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**Statement by the Special Rapporteur on the promotion and  
protection of human rights and fundamental freedoms  
while countering terrorism, Martin Scheinin**

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Mr. President, distinguished delegates, ladies and gentlemen,

This is the fourth presentation of my reports before the Human Rights Council as Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism.

During the year that has passed since my previous appearance I have again corresponded with Governments in 30 communications relating to a total of 26 countries or territories. Addendum 1 to my report summarizes the correspondence with Governments between 15 September 2007 and 31 December 2008, as well as replies received up to 31 January 2009. While half of the Governments to which communications were sent to, have shared their information and views on my submissions, the other half has regrettably not acted in the same responsible manner.

With a view to my mandate, including the reference to advisory services or technical assistance found in paragraph 2(a) of Resolution 6/28, I encourage more Member States to enter into a dialogue with my mandate, ideally during the preparatory stage of the adoption of new counter-terrorism legislation or legislation on terrorism-related offences.

In this context I welcome the fact that Egypt now is one of the countries that have taken the opportunity to engage with my mandate. I will visit Egypt from 16 to 21 April 2009 for the purpose of learning about and discussing its counter terrorism law and practice. I am also pleased to inform the Council that the Government of Chile has extended an invitation for a country visit in 2010. On both occasions I look forward to constructive cooperation with the Government and other relevant stakeholders.

Unfortunately I have to express my dissatisfaction with other some which have seemed to opt for a stalling approach in dealing with my mandate. The Philippines issued an invitation to visit back in June 2006, but has not confirmed or suggested any concrete date for the visit to take place, even after the UPR report of the working group last year recommended it to enable a visit. At the beginning of this month, ASEAN member states, including the Philippines, have agreed at the 14th ASEAN Summit on a Political-Security Community Blueprint to "strengthen interaction between the network of existing human rights mechanisms". I hope time will soon be ripe for a mission by my mandate.

Yesterday, I had an encouraging meeting with the Tunisian Permanent Mission, as a follow-up to my letter of 11 June 2008, to discuss possible dates for a country visit. As delegates will recall, Tunisia extended an invitation to the mandate during the UPR review of Tunisia in April 2008. So far, it has been unable to confirm the dates of the mission but this should soon be resolved. There are outstanding visit requests to Algeria, Malaysia, Pakistan, Peru and Thailand, and I am expecting rapid progress, in particular, with Peru that has a standing invitation.

With many other countries we are at the stage of correspondence between the Government and my mandate, on substantive issues related to my mandate. In some cases this will lead to a country visit at a later stage. To my great embarrassment I

must note that the system of special procedures does not always operate as smoothly and efficiently as it should. As the worst example, I am referring in the addendum of my report to a response received 14 months ago from the People's Democratic Republic of China, which has not even been translated to me yet.

Mr. President,

My only country visit during 2008 was to Spain. I want to express my gratitude to the Spanish government for their invitation and the facilitation of all aspects of the visit that took place from 7 to 14 May 2008. As Spain is a vibrant democracy with a tragic past of dictatorship and a continuing presence of both domestic terrorism and a threat of international terrorism, the mission was very useful in learning about challenges and best practice in the area of respecting human rights while countering terrorism. Those lessons are often painful, as I witnessed through my meetings with victims of terrorism, and through a bomb explosion killing one person during the last night of my visit, committed by the terrorist organization Euskadi Ta Askatasuna (ETA).

Despite the challenges, Spain provides a number of examples of best practice in the fight against terrorism. Its support to human rights on the global level, including to the Office of the High Commissioner, its Alliance of Civilizations initiative and its contribution towards the United Nations Global Counter-Terrorism Strategy, are all commendable. We also learned about work being done to support victims of terrorism, for good community relations and for the eradication of xenophobia and ethnic discrimination. The basic legal provision on objective elements of terrorism in article 571 of the Penal Code is a sound one. The trial in the Madrid terrorist bombings case included many innovative measures to secure the rights of the defence in an extremely complex case of prosecuting a major terrorist attack through a public trial. All this I was able to indentify as best practice.

However, as in any country, there are also areas where in my view more needs to be done in order to secure compliance with human rights while countering terrorism. In relation to definitions of crimes associated with terrorist violence, my report warns against the risk of a 'slippery slope' and recommends that articles 571-579 of the Penal Code are subjected to a process of independent expert review over the adequacy of the current definitions. I also recommend that Spain reconsiders certain vaguely formulated expressions in the Organic Law on Political Parties, so as to avoid any risk of applying it to political parties that share the political orientation of a terrorist organization, but do not support the use of violent means. As we know, several political parties or electoral groups have in recent years and even weeks been banned in the Basque country.

My report calls for the complete eradication of the institution of incommunicado detention, which in the case of Spain primarily means blocking contact between a terrorism suspect and his or her freely chosen lawyer for up to five days at the initial stage of detention. Most other countries manage without such a severe restriction, and by maintaining incommunicado detention Spain makes itself vulnerable to allegations of torture, and as a result weakens the legitimacy of its counter-terrorism measures.

With much regret I have to deplore the fact that Spain proceeded to extradite a Chechen individual to the Russian Federation a day before New Year's Eve 2008, despite the principal importance of the case, emphasized in my meetings with high-

level officials in Madrid during the mission and my repeated calls for not implementing the extradition. While I am aware that Spain has undertaken measures to monitor through its own diplomats the conditions of detention in the Russian Federation, the following features of the case strike me as incompatible with Spain's human rights obligation, including the absolute prohibition against torture:

- The judicial authority that approved the extradition, Audiencia Nacional, amended the conditions it had set for the extradition without hearing again the other party, in breach of the first sentence in article 14, paragraph 1, of the International Covenant on Civil and Political Rights; and

- It took six weeks from the date of the extradition before the Spanish diplomats visited the individual for the first time. Let me remind the delegates that in the case of Alzery, the Human Rights Committee found a multiple violation of ICCPR article 7 partly on this ground: "The visits by the State party's ambassador and staff commenced five weeks after the return, neglecting altogether a period of maximum exposure to risk of harm." (Alzery v. Sweden, para 11.5)

Mr President,

One fairly technical aspect of my mission to Spain relates to delays in issuing the report after my team finished working on it in the summer. In preparation and conduct of my country visit I usually pay much attention to the Concluding Observations by the Human Rights Committee on the country concerned. In the case of Spain I did not have this benefit, as no report had been considered in the preceding 12 years. Against this background I expected that the Human Rights Committee at least would have the benefit of learning from my mission and conclusions when it finally was to resume its dialogue with Spain half a year after my country visit. Therefore, we worked hard in the summer to deliver to the Government a draft report for their comments, in order to have a final version ready before the October session of the Human Rights Committee. To make a long story short, my efforts failed, and the Spanish version of the draft report was ready only after the Human Rights Committee's consideration of Spain, and could be sent to the governments for their comments at the end of October. In part, this was explained to me by the fact that as a UN document, the final version was scheduled for the current session of the Human Rights Council and had no priority at an earlier stage. A good opportunity for cross-fertilization between the Council's special procedures and the treaty-based mechanisms was missed.

Mr. President,

The main report in front of the delegates deals with the role of intelligence agencies and their oversight mechanisms in combating terrorism in compliance with human rights. Since submitting this report an undeniably important fact took place with the change of the administration in the United States of America. On this occasion I want to welcome specifically the decision of the United States to actively re-engage as an observer in the Human Rights Council. Already in my 2007 report on a country visit to the United States, I have expressed the view that the United States, as a world leader, has a special responsibility in the protection of human rights while countering terrorism.

Important first steps have now been taken in order to restore the role of the United States as a positive example for respecting human rights. Many of the measures taken or announced conform to proposals made in my mission report and by many other international observers.

I hope that the suspension of proceedings at the military commissions in Guantanamo signals the end of the commission trials of so-called 'enemy combatants,' and the beginning of treating detainees at Guantanamo and elsewhere as criminal defendants in a federal court, or have them released. The recent decision to try the last remaining American "enemy combatant" in a US Federal Court gives me hope that this will materialize.

I welcome the decision to close the Guantanamo Bay detention facility by next January. In the same breath, however, I would like to reiterate my request for a further follow-up visit to Guantanamo, expecting that unmonitored interviews with the detainees would now be possible. I encourage the current administration to take a different position than its predecessor on this issue which is crucial to the operation of the Council's special procedures.

Last but not least I welcome as well the 'executive order on ensuring lawful interrogations' which established clearly that the questioning of prisoners by any US government agency must follow the interrogation guidelines laid down in the US Army Field Manual, which guarantees humane treatment under the Geneva Conventions, and prohibits explicitly the use of torture.

It is encouraging that the order demands the CIA to close as quickly as possible any secret detention facility it currently operates and adds that the agency "shall not operate any such detention facility in the future."

Mr. President,

Together with the UN Special Rapporteur on torture I have initiated a Joint Study to examine the practice of secret detention *from a global perspective*. I want to stress this last part in particular. The United States has indicated that it wants to move forward, and turn this dark page in its history, but in other countries this practice or permission of secret detentions – often of people who have been branded as terrorist suspects – is continuing. The Joint Study will include a legal analysis of the framework for the operation of secret places of detention and aims to produce new findings regarding the nature and scope of secret detention as well as findings as to the extent to which persons have been tortured or subjected to cruel, inhuman or degrading treatment or punishment at such places. Before a page can be turned, we have to know what's on it, in order to move forward.

Mr. President,

The last subject I talked about overlap with many of the issues that are covered in this year's thematic report on the role of intelligence agencies and their oversight in the fight against terrorism. This report was submitted to the editors before the new US administration took office.

In various parts of the world States have conferred broader powers on intelligence agencies and increased the cooperation between them without establishing at the same time a specific and comprehensive legislative framework that regulates these new developments. This is one of the reasons why the collection and sharing of "signal" intelligence has led to several violations of the right to privacy and the principle of non-discrimination. "Human intelligence" - the gathering of intelligence by means of interpersonal contact - has even led to violations of *jus cogens* norms such as the prohibition against torture and other inhuman treatment. Evidence suggests that the lack of oversight and political and legal accountability has facilitated illegal activities by intelligence agencies.

The report highlights the need for establishing a specific and comprehensive legislative framework which covers the mandate and the use of intelligence agencies' special powers in a detailed manner; especially when these powers include powers to arrest and detain terrorist suspects. At stake is not only the oversight and control of the intelligence services but also preventing so-called "plausible deniability" on behalf of the executive and holding the latter accountable for potential abuses. Authorizations for an agency to assassinate, disappear or arbitrarily detain terrorist suspects can never be justified as a legitimate intelligence-led preventive approach to counter-terrorism.

The report also draws attention to preventive measures that deprive a person of his or her liberty which are solely based on intelligence. In these cases, intelligence has to be turned into concrete evidence and proof after a period of time so that the affected person can challenge the evidence against him or her. If intelligence cannot be transformed into evidence over time, or the State fails to obtain new evidence, the preventive measures need to cease. This is especially relevant in the context of the existence of data-mining techniques which are used to create terrorist profiles which can form the basis for preventive measures that may impede air travel, banking, and employment opportunities at airports or in places where radioactive materials are used, such as hospitals.

The report examines in particular the challenges that the increased cooperation between intelligence agencies pose from an accountability perspective. It is noted that domestic and international secrecy and security of information policies, such as those within NATO or the Shanghai Cooperation Organisation, often provide an insurmountable wall against independent investigations into human rights violations and increasingly serve as a tool to conceal illegal acts from oversight bodies or judicial authorities, or to protect itself from criticism, embarrassment and - most importantly - liability.

The report seeks to clarify the human rights obligations of states, by acknowledging that the active participation by a state through the sending of interrogators or questions, or even the mere presence of intelligence personnel at an interview with a person who is being held in places where he is tortured or subject to other inhuman treatment, can be reasonably understood as implicitly condoning torture. Even more, States which know or ought to know that they are receiving intelligence from torture or other inhuman treatment, or arbitrary detention, and are either creating a demand for such information or elevating its operational use to a policy, are complicit in the human rights violations in question. States that receive information obtained through

torture or inhuman and degrading treatment are complicit in the commission of internationally wrongful acts.

Under international human rights law, States are under a positive obligation to conduct independent investigations into alleged violations of the right to life, freedom from torture or other inhuman treatment, enforced disappearances or arbitrary detention, to bring to justice those responsible for such acts, and to provide reparations to the victims.

For those who think that calling to account individuals who have committed grave human rights violations in the name of combating terrorism, would constitute a "witch hunt", I want to respond that what we have seen gradually emerging from the reality of post-9/11 counter-terrorism measures, resembles a lot the witch hunts of 15th to 17th century Europe. At that time, critics of witch trials did not deny the existence of witches but opposed arbitrary trials, called for proper rights of the defence, emphasized that torture was not a good method to obtain truthful confessions, and above all warned against the escalation of arbitrary trials and torture to target innocent people, erroneously named as witches by others, out of sheer malice or under torture. Let me quote one of the critics, Friedrich Spee von Langenfeld who wrote in 1631: "Many people who incite the Inquisition so vehemently against sorcerers in their towns and villages are not at all aware and do not notice or foresee that once they have begun to clamor for torture, every person tortured must denounce several more. The trials will continue, so eventually the denunciations will inevitably reach them and their families, since, as I warned above, no end will be found until everyone has been burned."

Almost 400 years ago, Friedrich Spee addressed also the accountability issue: "The ruler investigates witches of his own accord, therefore he should also investigate of his own accord those who with their pestilent hissing have until now blown the suspicion of this crime upon whomever they wish to harm".

Now that the witch hunt is hopefully over, it is time for the law to step in. Suspected terrorists and those who committed grave human rights violations in the name of countering terrorism both deserve a fair trial, including the presumption of innocence and all rights of the defence. That is not a witch hunt but the opposite of a witch hunt.

Mr President,

Allow me to conclude by paraphrasing some of the recommendations made at the end of the intelligence report:

Any interference by intelligence agencies into the right to privacy or other human rights must have a firm basis in domestic law. Oversight of intelligence agencies by the responsible minister, by courts issuing warrants, and by parliamentary oversight bodies and comparable institutions need to be strengthened. In particular, cross-border sharing of intelligence must not escape scrutiny by oversight mechanisms that therefore will also need to cooperate across borders. Through professional training and other measures compliance with human rights must be made a part of the professional qualifications, and a source for professional pride, for any intelligence officer. Finally, I propose that the Human Rights Council undertakes to launch a project for guidelines for human rights compliance and best practice by intelligence agencies.