

Check against delivery



**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 my third 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. The two and a half years with the mandate have been somewhat of a challenge, as during this time the Commission on Human Rights was replaced by the Council, the new body understandably needing to devote much of its attention and time to institution-building. I do hope that we now have moved to a phase where the Council will act upon the reports presented to it by special procedures, including my own mandate.

I am optimistic in that respect, because during this year 2007 the cooperation by Member States with my mandate has clearly improved. I was able to conduct three successful country visits. Preparations are underway for missions during 2008. As to the forthcoming visit to Spain, I am pleased to inform the Council that since the text of my main report was finalized, Spain has confirmed 7-14 May 2008 as the dates of the mission. I look forward to constructive cooperation with the Government and other relevant stakeholders. I had been hoping to visit the Philippines already in January 2008 and to provide through my report input to the forthcoming Universal Periodic Review (UPR) by the Council. Unfortunately the Government has not been able to confirm the dates for the visit, while welcoming the visit as such.

There are outstanding visit requests to Algeria, Egypt, Malaysia, Pakistan and Tunisia.

The thematic focus of my annual main report now before you is on economic, social and cultural rights in the context of countering terrorism. The report discusses both the negative impact counter-terrorism measures can have on these specific rights and the role of promoting economic, social and cultural rights in preventing terrorism. The chosen theme illustrates the comprehensive and complementary nature of this particular mandate, avoiding duplication with other mandates and giving specific attention to often neglected substantive areas, but also to the indivisible and interdependent nature of all human rights.

Mr President,

I want to use this opportunity to thank the Governments of South Africa, the United States and Israel for the facilitation of country missions during 2007, and for their good cooperation with my mandate in that context. Further, I want to thank the Palestinian Authority for the opportunity to include visits to the Occupied Palestinian Territory and meetings with relevant interlocutors in the programme of the last-mentioned mission.

From 16 to 26 April 2007 I conducted an official mission to South Africa, a country that in the past so severely suffered from apartheid rule during which the term “terrorism” was abused by that regime to stigmatize resistance and protest. In my mission report I identify some aspects of the Protection of Constitutional Democracy against Terrorist and Related Activities Act (2005) as examples of good practice, but also express concern at certain elements contained in the Act, including an overly

broad list of crimes that potentially may be treated as terrorist activity, protection of freedom of expression, and lack of clarity about the nature and scope of Parliamentary action against persons listed by the UN Security Council and the form and scope of potential judicial review of Parliamentary action. In my report I draw attention to allegations of police brutality, as well as to community violence against certain foreigners. During the visit it transpired that the South African authorities perceive the threat of terrorism as coming primarily from foreigners and that provisions concerning detention of foreigners are highly pertinent in the context of counter-terrorism powers. Foreigners may be detained for security-related reasons, without trial of effective court review, and there is no independent monitoring agency conducting visits to the police stations where they may be held. My report highlights that South Africa plays a key regional role and encourages the Government to take the lead in ensuring the development of laws on counter-terrorism in conformity with international human rights standards. I also identify elements of good or best practice in that South Africa clearly excludes from its counter-terrorism measures racial, ethnic or religious profiling, preventive detention and the use of special courts or introduction of modified criminal procedures in terrorism-related cases.

As I am aware of the fact that the Government of South Africa has in the institution-building process of the Council expressed some critical remarks also on some details of my country visit, I want to emphasize three points. Firstly, that throughout the preparation, conduct and follow-up of my mission to South Africa we have maintained a frank, constructive and friendly dialogue between my mandate and the Government. Secondly, it is to be admitted that not all meetings during the country visit proceeded in unison. I was shocked, and expressed my astonishment, at views expressed by some high-level Government representatives which in my assessment were incompatible with the *non-refoulement* obligations of South Africa as enshrined in international human rights law and as affirmed by the country's own Constitutional Court. And I regret that albeit South Africa complied with the Standard Terms of Reference for special procedures mandate holders in providing full and non-monitored access to persons detained by the prison authorities or at the immigration detention facility at Johannesburg airport, the same approach was not extended during my visit on an *ad hoc* basis to police detention facilities. Thirdly, I welcome critical remarks by Governments in respect of my own conduct, as an open discussion on any misgivings will ultimately strengthen the special procedures.

From 16 to 25 May 2007 I conducted an official mission to the United States of America. In my report I express the view that the United States, as a world leader, has a special responsibility in the protection of human rights while countering terrorism. My report outlines the public international law framework of countering terrorism, including through discussions on the simultaneous application of international humanitarian law and human rights law during armed conflict, and on the extraterritorial application of international human rights law. The report expresses grave concern about the situation of detainees held at Guantánamo Bay and in other locations and the lack of judicial guarantees and fair trial procedures afforded to individuals suspected of terrorist activity. I draw attention to several problems related to the use of military commissions to try terrorist suspects, including jurisdictional and evidentiary issues, as well as issues regarding the independence and impartiality of the commissions and their potential use to try civilians. My report also expresses concern about the interrogation of terrorist suspects, particularly by the

Central Intelligence Agency. I address the issue of “extraordinary rendition” of terrorist suspects, and their detention in “classified locations”, and the accountability of those responsible for conducting interrogation by techniques amounting to torture or cruel, inhuman or degrading treatment. My report also identifies areas of good or even best practice, such as the measures by the Department of Homeland Security to eradicate practices of racial, ethnic or religious ‘profiling’, to engage in community outreach and the inclusion of disability concerns in recent evacuation plans in emergency situations.

As a follow-up to my visit to the United States I had last week, from 3 to 7 December, an opportunity extended to me by the Government to visit Guantánamo Bay for the purpose of observing hearings under the 2006 Military Commissions Act. The visit gave additional support to the concerns I have expressed in the mission report on the incompatibility of the Military Commissions Act with relevant international standards. Those concerns relate, inter alia, to the personal and material scope of jurisdiction of the commissions and to their composition. In addition, the hearings provided graphic illustrations of the practical difficulties in providing fair trials at a distant military base, and confirmed the difficulties or even impossibility of the defence to provide evidence, as neither witnesses from abroad or high-value detainees from the Guantánamo detention facility next door could be heard, at least on this particular occasion. Where I detected positive developments was in the effort by the military judge to do his best to enable a fair trial, including by allowing the defence to remedy through privately obtained counsel the inequality of human resources seemingly prescribed by the Military Commissions Act.

I still hope that a further follow-up visit will be possible for the purpose of conducting unmonitored interviews with detainees at places of detention, including Guantánamo Bay, despite the Government’s current position that it objects to such a request.

More than six years after 9/11 and the apprehension of hundreds of persons, military commission proceedings have been initiated against less than a handful of the Guantánamo Bay detainees and the Government estimates ultimately to initiate proceedings against some 80 of them. Coupled with an ongoing discussion in the United States about introducing new legislation on preventive or administrative detention, legalizing the holding of individuals without trial, this triggers me to update my mission report by stating that the *ex post facto* introduction of new legislation on preventive detention, for persons that already for years have been in detention, would unavoidably amount to arbitrary detention in the meaning of article 9, paragraph 1, of the International Covenant on Civil and Political Rights.

From 3 to 10 July I conducted an official mission to Israel, including visits to the Occupied Palestinian Territory (OPT). The report welcomes the invitation by Israel to my mandate to comment upon new counter-terrorism legislation currently being drafted, and identifies such a cooperative enterprise as element of best practice. However, the report identifies serious situations of incompatibility between Israel’s obligations pertaining to human rights and fundamental freedoms and its counter-terrorism law and practice. Such situations include the prohibition against torture or cruel, inhuman or degrading treatment; the right to life and humanitarian law principles concerning legitimate targeting; and the rights to liberty and fair trial. A major part of the mission was devoted to examining the route and effect of the

barrier/wall/fence built by the Government of Israel to separate not only its own territory but also many Israeli settlements and other parts of the OPT from the rest of the Territory and certain towns within it. During the mission I consulted with governmental and non-governmental agencies in Israel and the OPT to assess the effectiveness of the barrier in combating terrorism, and its impact on all human rights of the Palestinian people. Building in part upon the 2004 Advisory Opinion by the International Court of Justice my report concludes that given the illegality under international law of the existence and continued development of Jewish settlements in the occupied Palestinian territory, Israel should withdraw all such settlements and replace the still unfinished barrier, extending deep into Palestinian territory, with a security infrastructure that for its geographical position respects the Green Line or is otherwise accepted by the Palestinians. My report highlights the severe impact of the construction of the barrier, and of associated measures upon the enjoyment of civil, cultural, economic, political and social rights and freedoms in the Occupied Palestinian Territory. Addressing the full range of those situations is imperative, not only to secure Israel's compliance with its international obligations but also to address conditions that may be conducive to the recruitment to terrorism.

Mr President,

The main conclusion in this year's thematic report on economic, social and cultural rights in the fight against terrorism is that States' counter-terrorism measures often pose serious challenges also to the enjoyment of these rights. Therefore States need to be mindful of their duty to ensure the conditions for all people living within their jurisdiction to enjoy all human rights, including economic, social and cultural rights. This is particularly important as the promotion of economic, social and cultural rights should be seen as a means to address conditions conducive to the spread of terrorism and hence to prevent acts of terrorism.

Social and economic marginalization of and discrimination against vulnerable groups, such as minorities, indigenous peoples, or underprivileged households of women and children often amount to violations of their human rights and in particular their economic, social and cultural rights. These circumstances may also provide fertile soil for recruitment to movements that may promise a prospect for change but that resort to the inexcusable tactics of acts of terrorism.

Through their negative impact on the effective enjoyment of economic, social and cultural rights, insensitive counter-terrorism measures, even when they may have justification as permissible limitations to human rights, often result in counter-productive effects that undermine the long-term beneficial role of the promotion of economic, social and cultural rights in sustainable strategies to prevent terrorism. Therefore, States should exercise caution in resorting even to legally permissible counter-terrorism measures when those measures have significant negative impact on economic, social and cultural rights. One area where extreme caution is needed is the demolition of housing or other destruction of private property.

One pillar of the United Nations Global Counter-Terrorism Strategy, adopted by the General Assembly in September 2006 (A/RES/60/288) pertains to measures to address the conditions conducive to the spread of terrorism. Among such conditions, and underlining that none of these conditions can excuse or justify acts of terrorism,

Member States referred, inter alia, to prolonged unresolved conflicts, to violations of human rights, to ethnic, national and religious discrimination, to political exclusion, to socio-economic marginalization and to lack of good governance. Many of these factors have a direct link with the enjoyment of economic, social and cultural rights. The promotion and effective realization of those rights can therefore be seen as a strategic choice to pursue policies that aim at preventing terrorism. While there is no scientific evidence of a causal connection between economic and social grievances and acts of terrorism, patterns of correlation can be demonstrated that suggest that societies characterized by such grievances and educational exclusion often are breeding or recruitment grounds for terrorism.

Mr President, let me conclude by highlighting some of the main recommendations contained in the report.

Donor countries that assist other States to adopt and develop their counter-terrorism laws and mechanisms, should pay due attention to securing the compliance of those measures with human rights and to ensuring that technical or other assistance in the counter-terrorism field does not occur at the expense of development assistance, including programmes aimed at promoting the improved enjoyment of economic, social and cultural rights. Development cooperation should be fostered keeping in mind the strategic importance of the promotion of economic, social and cultural rights in preventing terrorism and the need to avoid undermining that potential by shifting resources from such programming to short-term capacity-building and technical assistance in the field of counter-terrorism.

Governments should engage in a dialogue with relevant communities engaged in charity work, in order to secure the availability of accessible and effective channels for charity that can be resorted to without a fear of donations being later stigmatized by the United Nations or the authorities of any country as financing of, or material support to, terrorism. As charity is seen as a religious duty by many Muslims, Christians and others, any donor must be able to choose a charity that is compatible with his or her convictions. Further, charity work often has an important role in enhancing the actual enjoyment of economic, social and cultural rights in poor countries.

My report recommends continued attention to providing for victims of terrorism and victims of counter-terrorism operations, besides compensation, also measures that address rehabilitative and other needs of the victims, including through ensuring a safe environment to enable persons who so wish to return to their previous villages or homes.

My report recommends that the Counter-Terrorism Committee of the Security Council would address the potential of promoting economic, social and cultural rights as an inherent dimension in long-term sustainable strategies to prevent terrorism, in order to provide guidance to Member States.

I recommend heightened attention to the right to education and to rights of women as two cornerstones in sustainable long-term strategies for the prevention of terrorism.

Building upon my previous work on international and national definitions of terrorism, the current report urges States not to apply their counter-terrorism laws and measures upon social movements or protest by indigenous peoples or minority communities who claim recognition and full protection for their economic, social and cultural rights, including the right to enjoy their own distinctive culture often associated with lands and specific forms of livelihood. Terrorism should be defined through its inexcusable methods of violence against bystanders and the intention to create fear amongst the general population, not through political or other aims which often overlap with the aims of social movements that have nothing to do with terrorist acts.