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**Statement by Martin Scheinin**

**SPECIAL RAPPORTEUR ON THE PROMOTION AND  
PROTECTION OF HUMAN RIGHTS AND FUNDATMENTAL  
FREEDOMS WHILE COUNTERING TERRORISM**

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Mr. Chairman, distinguished delegates

This is my third appearance before the General Assembly as the first holder of the mandate of Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. The mandate was established by the Commission on Human Rights in 2005 and has since then been assumed by the new Human Rights Council.

I am pleased to inform you and your colleagues that during this year the cooperation by Member States with my mandate has clearly improved. I was able to conduct successful missions to South Africa, the United States of America and Israel, the last-mentioned mission including also visits to the Occupied Palestinian Territory. Preparations are underway for missions to the Philippines and Spain during the first half of 2008. However, I am troubled regarding the slow progress in finalizing the dates for an official visit to the Philippines, which I still hope can take place in January 2008, as the Government has recently advised that preparations for the Universal Periodic Review (UPR) by the Human Rights Council may prevent the State from receiving me. Of course it should be the other way around, that cooperation with the special procedures of the Council is the best way to prepare for the UPR!

In addition there remain several outstanding requests for an invitation, including those communicated to Algeria, Egypt, Malaysia, Pakistan and Tunisia.

Mr Chairman,

The report in front of you focuses on one thematic area, challenges to refugee law and international protection posed by counter-terrorism measures. In many parts of the world, counter-terrorism measures disproportionately affect asylum-seekers, refugees and immigrants. In fact, asylum-seekers with a well-founded fear of persecution may be the largest similarly situated group of persons in the world who are seriously and adversely affected by the post-2001 wave of new counter-terrorism measures. It is a troubling observation made in my report that terrorism and national security are often used as an argument for more restrictive asylum and immigration regimes. I wish to underscore that human rights law and refugee law, as they have developed over the decades, do take proper account of the security concerns of States. The new momentum in addressing terrorism does not, as such, justify the revamping of standards and principles of international protection.

The current report highlights certain issues that have a particular bearing on the possibility of individuals to access refugee protection and determination by States of their need for international protection. These issues are: pre-entry interception and screening measures, detention of asylum-seekers, **exclusion** from refugee or other protection status, including in relation to the application of the principle of *non-refoulement*, the **repatriation or resettlement** of persons detained for terrorism-related reasons, and, finally strengthening **global responsibility** for international protection.

Being able to access other countries to seek protection is key to a refugee's life and security, and a cornerstone of international protection. In respect of pre-entry **interception** and screening measures which have become common particularly at sea, my report recommends that States, in cooperation with the United Nations High Commissioner for Refugees ensure

clear guidelines and practices in all military and border control operations involving interception or other pre-entry mechanisms, fully respecting the pertinent principles and obligations under international law, particularly refugee law and human rights law, towards persons seeking international protection. I also encourage States to thoroughly analyze the implications for international protection of the whole ambit of pre-entry measures to curb migration.

Responding to frequent patterns of mandatory or indefinite **detention** of asylum-seekers, my report urges States not to depart from the right to judicial review of the lawfulness of any form of detention. According to the Human Rights Committee this right is not subject to derogation even at times of a public emergency. Furthermore, given the vulnerable situation of detained immigrants, judicial review of any form of immigration detention should be made automatic within a reasonable time, such as 48 hours.

Mr Chairman,

The issue of so-called diplomatic assurances has figured quite strongly in recent debates on the fight against terrorism and the principle of *non-refoulement*. In this respect, my reports before the General Assembly and the Human Rights Council express the position I have taken in the matter. It can be summarized in four elements of which the first three pertain to law and the fourth factor relates to policy:

- 1) Diplomatic assurances sought from a receiving State to the effect that a person will not be subjected to torture, or any other form of cruel, inhuman or degrading treatment or punishment can never absolve the duty of the sending State to assess individually the existence of a "real risk" of such treatment. The same obligation to conduct an individual assessment relates also to the risk of persecution, or the risk of capital punishment in contradiction with the international obligations of the sending or the receiving state.
- 2) Diplomatic assurances can, at best, be taken into account as one of the several factors to be addressed in the individual assessment of the risk.
- 3) Such assessment of the risk must be subject to effective and independent, preferably judicial, safeguards. Any other than a judicial remedy is unlikely to meet the demanding requirements of human rights law, as spelled out in the *Agiza, Ahani* and *Alzery* cases by UN human rights treaty bodies.
- 4) Finally, as diplomatic assurances against torture or inhuman treatment, even when accompanied with post-removal monitoring, tend not to work in practice, I discourage as a matter of policy the creation of removal or resettlement mechanisms where such assurances would play a central role.

On the issue of **release, repatriation and resettlement of detainees** held for terrorism-related reasons in various parts of the world, I am encouraged by positive signals that the Government of the United States plans to close down one of the most long-standing places of detention of terrorism suspects, the military detention facility at Guantánamo Bay. I recommend in my report that the United States, without delay, close down this detention facility so that the detainees are either put on trial for crimes they have allegedly committed or are released. Further, irrespective of the primary responsibility of the United States for the

release, repatriation and resettlement process of Guantanamo Bay detainees not subject to criminal proceedings, all States should be prepared to receive for resettlement persons originally detained for terrorism-related reasons but where no criminal charges are initiated.

My report also recommends that the United Nations High Commissioner for Refugees (UNHCR) be involved in the resettlement of Guantanamo detainees claiming to be in need of international protection, through making an assessment, including through confidential interviews, of the situation of each individual detainee; and that the High Commissioner for Human Rights make use of her good offices in facilitating resettlement in humanitarian cases falling outside the scope of the Refugee Convention.

Mr Chairman,

I regret that during my visit to the United States I was not guaranteed a possibility to interview, in private, detainees at the Guantanamo Bay military detention facility, or other places where the US holds persons suspected of terrorist acts. The Standard Terms of Reference for Fact Finding Missions by Special Rapporteurs and Representatives call for unhindered access to all places of detention, including the possibility to interview detainees without monitoring by the authorities. Not being guaranteed that access, I was not able to visit Guantanamo or other detention facilities during my country visit. This is regrettable, as all my other country visits, to Turkey, South Africa and Israel, have included unhindered access to terrorism detainees.

After my visit to the United States the Government has extended an invitation to visit Guantanamo Bay for the purpose of observing proceedings before military commissions. I welcome this invitation and will conduct further consultations with the Government later this week.

As to the **exclusion** of persons for terrorism-related reasons from refugee status or other forms of international protection, my report calls for a restrictive and scrupulous application of exclusion clauses, including through their strictly individual application.

In order to strengthen **global responsibility** for international protection as part of a comprehensive counter-terrorism strategy, my report recommends greater efforts by States in cooperation with intergovernmental organizations to ensure protection of individuals, and enhanced international coordination and cooperation to resolve conflicts and stabilize societies, as well as thorough and responsible analysis of conditions enabling return of rejected asylum-seekers or repatriation of refugees, and of the existence and risk of conditions in the country of return that may be conducive to the recruitment and spread of terrorism..

On this occasion I want to express my gratitude to the United Nations High Commissioner for Refugees for their continued support to my mandate, including during my country visits or in their preparation, as well as in advising my mandate on issues pertaining to refugee law.

Mr. Chairman, I look forward to a constructive dialogue with the Delegates.