

Statement by Mr Martin Scheinin, Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism.

Security Council Counter-Terrorism-Committee, New York, 24 October 2005.

1. The CTC was established pursuant to Security Council resolution no 1373 (2001), in the immediate aftermath of the atrocious terrorist attacks of September 11, 2001. The Security Council, acting under Chapter VII of the UN Charter, identified a number of state obligations in countering terrorism and established the CTC for the purpose of monitoring, inter alia by considering reports, the performance of member states in implementing the resolution (para. 6).
2. Resolution no 1373 makes only one passing reference to human rights, and in a very specific context. Consequently, it could be argued, and has indeed been argued, that the CTC has no mandate to monitor that counter-terrorism measures by states comply not only with the resolution itself but also with human rights norms. Besides, and rightly, we are being reminded that there are separate human rights monitoring bodies within the UN framework.
3. That said, we must be mindful of the fact that Security Council resolution 1456 (2003), adopted at the level of Ministers of Foreign Affairs, includes the well-known formulation according to which “States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law.” (para. 6) This unconditional affirmation of human rights obligations forms a part of the context in which those other parts of the resolution must be read that refer to the work of the CTC. Inter alia, the CTC is, in the same resolution, encouraged to bear in mind and work towards the sharing of “best practice” in the fight against terrorism (paras. 4 iii and 8).
4. Furthermore, and perhaps more importantly, Security Council resolution 1624 (2005) explicitly confers the CTC with a human rights mandate by directing it to include in its dialogue with states also the implementation of this new resolution (para. 6) which includes a number of references to the required human-rights-compatibility of measures to be taken. (See, in particular, para. 4.)
5. In the Commission on Human Rights resolution 2005/80, establishing my mandate as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, I am entrusted with the task of developing a regular dialogue and discussing possible areas of cooperation with all relevant actors, “in particular” the CTC, fully respecting the respective mandates of these actors and with a view to avoiding duplication of effort.
6. It was with these considerations in mind that I approached your esteemed Chairperson in a letter dated 23 September 2005, proposing that I would address the CTC in order to

give a short presentation of current trends in states' counter-terrorism measures as to their conformity with human rights, and to explore possibilities for cooperation between the CTC/CTED and my mandate in four areas: (a) the questioning and comments by the CTC in the consideration of state reports in relation to human-rights-sensitive issues and in order to avoid misunderstandings or abuse; (b) the possible involvement of the special rapporteur in the CTC's consideration of state reports or, alternatively, direct access to the comments given by the CTC; (c) working together towards "model laws" or for the identification of "best practices" while countering terrorism; and (d) the possibility of parallel coordinated recommendations in the field of technical assistance, advisory services or country visits. I will remain at the disposal of the CTC and the CTED in pursuing any of these options, or in finding some other areas of cooperation.

7. As to "current trends", let me briefly outline some that in my view deserve greater interaction than so far between the CTC and the human rights world:

(a) First of all, the very old trend of states resorting to the notion of "terrorism" to stigmatize political, ethnic, regional or other movements they simply do not like, is very much also a new trend. What is new is that since September 2001, the international community seems to have become more ignorant in respect of such abuse of the notion of terrorism. What results is that calls and support for counter-terrorism measures by the international community may in fact legitimize oppressive regimes and their human rights-hostile actions. A common international definition of terrorism would be the best cure to this illness but, meanwhile, we are very often left with human rights law, primarily article 15 of the ICCPR that contains a non-derogable provision on the requirements that criminal law must meet: all crimes must be defined in the law in a manner that is precise and foreseeable, that specifies also the applicable penalty and that can be applied only in respect of crimes that were committed after the enactment and entry into force of the law.

(b) Secondly, perhaps the most alarming "new trend" in counter-terrorism measures is questioning or compromising the absolute prohibition against torture and all forms of cruel, inhuman or degrading treatment. This trend manifests itself in many different forms. We hear calls to apply actual torture in so-called "ticking bomb" situations. Some states try artificially to distinguish narrowly defined torture from other forms of cruel, inhuman or degrading treatment, disregarding the fact that all these practices are subject to an absolute and non-derogable prohibition under ICCPR article 7. Further, there are practices that amount to torture by proxy, for instance by dumping crime suspects for interrogation to countries that are known to practice torture. And there are proposals to compromise the rule of non-refoulement through calls for a "balancing approach", through diplomatic assurances or through amendments to human rights treaties or calls to change their established interpretation.

(c) Thirdly, although incitement to commit serious crimes is defined as a criminal offence in almost every country, in the current era of unpredictable terrorist attacks such as suicide bombings within democratic and traditionally peaceful societies, there is now a trend to move beyond actual incitement, in order to criminalize the "glorification" or

“apology” of terrorism, or the publication of information that may be useful in the commission of acts of terrorism. As a sound and human-rights-conforming response, I want to make reference to the newly adopted Council of Europe Convention on the Prevention of Terrorism (CETS 196) which includes in article 5 a definition of “public provocation” to terrorism, based on a double requirement of a subjective intent to incite (encourage) the commission of terrorist offences and an objective danger that one or more such offences would be committed.

(d) Fourthly, various forms of tightening immigration controls, including through so-called (racial, ethnic or religious) profiling, sharing of information between countries, and new forms of long-term or even indeterminate detention. Many countries are also moving towards eliminating the suspensive effect of appeals against negative asylum decisions, in spite of criticism by human rights bodies such as the European Court of Human Rights and the Human Rights Committee.

(e) As a fifth and final trend, terrorism has largely replaced drug-related crime as the primary justification for ever broadening powers of the police in the investigation or prevention of crime. Many of the traditional safeguards such as targeting only suspects of crimes already committed and advance judicial authorization are being disposed of in the fight against terrorism but then not necessarily stopping at terrorist offences.

8. To illustrate the crucial role of the CTC in promoting human-rights-conforming, human-rights-insensitive or human-rights-hostile methods of counter-terrorism, I would like to refer to roughly a dozen of examples collected from reports by states to the CTC. As a methodological observation it needs to be emphasized that I am not referring to the authentic comments or questions by the CTC but to the form in which they were reproduced in subsequent reports by the states concerned. For my purposes, this is perhaps even more important than what the CTC actually said: I am trying to address how states understand the message given to them by the CTC. Below, I am presenting examples of four types of different messages received by states from their interaction with the CTC. Many of my examples are related to the “current trends” described above.

9. The first category could be described as a “best practice” from the perspective of my mandate. Here, we are speaking of situations where the CTC has been explicitly promoting human-rights-conforming responses to terrorism. The CTC expressed positive interest in the drafting in *Belgium* of new counter-terrorism legislation that would at the same time preserve human rights (S/2004/156). Also *Kenya* received an explicit question on the compliance with human rights of its counter-terrorism measures (S/2004/181).

10. The second category consists of examples where the implementation of CTC recommendations – or of what were perceived as such – has met with human-rights-based criticism or resistance at the domestic level and states come back to the CTC with the “bad news” of not having been able to implement the recommendations received. With *Paraguay* the CTC appears to have engaged in a positive dialogue for the purpose of putting into operation counter-terrorism measures that at the same time comply with human rights (S/2003/700, S/2004/375, S/2005/516). This case highlights some of the

sensitivities involved in designing effective counter-terrorism measures in countries that are mindful of their record of human rights violations in the past. The exchanges with *Peru* (S/2003/896, S/2004/579) bear similar characteristics. To take a different example, the CTC appears to have understood a human rights clause in the *Austrian* Penal Code as a political exception for the prosecution of terrorist acts and hence as incompatible with resolution 1373. In its subsequent report (S/2005/231) Austria defended its law with a reference to the need to comply with human rights in the fight against terrorism and the possibility of nevertheless avoiding impunity of terrorist crimes.

11. The third and perhaps most problematic category consists of instances where my reading of subsequent reports by a state suggests that the CTC has been insensitive in respect of human rights in posing questions or making recommendations to the state in question. It transpires as a fairly standard item in the dialogue that the CTC has been asking questions about a long list of crime investigation techniques that manifestly constitute interferences with the right to privacy and family life. From a human rights standpoint the crucial questions are whether such measures are necessary for a legitimate aim such as the investigation of crime and at the same time proportionate in respect of the infringement of privacy. Against this background it is problematic that the CTC seems to be recommending a maximalist agenda of a variety of investigative techniques (such as controlled delivery, pseudo-offences, anonymous informants, cross-border pursuits, bugging of private and public premises, interception of confidential communications such as internet and telephone, etc.) and also appears to be proposing the relaxation of safeguards that may be in place under domestic law and are required by human rights law (such as the requirement that only actual crime suspects may be subjected to the measures, the requirement of advance judicial authorization and the requirement of limited duration). Unless the applicable human rights standards are referred to in this type of questioning, states may very well get the message that they are requested to expand the investigative powers of their law enforcement authorities at any cost to human rights. In particular, I want to underline that this line of questions has been applied also in respect of very authoritarian regimes which are known to violate human rights through the conduct of their law enforcement authorities. They would not deserve any legitimizing sanction by the UN Security Council. *Belarus* is a case in point, and I am referring to document S/2004/255.

12. Other examples in this category include the following cases:

- On the basis of subsequent state reports, states often seem to be confused in the important distinction between exclusion from refugee status and the physical exclusion or deportation from the territory of a country when a person is guilty or suspected of terrorist offences (*Bahrain* S/2003/1043, *El Salvador* S/2002/729, *Germany* S/2002/1193, *Latvia* S/2002/1370, *Slovakia* S/2002/730). From the perspective of ICCPR article 7 and CAT article 3 it must be emphasized that no one may be deported to face torture in another country, even when the exclusionary clause of article 1 (F) of the Refugee Convention applies.

- Judging by a subsequent report, the CTC appears to be ignorant in respect of the norm derived by the Human Rights Committee from article 6 of the ICCPR that a country that itself has abolished capital punishment violates the right to life if it deports a person to another country where he or she may face the death penalty (*Australia S/2003/513*).

- The CTC appears to suggest that naturalized persons should not be allowed to change their name (*Australia S/2003/513*) or to enter into a “marriage of convenience” (*South Africa S/2004/170*). These are matters related to the right to privacy and family life.

- When dealing with a report by *Colombia*, the CTC apparently identified persons providing medical treatment to terrorists as being covered by paragraph 1 (c) of resolution 1373 and called for the freezing of their assets (S/2004/403). In my view, this represents too broad a reading of paragraph 1 (c).

12. Finally, a review of state reports to the CTC reveals that the CTC has shown little, if any, interest in the definition of terrorism at the national level. This is problematic as it is well-known that states quite widely apply terrorism definitions that either do not meet the requirements of ICCPR article 15 (nullum crimen, nulla poena, non-retroactivity) or are in the worst case designed in bad faith to outlaw political opposition, religious entities, or minority, indigenous or autonomy movements. If the human-rights-conformity of terrorism definitions is not reviewed, then the CTC may end up encouraging the full scope of measures designed to implement resolution 1373 in respect of something that has nothing to do with terrorism.