



Interview with Fionnuala D. Ní Aoláin

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

Fionnuala D. Ní Aoláin is the United Nations (UN) Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. She was initially appointed to this position by the UN Human Rights Council in 2017 and was re-elected by member States for a further three-year term in 2020. In this capacity she works closely with States and UN entities to advance human rights protections in some of the most difficult contexts globally. She is also a University Regents Professor at the University of Minnesota Law School, and a Professor of Law at the Queen's University of Belfast, Northern Ireland.

In this interview, Ms Ní Aoláin discusses her duties as Special Rapporteur and illustrates the current challenges to the humanitarian space in the context of counterterrorism (CT) regulation.

Keywords: counterterrorism, sanctions, human rights, humanitarian exemptions, United Nations.

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By way of introduction, could you briefly explain your role and responsibilities as the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism? Why was the mandate established, and how have you approached its implementation?

* This interview was conducted by Bruno Demeyere, Editor-in-Chief of the Review.

Thank you for the question. The mandate I hold was established in 2005/06.¹ It was essentially created to address the excesses in the years following the 9/11 terror attack, during which particularly securitized and extreme violations of human rights were recorded, such as torture, extraordinary rendition, arbitrary detention and extrajudicial executions. The gap in the existent human rights system in terms of addressing these issues was made quite evident in the years immediately following 9/11. This was the principal reason behind the creation of the mandate. The mandate, as such, has three capacities: (1) the capacity to conduct country visits; (2) the capacity to engage with individual communications wherein individuals or groups send information to the mandate suggesting human rights violations that arise out of particular CT contexts; and (3) the capacity to issue annual reports to the UN General Assembly. Perhaps uniquely, however, the mandate has an additional set of responsibilities arising out of the fact that it is an entity for the purposes of the Global Counter-Terrorism Coordination Compact,² which is a New York-based institutional structure that coordinates all UN CT practice arising from the work of UN entities on CT-related issues as mandated by the General Assembly and the Security Council. Within the Global Compact, the mandate is the only entity charged with oversight on the interface between human rights and CT.

During my first term of appointment commencing in 2017, I identified four priorities for the mandate: (1) to examine the architecture of CT, including the various organizations and entities that are involved in CT work, both within and outside the UN; (2) to address the negative impact of CT on civil society; (3) to focus on states of emergency and use of exceptional powers in the CT arena; and (4) gender mainstreaming in the CT context. Having been re-appointed in the summer of 2020, I've added two additional priorities, namely (1) CT and technology, and (2) the examination of national CT legislation.

As part of your mandate, you are expected to conduct fact-finding country visit missions. What are some of the particular challenges faced in negotiating and securing these State visits, and how might they potentially hinder the discharge of your duty?

I do believe that being present in a country, and spending time with the government and civil society actors in the field, is one of the most effective ways to engage in a dialogue about CT and its impact on human rights. Without a doubt, many States face ferocious challenges of violence in their respective territories, and often there are difficult choices for governments to make, but expanding the conversation

- 1 For more information on the mandate of the Special Rapporteur, see Human Rights Council Res. 15/15, "Protection of Human Rights and Fundamental Freedoms while Countering Terrorism: Mandate of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism", UN Doc. A/HRC/RES/15/15, 7 October 2010, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/167/28/PDF/G1016728.pdf?OpenElement>.
- 2 For more information on the UN Global Counter-Terrorism Coordination Compact, see: www.un.org/counterterrorism/global-ct-compact.

with them and creating a dialogue is best advanced when you can physically be present in a country and engage with the relevant actors in the field. From the mandate's point of view, the visits are a means to an end, which is to start and establish a continued dialogue with States over an extended period of time. The biggest challenge, however, is getting those visits authorized. Many States claim that they have open access for Special Procedures, but in reality that is a misnomer, and when trying to get a visit, many mandate holders unfortunately fail to secure one. Also, many countries that use CT measures extensively, including P5 members, have never allowed the Special Rapporteur to visit. There are some exceptions to this, however; for example, I would positively highlight France, which invited me to visit in the early months of my first term. This is the kind of leadership you hope to see from a P5 country, wherein they are open to debate and dialogue with the mandate holder on CT measures that are being used in their territory. We also do follow-ups to country visits, which is very important. A good example would be Kazakhstan; I first visited this country in 2019, and we still continue to have a sustained public dialogue on CT issues, which in a sense illustrates to other States what good cooperation looks like. I think the biggest challenge remains that of access to countries which simply refuse to allow Special Procedures to visit. Positively, however, the mandate has never had an experience of being blocked from performing its duty on the ground. In fact, I have been pleasantly surprised by the scale and openness of State engagement, especially since the States that allow access open themselves up to criticism in real and politically risky ways because of the CT measures that are being implemented and scrutinized. In a way, when you criticize States for their conduct it is always under the caveat that they have opened up, which creates a model of best practice for other States to uphold, in ensuring that their CT measures are compliant with human rights and other international legal standards.

In contrast, can you elaborate with examples of good practices followed by States in creating a framework for the domestic adjudication of acts of CT without encroaching upon human rights standards?

I would say good practice is really hard to find in this space. I think it correlates to a broader challenge post-9/11, as we have seen a massive growth in the expanses of the CT realm. We have seen the scale of the definition of "terrorism" being broadened in many countries, for example to include offences like glorification of terrorism, or a whole range of preparatory acts which were not accorded special criminalization status in previous years. Not only are the core acts expanding, but so is the broader space – for instance, the increased criminalization of the pre-criminal space, such as acts of thought or acts of support, which are things that would traditionally fall outside the criminal justice framework but now come under the veil of CT adjudication. There has also been an expansion on the other side of justice after persons have completed criminal sentences for conducts attributed to terrorism, like the expansive criminal justice and administrative law models for maintaining the deprivation of liberty of these individuals, or maintaining continued

oversight, even after a sentence has been finished. Criminal responses to CT have been on a massive growth spurt over the past twenty years, without restraint. Additionally, we have seen enormous growth in the “preventing/countering violent extremism” narrative—a new nomenclature being used by States alongside, and sometimes indistinguishably from, that of CT—and an overall expansion of security measures. As such, it is really difficult to identify good practice. There are some small bright lights, such as in countries that have instituted independent oversight mechanisms for CT—like the UK, which has had a long history of appointing independent reviewers for terrorism, going back to the conflict in Northern Ireland. Their role is to give advice to the government on implemented measures and their legality in the broader scheme of things. Australia has also adopted a similar model. But it is true that there are only very few States which engage in this sort of practice. As such, one of our consistent pleas to States is to appoint independent, well-resourced oversight bodies at the national level.

In your recent report³ submitted to the UN General Assembly, you emphasize the interface between international human rights law and international humanitarian law [IHL] in CT regulation. In furtherance of this, it is pertinent to note that the fragmentation of the international legal order in tackling CT has grown substantially in recent years, for example with the increased involvement of the UN Security Council and its Counter-Terrorism Executive Directorate [CTED], the Financial Action Task Force [FATF], and so on. With so many legal instruments in play, do you think it is possible to ensure that the different mechanisms can maintain a harmonious relationship?

This thread of my work was first expounded upon in my UN General Assembly report A/73/361⁴ in 2018, which focuses really on new institutions and the effects of soft law in the CT space. We should note that since 9/11 the expansion of new entities has been extraordinary, such as the FATF (whose legal status under international law is somewhat indeterminate), the Global Counterterrorism Forum and the Shanghai Forum. In my view, these entities are significant in view of the extent to which they are weakening and undermining the value of multilateral frameworks, as they are composed of selective memberships or “clubs” of certain States only, rather than being more general and inclusive. Moreover, the creation of these entities has had an enormous (negative) effect on treaty-making as the primary mode of regulation in this area. We see an abandonment of treaty-making, and a move to more soft-law norms being produced. Interestingly, soft law in this context is an oxymoron of sorts, as many

3 Fionnuala D. Ní Aoláin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/75/337, 3 September 2020, available at: <https://undocs.org/pdf?symbol=en/A/75/337>.

4 Fionnuala D. Ní Aoláin, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism*, UN Doc. A/73/361, 3 September 2018, available at: <http://undocs.org/en/A/73/361>.

States hold these instruments in higher regard than hard treaty norms. I have warned against this dangerous trend in the past as well. The mandate encounters this problem in country visits and in other contexts, as often States mention that they are comportsing with their soft-law obligations but overlook the hard, treaty-law norms in the human rights and humanitarian law arena, which are far more important.

Therefore, I think harmony is quite absent and that the current situation is convenient for States that are purporting the creation of international law in these fora, with norms produced that suit them and their underlying political agendas. As a result we also get a massive fragmentation of norms, resulting in an “à la carte” menu of sorts, from which States can pick and choose the institutions and treaties that work best for them. This affects the *Grundnorm* nature of human rights and humanitarian law obligations. I find this highly problematic.

You have collaborated extensively with other Special Rapporteurs during your tenure. Can you give us more insight into some of these joint collaborative efforts and tell us why they are important in furthering your mandate?

As States operate more collectively, it’s increasingly important for human rights and humanitarian actors to also accept that operating alone often doesn’t drive the necessary agenda. In some places, speaking with one, concerted voice makes us more powerful and reduces interpretive differences between Rapporteurs to protect norms that we would like to advance. I have been pleased to be part of a number of high-profile collaborative efforts, which have been furthered with great effect and response. One example of this is the collective position of fifty Special Procedure mandate holders on China last year⁵ – almost every single mandate holder and working group addressed a whole range of human rights practice issues in China. Another example was on the issue of annexation, when the Israeli government appeared to be moving towards the annexation of the Occupied Palestinian Territory.⁶ In this case we saw an extraordinary statement by Special Procedures, speaking in one unified voice, on the absolute illegality of the acts of the Israeli State. In conclusion, I think you can see a growing trend of maturity in Special Procedures, in the operationalization of moving together on key issues and key countries, which strengthens us.

Given that your mandate requires you to work with, develop a regular dialogue with, and discuss possible areas of cooperation with relevant actors in the CT space, what are your thoughts on the role played by the UN Security Council and its subsidiary organs, such as the Counter-Terrorism Committee [CTC] and

5 UN Office of the High Commissioner for Human Rights (UN Human Rights), “UN Experts Call for Decisive Measures to Protect Fundamental Freedoms in China”, 26 June 2020, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26006.

6 UN Human Rights, “Israeli Annexation of Parts of the Palestinian West Bank Would Break International Law – UN Experts Call on the International Community to Ensure Accountability”, 16 June 2020, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25960.

the CTED? What are your thoughts on the Security Council's adoption of resolutions in the field of CT which have far-reaching legislative implications for States, and the role of the CTED when it comes to the interpretation of the rules regulating the interplay between IHL and CT? What challenges, if any, does this raise for international law-making and the various other stakeholders that are working in such contexts?

As a member of the Global Compact, the mandate sits on all of the working groups of the Compact as the only entity charged with overseeing the intersection of CT and human rights. I have expressed my reservations in a number of my General Assembly reports⁷ towards the gargantuan growth in the CT architecture. I have warned against it and have said that it needs to be pruned substantially. It is pertinent to note that the funding for these entities comes primarily from two States, comprising approximately 95% of the total funds. This is against the best interests of the UN in managing extra-budgetary funds, and of the operations and projects that are to be undertaken by these entities.

In relation to the CTC, the Special Rapporteur has expressed concern over the closed nature of the body, even in contrast to the access available for human rights experts to the Security Council. For instance, the CTC has largely been closed to independent civil society actors, with some very limited exceptions over recent years. None of this makes for good policy. The whole point of evidence-based policy formulation, whether in the Security Council or in national settings, is to have open debate and discussion, by bringing in people who may disagree to check if the measures/policies are in fact working or not. The lack of public discourse on the findings and availability of information has resulted in non-transparency. We have also, for instance, raised concerns regarding the secrecy and lack of transparency in the reporting process that the CTED leads on behalf of the CTC. Bear in mind that none of the reports that are issued on compatibility compliance by States in furtherance of Security Council Resolution 1373 (2001) and other resolutions have been made public since 2006. This is a travesty. However, I should commend in this regard the government of Finland, which is essentially the first country in twenty years to make its report and its assessment by the CTED public.⁸ The general trend, however, is that it seems to be a closed, non-transparent and highly problematic space, precisely because of the nature of its operation and its lack of accessibility.

On the increased legislative role of the Security Council in the CT arena, it is *sui generis* and completely unique in the legislative realm. It does not apply to other aspects of the Security Council's work. The mandate is of the view that this is an encroachment on the sovereignty of States. We are profoundly aware of how many States are concerned by the impingement of their sovereignty by

7 Particularly UN Docs A/73/361 and A/74/335. See also Fionnuala D. Ní Aoláin, "The Massive Perils of the Latest U.N. Resolution on Terrorism", *Just Security*, 8 July 2019, available at: www.justsecurity.org/64840/the-massive-perils-of-the-latest-u-n-resolution-on-terrorism/.

8 Finland has made its CTC assessment report public on its Ministry of the Interior's website, available at: <https://tinyurl.com/52r7uhbw>.

criminal law regulations induced by the Security Council, which often fails to take into account key issues like human rights and rule of law obligations, including under their own domestic constitutions. I think there is increasing disquiet amongst States, and I hope that, for example, the decision in the summer of 2020 will become an emerging trend, wherein there was a failure to pass a Security Council resolution on terrorism promoted by Indonesia; this was the first time we had a veto on a Security Council resolution in this context.⁹ This may be indicative of States' behaviour leaning towards a need to pause on the Security Council becoming a "global legislator" on CT-related issues.

Regarding the role of the CTED and its substantive interpretations of the interplay between IHL and CT, I have addressed this at length in my most recent report to the General Assembly.¹⁰ The mandate accepts that there is a role for the CTED in acknowledging and affirming fundamental human rights and IHL norms that are not controversial, but it seems to me that it is unacceptable and inappropriate for the CTED to appoint itself as "*primus inter pares*" on the interpretation of IHL. That seems to undermine the vision and structure of the Geneva Conventions and also undermines the key role that the International Committee of the Red Cross [ICRC] plays in this regard, as well as the important role of States in the Diplomatic Conference that were instrumental in the creation of the Geneva Conventions. The CTED is a special political entity and it has an important role to play, but it should ensure that its work does not expand the interpretation of IHL beyond the established, accepted norms agreed upon by States. And it deeply concerns me that there is an increased move to include IHL assessments in those CT reviews carried out by the CTED which – I remind us all – are secret, and as such, there is no way by which we can know what advice States are given. But what we do know is that States have consistently disavowed the application of IHL. It is highly comfortable for States, especially in the context of non-international armed conflicts, to address actors and their acts as terrorist in nature rather than to make the harder and more complicated questions of assessment on what the applicability of Common Article 3 to the Geneva Conventions, and Additional Protocol II, might mean.

It seems to me that in the highly political context of assessment within which the CTED operates, the idea that the CTED will apply IHL faithfully – given the kinds of political pressures that are brought to bear upon it in these assessment processes – seems a worrisome development and even a potential subversion of the Geneva Conventions themselves. The mandate has been very clear that we do not believe this to be appropriate.

From a humanitarian angle, one of the most debated topics in the realm of CT and sanctions is the need for humanitarian exemptions. You identify this in your

9 For the interviewee's assessment of that resolution, which did not pass, see Fionnuala D. Ní Aoláin, "The Challenges of a New UN Security Council Resolution on Foreign Fighters", *Just Security*, 17 August 2020, available at: www.justsecurity.org/72052/the-challenges-of-a-new-un-security-council-resolution-on-foreign-fighters/.

10 See F. D. Ní Aoláin, above note 3, paras 27–29.

recent report as well.¹¹ How have States responded, and what are there general reactions? Even though there are only a handful of States that have incorporated humanitarian exemption clauses within their domestic CT legislations, they are all different from each other. Is there a need to create a uniformly recognized language to ensure that there is no impediment to the provision of impartial humanitarian aid?

In its most recent report,¹² the mandate affirmed the integrity of principled humanitarian action. I have addressed in this report the very serious impact of what I call “a complex web of interwoven counter-terrorism measures, legislation, regulations, donor requirements and terrorism sanctions” on principled humanitarian action. I have been concerned about the ways in which sanctions regimes have led to impediments and delays to humanitarian operations, having impinged upon the core mandates of several humanitarian actors, including the ICRC. We see a proliferation of these measures and an increased interplay between national and international sanctions regimes, and these developments are particularly worrisome.

My view is that the Security Council has a particular responsibility in this regard to prevent the negative consequences of these measures on humanitarian action. But as you may know, we face a number of political challenges in this space. The mandate’s view is that there must be consistent exemption language in all of these CT resolutions, and that there is a need to revisit those resolutions where it has been arguably demonstrated empirically that the resolution has impeded and prevented principled and exclusively humanitarian action. Doing this, in practice, means ensuring that these provisions are included in Security Council resolutions, including affirming humanitarian access, like in Resolutions 2139 (2014)¹³ and 2175 (2014).¹⁴

My view is that at the moment, our best way forward is to focus on particular country resolutions by augmenting the language in a favourable manner where possible, and to focus our efforts on documentation of the negative effects of these measures. One striking feature, not just for CT sanctions, is that while the Security Council continues to effectively legislate, it has spent little effort in documenting the negative effects of these measures, or really any effects at all. Without needing to assess effects, the Security Council can legislate freely and in a more reckless fashion. To resolve this systemic structural problem and to undo some of the harms that have been done over the past twenty years, we must focus on documenting, articulating and ensuring that the costs of sanctions regimes are visible, so that it is no longer viable for the Security

11 *Ibid.*, paras 34, 35.

12 *Ibid.*

13 UNSC Res. 2139, UN Doc. S/RES/2139 (2014), 22 February 2014, para. 7, available at: <https://tinyurl.com/cb6n28zw>.

14 UNSC Res. 2175 (on protection of humanitarian personnel and UN and associated personnel in armed conflict), UN Doc. S/RES/2175 (2014), 29 August 2014, para 3, available at: <https://digitallibrary.un.org/record/778588?ln=en>.

Council to argue that these measures are neutral or cost-free to those in need of protection.

In your annual report submitted to the Human Rights Council as Special Rapporteur in 2019,¹⁵ you focused on the impact of measures to address terrorism and violent extremism on the civic space and the rights of civil society actors and human rights defenders. Can you elaborate further on this and highlight the operational challenges faced in this regard by members of civil society, humanitarian actors etc.?

In this report, my focus was to highlight the negative impacts on CT, the “preventing/countering violent extremism” debate, and the effects of security measures on civil society at large. It goes without saying that the civil society space has been shrinking around the globe. This shrinkage is inherently linked to the increased securitization since 9/11. Human rights defenders are increasingly the target of CT measures and actions by States. The report found that of all communications sent by the mandate to States in almost twenty years, nearly 66% showcased that CT measures directly affected civil society actors rather than furthering actual CT efforts. To state the obvious, this is indicative of lousy CT action by States, especially if you are targeting civil society rather than the violent actors carrying out so-called terrorist acts. Moreover, it speaks to the hardwiring of the misuse of CT frameworks. What we have to understand is that over the past twenty years, CT has become the favoured tool of many repressive States to target those who disagree with them, such as those advocating for women’s rights, the right to protest etc. As such, CT is largely being used as a tool to repress dissenting views to that of the government in power.

The challenge here is on how we can roll back the permissive global environment that has been created for States, from the Security Council outwards, because that is where it all starts. We cannot look at national practice in isolation from the cover and permissibility that is given to States by the invocation of the word “terrorism” without a definition, leaving national systems to define the terminology as they see fit. This is the perfect gentleman’s agreement, as it allows every State to define whoever they want as a terrorist and no one ever calls them out for it. I think we have a clear and evidenced pattern of abuse in this regard.

As such, the lack of a definition of terrorism results in the creation of an overarching veil that allows absolute discretion to States. The only way to address this nationally is by looking at the way each State interprets the use of CT frameworks in its domestic system. We need deep and profound change to CT laws at the national level. These laws currently provide cover and capacity for systemically undermining rule of law and fundamental human rights under the

15 Fionnuala D. Ní Aoláin, *Impact of Measures to Address Terrorism and Violent Extremism on Civic Space and the Rights of Civil Society Actors and Human Rights Defenders*, UN Doc. A/HRC/40/52, 1 March 2019, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/057/59/PDF/G1905759.pdf>.

guise of responding to terrorism, violent extremism and radicalization. From there, if the UN is involved in CT assistance and support, not only human rights entities but all CT entities have to clearly identify State abuse of CT and have an effective means to address it. From a human rights perspective, this work requires as much support as possible from States, and from other human rights entities in the CT system, especially bearing in mind that the Special Rapporteur is a part-time, unfunded position.

From a humanitarian and victim standpoint, one of the biggest challenges is to represent and measure the actual impact of CT measures and sanctions on affected populations. In your experience, can States be held accountable for the impact of their actions on vulnerable communities through their having imposed stringent CT and sanctions regimes?

This is a complicated question because it raises issues of State responsibility under international law. Often, vulnerable communities are the least able and the least well-placed to articulate the harms they have experienced. They are viewed with suspicion and distrust, and are often seen by their societies as tainted or deemed suspect by virtue of security and political classifications around supporting, enabling or being a site/hub for terrorism. The legal issues for accountability are really challenging in terms of holding States accountable under the classic rhetoric of State responsibility doctrine. This is where the UN and other humanitarian actors have a really important role to play in terms of being the voice for those communities, as well as – and I think this goes to the broader impact of CT – reimagining the mission and brand of the UN: when we have a situation where UN entities enable and support CT measures and in-country action with harmful outcomes on vulnerable communities, we run directly into UN due diligence territory and an enormous branding problem for the organization. The Secretary-General and other key actors within the UN system should take this seriously into account. The very “brand” of the UN is at stake in this regard.

On past occasions, you have mentioned the need for States to “talk the talk and walk the walk” when it comes to the treatment of foreign “terrorist” fighters. This topic is highly debated and relevant in today’s world. What are some specific human rights challenges you see in relation to these fighters, such as their treatment in areas of conflict, their repatriation, and the domestic criminalization and adjudication mechanisms that deal with them?

The mandate has addressed this issue in a number of reports, and I also address it in my most recent report¹⁶ to the Human Rights Council, which looks at the negative impact of CT on women, girls and families. I have been very clear that return and

16 Fionnuala D. Ní Aoláin, *Human Rights Impact of Counter-Terrorism and Countering (Violent) Extremism Policies and Practices on the Rights of Women, Girls and the Family*, UN Doc. A/HRC/46/36, 22 January 2021, available at: www.ohchr.org/EN/Issues/Terrorism/Pages/Annual.aspx.

repatriation of people from Syria and Iraq is the only international law-compliant response to the humanitarian catastrophe that has unfolded over the last several years in northeast Syria and Iraq. The failure of some States to enforce their international obligations, including under IHL, international human rights law and particularly the UN Convention on the Rights of the Child, is extraordinarily demoralizing not least because many of these States claim their foreign policy and approach to international law are driven by a gender- and human rights-sensitive approach, but their actual approach, particularly to foreign terrorist fighters and associated women and children, belies that. There is an obvious contradiction between the rhetorical sentimentality concerning victims of terrorism and the need to support them, on the one hand, and on the other, the failure on the part of many States to bring back and prosecute persons who commit serious violations of IHL and international law from Iraq and Syria, especially since those States are often the only ones that are well-placed to engage in such prosecutions. We do have good State practice as well, from countries including the Russian Federation, Kazakhstan, Kyrgyzstan, Tajikistan, Tunisia and Indonesia. As such, it is not that we have an absence of State practice here, but one of the failures has been a failure to acknowledge the return of nationals to their home States, including during this COVID-19 health pandemic. Enormous failings by Western States appear to be hardwired and speak to an enormous moral failure on their part, which is evidently glaring for the whole world to see.

In the wake of the COVID-19 global pandemic, the entire world has faced challenges in coping with this new disease. Has the impact of the pandemic exacerbated or amplified the effect of CT measures on affected populations? Moving forward, what are the steps that need to be taken to ensure that CT measures and sanctions do not have an adverse impact on the ability of local communities to fight COVID-19?

It truly seems like a very long year as we now look back and reflect on the twelve months plus since the advent of the global health pandemic. The mandate has identified a number of CT- and human rights-related challenges during this time. Firstly, we have seen a resort to the use of exceptional powers in multiple countries around the world. These powers have included an expansion of traditional emergency powers, the consistent use of *de facto* emergency powers (mostly found in health and sanitation law), expansions of executive purpose, and the repurposing of CT and security powers to manage the pandemic. The mandate, together with two NGOs – the International Center for Not-for-Profit Law and the European Center for Not-for-Profit Law – has created a global tracker¹⁷ on the use of emergency powers. Built into that exceptional power use has been the repurposing of CT and security powers to manage the pandemic, and that raises profound questions about the appropriateness, proportionality and necessity of using such measures, which were designed primarily to address

17 Available at: www.icnl.org/covid19tracker/.

extreme violence, for the purpose of addressing a global pandemic. This is further exacerbated when we recall that the communities that have been most negatively affected by the pandemic are communities of minorities and persons of colour – communities that have historically been marginalized or racialized within their own national settings. So, the idea that we would use the extraordinary powers of the State against these vulnerable communities, which often have tenuous and fragile relationships with their States, seems to me to be most regrettable.

Secondly, I would stress that we are particularly concerned that the negative impact of sanctions continues to apply through the COVID-19 period, without any relief in sight. And thirdly, many of the tools that have been used by the security State to address terrorism, especially surveillance and technology tools, raise questions of privacy. The mandate's observations have been that we see many of these tools being repurposed for the health pandemic, and this raises all kinds of questions on privacy and on privacy being a gateway right to the infringement of other rights like economic and social rights, including the right to health and the right to work, as well as classic civil and political rights such as freedom of movement, expression, religion and belief, which will all be monumentally compromised in the post-COVID world. As most of us who have spent time working in the field of exceptionality and exceptional powers know, the hardest thing about exceptional measures is getting rid of them, whereas implementing them in the first place is far easier.

To conclude, I think the challenge we will face – if there is a time after this pandemic – will be to address the fundamental distortions, excessive securitization and wholesale abandonment of rights protection in data and surveillance that will have been hardwired into many of our systems, including the health sectors of all States.

Is there anything else you would like to share with our readers?

My final comment would be that this is a big year. It is the 20th anniversary of 9/11 and of Security Council Resolution 1373, and we have sanctions committees celebrating twenty years as well. Today [11 January 2021] was also the 19th anniversary of the first formal statement by the US government that persons were being transferred and held at Guantanamo Bay, Cuba. If we were to pause and look at the last twenty years, we would need to ask the one fundamental question of whether any of this CT stuff is actually working. We see very little in terms of the monitoring and evaluation of effects of CT measures, especially of their negative effects in terms of fuelling and feeding the underlying drivers of violence as opposed to reducing them. We have also seen the displacement in the UN system of other important blocks of work by CT – indeed, CT might be described as a rising fourth pillar of the organization, displacing the UN Charter's core pillars of human rights, peace and security, and development, and thereby competing with other core values which, whether development or conflict resolution, are far more likely to bring an end to the causalities of violence in many areas of fragility and conflict than the CT measures currently being

deployed. Lastly, this is the year in which we will renegotiate the global CT strategy, and this being twenty years after 9/11, it is a great time for a fundamental rethink and a chance to significantly prune the global CT apparatus; to ensure that CT budgets are redirected to foundational development and conflict prevention work in order to prevent violence in the first place; and most importantly, to implement an independent, overarching and fully funded global CT oversight mechanism. A part-time Special Rapporteur cannot even conceive of being the oversight body for the scale and scope of work being done, and States can and should do better to ensure that CT work is IHL- and human rights-compliant.