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Statement by Martin Scheinin

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

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Mr Chair, distinguished delegates,

This is my sixth and final appearance before the General Assembly as Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. While my work and reporting to the Human Rights Council will continue until the end of July 2011, next October you will be addressed by another Special Rapporteur. Against this background, you will understand why I chose for this particular report (A/65/258) the thematic focus of United Nations' own compliance with human rights while countering terrorism.

Yesterday I had the honour of briefing the 1267 Al-Qaida and Taliban Sanctions Committee of the Security Council. On Thursday I hope to be received by the Counter-Terrorism Committee of the Security Council. Many of the issues and problems identified in the report in front of you relate to counter-terrorism measures by the Security Council, in particular those exercised under the umbrella of Chapter VII of the United Nations Charter, giving to the Security Council extraordinary powers to 'determine the existence of any threat to the peace, breach of the peace, or act of aggression' and to decide, with legally binding authority in respect of Member States, what measures shall be taken, accordingly, 'to maintain or restore international peace and security' (Article 39).

Two cornerstones of United Nations action against terrorism are based on Chapter VII powers of the Security Council, namely the listing of individuals and entities as Taliban or Al-Qaida terrorists, pursuant to resolution 1267 (1999), as subsequently revised and expanded, and the entire framework of measures required by resolution 1373 (2001), including in the fields of financing of terrorism, border controls and exchange of information. My report takes the view that neither one of these two regimes has a proper legal basis in Chapter VII of the Charter in the world of today. To put it bluntly, while international terrorism remains a very serious threat and constitutes a category of atrocious crime, it is not generally and on its own a permanent threat to the peace within the meaning of Article 39 of the Charter and does not justify the exercise by the Security Council of supranational quasi-judicial sanctioning powers over individuals or of supranational legislative powers over Member States.

The sanctions against the Taliban in Afghanistan were introduced in 1999 by Security Council resolution 1267 as a form of smart sanctions against a defined

group of persons, and limited in time and space. They were justified with reference to a concrete threat to peace from the side of the de facto regime in Afghanistan, and the concrete aim of compelling the Taliban to hand over terrorist leader Osama bin Laden. It was only through resolution 1390 (2002) that the regime became open-ended, without any link to a specific territory or State. While resolution 1267 (1999) could be seen as a temporary emergency measure by the Security Council, using its Chapter VII powers to maintain a permanent list of terrorist individuals and entities anywhere in a world and to impose its application upon all Member States as a legally binding Charter obligation goes beyond the powers of the Security Council.

Similarly, resolution 1373 was adopted in the immediate aftermath of the terrorist attacks of 9 September 2001, in a situation when only four States in the world had ratified the International Convention for the Suppression of the Financing of Terrorism which had yet to enter into force. Resolution 1373 was a shortcut, an emergency measure to impose upon States the rules of the Convention already while they were only preparing for its ratification. Today, there are 173 States parties to the Convention. Hence, there is no justification for the position that the supranational powers of the Security Council would have to be resorted to in order to provide a normative framework for action against terrorism.

These are the factors that motivate my assessment that both the 1267 leg and the 1373 leg of the Security Council's counter-terrorism measures are outside the scope of powers granted by the Charter. Of course, the adverse consequences of this can be mitigated by improving the delisting mechanisms under the 1267 regime, including through the creation of the office of the delisting Ombudsperson pursuant to resolution 1904 (2009) or through national courts exercising judicial review over the implementation of sanctions against persons listed by the Security Council, in line with General Assembly resolution 64/168 (para 10) that urges States 'to include adequate human rights guarantees in their national procedures for the listing of individuals and entities'.

Despite progress in those and other areas, the current situation of two cornerstones of the United Nations counter-terrorism architecture being *ultra vires* poses risks to the protection of human rights and the international rule of law. What is equally important, this situation weakens the legitimacy - acceptability and acceptance - of the UN counter-terrorism framework, hence constituting a threat to an effective and efficient fight against terrorism.

It is in the interest of both better counter-terrorism and better enjoyment of human rights that my report presents the proposal of seizing the opportunity of

the approaching the tenth anniversary of resolution 1373 (2001) by replacing the current 1267 and 1373 regimes by one single resolution, not adopted under Chapter VII of the Charter, in order to systematize the counter-terrorism measures by States under one framework. Instead of itself listing terrorists the United Nations would provide advice and assistance, including in collecting evidence, for States so that they could do it properly. As already reflected in practice, instead of focusing on formal reporting, the Counter-terrorism Committee needs to engage in a dialogue with Member States in order to find the optimal measures in each situation.

Mr Chair,

My report also addresses the issue of human rights compliance by United Nations peacekeepers and other field presences whenever they are engaged in counter-terrorism measures. The conduct of United Nations operations must comply with the substantive norms enshrined in core international human rights instruments, particularly the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

The report in front of you acknowledges and commends the increased attention paid by the General Assembly to the promotion and protection of human rights while countering terrorism, as reflected in a number of resolutions adopted on the subject and in the United Nations Global Counter-Terrorism Strategy. In particular, I am indebted to the General Assembly for its repeated request to all Governments to cooperate fully with this Special Rapporteur's mandate.

In this respect, I thank the Governments of Tunisia and Peru for earlier this year hosting a country visit, and the Government of Iceland for hosting shorter on-site consultations. The reports on the missions to Tunisia and Peru will be presented shortly to the Human Rights Council. Already now I wish to commend the Government of Tunisia for its transparency in allowing access to places of detention with confidential interviews with detainees, even if this will unavoidably result in critical observations in my forthcoming report. As to the visit to Peru, it was a very encouraging experience that one of the central issues on the agenda of my mission was resolved within a week after my departure by repealing a contested piece of legislation.

Mr Chair,

I seek the support of the General Assembly for continuing the program of country visits. There are outstanding requests for country missions pending in

relation to Algeria, Chile, Malaysia, Pakistan, the Philippines, the Russian Federation, and Thailand, as well as in relation to a follow-up visit to Egypt.

Mr Chair, distinguished delegates,

As reaffirmed in the Global Counter-Terrorism Strategy, effective counter-terrorism measures and the protection of human rights are not conflicting goals, but complementary and mutually reinforcing. Therefore, the promotion and protection of human rights for all and the rule of law is essential to all components of the Strategy.

I thank you, Mr Chair.