Goede and Sullivan (at 79).
[13] Rodiles and Sullivan (n. 2)