



COMMISSIONER FOR HUMAN RIGHTS  
COMMISSAIRE AUX DROITS DE L'HOMME



Speech by Nils Muižnieks,

Council of Europe Commissioner for Human Rights

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Ladies and gentlemen,

It is a pleasure for me to be here today and discuss with you such a topical issue as the health of our democracies. Europe and the United States have a very long history of democratic development and have done remarkable progress in the last decades to ensure fundamental values and freedom, as well as to establish democratic institutions to protect them. Our systems are today among the most advanced in the world, but we cannot remain complacent: a number of increasingly loud cracks in these systems should wake us up.

But before digging into the challenges we are facing and the possible solutions to them, allow me to introduce briefly to you the Council of Europe system of human rights protection and explain how my work fits in this system. Although the USA is just an observer state, the Council of Europe is actually closer to you than you might think. Just cross the Bearing Sea, and you would enter the legal space created by the Council of Europe.

### **THE EUROPEAN SYSTEM OF HUMAN RIGHTS PROTECTION**

The Universal Declaration of Human Rights (UDHR) adopted by the United Nations in 1948 is the moral basis of international human rights law. It is the first universal declaration built on inalienable human rights, and a common standard to exercise these rights by all people and all nations.

A concrete, even though indirect, application of the UDHR principles was the foundation of the Council of Europe in 1949. First intergovernmental European organisation, it was established primarily to promote democracy, the rule of law and human rights in Europe. After the atrocities of the Second World War, European politicians understood that a durable peace could only be established through a visionary governmental cooperation. Symbolically based in Strasbourg (France), the new intergovernmental organization was tasked “to achieve a greater unity between its Members for the purpose of safeguarding and realising the ideals and principles which are their common heritage”.

Until 1989, the Council of Europe had mainly a focus on Western European countries, which constituted its 23 members. It was after the fall of the Berlin wall that its role changed, becoming to promote the rapprochement of Eastern European countries to the democratic values. These major developments had

a strong impact on the Organisation, which, by 2008, reached 47 members, with the accession of all European countries from the former Soviet Bloc. Its membership now stretches from Portugal to Turkey, from Iceland to Russia, well beyond the 28 member States of the European Union.

Through its three main political bodies, the **Committee of Ministers** (where states are represented by their foreign ministers and their ambassadors), the **Parliamentary Assembly** (made up of members of national parliaments) and **the Congress of Local and Regional Authorities** (constituted of mayors and presidents of regions and provinces), the Council of Europe represents a unique political forum where executive and parliamentary representatives discuss together about major human rights concerns and find effective solutions. Moreover, the judicial dimension is guaranteed by the **European Court of Human Rights**, which is directly accessible by all individuals and whose decisions are legally binding for member States.

The Council of Europe also closely cooperates with civil society through the Conference of International Non-Governmental Organisations, thus allowing for a vital line of communication between political leaders and civil society organisations.

Over the last seven decades, **a comprehensive array of tools**, such as over 200 legally binding Conventions, recommendations and campaigns, has helped establish a **unique system of protection of fundamental rights and freedoms**.

### **Dynamic mechanisms**

The backbone of this system is the **European Convention on Human Rights** (ECHR). Opened for signature in Rome in 1950, the ECHR entered into force in 1953, representing the most elaborate step for the collective guarantee of many of the rights set out in the UDHR. The ECHR protects inalienable rights and fundamental freedoms such as the right to life, prohibition of torture, prohibition of slavery and forced labour, right to liberty and security, right to a fair trial, freedom of expression.

These fundamental rights and freedoms are ensured to everybody within the jurisdictions of the 47 Council of Europe member States - refugees, stateless persons and irregular migrants included. The Convention control mechanism, the European Court of Human Rights, guarantees that the principles of the ECHR are respected and implemented by member States.

In order to complement the provisions of the ECHR, provide adequate responses to new challenges and ensure constant monitoring, the Council of Europe has created several additional tools covering prevention against torture, fight against discrimination, social rights, legal co-operation, local democracy, minorities, cultural co-operation and environmental protection.

For example, the **European Social Charter** was adopted in 1961 and revised in 1996 to guarantee the respect of social and economic rights by the States Parties, including housing, health, education, employment, social protection, and protection against poverty.

To ensure humane conditions to all people deprived of their liberty, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment entered into force in 1989. Its monitoring mechanism, the **European Committee for the Prevention of Torture** (CPT), is made of independent and impartial experts from a variety of backgrounds (lawyers, medical doctors and specialists on prison or police matters) who have access to all places of detention (e.g. prisons, police stations, holding centres for migrants, psychiatric hospitals) and monitors the treatment of persons deprived of their liberty, as well as the working conditions of prison's officers.

To fight against discrimination, an independent monitoring mechanism, the European Commission against Racism and Intolerance (**ECRI**) was established in 1993, tasked to promote good practices and effective measures to combat racism, xenophobia, anti-Semitism and intolerance in all member States.

During the 1990s, Governments felt necessary to establish a new institution able to react promptly on all the fields of human rights concerns and to serve as a *trait d'union* between all the Council of Europe mechanisms. The **Commissioner for Human Rights** was therefore created in 1999 as an independent, impartial, non-judicial body, mandated to raise the standards of human-rights protection in the 47 member States of the Organisation by encouraging reform measures to achieve tangible improvements.

I am currently the third Commissioner for Human Rights since April 2012, succeeding Thomas Hammarberg (2006-2012) and Alvaro Gil-Robles (1999-2006).

In discharging my functions I work along three main, intertwined lines: a system of country visits and dialogue with the Governments and national actors; thematic recommendations and awareness-raising activities; and cooperation with human rights structures (i.e. ombudsmen and national institutions).

So far, I have visited over 30 countries and in many of them I have observed worrying trends which are causing a **backsliding on Europe's commitment to human rights**. Nowhere is it more evident than in the way European countries and institutions are responding to the challenges posed by migration and terrorism.

## **IMMIGRATION AS A TEST OF OUR VALUES**

Immigration has arguably been the most controversial issue in the EU during the last decade, fueling divisions among European countries and feeding a widespread euroscepticism that far-right political movements promptly exploited.

I have observed this regression in many countries. Just over the last 12 months, Spain adopted legislative amendments to enable border guards to repel without due process migrants arriving from Morocco at Ceuta and Melilla, Spanish territories in North Africa. Spain has pushed ahead with this policy in spite of international criticism that these amendments threaten the right to asylum and erode hard-won international protections for refugees.

In Hungary, the government has conducted a racist poster campaign about migrants and asylum seekers, feeding popular prejudice about refugees "stealing" locals' jobs. The Hungarian government has also built fences on its border with Serbia and Croatia to prevent migrants from entering. This is similar to what Bulgaria had done on its border with Turkey.

In France, a chronically underfunded refugee reception system obliges many asylum seekers to live on the streets. In Denmark, a populist party now holds the balance of power after running an electoral campaign on anti-immigrant rhetoric, including calls for stricter border controls. The Government also decided to cut benefits for refugees and buy ads in newspaper in Lebanon to attempt to make Denmark less attractive to migrants.

The Syrian refugee crisis is a good illustration of the widespread reluctance in Europe to improve refugee protection. While over the summer hundreds of thousands of Syrian refugees were asking for protection, the majority of European governments not only looked away, but also proffered a mix of nationalist, religious and economic reasons to counter the many calls for more European solidarity in sharing the responsibility of receiving asylum-seekers.

Even when the European Commission adopted a human-rights oriented approach proposing modest mandatory quotas for redistributing asylum-seekers, a considerable number of EU member states met this proposal with open hostility.

This is very disappointing, in particular knowing that Turkey alone is dealing with almost two million displaced Syrians. With the exception of Armenia, Germany and Sweden, the response of the other 43 European countries has been so far simply shameful.

Not even the thousands of deaths in the Mediterranean have made European governments shift their position. More worrying, the European Union has continued along the path of “externalizing,” or outsourcing, border controls. This involves paying countries that have either weak democracy or none at all to keep migrants away from European coasts.

It can also mean putting pressure on European countries that are not member states — in the Western Balkans in particular — to reduce the number of their citizens applying for asylum in the European Union with the threat of restoring mandatory visa requirements. These tactics have led to the adoption of unlawful measures like ethnic profiling at border crossings, the confiscation of travel documents and physical measures to repel migrants.

### **A THICK VEIL OF SECRECY**

The second field in which our complacent look at ourselves proves wrong is counter-terrorism. Revelations over the last years about security operations which have violated human rights should have prompted reforms in this field, but progress has been disappointingly slow. Two main episodes show how dangerous is to leave carte blanche to security services: the CIA rendition programme and the massive surveillance unveiled by Mr Edward Snowden.

#### **Complicity in the CIA rendition programme**

To date, too many governments have been unwilling to establish the truth and ensure accountability for their complicity in the unlawful programme of “extraordinary renditions” – involving abduction, detention and ill-treatment of suspected terrorists – carried out by the CIA in Europe between 2002 and 2006. In many cases, an abuse of the state secrets privilege hampered judiciary and parliamentary initiatives to determine responsibility.

In July 2014, the European Court of Human Rights delivered two judgments which reaffirmed that absolute human rights norms, such as the prohibition of torture, must be upheld in all circumstances. The European judges were asked to determine whether Poland had violated its human rights obligations in relation to the conditions of detention, interrogation and transfer to the USA of two terrorist suspects currently held in Guantanamo, Abd Al Rahim Hussayn Muhammad Al Nashiri and Zayn Al-Abidin Muhammad Husayn, also known as Abu Zubaydah.

The 7 judges unanimously found that Poland breached the European Convention on Human Rights on all these counts and on the failure to conduct effective investigations into the applicants’ allegations. Indeed, the investigations only started a full three years after credible information emerged and they have been dragging on for five years, mainly because of undue political interference in the work of the prosecutors and the unwillingness of the USA to co-operate with the investigations. Moreover, the judges condemned Poland’s refusal to comply with the Court’s requests for the submission of evidence and required the Polish authorities to obtain assurances from the USA that Mr Al Nashiri will not be subjected to the death penalty.

This was not the first time that the Court exposed the lawlessness that has characterised the sordid rendition programme carried out by the CIA. Already in December 2012 the Court held “the former Yugoslav Republic of Macedonia” responsible for the torture of Khalid El Masri performed by a CIA rendition team in the presence of Macedonian officials and for inhuman and degrading treatment during his arbitrary detention. It also found that the State had failed to comply with its obligation to carry out an effective investigation into the allegations of ill-treatment and arbitrary detention, as well as to provide an effective remedy to the complainant.

The significance of these judgments has a bearing well beyond the two countries directly concerned. At least twenty-five European countries have co-operated in the CIA rendition programme, but only very few of them - above all, Italy - have established some sort of accountability. Very often, this has not been possible both for a lack of political will and for the lack of co-operation shown by the USA in disclosing necessary information to its European partners.

### **Mass surveillance**

Compared to the tangible violations perpetrated during the CIA programme, surveillance may seem a small issue. But it is not. Privacy is in fact a fundamental human right which is essential if we wish to live in dignity and security. Yet, several Governments in Europe are amending their laws to increase the powers of security services to snoop on us.

In Switzerland a new intelligence law was adopted in September to widen the powers of the secret services. In June France adopted a much criticised law and the Senate is currently discussing a new law proposal on the surveillance of international electronic communications. Similar laws have been adopted in the UK, Spain and Turkey, while other countries (Austria, Belgium, Italy, the Netherlands) have debated proposals to increase the powers of security services to keep individuals under surveillance without prior judicial authorisation. Denmark and Italy, have stepped back from initial intrusive measures to afford stronger safeguards.

### **THE WAY FORWARD**

How can we respond to the challenges posed by migration and terrorism? These are phenomena which are objectively complex to deal with. My role as Commissioner for Human Rights is to help governments find answers which comply with human rights. In my recommendations to a number of member states, I have highlighted a number of concrete steps which can both serve the purposes of State security and border controls, and of human-rights protection.

### **Overhauling Europe’s asylum and immigration system**

As concerns migration, one of the most urgent measures is the reform of the policy and legislation governing asylum. EU countries should agree on a new system that could fairly re-locate asylum-seekers, based on the principles of inter-state solidarity, and effective human rights protection. In addition, it should create more legal avenues to allow asylum-seekers to reach Europe safely. In this context, legislation on humanitarian visas, as well as family reunification, should be eased to facilitate refugees’ safe passage to Europe. Carrier sanctions on transport companies should be abolished, in order to reduce refugees’ dangerous, often deadly journeys by sea or land and counter the well-organised networks of migrant smugglers.

Laws that ensure a humane approach to the needs of migrants should replace provisions that criminalize migrants who enter and remain by irregular means. Such legislative changes must go hand in hand with improved migration policies.

In addition, the EU should boost real European search-and-rescue operations in the Mediterranean, so as to mutualise efforts that so far have rested on the shoulders of a few countries, notably Italy. The increased resources and enlarged mandate given to Triton is a positive initiative that the EU must sustain in the long-term.

### **Common minimum standards**

EU countries have to team up not only to save lives but also to ensure common minimum standards of reception across Europe. The EU Council's decision adopted in September to assist Greece, Turkey and non-EU Western Balkan countries in strengthening their reception capacities and asylum systems is a first positive step in the right direction. This assistance should also be extended to other EU countries, in particular in the Baltic and eastern regions, which often have substandard reception capacities and integration policies. Effective monitoring must accompany such a policy development, and the European Commission should show more determination to start infringement proceedings against countries unwilling to co-operate.

Most crucially, the EU should make available more resources to help member states and their local authorities to strengthen their capacity to integrate refugees, especially in those countries where public resources are already strained by austerity measures or other chronic economic difficulties.

The European Union should also implement development policies in refugees' countries of origin to help eradicate the causes of migration. And when it signs cooperation agreements with those countries, it must ensure that its partners respect human rights.

### **Promoting European values**

Another key element is political discourse. Legislative and policy changes will hardly be possible if political leaders continue pandering to people's fears and insecurities. This holds particularly true today as political discourse in many European countries is contaminated by anti-migrant rhetoric which plays the majority population off against minorities, in particular those with a Muslim background. Political leaders and opinion-makers have to confront a fearful public opinion from a principled standpoint. They have to explain that refugees are people fleeing countries like Syria, Afghanistan, Iraq, Somalia, and Eritrea where civil wars, widespread violence or state or quasi-state-sponsored repression leave no other option but to leave. To avoid a further polarisation of our societies, political leaders must promote successful integration examples and stress the values and principles that have defined a certain idea of Europe built on tolerance, acceptance and solidarity.

### **Accountability in counter-terrorism operations**

Concerning counter-terrorism measures, it is imperative to take urgent political and judicial initiatives in member States to lift the veil of secrecy Governments have drawn over their responsibilities. If the El Masri, Al Nashiri and Abu Zubaydah judgments oblige "the former Yugoslav Republic of Macedonia" and Poland to implement specific measures, they should also drive all governments to finally remove the cloak of secrecy they have drawn over their responsibilities. At the same time, these judgments provide two broader lessons for all democracies engaged in the fight against terrorism.

The first is that Governments must not abuse the state secrets privilege to hamper judiciary and parliamentary initiatives established to determine responsibility for unlawful counter-terrorism acts. Though secrecy is sometimes necessary to protect the State, it should never serve as an excuse to conceal serious human rights violations.

The second lesson is that forfeiting human rights in the fight against terrorism is a grave mistake and an ineffective measure with far-reaching consequences, as it breeds contempt for the rule of law, a fundamental pillar of democracy and the values we stand for.

### **Stronger democratic oversight**

In the current debate on surveillance, it is crucial to inject a greater amount of human rights perspective. States cannot do whatever they want to defend national security, but must operate within strict parameters. As a minimum, five main safeguards should be provided.

First, the law must be precise and clear as to the offences, activities and people subjected to surveillance, and must set out strict limits on its duration, as well as rules on disclosure and destruction of surveillance data.

Second, rigorous procedures should be in place to order the examination, use and storage of the data obtained, and those subjected to surveillance should be given a chance to exercise their right to an effective remedy.

Third, security agencies must operate under independent scrutiny and judicial review. Effective oversight is first of all democratic. This requires primarily the involvement of parliaments, which must be granted intrusive overseeing powers and the ability really to influence decision-making and operations.

A fourth requirement is the need for prior authorisation of the most intrusive measures, including surveillance, and establishment of a body able to issue legally-binding decisions over complaints by individuals affected by security activities, with access to all intelligence-related information.

Lastly, the judiciary must be involved in the decision-making process of intrusive measures and must be free to play its ex post role to ensure accountability.

### **STRENGTHENING DEMOCRACY**

The way we respond today to the challenges posed by refugee arrivals and the terrorism threats will either destroy or strengthen our democracies. It is clear to me that only by upholding human rights can Europe and the USA hold true to their democratic values. This is not a partisan opinion, but one based on facts.

Immigration policies which are not based on human rights will not only utterly fail in stopping migrants and asylum-seekers from coming, but would also betray the values we stand for. Managing migration is not an easy task, but Europe must not use this difficulty as an excuse to trample on our obligations to protect those who flee wars and persecution. It is a matter of principle that defines our identity.

At the same time, we have to pay closer attention to the activities of secret services. They are of paramount importance to ensure our safety, but if their work goes unchecked, their operations can profoundly affect our lives. The best way to ensure our security is to have security services comply with the rule of law, not violate it. There is in fact no contradiction between security and human rights—they go hand in hand. Less human-rights protection means less security and vice versa. By upholding human rights in the fight against terrorism, governments would increase their credibility among the public and weaken support for anti-democratic causes. Eventually, this will make our societies safer and stronger.

I look forward to your input and to deepen our discussion.