



## **Oversight and Accountability in Counter-Terrorism Initiative Transregional Meeting, Nairobi, 26 February 2024**

### **Remarks of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Saul**

Excellencies, distinguished participants

I am delighted to join you from the future this evening here in Sydney, Australia. I am sorry I cannot attend this important event in person in beautiful Kenya. My human rights officer from Geneva, Karen Tolosa, is there with you, so you can save all your tough questions for her when I make a quick escape to enjoy the last days of summer at the beach in Sydney.

I am pleased to be part of the Reference Group for the Framework Document on Good Practices on Oversight and Accountability Mechanisms in Counterterrorism Law and my thanks for the invitation to join from Steven Hill at the International Institute for Justice and the Rule of Law.

I am also pleased that the Document has been drafted in an inclusive and participatory manner, bringing together existing knowledge from the United Nations, international and regional organisations, including the EU, think tanks and academia, with insights from regional and transregional consultations, including with diverse civil society. I have found the drafting process to be open to constructive feedback and I encourage you all to participate energetically over the next two days to further improve the Document.

As a Special Rapporteur mandated by the United Nations Human Rights Council and General Assembly, I have an obvious interest in ensuring that all national actors comply with their state's international human rights law obligations when countering terrorism, as the Security Council and General Assembly have repeatedly demanded. **National oversight and accountability mechanisms perform a vital role in effectively checking that counterterrorism actors respect human rights.** My predecessors have made recommendations for oversight and accountability in a range of contexts, from the review of counter-terrorism legislation, to supervision of intelligence agencies, to the independent investigation of human rights violations when countering terrorism.

Oversight mechanisms can help to ensure that counter-terrorism measures are lawful, strictly necessary and proportionate in pursuit of a legitimate security aim, and non-discriminatory. They can help to prevent and remedy inadvertent breaches as well as deliberate violations. They can prevent arbitrary detention and arbitrary killings, torture and forced confessions in custody, unfair trial, and violations of privacy or political freedoms. They can ensure due process and independent judicial safeguards, thus protecting other rights and freedoms. They can also help to fulfil the duty to provide effective remedies for violations of human rights when countering terrorism, including reparation, compensation, truth and accountability.

**While oversight and accountability mechanisms are fundamental to human rights law, they should not be confined to monitoring human rights.** Like this Framework Document, my predecessors have recommended that oversight should also address wider issues such as compliance with law and procedure, preventing abuse of discretion or authority, effectiveness and efficiency, good administrative and management practices, strong financial controls, anti-corruption, and ethical organisational culture. Ensuring institutional integrity, good public administration and professionalism by counter-terrorism actors ultimately also reinforces an internal culture of respect for human rights.

**Oversight also enhances national security.** First, it ensures counter-terrorism actors are focused on their mission, competent, professional and disciplined in pursuing it, properly use scarce resources, and use their investigative and other powers in a targeted and strictly lawful, necessary and proportionate manner. As one of my predecessors observed, ensuring the effective performance of counter-terrorism institutions assists states to fulfil their international obligation to protect human rights, including the right to life, against terrorist threats.

Secondly, as the United Nations Global Counter-terrorism Strategy emphasizes, state violations of human rights can themselves be conditions conducive to terrorism. Oversight and accountability mechanisms can assist in both preventing and remedying these. Thirdly, oversight and accountability can build public trust and confidence in law enforcement and other actors, sustaining their social license to use highly invasive and secretive powers. Fourthly, oversight can give foreign states the confidence that international cooperation, such as mutual legal assistance, extradition, or intelligence sharing, will be lawful and human rights compliant.

**This Framework Document comes at an opportune time.** My first report to the Human Rights Council emphasizes that profound and frequent violations of human rights continue to be committed in all parts of the world under the auspices of counter-terrorism. These affect not only terrorist suspects. Counter-terrorism laws are often misused and weaponised against innocent civil society, including journalists, human defenders, NGOs, political opponents and even judges. Strengthening oversight and accountability can help to push back against abuses by placing institutional constraints on their commission and raising the legal and political costs.

**I would now like to highlight some of the key elements of the Framework Document to assist in your discussion.**

**Part I: Subjects of Oversight** emphasizes the need for oversight of all of the diverse actors involved in counter-terrorism. There are of course many existing guidelines and recommendations on oversight and accountability for specific actors, particularly police, prisons and intelligence agencies that have traditionally played the central roles in countering terrorism. The Framework Document adds value to these because it identifies that contemporary counter-terrorism involves a great diversity of actors beyond criminal justice and intelligence, from financial regulators, to border and transport authorities, to bodies assisting victims of terrorism or preventing and countering violent extremism, to the legislative and policy branches, to private actors.

**There should also be oversight of the watchdogs themselves.** One additional subject of oversight I suggest adding to the current draft is the judiciary. In one recent case addressed by my office, a government exercised state of emergency powers to dismiss an independent judicial council and assume its powers to dismiss judges, and then politically purged the judiciary. The case illustrates that judicial oversight should also be independent and free from

political interference. Special care is needed to design oversight procedures which do not infringe on the independence of judges, while ensuring that judges are held accountable if they do engage in corruption, serious misconduct, or rights violations.

**In Part II: Forms of Oversight**, the Framework Document wisely recognizes that oversight and accountability are not usually, and need not be, concentrated in single national actor but are typically spread across a variety of mechanisms with different powers. These are often tailored to oversight of particular counter-terrorism actors with distinctive functions. Approaches vary from country to country and there is no “one size fits all”.

Some oversight bodies are internal to the counter-terrorism actor being scrutinized, as is common in the police, intelligence agencies or the military, while others are external, such as auditors, human rights commissions, ombudspersons, anti-corruption commissions, inspectorates, parliaments, or courts. Some bodies can make binding decisions while others only recommendations. Some bodies assess individual complaints while others look for more systemic or structural defects. Some operate confidentially within the executive, while others are more open and transparent public processes.

Whatever combination of mechanisms is chosen by a state, **the system of oversight as a whole must be sufficiently comprehensive to ensure that wrongdoing can always be effectively investigated and remedied.** There must not be gaps. This will often require close coordination between multiple agencies.

In addition, as one of my predecessors emphasized, an effective oversight system must also involve civilian institutions that are fully independent of both the counterterrorism actor and the executive, such as a court. This is to ensure that counter-terrorism actors are not ultimately judging themselves, resulting in public perceptions of bias if not actual bias. It is good practice, for example, for surveillance warrants to be issued by a court empowered to examine the substance of the request, rather than by an executive authority.

**Different forms of oversight present their own advantages and disadvantages.** For example, parliamentary oversight of legislation and counter-terrorism actors enjoys democratic legitimacy and is typically marked by openness, transparency and public participation, and can address systemic or legislative issues. On the other hand, parliamentary processes can be politicised and lacking in objectivity, particularly where the government controls the whole parliament, including any house of review. Populism is a threat to human rights. Parliaments may also not be able to intensively scrutinize individual cases like quasi-judicial or judicial bodies, or easily deal with classified information.

In another example, internal review bodies within the police service, intelligence agencies, or the military may enjoy broad mandates and powers, use flexible and expeditious procedures, possess the technical expertise in the area being regulated, and enjoy the confidence of the actor under investigation. On the other hand, they may be perceived to lack independence or impartiality and thus not enjoy full public confidence; or they may lack binding powers.

Judiciaries can enjoy public confidence in their independence and impartiality, give close attention to individual cases, rigorously guarantee due process, and issue binding and enforceable remedies. On the other hand, they may have a narrow or technical focus and not be well suited to addressing wider legislative and policy considerations, or systemic or resource issues. Justice can also be inaccessible, expensive, and overly formalistic.

Where oversight mechanisms – internal or external – only have recommendatory powers, these can be vital in publicly exposing systemic problems and prompting reform of working methods, procedures, policies, internal culture and so forth. However, where violations of individual rights are concerned, it is essential that such bodies are required to refer well-founded complaints to an appropriate disciplinary, prosecutorial, regulatory or other enforcement authority, for binding accountability and remedial action to be taken. Oversight is ultimately ineffective if it is limited to exposing but not remedying breaches. Coordination and collaboration is addressed by Good Practice 13 in the Framework Document.

**The Framework Document importantly encourages states to participate fully international and regional oversight and accountability mechanisms**, including by accepting United Nations human rights procedures and regional human rights systems. It further recognises that national mechanisms should be empowered to monitor compliance with international human rights obligations. While counter-terrorism may be a sensitive area for many states, international scrutiny should be welcomed as not only protecting human dignity but improving the effectiveness of counter-terrorism, including by avoiding state violations that are conducive to terrorism and sharing lessons learned from other states who have faced the challenge of reconciling human rights with security challenges.

**In Part III: Good Practices**, the Framework Document identifies good practices applicable across all oversight and accountability mechanisms, while realistically and flexibly acknowledging that the different functions of different bodies may require customised approaches. The special context of counter-terrorism can also require specialised or more intensive scrutiny than in more ordinary law enforcement or regulatory contexts.

In thinking about the idea of “good practices”, in his Good Practices on Intelligence Services in 2011, the then Special Rapporteur on human rights and counter-terrorism Professor Martin Scheinin observed that “good practices... not only refers to what is required by international [human rights] law... but goes beyond these”. International law is a floor, not a ceiling, and states should always be encouraged to adopt higher, not bare minimum, safeguards.

Many of the good practices in the Framework Document are common sense and should already be familiar to professionals working within state authorities. The Document nonetheless serves a very valuable role in laying them out so systematically, so that states can check for comprehensiveness and quality when they design or reform their system of mechanisms.

**Let me now highlight some key good practices in the Framework Document.**

First, the mandate and procedures of an oversight or accountability mechanism should be clearly **codified in law** (GP1), both to ensure it has sufficient powers effectively do its job and to prevent arbitrariness by the mechanism itself. **Substantively** the mandate should be broad enough to assess not only the legality and propriety of action by the counter-terrorism actor but also its substantive compliance with human rights law (GC4). **Geographically** the oversight mandate should apply to wherever the counter-terrorism actor operates, including any extraterritorial operations and foreign electronic surveillance: I would encourage the Document to expressly reflect this.

**Procedurally** a mechanism must be empowered to access relevant records, facilities, personnel and witnesses, so that it can effectively carry out its investigations (GP3 and GP6), while protecting classified information, data, and privacy. Within the oversight system, there must also be procedures for making individual complaints, and for whistleblowers to make protected

disclosures. Complainants and whistleblowers must be protected from all forms of reprisal. At some level in the oversight system there must be available enforceable remedies, including cessation of violations, reparation (including apology and compensation), and accountability for violators, including criminal prosecutive and proportionate punishment.

**Secondly, a mechanism must be independent** from the counter-terrorism actor it is scrutinizing (GP1) – whether absolutely, as in the case of a court, or relatively, as where an internal oversight mechanism is structurally insulated from, for example, the chain of command within the police, military or an intelligence agency. Independence requires consideration of issues such as merit-based appointments, guarantees of tenure, protection against arbitrary dismissal, freedom from improper political interference, and adequate powers, funding, resources, personnel, expertise and infrastructure. Independence of mechanisms is particularly important in relation to counter-terrorism actors that operate in secret, such as intelligence services, who are often not subject to open and public accountability or media scrutiny.

**Thirdly, the oversight or accountability mechanism itself must respect human rights**, including due process and privacy (GC15). Training and expertise in human rights are essential to this. A mechanism should also ensure transparency through, for example, public information laws, public reporting, and engaging with civil society (GP13). All of these serve to enhance public confidence in the integrity of counter-terrorism measures and actors, and can also increase public cooperation with the authorities and the effectiveness of laws. The accountability of oversight bodies themselves also requires their own decisions to be subject to judicial review and effective remedies.

**In conclusion:** The Framework Document is a call to action for states to put in place the institutional structures that are necessary to prevent human rights violations when countering terrorism, and to make countering terrorism itself more effective. Of course, the mechanisms alone are not enough.

Their value will also depend on the content of the national laws whose implementation they monitor. For example, the power of an oversight body to compel access to counter-terrorism actor's records is futile if that actor is not required to keep the records in the first place, and accordingly deletes video footage of torture or forced confessions in custody. Or if counter-terrorism law criminalises protest in a democratic society, permits arbitrary detention, or confers excessive investigative powers on law enforcement, then an oversight body that is limited to assessing the legality of such measures will be powerless to prevent rights violations.

There is then a risk that oversight or accountability mechanism could confer a veneer of legitimacy on counterterrorism laws even when they substantively violate international law. Governments will point to them as evidence of their commitment to oversight, even when it is not genuine. It is essential that an effective oversight and accountability system is not limited to checking domestic legality, or administrative and financial integrity, but can also ensure substantive compliance with international human rights law.

Further, even well designed and resourced oversight and accountability mechanisms cannot be fully effective in the absence of a wider enabling environment. To flourish they must operate within a system of rule of law, good governance and human rights, where the political branch respects the separation of powers, and executive actors are accountable to, not above, the parliament and the judiciary. Counter-terrorism laws have been abused in liberal democratic states even with constitutionally protected rights and strong judicial safeguards. But they have

also been violated in distinct and distressing ways, including against civil society, in non-democratic and authoritarian states.

Oversight and accountability mechanisms cannot be viewed in isolation or as technical fixes, but must be part of wider improvements in counter-terrorism laws, the protection of human rights, a rule of law culture, and institutions and ethics of good governance.

I commend the Framework Document to you and wish you well in your deliberations.

Thank you.