

*Check against delivery*



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

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Mr. President, distinguished representatives, ladies and gentlemen,

### **Country visits and other country-specific work**

When I for the first time appeared before the Council in September last year, I expressed my dissatisfaction at the low level of cooperation by Governments with my mandate, and a hope that a certain wait-and-see approach was merely related to a phase of transition from the Commission to the Council. Today I am glad to announce that things have improved. I have received invitations by the Governments of South Africa, the United States and Israel to conduct country visits, and discussions on the timing of visits to Spain, which has a standing invitation and the Philippines are underway. The visit to South Africa is scheduled for the second half of April, the visit to the United States to the second half of May and the visit to Israel for early July. During each of these visits I will conduct an assessment of the compatibility of the law and practice of the country's counter-terrorism measures with human rights and fundamental freedoms. The primary point of departure for such assessment will be in the human rights treaties ratified by the country concerned. Secondly, and only in respect of certain aspects of counter-terrorism measures, also norms of customary international law or international humanitarian law will need to be addressed, the latter category of course only to the extent the country concerned is experiencing an armed conflict or seeks to justify its counter-terrorism measures with reference to an armed conflict.

As you know, during 2006 I was able to conduct only one country visit, complemented by preliminary consultations with a number of other governments. A report of my visit to Turkey constitutes Addendum 2 to my report under consideration. Once again, I want to thank the Government of Turkey for its exemplary cooperation in preparing and conducting the visit.

In Addendum 3 to my report you will find a study on the counter-terrorism law and practice of Australia. This study was produced through a process of consulting both governmental and civil society actors in the country. While the intensity of country visits during the next months will prevent me from rapidly conducting similar desktop studies, it is my intention to apply the methodology developed for the Australia study in future cases, either in preparation of a country visit or instead of such a visit.

Addendum 1 to my report summarizes my correspondence with Governments during 2006. As you will note, similarly to most Special Rapporteurs my letters to governments are often related to individual cases of alleged human rights violations and based on information received from credible sources. Quite often, these letters also represent cooperation between my mandate and one or more other mandates. Where my correspondence with governments, however, differs from the approach taken by most Special Rapporteurs, is that fairly often my letters address new legislation or laws under preparation, seeking to clarify on the abstract level legal issues related to the promotion and protection of human rights while countering terrorism.

## Profiling

The main theme of my annual report to the Council is racial, ethnic or other forms of profiling in the fight against terrorism. '*Profiling*' is generally defined as the systematic association of sets of physical, behavioural or psychological characteristics with particular offences and their use as a basis for making law enforcement decisions. In my view profiling is, in principle, a permissible means of law enforcement activity. Detailed profiles based on factors that are statistically proven to correlate with certain criminal conduct may be effective tools better to target limited law enforcement resources.

However, when law enforcement agents use broad profiles that reflect unexamined generalisations, their practices may constitute disproportionate interferences with human rights. In particular, predictive profiling based on stereotypical assumptions that persons of a certain 'race', national or ethnic origin or religion are particularly likely to commit crime may lead to practices that are incompatible with the principle of non-discrimination and many other human rights, including the right to privacy, freedom of movement and liberty of person. It is therefore of grave concern that, since 11 September 2001, law enforcement authorities of different States have adopted counter-terrorism practices that are based on terrorist profiles that include characteristics such as a person's presumed 'race', ethnicity, national origin or religion.

In the fight against terrorism, terrorist profiles have been employed, for example, in the context of data mining initiatives, immigration controls, conducting stops, document checks or searches, and identifying possible suicide bombers. My report draws upon the experiences of a number of countries, including Germany, the United Kingdom, the United States and Russia. Alarming often the profiles have been based on Arab, Muslim, Middle Eastern, Asian or Central Asian origin, religion, ethnicity or nationality.

In my report I express the view that terrorist profiling practices that involve distinctions according to a person's presumed '*race*' cannot be supported by objective and reasonable grounds, because they are based on the wrongful, unscientific assumption that there are different human '*races*' and, therefore, inevitably involve unfounded stereotyping through a crude categorization of assumed "*races*", such as "white", "black" and "Asian".

The use of terrorist profiles that include criteria such as *ethnicity*, *national origin* and *religion* is not always impermissible. If, in the context of an investigation into an already committed terrorist crime, there are reasonable grounds to assume that the suspect fits a certain *descriptive* profile, then the reliance on characteristics such as ethnic appearance, national origin or religion is justified. Similarly, these factors can be employed to target search efforts where there is specific intelligence suggesting that someone fulfilling these characteristics is *preparing* a concrete terrorist act. The situation is different, however, in the case of general preventive counter-terrorism efforts. While profiles used for such efforts may legitimately include behavioural or psychological characteristics, they must not be based on stereotypical generalisations that certain ethnic or religious groups pose a greater terrorist risk than others.

To the limited extent profiling is potentially permissible, it must be subjected to two sub-tests to determine the existence of an objective and reasonable justification for it in the concrete situation. First, the difference in treatment must pursue a legitimate aim. Second, there has to be a reasonable relationship of proportionality between the difference in treatment and the legitimate aim sought to be realized.

As far as the first requirement of a legitimate aim is concerned, the aim of law enforcement practices at issue is the prevention of terrorist attacks. In my view this does constitute a legitimate and compelling social need. Therefore, the decisive question will be whether, when and where terrorist profiling practices, and the differential treatment they involve, are a proportionate means of achieving this aim.

Ethnicity, national origin and religion are inaccurate indicators for a risk of terrorism, because the initial premise on which the profiling practices of many countries are based, namely that persons of a particular appearance or origin are likely to be involved in terrorist activities, is highly doubtful. In practice, most existing terrorist profiles use ethnic appearance and national origin as proxies for religion, as religious affiliation is normally not readily identifiable (and in any case it is easy to conceal). Yet real experiences of profiling, for instance in the United States and the United Kingdom, demonstrate that ethnicity and national origin are very poor proxies for religion. Hence, existing experiences of profiling in the context of countering terrorism, have usually proven to be discriminatory and thus impermissible under human rights law. Although profiling is not by definition impermissible, in practice it tends to fail to meet the demanding test of legitimate aim and proportionality.

This applies to the massive German *Rasterfahndung* data mining project, to United States immigration controls, to stop and search practices by the United Kingdom and the Russian police. All these efforts to profile potential terrorists failed to deliver what they were supposed to do.

Profiles based on ethnicity, national origin or religion are easy to evade. Real terrorist groups have regularly proved their ability to adapt their strategies, with the use of female or child suicide bombers to avoid the stereotype of the male terrorist as just one example. Thus, as law enforcement specialists acknowledge, any kind of terrorist profile based on physical characteristics can easily become self-defeating.

The available evidence suggests that profiling practices based on ethnicity, national origin or religion are an unsuitable and ineffective means of countering terrorism: they affect thousands of innocent people, without producing concrete results.

Instead of producing real results, profiling practices based on ethnicity, national origin or religion can take a profound emotional toll on those subjected to them. Such individual experiences may translate into negative group effects. Terrorist profiling practices single out persons for enhanced law enforcement attention simply because they match a set of group characteristics, thus contributing to the social construction of all those who share these characteristics as inherently suspect. This stigmatization may, in turn, result in a feeling of alienation among the targeted groups. To be successful, counter-terrorism law enforcement policies would build on a diametrically opposite strategy of strengthening the trust between the police and communities.

In the fight against terrorism it is of great value to be able to identify potential perpetrators of acts of terrorism before they commit the crime. For this end, profiling based on behavioral patterns is significantly more efficient than reliance on ethnicity, national origin or religion. Of course, behavioural indicators must be implemented in a neutral manner and must not be used as mere proxies for ethnicity, national origin or religion.

In practice, it may not always be possible for law enforcement agencies to rely on specific intelligence or useful behavioral indicators in the context of preventive counter-terrorism efforts. In my report I express the view that in such situations controls should be universal, affecting everyone equally. Where the costs for blanket searches are deemed to be too high, the targets for heightened scrutiny must be selected on a random rather than on an ethnic or religious basis. In fact, this is what airlines are already routinely doing. As opposed to profiling, random searches are impossible for terrorists to evade and may thus be more effective than profiling.

States should establish clear and strict standards as to what factors law enforcement agents may or may not employ for their search efforts in the counter-terrorism context. These guidelines should make clear that criteria such as ethnicity, national origin and religion may only be used in very limited circumstances: namely, in the investigation of already committed crimes or where there is specific intelligence suggesting that someone fulfilling these characteristics is preparing a terrorist act. Furthermore, these standards should make clear that any terrorist profiling practices that involve interferences with the freedom of movement, the right to liberty or the right to privacy – regardless of the criteria on which they are based – must strictly comply with the principle of proportionality.

Any use of terrorist profiling practices by law enforcement agencies must be clearly documented and monitored. States should establish systems of transparent and independent oversight of law enforcement agencies to monitor and ensure compliance of counter-terrorism practices with human rights standards. States must also provide effective means of holding law enforcement agents accountable for any violations of human rights, including when committed in the context of countering terrorism.

States should develop and implement a system of training of law enforcement officials that includes clear instructions as to what factors they may legitimately employ for terrorist profiles as well as a substantial training component on human rights and non-discrimination. Importantly, such training of law enforcement agents should make clear that profiling based on stereotypical generalizations that certain ethnic or religious groups pose a greater terrorist risk than others is not only impermissible but also ineffective and even counterproductive.

### **Suicide attacks**

My report also deals with suicide attacks as a particular form of terrorism that perhaps poses distinctive questions concerning responses to terrorism that are human rights compatible. One of the conclusions in the report, however, is that existing international standards such as the Code of Conduct for Law Enforcement Officials, and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, are adequate also in respect of suicide attacks as a form of terrorism. There

is no need for new loosened standards in respect of the use of firearms to prevent suicide terrorism. The rhetoric of "shoot-to-kill" serves only to displace clear legal standards with a vaguely defined license to kill, risking confusion among law-enforcement officers, endangering innocent persons and rationalizing mistakes, while avoiding the genuinely difficult challenges that are posed by the relevant threat. My report recommends scrupulous adherence to and systematic training in existing international standards on the use of firearms by law-enforcement officials. Further, also in the context of preventing suicide attacks, I reiterate the recommendation to apply either universal or random security checks, instead of measures based on profiling.

Mr. President,

### **Mainstreaming human rights into counter-terrorism**

My mandate is one of the entities that compose the United Nations Counter-Terrorism Implementation Task Force (CTITF). This inter-agency body did background work for the United Nations Global Counter-Terrorism Strategy adopted by the General Assembly in its resolution 60/288 of 8 September 2006. Currently the CTITF is involved in the implementation of that strategy, inter alia through thematic smaller working group. I see it as important for the promotion and protection of human rights in the fight against terrorism that my mandate is involved in the task force, assisting the other agencies involved in identifying and addressing human rights concerns.

The global counter-terrorism strategy includes the following list of conditions conducive to the spread of terrorism: prolonged unresolved conflicts, dehumanization of victims of terrorism in all its forms and manifestations, lack of rule of law and violations of human rights, ethnic, national and religious discrimination, political exclusion, socio-economic marginalization, and lack of good governance. The strategy calls for action to combat these conditions while it makes clear that none of these conditions can excuse or justify terrorism. These pronouncements are in line with my understanding of the importance of the promotion of human rights in long-term work to prevent terrorism, including suicide terrorism.

### **On the future of the mandate**

The mandate of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms was not set up hastily. Particularly after the massive terrorist attacks of September 11, 2001, the international community and individual states have intensified their efforts to fight against terrorism in all its manifestations and forms. While many of these efforts are commendable and absolutely necessary in the defence of human rights, unfortunately there have also been unintended negative side effects on human rights, or even cases of outright abuse of the legitimate fight against terrorism to target forms of dissent that are not terrorism. In order to secure the respect for human rights, the Commission on Human Rights established in 2004 the mandate of an independent expert to study the issue and in 2005 the mandate of a new Special Rapporteur. This mandate is a clear response to an identified protection gap. Being comprehensive, this mandate is aimed at complementing other Special Rapporteurs and mandates by concentrating on areas not covered by those mandates and on the complex ways in which several human rights of particular segments of the

population are affected by counter-terrorism measures. Still today, human rights are often under threat or attack by measures that are taken in the name of fighting against terrorism.