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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

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

**at the 71st Session of the International Law Commission (ILC)
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71st SESSION OF THE INTERNATIONAL LAW COMMISSION OF

THE UNITED NATIONS

Statement by

Ms Marta REQUENA

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Geneva, 31 May 2019

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.

In this context, allow me to provide you with 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 2018:

-firstly, I would like to inform you about the recent developments within the Council of Europe, in particular the Organisation's 70th anniversary in 2019, the election of the new Secretary General for the next five years and the priorities of the current French Presidency of the Committee of Ministers;

-secondly, I would like to inform you of the latest developments concerning the Council of Europe's conventions, in particular different aspects of the *European Convention on Human Rights* (ECHR) and the preparation of a Second Additional Protocol to the Cybercrime Convention ;

-finally, I would also like to mention the importance for us of the new Resolution A/RES/73/15 on *Cooperation between the United Nations and the Council of Europe*, adopted by the General Assembly on 26 November 2018.

I. RECENT DEVELOPMENTS WITHIN THE COUNCIL OF EUROPE

A. 70th anniversary of the Council of Europe in 2019

As you know the Statute of the Council of Europe –our constituent treaty- was signed in London on 5 May 1949 and therefore 2019 marks the **70th anniversary of the Council of Europe**. It also coincides with other major anniversaries, namely the 30th anniversary of the fall of the Berlin Wall, which was a turning point for our Organisation, and the **60th anniversary of the European Court of Human Rights**.

There are two key events in this commemorative year of our 70th Anniversary under the slogan "***Our Rights, Our Freedoms, Our Europe***": the first one was the 129th Session of the Committee of Ministers in Helsinki on 16-17 May 2019, closing the Finnish Presidency; and the second series of events will take place in September-October in Strasbourg under the French Presidency in a Ceremony marking the 70th Anniversary of the Council of Europe, including an institutional commemoration.

The [**Declaration by the Committee of Ministers on the occasion of the 70th anniversary of the Council of Europe**](#) was adopted on 17 May 2019 at the 129th Session of the Ministers' Deputies and was focused on the Council of Europe as the leading human rights Organisation in Europe. Furthermore, other Decisions were also adopted during this 129th Session, in particular one entitled "[**A shared responsibility for democratic security in Europe -Ensuring respect for rights and obligations, principles, standards and values**](#)" which addresses the relationship among the member States as well as the institutional relations between the different statutory organs of the Council of Europe. Other decisions on the following issues were also adopted during this 129th Session:

- The need to strengthen the protection and promotion of civil society space in Europe;
- The Report by the Secretary General "Ready for future challenges-Reinforcing the Council of Europe";
- Securing the long-term effectiveness of the system of the European Convention on Human Rights;
- The Co-operation between the Council of Europe and the European Union;
- The Council of Europe policy towards neighbouring regions.

B. Election of a new Secretary General of the Council of Europe

The term of office of the current Secretary General, Thorbjørn Jagland, will finalise on 1st October 2019 and therefore a new Secretary General must be elected this year. According to the Statute of the Council of Europe, the [election of the Secretary General](#) is a shared responsibility between the Committee of Ministers and the Parliamentary Assembly: the Committee of Ministers draws up a list of candidates to be transmitted to the Parliamentary Assembly and the Parliamentary Assembly elects the Secretary General from the candidates included in that list. Four candidates apply to the post of Secretary General¹ and the Committee of Ministers adopted a Resolution CM/Res(2019)2 on 27 March 2019 deciding to submit to the Parliamentary Assembly, for appointment to the post of Secretary General, with effect from 1 October 2019, the following two candidatures (in alphabetical order):

- Ms Marija Pejčinović Burić (Croatia)
- Mr Didier Reynders (Belgium).

The Parliamentary Assembly will elect the new Secretary General of the Council of Europe at its June Session on 24-28 June 2019.

C. Priorities of the French Presidency of the Committee of Ministers

The handover of the Presidency of the Committee of Ministers from Finland to France took place on 17 May 2019. The French Presidency will be marked by the official celebration of the Council of Europe's 70th anniversary in Strasbourg, on the margins of the Parliamentary Assembly October part-Session, as well as the taking of office of a new Secretary General.

The three main priorities of the current French Presidency are:

- 1) preserving and consolidating the European system of human rights protection,
- 2) promoting equality and living together,

¹ In order of submission: Mr Didier Reynders (Belgium); Mr Andrius Kubilius (Lithuania); Ms Dora Bakoyannis (Greece); and Ms Marija Pejčinović Burić (Croatia).

3) meeting the new challenges facing human rights and the rule of law (in particular digital technology issues and artificial intelligence).

France will hand over its Presidency to Georgia on 27 November 2019. It will be the first time that Georgia will hold the Presidency of the Committee of Ministers since it joined the Organisation in April 1999.

D. Republic of North Macedonia

The Republic of Macedonia and the Hellenic Republic signed on **17 June 2018** the "**Final Agreement for the settlement of the differences as described in the United Nations Security Council Resolutions 817 (1993) and 845 (1993), the termination of the Interim Accord of 1995 and the establishment of a strategic partnership between parties**" which entered into force on 12 February 2019, and was notified to international organisations on 14 February 2019.

In the framework of the Council of Europe since its accession in 1995 (*Resolution (95) 23 inviting "the former Yugoslav Republic of Macedonia" to become a member of the Council of Europe*) the name used in all documents was "**the former Yugoslav Republic of Macedonia**". Following the above mentioned Agreement since February 2019 the new official name is **Republic of North Macedonia** or the short name **North Macedonia**. North Macedonia therefore appears between the Netherlands and Norway in the English alphabetical order of the Council of Europe member States.

Therefore, the Council of Europe's Treaty Office has replaced the data *the former Yugoslav Republic of Macedonia* in its database by *North Macedonia* in all charts and headings referring to the country on its website, but not in the texts of registered reservations and declarations as they cannot be modified retroactively. Furthermore, it is important to note the end of the practice where due to the dispute related to the name of "the former Yugoslav Republic of Macedonia" this State did not sign the Conventions of the Council of Europe (its name does not appear on the original treaties), instead deposited a signature letter: the Permanent Representation sent a letter to the Treaty Office which registered it. A unilateral Procès-Verbal was signed by the Secretary General of the Council of Europe or his/her Deputy. The same procedure applied to the deposit of instruments of ratification. The Treaty Office when notifying to other States attached a copy of the letter of signature.

On **27 February 2019**, the **Committee of Ministers** took note of the Note Verbale concerning the change, with immediate effect, of the country's official name to "Republic of North Macedonia", with the short name "North Macedonia".

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 Turkey and Ukraine

As it has already been mentioned by the Chair of the CAHDI, in relation to the most recent derogations to the ECHR allowed by Article 15, France and Turkey have already withdrawn them in 2017 and 2018, respectively, and the Ukrainian derogation is still in force.

The derogation under Article 15 of the ECHR by **Turkey** was withdrawn in a letter from the Permanent Representative of Turkey, dated 8 August 2018, registered by the Secretariat General on **9 August 2018**. Since Turkey communicated the declaration of the State of Emergency on 20

July 2016 until the end of the state of emergency in this country on 19 July 2018, the derogation was extended seven times.

Last year, I informed you about a number of cases that reached the European Court of Human Rights concerning measures taken under the state of emergency. There are final judgments on two cases (*Sahin Alpay v. Turkey*, no.16538/17 and *Mehmet Sahan Altan v. Turkey*, no.13237/17²), while the other cases I referred to last year remain pending. In addition, in April 2019 the European Court of Human Rights found a violation of Article 5(1) – right to liberty and security – in the case *Alparslan Altan v. Turkey*, no. 12778/17³, concerning the detention of a Turkish Constitutional Court judge, on suspicion of membership of an armed terrorist organisation, following the attempted coup of 15 July 2016. In this case, the European Court also found that the measures taken against the applicant were not strictly required by the exigencies of the situation for the purposes of Article 15 of the Convention (derogation in time of emergency).

With regard to **Ukraine**, there have been no changes since I reported the latest developments to you a year ago and the derogation to the ECHR under Article 15 made by Ukraine in 2015 is 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 latest development concerning the non-execution of the judgment in the *Ilgar Mammadov*⁴ case from May 2014⁵. The case concerned the referral of a question to the ECtHR on 5 December 2017 by the Committee of Ministers of the Council of Europe, which is responsible for supervising the enforcement of the Court's judgments, as to whether Azerbaijan had failed to abide by the 2014 judgment by not releasing Mr Mammadov unconditionally. The Committee of Ministers was using powers set out in Article 46 § 4 of the European Convention. 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.

On 13 August 2018, Mr Mammadov was released from prison after Azerbaijan's Supreme Court quashed the previous decisions on the applicant's conviction and the Court of Appeal decided to replace the remaining part of imprisonment by a conditional sentence, with a probation period of two years. The applicant was therefore not released from criminal responsibility, and he lodged a cassation appeal with the Supreme Court of Azerbaijan on 30 October 2018. In March 2019, the Supreme Court of Azerbaijan upheld the applicant's conviction but varied his sentence. Taking account of the time spent by the applicant in detention, his sentence was considered to be "finalised".

In April 2018, the Grand Chamber of the ECtHR decided not to hold a hearing in this case. The Grand Chamber delivered its **first judgment in infringement proceedings under Article 46 § 4 of the ECHR on 29 May 2019** and found that Azerbaijan had failed to fulfill its obligation to comply with the Court's 2014 ruling in the case of political activist Ilgar Mammadov (application no. 15172/13). The Grand Chamber found, unanimously, that there had been:

- a **violation of Article 46 § 1** (binding force and execution of judgments) of the European Convention on Human Rights by Azerbaijan.

² ECtHR, *Sahin Alpay v. Turkey*, application no.16538/1, Chamber judgment of 20 March 2018 (final on 20 June 2018); ECtHR, *Mehmet Sahan Altan v. Turkey*, application no.13237/17, Chamber judgment of 20 March 2018 (final on 10 September 2018).

³ ECtHR, *Alparslan Altan v. Turkey*, no. 12778/17, Chamber judgement of 16 April 2019.

⁴ ECHR, *Ilgar Mammadov v. Azerbaijan*, application no. 15172/13, Chamber judgment of 22 May 2014.

⁵ See, *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 1288th meeting, 6-7 June 2017 (DH).

- the Court found in particular that the **Government had taken only limited steps to implement the judgment**, which had not amounted to Azerbaijan acting in “good faith” or in a manner which was in accordance with the “conclusions and spirit” of its ruling in Mr Mammadov’s case.
- It concluded that **Azerbaijan had failed to fulfil its obligation under Article 46 § 1 of the Convention to abide by the judgment.**
- In accordance with Article 46 § 5 of the Convention, **cases in which the Court finds a violation of Article 46 § 1 are to be referred back to the Committee of Ministers for consideration** of the measures to be taken.

c. Protocol No.16 to the ECHR and the first Advisory Opinion

[Protocol No. 16 to the European Convention on Human Rights](#) (CETS No.214) entered into force on 1 August 2018, in respect of the member States that have ratified it⁶. This Protocol enables the highest national courts and tribunals to request the European Court on Human Rights for advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the European Convention and its Protocols. These advisory opinions are delivered by the Grand Chamber. The first request for such advisory opinion was sent by the French Court of Cassation in October 2018, concerning the legal parentage of children born to a surrogate mother. The Court of Cassation adjourned its proceedings until the European Court of Human Right delivered its [Advisory Opinion](#)⁷, which it did on 10 April 2019. The Advisory Opinion established that in a situation where a child is born abroad through a gestational surrogacy arrangement, the child’s right to respect for private life requires that domestic law provides a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate as the “legal mother”. However, States are not required to register the details of the birth certificate in order to establish the legal parent-child relationship with the intended mother. Another means, such as adoption of the child by the intended mother, may also be used. In addition to the ECHR, I would also like to inform you of recent developments of other Council of Europe conventions.

B. Opening for signature and new Council of Europe protocols and Conventions

a. Opening for signature

The [Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data](#) (CETS No. 223) was **opened for signature** by the Contracting States to the Convention, in Strasbourg, on 10 October 2018. 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. So far, there have been 30 signatures, including Tunisia and Uruguay.

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 was 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.

b. Enhanced international cooperation on cybercrime and electronic evidence: Towards a Second Additional Protocol to the Budapest Convention

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, the powers of law enforcement are limited by territorial boundaries. The

⁶ To the date [13 member States](#) have ratified it.

⁷ ECtHR, [Advisory Opinion concerning the recognition in domestic law of a legal parent-child relationship between a child born through a gestational surrogacy arrangement abroad and the intended mother](#) Requested by the French Court of Cassation, Request no. P16-2018-001, 10 April 2019.

Parties to the [Council of Europe Convention on Cybercrime](#) (the so-called Budapest Convention) have been searching for solutions to these challenges related to criminal justice and the rule of law in cyberspace and, in June 2017, the Cybercrime Convention Committee (T-CY) - representing the 63 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 a 2nd additional Protocol, negotiated from September 2017 to December 2019.

The 2nd additional Protocol to the Budapest Convention on Cybercrime is to cover provisions for:

- more effective mutual legal assistance;
- direct cooperation with service providers, including production orders for subscriber information to be issued directly to a service provider in another Party;
- extending transborder searches;
- conditions and safeguards, including data protection requirements.

The Protocol is being drafted by a Drafting Group – with subgroups for specific provisions – consisting of experts appointed by the Parties to the Budapest Convention. The proposals prepared by this Group are submitted to the T-CY Protocol Drafting Plenary.

On 5 February 2019, the European Commission issued a Recommendation for a EU Council Decision, aimed at receiving authorisation to participate in the negotiations, on behalf of the European Union and its member States, on a second Additional Protocol to the Convention on Cybercrime (ETS No. 185). The Recommendation included a draft “negotiation mandate”, which is scheduled to be adopted by the Justice and Home Affairs Council of the EU in June 2019.

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 153 Council of Europe conventions, out of a total number of 223, are open to non-member States.

Since July 2018, we have had **24 acts expressing consent to be bound by a treaty** (7 signatures, 11 ratifications, 6 accessions) by **19 non-member States**⁸

Two non-member States have already been invited to sign/accede to [Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health](#) (CETS No. 211): Congo and Côte d’Ivoire.

We have also 15 requests from non-member States to be invited to accede to several Council of Europe conventions which are still pending⁹.

⁸ [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; [Convention on the Transfer of Sentenced Persons](#) (ETS No. 112):, Holy See, Ghana; and its [Additional Protocol](#) (ETS No. 167) and [Amending Protocol](#) (CETS No. 222): Holy See; [Convention on Mutual Administrative Assistance in Tax Matters](#) (ETS No. 127): Antigua and Barbuda, Brunei Darussalam, Dominica, Ecuador, El Salvador, Jamaica, Kuwait, Mauritania, Morocco and Qatar; [Convention on Cybercrime](#) (ETS No. 185): Ghana and Paraguay, and its [Additional Protocol](#) (ETS No. 189): Paraguay; [Council of Europe Convention on the Manipulation of Sports Competitions](#) (CETS No. 215): Australia; [Council of Europe Convention on Offences relating to Cultural Property](#) (CETS No. 221): Mexico; [Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data](#) (CETS No. 223): Tunisia, Uruguay.

⁹ [European Convention on Extradition](#) (ETS No. 24): Mongolia ; [European Convention on Mutual Assistance in Criminal Matters](#) (ETS No. 30): Mongolia; [Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data](#) (ETS No. 108) and its [Additional Protocol](#) (ETS No. 181): Costa Rica; [Convention on Mutual Administrative Assistance in Tax Matters](#) (ETS No. 127): Angola, Belarus, Benin, Chad, Madagascar, Maldives, Papua New Guinea, Togo, Trinidad and Tobago; [Anti-Doping Convention](#) (ETS No. 135): Qatar; [Convention on Cybercrime](#)

A Treaty Ceremony on the margins of the 129th Session of the Committee of Ministers in Helsinki on 16 May 2019 allowed governments to sign and/or ratify 12 Protocols and/or Conventions. Furthermore, in the framework of the 70th Anniversary of the Council of Europe a "treaty week" will take place in Strasbourg from 30 September to 4 October 2019 on the occasion of the main commemorative event, which will be held on the margins of the Parliamentary Assembly's fourth part-session in 2019.

III. CONCLUSION

To conclude, I would like to underline the importance of the increasing cooperation between the Council of Europe and the United Nations in a wide range of fields. In this respect, I would like to mention that **Resolution A/RES/73/15 on Cooperation between the United Nations and the Council of Europe**, adopted by the General Assembly on 26 November 2018, acknowledged in its Preamble "*the contribution of the Council of Europe to the development of international law, and noting the openness of the Council of Europe to the participation of States of other regions in its legal instruments*". Furthermore, the General Assembly in the text of the Resolution itself (pp 27) further "*welcomes the contribution of the Council of Europe to the Sixth Committee of the General Assembly and the International Law Commission*".

I cannot finalise without expressing 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 and to your current Chair, **Mr Pavel ŠTURMA**, for having participated in the CAHDI meeting last year and for having accepted to participate at our forthcoming CAHDI meeting in September in Strasbourg.

Thank you very much to all for your attention.