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Respecting fundamental rights and freedoms in the context of strengthening the fight against terrorism

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Terrorist attacks have deeply traumatised Europe. Preventing and combating this scourge is a clear duty of all states, which must respect and protect every one's life and security.

However, states' duty to prevent and combat terrorism should in no way be fulfilled at the expense of human rights standards and the common values in which European societies are grounded. This would be a mistake, since laws and policies that are human rights compliant preserve the values the terrorists are trying to destroy, weaken the pull of radicalisation, and strengthen the public's confidence in the rule of law and democratic institutions.

Intrusive surveillance measures adopted in the context of the fight against terrorism

In response to the attacks in Paris in 2015 and elsewhere in the world, the knee jerk reaction by France and other states has been to enhance the powers of intelligence services – to give them more powers to forestall threats to security by terrorism and organised crime.

Several European countries adopted laws on surveillance and counter terrorism which caught my attention due to their potentially detrimental impact on the protection of human rights, in particular the right to privacy. Following Ukraine's and France's moves in 2015, Turkey became in 2016 the third member state to derogate from the European Convention on Human Rights (ECHR) – an unprecedented situation.

In 2015, I expressed concern about intrusive surveillance measures adopted in Spain, as well as about the Danish and Italian governments' plans to increase the powers of security services to keep individuals under surveillance without prior judicial authorisation. In this context, I stressed that any surveillance legislation 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 the disclosure and destruction of surveillance data. In addition, rigorous procedures should be in place to order the gathering, examination, use and storage of the data obtained, and those subjected to surveillance must be able to challenge these decisions through an effective remedy. Finally the bodies supervising the use of surveillance should be independent, and appointed by and accountable to parliament rather than the executive.

In September 2015, I sent a letter to the Swiss Parliament and the minister of Defence to raise my concerns regarding two draft laws on surveillance extending the powers of the intelligence service, including the use of intrusive surveillance measures and massive collection of metadata. In November 2016, I sent a letter to the Dutch government to raise my concerns about the possible detrimental impact that three counter-terrorism Bills under discussion may have on the protection of human rights. I urged caution in implementing the Intelligence Services Bill, in order to ensure that online surveillance is carried

out in a targeted way and is subjected to a strong independent oversight at all stages, including in the gathering and storing of data.

In May 2016, I also published a Memorandum on surveillance and oversight mechanisms in the UK in which I commended the UK government for its attempt to overhaul the investigatory powers framework by providing a world-leading Investigatory Powers Bill and expressed concern about certain issues such as the compatibility of the bulk interception and equipment interference powers proposed in the above Bill with the European Convention on Human Rights. Drawing upon my 2015 Issue Paper on intelligence service oversight mechanisms, I highlighted the need for oversight bodies and systems to be periodically evaluated to assess whether or not they possess the necessary attributes to be effective.

I continue to be particularly worried by certain states' counter-terrorism initiatives that raise serious issues of compatibility with the European Convention on Human Rights, perpetuate state of emergency measures or "normalize" them by embedding them in ordinary legislation. In July I addressed a letter to the French Senate in which I expressed my concern with regard to the bill strengthening internal security and anti-terrorism measures. I stressed the need that this draft law does not result in the indefinite extension of the state of emergency and to bring it fully into line with Council of Europe standards. Certain provisions of this bill seem to be problematic, particularly those giving prefects powers to set up protective perimeters within which searches and frisking can be organised, which have previously always been subject to a judicial order.

Police misconduct and the importance of effective complaint mechanisms

One of the major side effects of counter-terrorism policies and laws has been police misconduct, a long-standing matter of concern to me. In this context, institutionalised racism continues to play a major role in ethnic profiling resulting in abusive stops and searches by police forces in Europe, targeting in particular Muslims and migrants. Under cover of the fight against terrorism, there seems to be more reason to stop and check 'people of Muslim appearance', in other words black or Arab people.

French residents of "immigrant origin" have long complained that police single them out for unfair, discriminatory and unnecessary identity checks. Extensive reports since the mid-1990s by non-governmental organisations, academic institutions and official police oversight bodies support these allegations. In my report on the 2014 visit to France, I noted with concern that certain conduct by law enforcement agents seems to contribute to discrimination against minority groups. According to a survey carried out in 2016, the French Defender of Rights found that young men perceived as Black or Arab are twenty times more likely to be stopped by the police than the rest of the population. Police often do not explain the reasons for identity checks. Brutality, insults and lack of politeness have on occasion accompanied such stops.

Similarly in Belgium, there has been an increase in ethnic profiling by police of young males of African or north African background since the Brussels and Paris terrorist attacks. In 2016, the European Network against Racism (ENAR) and other NGOs, urged states to develop standards on combatting racial and ethnic bias in policing. These standards should include strong prohibitions against ethnic profiling, the collection of data on police stops, and the provision of appropriate training for police officers.

Despite underreporting and difficulties in some countries in collecting disaggregated data on race, descent or ethnic origin, similar experiences of discriminatory policing have been reported by the UN Working Group of Experts on People of African Descent in Italy, Germany, Sweden, the Netherlands and the United Kingdom. Counter-terrorism measures and the crackdown against irregular migrants over the last few years have accentuated these phenomena.

Differences in the treatment of Black people and other minorities in the law enforcement and criminal justice system are not only contrary to human rights standards, but are also ineffective and generate social tensions. When police engage in racial profiling, they decrease the likelihood that members of the target communities will cooperate with them in combatting crime and violent extremism. Anger and

resentment towards the police due to abusive practices, combined with unemployment and poor housing, have also contributed to the regular eruption of riots in some European cities.

In order to counter arbitrariness and abuse, European states should be guided by European Commission against Racism and Intolerance General Policy Recommendation N° 11on combating racism and racial discrimination on policing. In particular, they should clearly define and prohibit racial profiling by law, carry out research on racial profiling and monitor police activities, notably through the collection of statistics broken down by grounds such as ethnic origin, introduce a reasonable suspicion standard for police activities and train the police on the issue of racial profiling and on the use of the reasonable suspicion standard.

Given the difficulties complainants face in practice in proving that they were victims of racial profiling by the police, consideration should also be given to shifting the burden of proof when racial profiling is alleged; in this respect, reliable statistics are key in establishing the presumption of discrimination, upon which the burden of proof shifts on the law enforcement authorities to show that their control activities were carried out on non-discriminatory grounds.

Moreover, the existence of an independent and effective complaint mechanism against police officers for alleged discriminatory practices is essential for preventing ill-treatment and building confidence in law enforcement officers.

It is of utmost importance that all allegations of police misconduct are effectively investigated and lead to the identification and punishment of those responsible, as required by the well-established case-law of the European Court of Human Rights. Moreover, there is a need to impose dissuasive penalties on offenders involved in serious human rights violations, in line with the Committee of Ministers' Guidelines on eradicating impunity for serious human rights violations.

Regrettably, many investigations into human rights violations committed by law enforcement officials are ineffective, especially when members of the same force are investigating into actions of their colleagues and there is sometimes a "code of silence" about protecting one's own. For example, in the *McKerr v. UK* group of cases concerning ineffective investigations into deaths of individuals in Northern Ireland during security forces operations, the Strasbourg Court found various shortcomings in the investigation proceedings, notably a lack of independence of police officers investigating the incidents, defects in the police investigations and a lack of public scrutiny and information to the victims' families. From the start of the execution process of this group of judgments in 2003, the UK authorities adopted many general measures. These were mainly focused on reforms to the inquest procedure, and on the work of the Police Ombudsman and the Historical Enquiries Team (HET). As a result the Committee of Ministers closed its supervision of many aspects of the general measures. However, the measures adopted by UK authorities to improve the efficiency of inquest proceedings are not sufficient to resolve the root causes of the delays in legacy cases. To do so, the promise of new legacy bodies, as agreed in the 2014 Stormont House Agreement, is particularly significant in ensuring Article 2 compliant investigations of cases like in the *McKerr group*. Worryingly, however, progress on delivering on these promises has stalled.

Turkey has been another European country where the struggle against terrorism has been waged in a way that undermined human rights. In Turkey, the biggest concerns highlighted in a memorandum to the authorities I published in December 2016 were the imposition of draconian curfews, hugely disproportionate counter-terrorism operations displacing hundreds of thousands of civilians and almost complete impunity for security forces despite widespread allegations of human rights violations.

I was very concerned that the Turkish authorities did not treat with the requisite seriousness numerous allegations of human rights violations from credible sources, nor did they conduct effective ex officio criminal investigations into the deaths occurring during anti-terrorism operations, despite the fact that it is under the obligation to prove convincingly that state agents have taken all necessary precautions to avoid casualties in each and every case. The priority seemed to have rather been to reassure and shield from prosecution the security forces, who have only been subjected to disciplinary sanctions for particularly egregious forms of misconduct with the exception of very few criminal cases where they were treated as

suspects. I highlighted that investigations seemed largely ineffective, because they have not been immediate, diligent and thorough.

In May 2017 I published the written observations I submitted to the European Court of Human Rights concerning a group of 34 cases related to events which have occurred since August 2015 in the context of counter-terrorism operations and curfews in South-Eastern Turkey. The observations also address, inter alia, in more detail major issues of concern about the human rights implications of counter-terrorism operations, including the protection of the right to life, the lack of effective investigations and the problem of impunity of law enforcement officials. In these cases, despite the serious allegations of excessive use of force, abuse or misconduct by the security forces, only few, if any, criminal investigations were initiated where members of security forces were identified as suspects. The lack of judicial investigations into alleged human rights violations is disheartening and revives concerns about the systemic problem of impunity enjoyed by the security forces during the fight against terrorism in South-Eastern Turkey in the 1990's, which has been widely attested in the Court's case-law.

Persistent patterns of impunity for serious human rights violations by law enforcement services are among the most intractable problems of the North Caucasus and remain a source of major concern. My predecessor's and my reports on the Russian Federation in 2011 and 2013, have stressed that the absence of requisite determination is one of the main obstacles to pursuing accountability in cases where the responsibility of public officials is implicated. I recommended that every effort should be made to remove the existing obstacles to accountability for law enforcement officials, and to ensure that any criminal act committed by them is effectively investigated by the competent authorities, in full compliance with the criteria established by the European Court of Human Rights. I stressed that the parliamentary mechanisms for ensuring democratic oversight of law-enforcement and security structures should be further strengthened; representatives of civil society institutions, experts and the public in general should play a more prominent role in the corresponding oversight mechanisms. An unequivocal commitment must be demonstrated to combating impunity for such acts, including through the imposition of sentences commensurate to the gravity of the offence.

The Court has developed five principles for the effective investigation of complaints against the police that engage Article 2 or 3 of the European Convention on Human Rights: independence, adequacy, promptness, public scrutiny and victim involvement. These five principles must be adhered to for the investigation of a death or serious injury in police custody or as a consequence of police practice. They also provide a useful framework for determining all complaints. Best practice is served by the operation of an Independent Police Complaints Body working in partnership with the police. In my predecessor's 2009 Opinion concerning independent and effective determination of complaints against the police I stressed that the Independent Police Complaints Body should have oversight of the police complaints system and share responsibility with the police for: 1) visibility and oversight of the system; 2) procedures for the notification, recording and allocation of complaints; 3) mediation of complaints that are not investigated; 4) investigation of complaints; 5) and resolution of complaints and review.

Furthermore, the 2009 Opinion issued by my predecessor has highlighted that the initiation of criminal or disciplinary proceedings against a law enforcement officer with regard to whom there is evidence of misconduct is an important safeguard against impunity and essential for public confidence in the police complaints system. The prosecution authority, police and Independent Police Complaints Body should give reasons for their decisions relating to criminal and disciplinary proceedings for which they are responsible.

States must draw upon the Council of Europe standards, in particular the 2001 European Code of Police Ethics, in order to improve police conduct and eradicate law enforcement agents' excessively violent or racist conduct. They should develop clear guidelines concerning the proportionate use of force by police, including the use of tear gas, pepper spray, water cannons and firearms in, in line with international standards. These are essential requirements for restoring the public's trust in the rule of law and human rights principles. Furthermore, in the selection, recruitment and promotion of police, special attention should be paid to reports of past misconduct, racist attitudes, and the ability of individuals to withstand stressful situations. The recruitment of officers among minority groups would also help reduce the risk of

racially motivated violence and contribute to make the police more representative of society's diversity. In this context, continuous, systematic human rights training as well as the adoption and implementation of the 2001 European Code of Police Ethics, are essential.

Political leaders also bear an important part of responsibility. As the organisation of law enforcement is hierarchical, the discourse and attitudes of politicians, particularly ministers of interior, are rarely ignored by rank-and-file officials. It is extremely damaging to public trust in state institutions when law enforcement officials convicted of misconduct involving ill-treatment are pardoned or receive inadequate sanctions. Political leaders should instill the clear message that responsibility for ill-treatment extends beyond the actual perpetrators to anyone who knows, or should know, that ill-treatment is occurring and fails to prevent or report it.

I would like to conclude by fully supporting the creation of the Independent Police Complaints Authorities' Network (IPCAN), an informal network of exchange and cooperation amongst independent structures in charge of external control of security forces, which brings together national counterparts from about 20 countries, mainly European Union member states. It would be desirable to see institutions from more countries join this network. I encourage members of the Independent Police Complaints Authorities ' Network, to strengthen their cooperation with the Council of Europe, by the common adoption of high standards and the promotion of good practice. I also support - especially in today's world- today's IPCAN declaration aiming at reinforcing the independent, external control of national security services and at foreseeing its existence in every Council of Europe member state.