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Overview

On 10 March, the Human Rights Council (the Council) heard a report from the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mr Martin Scheinin. As many States had inscribed to comment during the session, the interactive dialogue continued on 12 March.

In presenting his report, Mr Scheinin commented on the role of intelligence agencies in the fight against terrorism and his visit to Spain. Regrettably, Spain rejected several of the Special Rapporteur's findings and conclusions claiming that they did not 'reflect the facts'. Many States highlighted their own counter-terrorism efforts and some States endorsed the Special Rapporteur's recommendation to develop guidelines on human rights compliance and best practices for intelligence agencies. The European Union (EU) stated that the recommendations were 'far-reaching' and required careful study. Drawing from the Special Rapporteur's report, a number of States affirmed the need to empower effective oversight mechanisms of intelligence agencies. Further, regional and international cooperation were broadly encouraged though the sentiment was checked by some States stressing the importance of respect for territorial integrity in counter-terrorism measures. The Special Rapporteur announced his intention to conduct a joint study with the Special Rapporteur on torture on secret detention. The study will be presented to the Council in March 2010.

Presentation of the report

The Special Rapporteur presented his annual report and a report on his visit to Spain.¹ Mr Scheinin's opening remarks encouraged States to enter into dialogue with his mandate, ideally as they are in the preparatory stages of formulating counter-terrorism laws. The Special Rapporteur welcomed recent engagement with Egypt, Chile and Peru but expressed dissatisfaction with Tunisia and the Phillipines for utilising a 'stalling' approach to dealing with his mandate. Mr Scheinin then discussed in some detail his recent visit to Spain, explaining his recommendations to the Council to exemplify the assistance States could expect to receive if they were to engage with his mandate. Notably, Mr Scheinin criticised a Spanish law permitting a five-day period of 'incommunicado

¹ A/HRC/10/3, A/HRC/10/3/Add.1 (Communications to and from governments), and A/HRC/10/3/Add.2 (mission to Spain).

detention’ and a decision made by the Spanish government to extradite a Chechen individual, Mr Murad Gasayev, to the Russian federation despite the Special Rapporteur’s objection.

Mr Scheinin explained the focal point of his report; stressing the need for oversight mechanisms for intelligence agencies and, more particularly, underscoring the importance of respecting the rule of law and safeguarding accountability to judicial authorities. Further, the Special Rapporteur called for oversight mechanisms to be strengthened in respect of cross-border information, affirmed the need to respect terror suspects’ right to due process, and argued that arbitrary detention could never be justified as an acceptable means of countering terrorism. To conclude, Mr Scheinin suggested the Council undertake to prepare best practice guidelines for the operation and regulation of intelligence agencies to ensure they remain amenable to effective oversight mechanisms.

Interactive Dialogue

The interactive dialogue focused on regional and international cooperation in countering terrorism, the character of effective oversight mechanisms and the Special Rapporteur’s recent visit to Spain and subsequent recommendations.

Yemen (on behalf of the Arab Group) Indonesia, China, and Slovenia acknowledged the global threat posed by terrorism and called for greater **international cooperation** in counter-terrorism efforts. In this regard, China was notable in its stress on regional cooperation to fight increasingly problematic transnational crime and money-laundering in Asia but also underscored the importance of respecting territorial integrity in counter-terrorism collaboration. Responding to Mr Scheinin’s comments on Spain’s extradition of Mr Gasayev, a Chechen, to the Russian Federation; the Russian delegate reminded the Council that all States should refrain from granting terrorists political asylum.

The Special Rapporteur’s recommendation for best practice **guidelines for intelligence agencies** was endorsed by New Zealand and Austria while Brazil and Iceland asked questions on how to hold intelligence agencies accountable and ensure specific oversight. Mr Scheinin’s comments stressing the need for an oversight mechanism for cross-border information sharing triggered discussion on **data protection**. Pakistan, Finland, Switzerland and Austria all posed questions in this vein, seeking clarification on what the Special Rapporteur envisaged would produce an outcome respecting the right of individuals to privacy, safeguarding the transmitted information and facilitating further cooperation. In this regard, the Russian Federation, Switzerland and Austria drew from the Special Rapporteur’s report to note the occurrence of States commissioning counter-terrorism and information-gathering operations to private companies and, accordingly, queried how best to make such practice human rights compliant. Each of these countries asserted the importance of effective oversight for data submitted by private companies to governments. Though the Special Rapporteur called for oversight of such activity in his opening remarks, he did not elaborate on any cooperative framework for data protection nor put any best practice examples to the Council. Notably, Finland, Slovenia, Norway and Austria all proposed the use of such guidelines in their comments. More broadly, New Zealand, Austria and the German Institute for Human rights called for the Council to develop best practice guidelines for the work of intelligence agencies.

While most speakers affirmed the need to safeguard human rights while countering terrorism; a significant number of States² and NGOs³ expressed strong support for Mr Scheinin’s recommendation that national counter-terrorist intelligence strategies be subject to **effective oversight mechanisms**. In response to questions posed by Brazil and the Czech Republic (on behalf of the EU) on specific measures of accountability, Mr Scheinin explained an aggregate of judicial, executive and parliamentary oversight of intelligence agencies would be necessary with judicial or parliamentary oversight on its own lacking effectiveness. In this vein, the German Institute for Human Rights⁴ proposed tangible recommendations for States to strengthen their counter-terrorism infrastructure. These recommendations included: the establishment of a clear legal framework with real accountability and remedies for

² South Africa, Slovenia Brazil, Czech Republic (speaking for the European Union), Iceland and Tanzania.

³ German Institute for Human Rights, Human Rights Watch and International Commission of Jurists.

⁴ The German Institute for Human Rights spoke for a coalition of NHRIs from Germany, Afghanistan, Denmark, Canada, France, Greece, Mexico and Norway.

victims, a parliamentary review mechanism with the power to investigate and publicise, an independent inquiry system and the conferral of jurisdiction of all counter-terrorism issues to the judiciary. Human Rights Watch, the International Commission for Jurists and the German Institute for Human Rights all called for an end to ‘state secret’ laws shielding government officials from accountability for human rights violations.

In response to Mr Scheinin’s opening comments concerning his **mission to Spain**, the Spanish delegation openly regretted the fact that ‘some observations did not reflect the reality of counter-terrorism operations in Spain’. Spain asserted that the Government would reject any recommendation ‘questioning the legal and institutional framework without providing valid justified alternatives bar his own personal opinion’. In this regard, Spain did not share Mr Scheinin’s criticism of the role of the Spanish judiciary in the national counter-terrorism machinery. In respect of the decision to extradite Mr Gasayev to the Russian Federation, Spain defended the decision as an exercise of sovereignty, further justifying the extradition by reference to the diplomatic assurances sought and gained from the Russian Federation.

Mr Scheinin responded by clarifying his recommendation. He explained that Spain had a centralised national court, the ‘Agencia Nacional’, which had sole jurisdiction to try terrorism related offences. Mr Scheinin recommended to grant territorial courts the jurisdiction to try terrorist offences rather than keeping the issue centralised. He justified this proposal by explaining that a centralised court would permit limited room for review on appeal and also place fairly minor terrorism-related offences within its jurisdiction – a factor that may serve to over-burden the court. In relation to Mr Gasayev, Mr Scheinin asserted he did not approve of the extradition as he would have preferred the national courts to be vested with extra-territorial jurisdiction to be able to deal with terrorism as a crime.

Additionally, Mr Scheinin’s report attracted criticism from the Spanish Office of the Ombudsman during the interactive dialogue. The Spanish Ombudsman deplored the fact that only one paragraph of the Special Rapporteur’s report had been devoted to victims. It asserted that very little legislation was in place in Spain to defend victims, including those accused of terrorism.

Other issues raised included the following. Cuba, Sri Lanka and the Sudan all drew attention to the plight of some of their own citizens affected by counter-terrorism measures, however, notably, none sought to engage with the mandate of the Special Rapporteur. In response to allegations in the Special Rapporteur’s report of government complicity in human rights violations in counter-terrorist measures, the United Kingdom stressed its abhorrence of torture and vehemently denied any participation in or encouragement of such practice. The UK further asserted that it equates extraordinary rendition with torture and have a tribunal vested with investigatory powers to deal with any such cases. The UK informed the Council that it would follow up the specifics of the allegations with Mr Scheinin in due course.

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