

Mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, pursuant to Human Rights Council resolution 31/3.

In this connection, I would like to bring to your attention my views concerning the upcoming review of **the Madrid Guiding Principles, scheduled on 13 December 2018, in particular I underscore the human rights centrality and compliance in addressing foreign fighters.**

Following the passage of United Nations Security Council Resolution 2178 (2014) the Counter-Terrorism Executive Committee produced a series of documents to support and enable states to implement their obligations under that Chapter VII Resolution. The Madrid Guiding Principles were specifically created to enable the creation of practical tools supporting states to stem the flow of foreign fighters. The Principles are a worthy departure to aid states as they seek to translate the broad exhortations of the Security Council into practical measures. As the review of the Madrid Principles is undertaken and an addendum to these Principles is likely to be adopted, I underscore the importance of centralizing a human rights approach to the foreign fighters phenomenon by states. The centrality of human rights to the counter-terrorism endeavour has been confirmed by the sixth review of the Global Counter-Terrorism Strategy (June 2018).¹ The value of a human rights compliant approach to foreign fighters has been specifically elucidated by the CTITF Working Group on Rule of Law and Human Rights in creating the Guidance to States on Human Rights Compliant Approaches to Foreign Fighters² and further advanced by the OSCE Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework.³ Both sets of Guidelines represent the epitome of best practice to mainstreaming and centralizing human rights in every regulatory aspect of state engagement with and oversight of foreign fighters.

I note that when the United Nations Security Council Counter-Terrorism Committee held a special meeting in July 2015 to address regulatory gaps and the need for technical assistance in the regulation of the threat posed by foreign fighters, significant knowledge and capacity gaps were evident. States were struggling to ascertain

¹ <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terrorism-strategy>

² <https://www.un.org/sc/ctc/wp-content/uploads/2018/08/Human-Rights-Responses-to-Foreign-Fighters-web-final.pdf>

³ <https://www.osce.org/odihr/393503?download=true>

and quantify the scope of the threat, and regulation at the domestic level in many states was absent, in progress or in early stage of implementation. States were challenged to use their existing regulatory tools to address and regulate the phenomenon. Since that time, a number of salient differences should be noted. The contours of the threat, at least in terms of the number of persons who joined terrorist groups but specifically the “Islamic State” in Iraq and the Levant (ISIL) and suspected associated groups in Iraq, Syria and other countries are now more accurately known than was the case some years ago.⁴ Particularly, for countries collecting robust data fairly effectively on inwards and outward travel,⁵ the numbers of those men and women who departed to join non-state actor groups is broadly established, we have more accurate data on the numbers of fighters traveling,⁶ data on deaths and casualties,⁷ better analysis on movement between conflict sites, and better statistics on returnees (particularly to European states).⁸ Greater disaggregated data on women and girls is notable,⁹ and increased attention is being paid to children including disaggregation by sex and age. Detention, charging, trial and imprisonment data is also emerging. This tells us that some substantial perimeters of regulation and its scope are well established and this has significant management, legality and regulatory consequences. More accurate global and national level data and greater accuracy in that data, means that a constrained fact-based, intentional and pragmatic approach to the challenge of foreign fighters should be adopted, and Guidance to states should reflect these underlying empirical and regulatory realities.

⁴ See Radicalisation Awareness Network, *RAN Manual: Responses to Returnees: Foreign Terrorist Fighters and Their Families*. July 2017, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/ran_br_a4_m10_en.pdf and See International Centre for the Study of Radicalisation, *From Daesh to ‘Diaspora’: Tracing the Women and Minors of Islamic State*. 2018.

⁵ European Parliamentary Research Service, *The Return of Foreign Fighters to EU Soil* (2018)

⁶ U.S. intelligence assessments suggested that the number of foreign fighters crossing the border from Turkey fell from 2000 each month to about 50 in September 2016.

⁷ With the obvious emergence of a bulge occurrence to be explained as well as having more consistent methodology on baseline data and honesty about data gaps and extrapolation of results from poor or limited data or making conclusions based on poor to limited data. A key point for competent data analysis is the use of mixed methods and systematic integration of quantitative and qualitative methodologies and methods at all stages of an evaluation, a feature notably missing from the data production we are seeing in the FF field. See e.g. Greet Peersman, *Overview, Data Collection and Analysis Methods in Impact Evaluation* (UNICEF, 2014) https://www.unicef-irc.org/publications/pdf/brief_10_data_collection_analysis_eng.pdf

⁸ The Soufan Center, *Beyond the Caliphate: Foreign Fighters and the Threat of Returnees* (2017) estimate that at least 5,600 citizens or residents from 33 countries have returned to countries of origin. It is worth noting data addressing the complex roles that returnees may play on return. Data of direct participation in violence shows a small but deadly reengagement cycle. In parallel, however evidence suggests that a sizeable number may remain engaged in extremist or Salafist environments and/or that they return as high-status bridge-builders to external networks and they may continue to pose a threat by upholding and performing secondary functions within extremist networks. Also, worth noting that despite the strong emphasis on threat in European countries, the regions with the highest number of fighters are estimated to be Former Soviet Republics (8717), the Middle East (7054), Western Europe (5778), The Maghreb (5,356) and S and SE Asia (1568). Soufan Center *id* at 11.

⁹ See International Centre for the Study of Radicalisation, *From Daesh to ‘Diaspora’: Tracing the Women and Minors of Islamic State*. 2018.

From the Special Rapporteur’s perspective, a human rights and rule of law based approach to addressing the phenomenon of foreign fighters is essential in a complex multi-faceted environment and is essential to effective counter-terrorism policy. Such an approach is also indispensable in preventing and countering violent extremism as set out in the Secretary-General’s Plan of Action to Prevent Violent Extremism.¹⁰ In an intersectional and integrated approach to understanding the threats, challenges and opportunities of addressing foreign fighters, the lack of a human rights based underpinning is not an unimportant loss but rather a recipe for greater challenge down the road.

Essential aspects of a human rights and rule of law compliant approach to the regulation addressing Foreign Fighters are highlighted here.

1. A firm legal basis in national law for the regulation of foreign fighters that hews closely to the strict limits of regulation for the specific, defined and identified threat of foreign fighters within the boundaries of international law and does not use the regulatory mandate to address foreign fighters from the Security Council as a basis to apply disjunctive standards to a broad range of actors and groups who do not fall squarely in the category of “foreign fighter”. This matter has been addressed in some detail in my report to the General Assembly.¹¹

2. Any revision or review of the Guidelines requires consistent, precise and detailed references to international law, human rights law, international humanitarian law and refugee law. Specifically, while generic references to human rights and international law found in the UNSCR 2178 are welcome, these are unmoored to any specific requirements of benchmarking or review. However, if we take the Resolution at face value many of the references appear superfluous and do not have any concrete specificity or enforcement unlike unambiguous elements of data collection and criminal justice co-operation. Significant inroads made to this gap is made by the *Guidance to States on Human Rights Complaint Responses to the Threat Posed by Foreign Fighters*.¹² As these Guidelines demonstrate, precision can be supplied in the specific regulatory human rights obligations for states in the foreign fighters sphere.

3. Measures addressing foreign fighters must be proportionate and non-discriminatory, a key tenet of any counter-terrorism regulation as informed by the international law obligations of states. Co-operation between states in the detection of, intervention against and prevention of the incitement of terrorist offences, recruitment to terrorism, and facilitation of travel, of foreign fighters must itself be human rights and

¹⁰ <https://www.un.org/counterterrorism/ctitf/en/plan-action-prevent-violent-extremism>

¹¹ See [A/73/361](#) General Assembly Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

¹² United Nations Counter-Terrorism Implementation Task Force, Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism (2018); See also OSCE *Guidelines for Addressing the Threats and Challenges of “Foreign Terrorist Fighters” within a Human Rights Framework* (ODIHR, 2018)

international law compliant.¹³ The response to the phenomenon of foreign fighters may be intricately linked to the long-term management of threat itself, a point underscored by the ground-breaking UNDP study of pathways to extremism.¹⁴ The Secretary-General's Plan of Action on Preventing Violent Extremism (para 27) addresses this matter directly by noting: "Violent extremism tends to thrive in an environment characterized by poor governance, democracy deficits, corruption and a culture of impunity for unlawful behaviour engaged in by the State or its agents. When poor governance is combined with repressive policies and practices which violate human rights and the rule of law, the potency of the lure of violent extremism tends to be heightened. Violations of international human rights law committed in the name of state security can facilitate violent extremism by marginalizing individuals and alienating key constituencies, thus generating community support and sympathy for and complicity in the actions of violent extremists. Violent extremists also actively seek to exploit state repression and other grievances in their fight against the state. Thus, Governments that exhibit repressive and heavy-handed security responses in violation of human rights and the rule of law, such as profiling of certain populations, adoption of intrusive surveillance techniques and prolongation of declared states of emergency, tend to generate more violent extremists. International partners that are complicit in such action by States further corrupt public faith in the legitimacy of the wider international system." This means that states must pay particular attention to the dangers of overreach, abuse and counterproductive application of counter-terrorism law and practice when addressing the challenges of foreign fighters.

4. Engagement with and support to a thriving civil society sector is an intrinsic part of addressing the push and pull factors that have driven the recruitment to terrorist groups. The Guiding Principles validate and recognize the role of civil society in important ways.¹⁵ However, civil society remains under significant threat in many parts of the globe. I have underscored the ways in which counter-terrorism law and practice is being used to target and undermine civil society actors and human rights defenders across the globe. The Guiding Principles need to acknowledge the abuse of counter-terrorism law and practice, including the regulatory mechanism being created to regulate foreign fighters, and strongly deny the validity of such measures by governments.

5. Foreign fighters are a specific, defined and acknowledged threat. However, as with any form of exceptional legal measure designed to confront a particular threat, mechanisms of ongoing review and a mechanism to sunset the relevant regulatory

¹³ cf. https://www.un.org/sc/ctc/wp-content/uploads/2016/10/Madrid-Guiding-Principles_EN.pdf (part 1 (a)). Note in particular the recent important contribution by Privacy International to this discussion "Unregulated intelligence sharing poses substantive risks to human rights and to the democratic rule of law" (2018) <https://privacyinternational.org/blog/2453/unregulated-intelligence-sharing-poses-substantive-risks-human-rights-and-democratic-rule>

¹⁴ UNDP Journey to Extremism in Africa (2017) <http://journey-to-extremism.undp.org/content/downloads/UNDP-JourneyToExtremism-report-2017-english.pdf>; "Where there is injustice, deprivation and desperation, violent extremist ideologies present themselves as a challenge to the *status quo* and a form of escape"

¹⁵ Guidance Principle 2, Principles 7-9 https://www.un.org/sc/ctc/wp-content/uploads/2016/10/Madrid-Guiding-Principles_EN.pdf

frameworks if the threat is no longer prescient, or is substantially diminished such as to enable states to regulate under less arduous and invasive approaches should be signaled. If sunset clauses are good practice in the domestic context, a mechanism to enable their activation in global regulatory frameworks should also be envisaged and validated.

6. Data collection has become a mainstay of state responses to terrorism in general, and the threat of foreign fighters in particular. Data collection, data sharing, data management, data storage, and data use raise a plethora of human rights concern.¹⁶ The Special Rapporteur notes the particular importance of ensuring a firm legal basis in all aspect of data collection, use and management. The Special Rapporteur underscores the threats to privacy in particular, but also the broader diminution of a range of individual rights in the context of data deployment in counter-terrorism contexts including but not limited to rights to employment, freedom of movement, right to family life, freedom of expression and the potential to impinge on non-derogable human rights. The Special Rapporteur urges that the review give greater regulatory attention to providing specific privacy protection as well as ensuring that data gathering, storage and use is not used as a means to undercut the enjoyment of a broad range of human rights. In particular, the Special Rapporteur recalls the provisions of the International Covenant on Civil and Political Rights, ratified by 172 member states, which provide that no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home, or reputation.

While there are a number of issues that may be raised in the context of this Review, these are the primary issues that I wish to bring to the attention of states and entities involved in the Review Process. The mandate remains willing and available to provide technical assistance and specific human rights guidance to the Counter-Terrorism Committee and the CTED carrying out this important and valuable review task.

This communication, as a comment on pending review of the Madrid Guiding Principles, and any response received from your Excellency will be made public via the communications reporting [website](#) within 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please also note that a copy of this communication will be shared with the Permanent Missions of UK, US, France, Sweden, Netherlands and Peru.

Please accept, Excellency, the assurances of my highest consideration.

¹⁶ General Assembly Resolution 68/167, which expressed deep concern about the negative impact that surveillance and interception of communication may have on human rights.

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freedoms while countering terrorism