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Presentation by Ms Marta Requena,
Secretary to the Committee of Legal Advisers on Public International Law (CAHDI)

at the 68th Session of the International Law Commission

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Mr President,
Members of the International Law Commission,
Ladies and Gentlemen,

First of all, I would like to thank the International Law Commission (ILC) for allowing the Council of Europe to present every year our main activities in the field of public international law.

On behalf of the Council of Europe, I would like to express our appreciation for these annual exchanges of views and underline the importance that our Organisation attaches to them, as well as to the close links developed between our two entities in the field of public international law.

Allow me, now, to provide an overview of the latest developments related to public international law which have taken place within the Council of Europe since we last met in July 2015:

-firstly, I would like to inform you of the recent developments within the Council of Europe, in particular the priorities of the current chairmanship of the Committee of Ministers;
-secondly, I would like to inform you of the latest news concerning the Council of Europe's Conventions;
-thirdly, I would like to inform you of some opinions of the Council of Europe's so called "Venice Commission" which concern public international law;
-finally, I would also like to provide you with some information concerning the Council of Europe's efforts in handling the current migration crisis in Europe.

I. Recent developments within the Council of Europe

A. Chairmanships of the Committee of Ministers

The handover of the Chairmanship of the Committee of Ministers from Bulgaria to the current Estonia Chairmanship took place on 18 May 2016. Estonia will hand over the Chairmanship to Cyprus on 22 November 2016.

The main priorities of the current Estonian Chairmanship of the Committee of Ministers are the following:

-The promotion of the Council of Europe Internet Governance Strategy (2016-2019), ensuring the protection of human rights and the rule of law on the internet, as well as the further promotion of Council of Europe Convention on Cybercrime (ETS No. 185) during its 15th anniversary which has been ratified by 40 member States of the Council of Europe as well as 9 non-member States have ratified or acceded to it;
-The Gender Equality Strategy (2014-2017) with the aim of advancing and empowering women and realising gender equality in Council of Europe member States; and
-the New Strategy for the Rights of the Child launched in April 2016 during the High-Level conference held in Sofia (Bulgaria) during the term of the previous Bulgarian Chairmanship.

II. Recent developments concerning Treaty Law within the Council of Europe

A. The Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols

I would like to inform you of the latest developments that have taken place within the framework of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the ECHR).

a. Derogations to the ECHR – Ukraine and France

With regard to **Ukraine's** derogation to the ECHR, allow me to provide a brief overview of the situation as it stood the last time I spoke before you: you may recall that on 9 June 2015 the Secretary General of the Council of Europe had been notified by the Government of Ukraine of its decision to have recourse to Article 15 of the ECHR and that in our capacity as Depositary of the Convention, the Treaty Office had notified this declaration to all High Contracting Parties.

The declaration made under Article 15 of the ECHR had indicated that, given the public emergency threatening the life of the nation, the Ukrainian authorities had had to take measures introducing special restrictions to the rights guaranteed by Articles 5 (right to liberty and security), 6 (right to a fair trial), 8 (right to respect for private and family life), and 13 (right to an effective remedy) of the European Convention on Human Rights as well as Article 2 (freedom of movement) of Protocol No.4 to the ECHR.

Since then, on 4 November 2015 the Secretary General of the Council of Europe received a further Declaration submitted by the Government of Ukraine in relation to the specific territories concerned (localities in Donetsk and Luhansk oblasts) by the derogation of rights contained in the ECHR.
On 29 June 2016, the Secretary General of the Council of Europe received a further Declaration of the Government of Ukraine. This Declaration contained a reviewed list of localities in Donetsk and Luhansk oblasts which are under control/partially controlled by the Government of Ukraine as of 14 June 2016.

Both declarations of 4 November 2015 and 29 June 2016 underlined the need to adopt a very careful approach in establishing whether the areas of Donetsk and Luhansk were under effective control and jurisdiction of either Ukraine or the Russian Federation.

Furthermore, I would also like to inform you that following the decision adopted by the Committee of Ministers on 15 April 2015, where they expressed their concern regarding the deterioration of human rights in Eastern Ukraine and Crimea, the Secretary General of the Council of Europe on 20 January 2016 announced that he was sending a Human Rights delegation led by Ambassador Gérard Stoudmann (Switzerland) to Crimea. The delegation's objective was to review the human rights and rule of law situation of the 2.5 million people who live in the Peninsula and are covered by the European Convention on Human Rights. The delegation had its first mission from 25 to 31 January 2016 and presented its report (SG/Inf(2016)15rev) to the Secretary General of the Council of Europe on 11 April 2016. The report emphasises the need to re-open the Peninsula to monitoring structures and international mechanisms, stressing that it is neither normal nor acceptable that the population of the Peninsula is being kept beyond the reach of human rights mechanisms.

To this end, the European Court of Human Rights continues to work on all Ukraine-related applications and cases and any individual may still apply to the Court in relation to the alleged violations by Ukraine of the rights guaranteed by the Convention.

With regard to **France**, on 24 November 2015 France also informed the Secretary General of the Council of Europe of the declaration of the state of emergency in France and the derogation from

some of the rights contained in the ECHR under Article 15 of this Convention, following the large-scale terrorist attacks that had taken place in the Paris region.

The Declaration stated the relevant legislation and legislative changes applicable during the state of emergency. In particular, the Declaration communicated the decision of the Government of France to apply Law No. 55-385 of 3 April 1955 by Decree No. 2015-1475 of 14 November 2015, as well as Law No. 2015-1501 of 20 November 2015 to extend the state of emergency for three months.

On 26 February 2016, the Secretary General of the Council of Europe received a notification in this regard, informing that the state of emergency in France had been prolonged for 3 more months by Act No. 2016-162 of 19 February 2016.

On 26 May 2016, the Secretary General of the Council of Europe received another notification, informing of that the state of emergency in France had been prolonged for a further 2 months in accordance by Act No. 2016-629 of 20 May 2016. The Note Verbale underlined the changes in measures taken under the state of emergency, noting in particular that the law no longer provided for administrative searches in places where there were serious reasons for considering that they were frequented by people that threatened order and public safety. In its Note Verbale, the Government of France further recalled that the measures taken under the state of emergency were subject to effective judicial review, Parliamentary monitoring and control mechanism.

b. Protocols to the ECHR

Protocol No. 15 (CETS No.213) amending the ECHR introduces a reference to the principle of subsidiarity and the doctrine of margin of appreciation. It also reduces from six to four months the time-limit within which an application may be made to the Court following the date of a final domestic decision. Protocol No. 15 will enter into force as soon as all the States Parties to the Convention have signed and ratified it. So far 29 States Parties have ratified it and 13 have signed it.
Protocol No. 16 (CETS No.214) to the ECHR will allow the highest courts and tribunals of a State Party to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto. So far 6 States have ratified it and 10 States have signed it.

c. The Secretary General of the Council of Europe and the ECHR

Speaking on the importance of the Convention, that is the ECHR, the Secretary General of the Council of Europe in his third report on *State of Democracy in Europe, Human Rights and the Rule of Law in Europe: a security imperative for Europe* issued in May 2016, stressed that “The Convention remains an indispensable basis for joint action between European States. It guarantees the fundamental freedoms which constitute a contract between Europe’s citizens and their governments. The Convention establishes, in black and white, the clear rights and responsibilities all individuals within a society have to one another, too.”

With regard to the Secretary General and the ECHR, allow me to take some time to inform you about a relatively rare situation which merits some consideration. I would like to refer to the right granted to the Secretary General of the Council of Europe by Article 52 of the Convention and which, until now, has only been used 8 times[1].

[1] Up until 1989, the provision under Article 52 had been applied five times (in **1964**, **1970**, **1975**, **1983**, and **1988**), each time in respect of all States Party to the European Convention on Human Rights. The Secretary General availed himself of those powers on two further occasions: in respect of the Russian Federation (in **1999-2000**, on the manner in which the Convention was being implemented in Chechnya) and in respect of Republic of Moldova (in **2002**, as a reaction to the suspension of a political party on the grounds of violating rules concerning public gatherings). In **2005**, the Secretary General decided to act under Article 52 of the

In December 2015, the Secretary General decided to use his powers under Article 52[2] to launch an investigation into the manner in which Azerbaijan effectively implements the provisions of the Convention. The investigation will seek explanations regarding the execution of the judgment of the European Court of Human Rights on the detention of Mr Ilgar Mammadov in the case of *Ilgar Mammadov v. Azerbaijan*. This case concerned several violations of the European Convention on Human Rights suffered by the applicant, a political opposition activist, who was arrested and placed in custody in February 2013 following his denouncement of the authorities' official version of the Ismayilli riots of 23 January 2013[3]. The exact date of the visit is yet to be determined.

In accordance with Article 46 of the ECHR, the Committee of Ministers of the Council of Europe supervises the execution of the judgments of the Court. This work is carried out mainly at four regular meetings (DH meetings) every year. Its essential function is to ensure that member States comply with the judgments and certain decisions of the European Court of Human Rights. For that purpose, it completes each case by adopting a final resolution. However, in some cases, interim resolutions may prove appropriate.

In the present case, despite the adoption of two interim resolutions in March 2015 and September 2015, the Committee of Ministers has noted that to date:

- the applicant has still not been released despite the fundamental flaws of the criminal proceedings engaged against him, as established by the European Court's judgment;
- no response has been given to the demand for guarantees as to his physical integrity in the meantime; and
- so far no domestic court has addressed the violation of Article 18 combined with Article 5.

The Committee of Ministers has therefore adopted at its last DH meeting in June 2016 a third interim resolution according to which it has decided to examine the applicant's situation at each regular meeting and DH meeting until such time as he is released. In this regard, it is important to note that the Committee of Ministers meets every Wednesday for its regular meeting.

d. Case law of the European Court of Human Rights

Turning now to the case law of the **European Court of Human Rights**, just recently the Grand Chamber on 21 June 2016 delivered its judgment in the case of *Al-Dulimi and Montana Management Inc. v. Switzerland* (application no. 5809/08), which had been referred to the Grand Chamber on appeal from the Second Section on 14 April 2014. The case concerned the freezing of the assets in Switzerland of Mr Al-Dulimi and the company Montana Management Inc. pursuant to UN Security Council Resolution 1483 (2003), which provided for sanctions against the former Iraqi regime. The applicants complained that the confiscation of their assets had been ordered in the absence of any procedure compatible with Article 6 (1) (right to a fair hearing) of the Convention.

The application was lodged with the European Court of Human Rights on 1 February 2008. In its Chamber judgment of 26 November 2013 the Court found, by four votes to three, that there had been a violation of Article 6 (1). On 25 February 2014 the Government of Switzerland requested that the case be referred to the Grand Chamber under Article 43 and on 14 April 2014 the panel of

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ECHR following allegations revealed by the press and the civil society about the existence of secret CIA detention centres in Council of Europe member States.

[2] Article 52 ECHR : "On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention."

[3] In its judgment of 22 May 2014, the Court found, in particular, that the arrest and detention of the applicant had taken place in the absence of any reasonable suspicion that he had committed an offence. It also found that the domestic courts, both at first instance and on appeal, had limited themselves in all their decisions to an automatic endorsement of the prosecution's requests without having conducted a genuine review of the lawfulness of the detention.

the Grand Chamber accepted that request. The applicants and the Government filed further written observations. Comments were also received from the French and United Kingdom Governments, which had been given leave by the President to intervene in the proceedings. A hearing was held on 10 December 2014.

The Grand Chamber in its judgment found that none of the provisions of Resolution 1483 (2003) expressly prohibited the Swiss courts from verifying, to ensure respect for human rights, the measures taken at national level to implement the Security Council's decisions. The inclusion of individuals and entities on the lists of persons subject to the UN sanctions entailed practical interferences that could be extremely serious for the Convention rights of those concerned. In the Court's view, before taking those measures the Swiss authorities had a duty to ensure that the listings were not arbitrary. The applicants should have been given at least a genuine opportunity to submit appropriate evidence to a court, for examination on the merits, to seek to show that their inclusion on the lists had been arbitrary. Consequently, the very essence of their right of access to a court had been impaired. Noting that the UN sanctions system, and in particular the procedure for the listing of individuals and legal entities and the manner in which delisting requests were handled, had received very serious, reiterated and consistent criticisms, the Court found that access to the delisting procedure could not therefore replace appropriate judicial scrutiny at the level of the respondent State or even partly compensate for its absence. The Grand Chamber therefore held that there had been a violation of Article 6 (1).

B. Opening for signature and new Council of Europe Conventions

I would also like to inform you of recent developments of other Council of Europe conventions.

• The *Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism* (CETS No. 217) was opened for signature on 22 October 2015 in Riga (Latvia). To date this Protocol has been ratified by one State and signed by 29 States. This Protocol requires 6 ratifications, including 4 member States to enter into force.

• The *Council of Europe Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events* (CETS No. 218) was opened for signature 3 July 2016 in Saint-Denis (France) and signed by 14 member States. The Convention requires 3 ratifications by member States to enter into force.
• The *Protocol amending the European Landscape Convention* (CETS NO. 219) was adopted by the Ministers' Deputies of the Committee of Ministers at their 1260th meeting on 15 June 2016 and will be opened for ratification, acceptance or approval by the States Parties to the Convention on 1 August 2016.
• The draft revised *Convention on Cinematographic Co-Production* was adopted by the Committee of Ministers on 29 June 2016 at the 1261st meeting of the Ministers' Deputies

C. Accessions to the Council of Europe conventions by non- member States: the universal vocation of the Council of Europe conventions

The Treaty Office of the Council of Europe is also dealing with an increasing number of requests by non-member States to accede to the Council of Europe conventions. Indeed 161 Council of Europe's conventions out of our 218 are opened to non-member States.

-From July last year we have had the following 20 accessions and signatures (15 accessions, 5 signatures) by non-member States:

 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS. No. 108) and its Additional Protocol (ETS No. 181): Mauritius
 Convention on the Transfer of Sentenced Persons (ETS No. 112): Mongolia

 Convention on Mutual Administrative Assistance in Tax Matters (ETS No. 127): Mauritius, China, Saudi Arabia, Singapore, Uganda, Brazil, Niue, Barbados, Israel, Nauru, Senegal, Kenya, Jamaica, Uruguay, Dominican Republic
 European Convention on the Legal Protection of Services based on, or consisting of, Conditional Access (ETS No. 178): European Union
 Convention on Cybercrime (ETS No. 185): Israel
 Council of European Convention on the Prevention of Terrorism (CETS No. 196) and its Additional Protocol (CETS No. 217): European Union
 Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health (CETS No. 211) – "Medicrime": Guinea.

- 6 non-member States have already been invited to sign/accede to the following Council of Europe conventions:

 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) and its Additional Protocol (ETS No. 181): Cabo Verde and Tunisia
 Convention on the Transfer of Sentences Prisons (ETS No. 112): India
 Convention on Mutual Administrative Assistance in Tax Matters (ETS No. 127): Cook Islands
 Convention on Cybercrime (ETS No. 185): Ghana
 Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health (CETS No. 211) – "Medicrime": Burkina Faso

-9 requests from non-member States to be invited to accede to the following Council of Europe conventions are still pending:

 Convention on Mutual Administrative Assistance in Tax Matters (ETS No. 127): Marshall Islands, Kuwait, Mauritania, Pakistan, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and Samoa.

III. Opinions of the European Commission for Democracy Through Law, "Venice Commission"

a. Poland

On 23 December 2015, the Minister of Foreign Affairs of Poland, on behalf of the Polish Government, requested an opinion of the Venice Commission 'on the constitutional issues addressed in the two proposals for the legislation amending the Act on the Constitutional Court of 25 June 2015' arising from amendments adopted to remedy a dispute regarding the appointment of judges to the Constitutional Tribunal. In December 2015, the Polish Government transmitted the Act in question to the Venice Commission which gave its 'Opinion on amendments to the Act of 25 June 2015 of the constitutional tribunal of Poland' on 11 March 2016. In its Opinion, the Venice Commission, amongst other things, calls "both on majority and opposition to do their utmost to find a solution in this situation. In a State based on the rule of law, any such solution must be based on the obligation to respect and fully implement the judgments of the Constitutional Tribunal."

On 29 January 2016, the Chair of the Parliamentary Assembly's Monitoring Committee also requested the opinion of the Venice Commission 'on the Act of 15 January 2016 amending the Police Act and certain other Acts'. The purpose of the proposed amendment was to regulate various methods of secret surveillance employed by law-enforcement and intelligence agencies. In its Opinion of 12 June 2016, the Venice Commission, amongst other things, viewed "the procedural safeguards and material conditions set in the Police Act for implementing secret surveillance still insufficient to prevent its excessive use and unjustified interference with the privacy of individuals."

b. Russian Federation

On 2 July 2015, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly requested the Venice Commission's opinion on the compatibility with international standards on human rights and fundamental freedoms of the Law on "undesirable foreign and international organisations" previously adopted by the Russian Federation on 19 May 2015. In its Opinion of 13 June 2016 on "Federal Law No.129-FZ on Amending Certain Legislative Acts", the Venice Commission notes that the "Law interferes with several human rights protected under the European Convention, especially freedom of association (Article 11), freedom of assembly (Article 11), freedom of expression (Article 10), the right to an effective remedy (Article 13) and the principle of nulla poena sine lege (Article 7)."

On 11 December 2015, the Parliamentary Assembly's Committee on Legal Affairs and Human Rights requested from the Venice Commission another opinion on the draft law of the Russian Federation which would empower the Court to determine whether findings of international bodies on human rights and freedoms, such as the European Court of Human Rights, will be implemented. In its Opinion of 13 June 2016 on "The Amendments to the Federal Constitutional Law on the Constitutional Court", the Venice Commission, amongst other things, called on States to "remove possible tensions and contradictions between rulings of the European Court of Human Rights and their national systems, including – if possible – via means of dialogue."

IV. Migration crisis

Turning to the **migration crisis** in Europe, the Secretary General of the Council of Europe sent on 2 March 2016 to the Heads of Government of the 47 member States of the Council of Europe a letter calling on member States to better ensure the safety and proper treatment of asylum-seeking and refugee children. The letter also proposed a set of priority measures. This letter was a follow up letter to a previous letter of the Secretary General of the Council of Europe, dated 8 September 2015 addressed to all Council of Europe member States reminding them of their obligations under the European Convention on Human Rights. On this point, the Secretary General of the Council of Europe in January 2016 appointed Ambassador Tomáš Boček (Czech Republic) as the Special Representative on Migration and Refugees. Ambassador Boček is mandated to gather information on the situation of the basic rights of migrants and refugees in Europe and to develop proposals for action. From 7 to 11 March 2016, Ambassador Boček led his first fact-finding mission which took him to hotspots and migrant and refugee camps Greece and "the former Yugoslav Republic of Macedonia". In his "Report on the fact-finding mission" (SG/Inf(2016)18) dated 21 April 2016, Ambassador Boček calls for the Council of Europe to mobilise resources to enable the necessary additional capacity to house migrants and refugees in decent living conditions in both countries.

V. Conclusion

To conclude my presentation I would like to express my sincere gratitude once again to the International Law Commission ILC for allowing the Council of Europe to take part each year in your sessions. However, I cannot conclude it without expressing my gratitude to Mr Narinder Singh, the President of the ILC during your 67th Session, for having participated in the CAHDI meeting last year and for his very interesting presentation.

Thank you very much for your attention