

*Check against delivery*



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

**Thirteenth session of the Human Rights Council  
(1 -26 March 2010)**

**Geneva, 8 March 2010**



Mr. President, distinguished delegates, ladies and gentlemen,

This is the fifth time I am delivering an annual thematic report to the Human Rights Council, pursuant to my mandate as Special Rapporteur on human rights and counter-terrorism. Each one of my regular reports deals with a new topic related to human rights aspects of the fight against terrorism. This time, the main report in front of you (A/HRC/13/37) focuses on the right to privacy and its erosion in our age of global terrorism. My regular reporting also includes an annual report to the General Assembly, similarly with annually chosen thematic focuses. When the mandate was renewed in 2007, the Special Rapporteur was asked to integrate a gender perspective throughout the work of his/her mandate. Pursuant to this emphasis, my latest report to the General Assembly (A/64/211) focused on a gender perspective of countering terrorism. I take this opportunity to note that I was pleased to join the media statement with the Special Rapporteur on violence against women and applaud all women on today's International Women's Day.

In addition to the two annual thematic reports my regular reporting includes also other reports. This time, you have in front of you a report on communications with Governments (A/HRC/13/37/Add.1), and a report on my mission to Egypt (A/HRC/13/37/Add.2). As you are aware I had worked over the past year on a joint study prepared together with three other Special Procedures, in line with the coordinating and supplementary nature of my mandate, on practices of secret detention in the name of countering terrorism (A/HRC/13/42). This study was announced one year ago when I, on 10 March 2009, appeared in front of you, and I understand that the discussion of this report has been postponed to the June session of the Council. I will be happy to engage with you on that occasion.

A year ago, my main report to the Council (A/HRC/10/3) focused on the role of intelligence agencies and their oversight in the fight against terrorism. The final recommendation in that report proposed to the Council to initiate a process aiming at the elaboration and adoption of an international instrument, such as guidelines for human rights compliance based on best practice by intelligence agencies. Towards the end of its 10th session the Council adopted resolution 10/15 on “Protection of human rights and fundamental freedoms while countering terrorism”. In Operative Paragraph 12 of that resolution the Council requested the Special Rapporteur, "pursuant to his mandate, to prepare, working in consultation with States and other relevant stakeholders, a compilation of good practices on legal and institutional frameworks and measures that ensure respect for human rights by intelligence agencies while countering terrorism, including on their oversight, and to present the compilation in a report to the Council at its thirteenth session." I was happy to include this additional report in my programme of work.

In March and April 2009, I sought the support and assistance of the Office of the High Commissioner for Human Rights in order to produce the requested compilation of good practice in intelligence, in time for consideration at the Council's 13th session. Unfortunately, the response of the Office was that the language of Council Resolution 10/15 was not strong enough to trigger a programme budget implication (PBI), and therefore work towards the compilation was to be pursued by starting from fundraising. On 13 May 2009, I informed the main sponsor of Resolution 10/15 that the compilation will be delayed beyond the 13th session but nevertheless finalized during 2010. I also engaged in a number of partnerships to prepare the ground for the report, so that Governments, intelligence agencies, their oversight bodies and other relevant stakeholders could be consulted on the elements of an emerging compilation of good practice. A two-day meeting of a research group established within the

International Association of Constitutional Law was convened in Florence on 12-13 November 2009, with external funding. Just one week ago, another expert consultation, funded by the Office of the High Commissioner, was convened with the Geneva Centre for the Democratic Control of Armed Forces, in Montreux. These expert consultations have produced all the elements that will be needed during this month and April to distil from a fairly wide set of materials and experiences a concise compilation of good practice. To ensure consultation with Member States and other relevant stakeholders, and their meaningful participation in the process, a questionnaire calling for information on good practices in accordance with Council Resolution 10/15 is being sent out this week. The resulting compilation of good practice, with background explanations, will be submitted in the format of a Special Rapporteur's report in time for consideration by the 14th session of the Council. Later today, a public side event will be convened to report on substantive progress so far and to discuss the forthcoming compilation of good practice in the field of intelligence and its oversight.

Mr President, let me now move to the topic of my current main report. This report addresses the erosion of the right to privacy in the fight against terrorism, through surveillance powers and new technologies that are used without adequate legal safeguards. States have restricted the protection of the right to privacy by not extending pre-existing legal safeguards into their cooperation with third countries and private actors. These measures have not only led to violations of the right to privacy, but also have an impact on other human rights such as due process rights and the freedom of movement – especially at borders – and can have a chilling effect on the freedom of association and the freedom of expression.

Privacy is a prime example of how existing human rights are easily bypassed by subordinating them to an all-encompassing act of 'balancing' between security and human rights. But as has been said by many before, and was recently pointed out also by United States President Barack Obama in his State of the Union address, the proposed choice between protecting the security of people and our common values (human rights) is false. Human rights do allow for permissible limitations and restrictions, but these need to be addressed within the law, not as a balance between the law and something else. The crux of my report is that an analytically rigorous test for permissible limitations applies also to privacy rights. The elements of that test have long been established in the practice of international and regional human rights treaty bodies and courts. My report encourages the Human Rights Committee to produce a new General Comment on article 17 of the International Covenant on Civil and Political Rights to clearly spell out the elements of the permissible limitations test, including appropriate legislative basis for any interference, necessity and proportionality, and the requirement of adequate safeguards to curtail discretion and abuse.

Despite rapid developments in the field of surveillance and other privacy-intrusive technologies, privacy is not yet dead. Better technology for the detection of terrorism may in fact also be better for human rights. Racial or ethnic profiling of suspected terrorists is both discriminatory and ineffective. Also technologies that are highly intrusive into privacy tend to be ineffective in doing the actual job of preventing terrorism. Reference can be made to the ongoing hype about full body scanners at airports. The hasted decision to start using them taken following the Christmas Day terrorist attempt on a flight between Amsterdam and Detroit has been more a political response to be seen to "do something" and to react to calls by media and the expectations of the public, rather than a carefully designed security measure.

Full body scanners are a disproportionate intrusion into privacy when measures are not taken to minimize the negative impact on privacy through

- not storing any images;
- securing that no human person sees the original image; and
- including an algorithm in the design of the device that anonymizes the image of the person but does not blur the image of the suspect items.

Full body scanners are ineffective in detecting a genuine terrorist threat, if they do not reveal dangerous substances in body cavities, body folds or hand luggage. They may also give a false feeling of security and allow the real terrorists to adapt their tactics to the technology in use. Counter-terrorism work has focused too much on going after the 'bad person', when better results could be obtained by looking for technological solutions that are less intrusive and non-discriminatory while at the same time detecting what should be detected, namely explosives. The detection of explosive substances from a distance is hopefully one element in designing solutions that are at the same time compatible with human rights and effective in preventing acts of terrorism. Handheld devices that can detect small quantities of explosives from a distance and through clothing or even a solid wall do already exist, so that no features of the human person will need to be exposed for detecting the explosives. Once explosive substances are detected, that means that there is a crime suspect, and targeted, more intrusive measures will be legitimate and proportionate from the perspective of human rights law.

Another promising line of development relates to privacy-enhancing technologies and the concept of 'privacy by design'. Within a research consortium called DETECTER, we are

demonstrating to technology developers that, in the long run, products that take into account privacy rights will be more competitive, as the general public and human rights compliant Governments will ultimately choose technology that protects privacy.

As data protection is a particularly important but at the same time underdeveloped area of privacy rights, my report includes a recommendation for the Human Rights Council to establish a process that builds on existing principles of data protection to recommend measures for the creation of a global declaration on data protection and data privacy.

Mr. President,

During 2009 and early 2010, I conducted a country visit to Egypt from 17 to 21 April 2009, followed by another one to Tunisia from 22 to 26 January 2010.

Egypt

I first wish to thank the Government of Egypt for the invitation. This visit was important not only from the point of view of human rights and counter-terrorism, but also as an opening for more intense cooperation between Egypt and the Special Procedures of the Human Rights Council. The recent Universal Periodic Review by the Council confirmed many of my findings and again demonstrated Egypt's commitment to the replacement of its state of emergency with a properly drafted counter-terrorism law that secures compliance with human rights.

As was repeatedly mentioned in my meetings with the Government and also reflected in my mission report, I interpreted the April trip to Egypt as a learning experience, an eye-opener and hopefully also a door-opener. Naming that mission as 'Part One', I have wanted to emphasize that a 'Part Two' should follow, including visits to detention facilities for interviewing in private persons suspected of, prosecuted for, or convicted of terrorist crimes.

Through my meetings with the Minister of Legal and Parliamentary Affairs, the President of the People's Assembly, the Chief of the Egyptian Supreme Constitutional Court, and many other official and civil society interlocutors, I was able to learn about the drafting of the future Counter-terrorism act and about the important role of the independent judiciary in protecting human rights in the counter-terrorism context. With regard to the latter I, however, want to draw attention to paragraph 23 of my mission report. Administrative detention orders quashed by the judiciary are often renewed immediately upon a person's release or, in the worst case, just ignored through unacknowledged detention until a new order on official administrative detention is obtained. Reiterating the recommendations included in paragraphs 49 to 60 of the report, let me also renew my wish soon to return to Egypt for a second mission as a follow-up measure and including visits to places of detention.

I equally want to thank the Government of Tunisia for its good cooperation during my official visit to Tunisia. I was able to meet with the Ministers of Foreign Affairs and Justice and Human Rights, as well as with a number of officials, legislators, judges and civil society actors. The doors to prisons and regular police detention facilities were open to me, and I was able to conduct confidential interviews with persons detained in connection with terrorism. I learned much about Tunisia's strategy and role in the international fight against terrorism. Currently we are working on the mission report which will be submitted to the Council after



consultation with the Government. There are open issues and concerns, out of which I highlighted in a public statement at the end of the mission the existence of serious discrepancies between the law and what was reported to me as happening in reality. I am engaging with the Government, in the hope of achieving real improvements and identifiable best practice to highlight in my mission report.

Mr. President, let me once again thank the Governments of Egypt and Tunisia for their cooperation, as well as all other Governments that have through correspondence or bilateral meetings engaged with my mandate. I look forward to this interactive dialogue and future forms of cooperation, including through new country visits.