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# COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

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

**at the 70<sup>th</sup> Session of the International Law Commission (ILC)**

**56<sup>th</sup> meeting**  
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**Statement by Ms Marta REQUENA**  
**Head of the Council of Europe's Public International Law and Treaty Office Division**  
**and Secretary to the Council of Europe Committee of Legal Advisers of Public**  
**International Law (CAHDI)**

**at the 70th Session of the International Law Commission**

**Geneva (Switzerland), 19 July 2018**

Mr Chair,  
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 you 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 2017. I would like to start by shortly informing you about the priorities of the current chairmanship of the Committee of Ministers and continue then with the latest news concerning conventions and other relevant developments within the Council of Europe.

**I. PRIORITIES OF THE CROATIAN CHAIRMANSHIP OF THE COMMITTEE OF MINISTERS**

The handover of the Chairmanship of the Committee of Ministers from Denmark to Croatia took place on 18 May 2018. It is the first time that Croatia holds the Chairmanship of the CoE's Committee of Ministers since it joined the Organisation in November 1996. Croatia will hand over the Chairmanship to Finland on 21 November 2018.

The four main priorities of the current Croatian Chairmanship are the:

- fight against corruption;
- efficient protection of rights of national minorities and vulnerable groups;
- decentralisation in the context of strengthening of local government and self-government; and
- protection of cultural heritage and cultural routes.

## II. RECENT DEVELOPMENTS CONCERNING TREATY LAW WITHIN THE COE

### A. The Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (ECHR)

I would now like to move on to the latest developments that have taken place within the framework of the [Convention for the Protection of Human Rights and Fundamental Freedoms](#) (ETS No. 5) (hereinafter the ECHR).

#### a. Derogations to the ECHR by France, Turkey and Ukraine

Since I spoke before you, important developments have taken place concerning the derogations under Article 15 ECHR due to the state of emergency in France, Turkey and Ukraine, allowing them to derogate, in a temporary, limited and supervised manner, from their obligation to secure certain rights and freedoms under the Convention.

The most important development was the withdrawal of the derogation under Article 15 ECHR by **France** on 1 November 2017 following the end of the state of emergency in this country. Indeed in July 2017 France extended the state of emergency a fifth time since it was first introduced in November 2015. This last extension ran from 15 July to 1 November 2017. The Declaration of derogation sent by the French authorities in July 2017 mentioned that “*as the state of emergency cannot remain in force as long as a continuing terrorist threat, the state of emergency has been extended only until 1 November 2017, which will be used to complete the structure built in recent years and provide the State with new instruments to enhance the security of people and property outside the special framework of the state of emergency*”.

With regard to **Turkey**, the declaration of derogation pursuant to Article 15 ECHR due to the state of emergency declared following the attempted *coup d'état* on 15 July 2016 were transmitted to the Secretary General of the Council of Europe by letter dated 21 July 2016. Further declarations concerning the subsequent three-month extensions of the state of emergency were transmitted to the Council of Europe on 17 October 2016, 5 January 2017, 20 April 2017, 17 July 2017, 19 October 2017, and 19 January 2018. Currently, the declaration of derogation of certain rights under the state of emergency has been prolonged until today 19 July 2018 by letter dated 19 April 2018. On several occasions the Government of Turkey provided the Secretary General of the Council of Europe with information concerning the national emergency legal measures adopted. In particular, the Turkish authorities informed the Council of Europe in May 2018 that “*all 31 decrees with force of law issued under the state of emergency have been approved by the Grand National Assembly of Turkey in accordance with Article 91 of the Turkish Constitution*”.

In the meanwhile, several cases concerning measures taken under the state of emergency have reached the European Court of Human Rights. In four cases<sup>1</sup> the applications were declared inadmissible on the grounds that all domestic remedies had not been exhausted and therefore the Court did not examine the complaints on the merits. Furthermore, in June 2017, the European Court of Human Rights communicated to the Government of Turkey six cases<sup>2</sup> of 17 journalists and media workers who were detained on suspicion of their alleged links with the Gulenist

<sup>1</sup> ECHR, [Merçan v. Turkey](#), no. 56511/16, decision of 8 November 2016; ECHR, [Zihni v. Turkey](#), no. 59061/16, decision of 29 November 2016; ECHR, [Çatal v. Turkey](#), no. 2873/17, decision of 7 March 2017; ECHR, [Köksal v. Turkey](#), no. 70478/16, decision of 6 June 2017.

<sup>2</sup> [Sabuncu and Others v. Turkey](#), no. 23199/17, communication of 8 June 2017; [Tas and Aksoy v. Turkey](#), no. 72/17 and 80/17, communication of 13 June 2017; [Altan and Altan v. Turkey](#), no. 13237/17 and 13252/17, communication of 13 June 2017; [Bulac v. Turkey](#), no. 25939/17, communication of 13 June 2017; [Ilicak v. Turkey](#), no. 1210/17, communication of 13 June 2017; [Alpay v. Turkey](#), no. 16538/17, communication of 13 June 2017.

movement following the attempted *coup d'état*. Criminal charges of overthrowing the government by force, membership of a terrorist organisation and supporting or acting on behalf of a terrorist organisation have been brought against them on the basis of their journalistic activities.<sup>3</sup> Both the [Commissioner for Human Rights of the Council of Europe](#) and the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression were granted leave to submit written observations in these cases, which they did in October 2017. Two of these cases were adjudicated in March 2018<sup>4</sup>, where the Court found violations of Art. 5(1): right to liberty and security and Art. 10: freedom of expression, but no violation of Art. 5(4): right to a speedy review of the lawfulness of detention.

A national “Commission of Inquiry for State of Emergency Practices” was set up in Turkey in January 2017, for a term of two years, with responsibility for examining the appeals lodged in response to the decisions taken since the attempted *coup d'état*. In its 2017 annual report, the ECtHR indicated that last year was marked by a flood of applications directly linked to the measures taken following the attempted *coup* in Turkey. Most of these applications were lodged by individuals who had been taken into custody, in particular journalists and judges. Since the onset of this crisis, the Court took the view that the subsidiarity principle must be fully observed and that applicants must exhaust domestic remedies before bringing their application. As a result, more than 27,000 applications lodged in this context were declared inadmissible for failure to exhaust domestic remedies, either because there had been no appeal to the Constitutional Court or because the remedy of a complaint to the ad hoc commission had not been attempted.

In 2017, the Venice Commission adopted an “[Opinion on the Provisions of the Emergency Decree-Law N° 674 of 1 September 2016 which concern the exercise of Local Democracy](#)” (CDL-AD(2017)021, adopted in October 2017), where it recalled that “the main purpose of an emergency regime is to restore the democratic legal order and that the emergency regime itself should remain within the limits established by the Constitution and domestic and international obligations of the State”. The Venice Commission found “particularly worrying that, through emergency legislation, the central authorities are enabled, in the framework of the fight against terrorism, to appoint unelected mayors, vice-mayors and members of local councils, and exercise, without judicial control, discretionary control over the functioning of the concerned municipalities”. The Venice Commission has also been asked to provide an opinion on the amendments to the electoral legislation and related “harmonisation laws” adopted in March and April 2018 in Turkey. This Opinion is currently under preparation and its adoption is foreseen for October 2018.

Lastly, with regard to **Ukraine**, there have been no changes since I reported the latest developments to you a year ago and the derogations to the ECHR under Article 15 are still in force.

### **b. Supervision of the execution of judgements of the European Court of Human Rights**

With regard to the supervision of the execution of European Court of Human Rights judgments by the Committee of Ministers in conformity with Article 46 of the ECHR, I would like to draw your attention to the unchanged situation concerning the persistent non-execution of the judgment in the *Ilgar Mammadov*<sup>5</sup> case.<sup>6</sup> The applicant is still detained despite the fact that the European Court

<sup>3</sup> The cases were communicated under Article 5 (1), (3), (4), right to liberty and security, Article 10, freedom of expression and Article 18 ECHR, limitation on use of restrictions on rights.

<sup>4</sup> Judgments of 20 March 2018 on the cases of *Alpay v. Turkey*, no. 16538/17, and *Altan v. Turkey*, no. 13237/17. The former is final and for the latter a request for referral to the Grand Chamber is pending.

<sup>5</sup> ECHR, [Ilgar Mammadov v. Azerbaijan](#), no. 15172/13, Chamber judgment of 22 May 2014.

found - in a binding judgment more than four years ago - that Mr Mammadov's deprivation of liberty not only violated Article 5 ECHR, but also amounted to a violation of Article 18 ECHR prohibiting the restriction of a Convention right for any reason other than the ones prescribed under the Convention. Azerbaijan submitted an action plan to the Committee of Ministers including the adoption of legislative measures for the execution of this ECHR judgment. However, as the Committee of Ministers has reiterated, the continuing detention of Ilgar Mammadov constitutes a flagrant breach of the obligations under Article 46(1) ECHR and therefore the Committee of Ministers decided in December 2017 to start proceedings under Article 46(4) ECHR in view of the refusal by the Republic of Azerbaijan to abide by the final judgment of the ECtHR. Under this procedure, the Committee of Ministers refers to the Court the question of whether a Party has failed to fulfil its obligations concerning the binding force and execution of judgments of the European court of Human Rights.

This is the first time since its introduction in the Convention by Protocol No. 14, on 1 June 2010, that a case of infringement is referred back to the ECtHR. Rules 94 to 99 of the Rules of the Court regulate the proceedings under Article 46(4) of the Convention. A Grand Chamber has been constituted to address the question of whether a Contracting Party has failed to fulfil its obligation under Article 46(1) of the Convention. The Committee of Ministers, the respondent and the applicant (Mammadov) were invited to make written comments regarding the non-execution of the judgment. They have all made submissions to the Court. The Azerbaijani authorities, the Applicant and the Committee of Ministers have each sent observations to the others' submissions to the Court.

Another interesting aspect of this case is an issue of impartiality. ECtHR President Raimondi made reference to the Mammadov case in his speech at the Opening of the Judicial Year of the ECtHR (January 2018) and in particular to "*the authorities' persistent refusal to ensure the unconditional release of Mr Mammadov*". This was considered by the Azerbaijani authorities to indicate a certain form of partiality on the part of President Raimondi, who eventually withdrew as president of the Grand Chamber constituted for this case (who was replaced by Vice-President Angelika Nußberger).

In April 2018, the Grand Chamber of the ECtHR decided not to hold a hearing in this case. The question referred to the Court will be decided upon by the Grand Chamber by means of a judgment.

## **B. Opening for signature and new Council of Europe Conventions**

In addition to the ECHR, I would also like to inform you of recent developments of other Council of Europe conventions:

- The negotiations regarding [the Protocol](#) amending the [Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data](#) (ETS No. 108) have been finalised and the Protocol was adopted by the Committee of Ministers of the Council of Europe in May 2018, together with its [Explanatory Report](#). The Amending Protocol will enter into force by the standard procedure of entry into force via signature and ratification: three months after the date on which all Parties to the Convention have expressed their consent to be bound by the Protocol.

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<sup>6</sup> See, most recently, *Ilgar Mammadov group v. Azerbaijan* (Application No. 15172/13), [CM/Del/Dec\(2017\)1288/H-46-2](#), decision of the Committee of Ministers at the 1288<sup>th</sup> meeting, 6-7 June 2017 (DH).

In July 2018, the Committee of Ministers of the Council of Europe agreed to **open for signature** this Protocol on 10 October 2018, in Strasbourg.

According to Article 37(2) of the Protocol, in the event that the Protocol has not entered into force following the expiry of a period of five years after the date on which it has been opened for signature, it will enter into force in respect of those States which have expressed their consent to be bound by it, provided that the Protocol has at least thirty-eight Parties. The Committee of Ministers of the Council of Europe urged member States and other Parties to the Convention to take without delay the necessary measures to allow the entry into force of the Protocol within three years from its opening for signature.

### **C. Accessions to 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 152 CoE conventions out of our 222 are open to non-member States.

Since July last year, we have had the following 30 accessions and signatures (20 accessions, 10 signatures) by 22 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): Tunisia, Cape Verde and Mexico
- [Convention on the Transfer of Sentenced Persons](#) (ETS No. 112): India
- [Convention on Mutual Administrative Assistance in Tax Matters](#) (ETS No. 127): Bahamas, Bahrain, Brunei Darussalam, Granada, Liberia, Paraguay, Peru, Qatar, the United Arab Emirates and Vanuatu.
- [Convention on the Recognition of Qualifications concerning Higher Education in the European Region](#) (ETS No. 165): Canada
- [Convention on Cybercrime](#) (ETS No. 185): Argentina, Cape Verde, Morocco, Philippines and its [Additional Protocol](#) (ETS No. 189): Morocco
- [Council of Europe 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”: Benin, Burkina Faso
- [Council of Europe Convention against Trafficking in Human Organs](#) (CETS No. 216): Costa Rica.

11 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): Argentina, Tunisia
- [Convention on Mutual Administrative Assistance in Tax Matters](#) (ETS No. 127): Bahamas, Bahrain, Granada, Qatar, Peru and Vanuatu
- [Convention on Cybercrime](#) (ETS No. 185): Cape Verde, Tunisia
- [Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health](#) (CETS No. 211): Benin, Tunisia
- [Council of Europe Convention against Trafficking in Human Organs](#) (CETS No. 216): Costa Rica



Eight 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):

Antigua and Barbuda, Belarus, Chad, Dominican Republic, Ecuador, Papua New Guinea, Trinidad and Tobago

- [Convention on the Transfer of Sentenced Persons](#) (ETS No. 112): Holy See

### **III. OTHER RELEVANT DEVELOPMENTS WITHIN THE COE**

#### **A. 5<sup>th</sup> annual report of the Secretary General on the “State of democracy, human rights and the rule of law: Role of institutions – Threats to institutions” (May 2018)**

The five chapters of the [Secretary General's report in 2018](#) look at the key building blocks of democratic security: efficient, impartial and independent judiciaries; freedom of expression; freedom of assembly and freedom of association; democratic institutions; and inclusive societies. The Council of Europe and the ECtHR remain the bedrock of human rights, democracy and the rule of law in Europe.

The SG outlined some of the challenges facing the Council of Europe, which are long-term, recurring issues. For example, the lack of enforcement of domestic judicial decisions and the excessive length of proceedings remain, together, the most frequently invoked complaint in applications before the Court.

In last year's report, the Secretary General highlighted the challenge posed by the rise of populism and asked how strong Europe's checks and balances are. This year's report draws attention to one of its disturbing outcomes. Our human rights, democracy and the rule of law depend on the institutions that give them form - but for populists, who invoke the proclaimed “will of the people” in order to stifle opposition, these checks and balances on power are often seen as an obstacle that should be subverted. This year's report finds nascent trends – illuminated by alarming examples – of exactly this: attempts to undermine institutions at the European level, namely the Council of the Europe and the European Court of Human Rights, and also at the level of member states which, under the principle of subsidiarity, are at the vanguard of upholding our laws, standards and values.

Among the findings in this year's report as regards efficient, impartial and independent judiciaries we can find that there are increased attempts to challenge judicial independence, including through political influence over appointments, weakening the security of judges' tenure and empowering the executive to replace court presidents at its own discretion. Similarly, at the international level, we have witnessed member states challenging the primacy of the European Convention on Human Rights, seeking to empower national courts to overrule judgments from the Court, and refusing to implement such judgments for political reasons. In view of this year's findings, the Secretary General of the Council of Europe recommends that the Organisation, with its member states, pay special attention to the following:

- implement fully the Plan of Action on Strengthening Judicial Independence and Impartiality, in order to ensure compliance with Council of Europe standards and taking into account the assessments of our intergovernmental and advisory bodies on the alleged infringements concerning the independence and impartiality of judges;

- assist member states in strengthening – in legislation and in practice – guarantees for the freedoms of assembly and association;
- use Council of Europe legal instruments to promote and protect the human rights of persons affected by the refugee crisis, with particular attention to the most vulnerable, notably women and children.

### **B. Council of Europe Gender Equality Strategy (2018-2023)**

On 7 March 2018, the Committee of Ministers adopted the new [Council of Europe Gender Equality Strategy](#) for the years 2018-2023. The new CoE Gender Equality Strategy contributes towards the achievement of the UN 2030 Sustainable Development Goals, and renews the commitment of the Council of Europe to guaranteeing substantive and full gender equality both in the member States and within the organisation itself.

The Strategy focuses on six strategic areas: 1) Prevent and combat gender stereotypes and sexism; 2) Prevent and combat violence against women and domestic violence; 3) Ensure the equal access of women to justice; 4) Achieve a balanced participation of women and men in political and public decision-making; 5) Protect the rights of migrant, refugee and asylum-seeking women and girls and 6) Achieve gender mainstreaming in all policies and measures.

The official launching of the Gender Equality Strategy took place at the conference “Gender Equality: Paving the Way” hosted by the Danish Chairmanship of the Committee of Ministers in Copenhagen on 3-4 May 2018.

### **C. Council of Europe Counter-Terrorism Strategy (2018-2022)**

Earlier this month - on 4 July 2018 - the Committee of Ministers adopted [the Council of Europe Counter-Terrorism Strategy \(2018-2022\)](#). The aims of the Strategy can be summarised as “the three P’s”: Preventing terrorism, Prosecuting terrorists, and Protecting all persons present on the territories of the member States against terrorism, as well as assisting victims.

In recent years the Council of Europe has developed new legal and other standards on issues such as the criminal law response to foreign terrorist fighters, the use of special investigation techniques in terrorism cases, and how to prevent attacks by “terrorists acting alone”. These standards, together with the already existing body of relevant conventions, recommendations and guidelines, form the basis for the Organisation’s current and future work in the field of counter-terrorism and prevention of radicalisation leading to terrorism.

The Council of Europe adds particular value to the regional and global efforts to prevent and suppress terrorism through its standard-setting activities, but also through its other activities aimed at preventing radicalisation leading to terrorism and, more generally, the furthering of democracy. The Council of Europe will continue its efforts to promote its standards, both regionally and globally, in close co-operation and co-ordination with member States and other regional and global organisations, in particular the United Nations.



#### **D. Enhanced international cooperation on cybercrime and electronic evidence: Towards a Protocol to the Budapest Convention**

The evolution of information and communication technologies – while bringing unprecedented opportunities for mankind – also raises challenges, including for criminal justice and thus for the rule of law in cyberspace. While cybercrime and other offences entailing electronic evidence on computer systems are thriving and while such evidence is increasingly stored on servers in foreign, multiple, shifting or unknown jurisdictions (that is, in the cloud), the powers of law enforcement are limited by territorial boundaries.

The Parties to the [Council of Europe Budapest Convention on Cybercrime](#) have been searching for solutions for some time and, in June 2017, the Cybercrime Convention Committee (T-CY) - representing the 60 Parties to the Budapest Convention, with signatories and States invited to accede participating as observers - agreed on the Terms of Reference for the preparation of the Protocol from Sept.2017 to Dec.2019.

An international [Octopus Conference on “Co-operation against Cybercrime”](#) was held at the CoE in Strasbourg last week, focusing on solutions to strengthen the rule of law in cyberspace through a Protocol to the Budapest Convention. Consultations were held with civil society, data protection experts and industry to review proposals for more effective ways to secure the electronic evidence needed in criminal investigations, for example, through mutual legal assistance and direct cooperation with service providers.

#### **IV. 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 Georg NOLTE, the Chairperson of the ILC during your 69th Session, for having participated in the CAHDI meeting last year and for his very interesting presentation. We also look forward to the participation of your current Chairperson, Mr Eduardo VALENCIA-OSPINA, at the forthcoming CAHDI meeting in Helsinki in September.

Thank you very much for your attention.