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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 69<sup>th</sup> Session of the International Law Commission

**54<sup>th</sup> meeting**  
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**Presentation 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 69<sup>th</sup> Session of the International Law Commission**

**Geneva, 6 July 2017**

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 2016. 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 concluded under the auspices of the Council of Europe.

**I. Priorities of the Czech Chairmanship of the Committee of Ministers**

The handover of the Chairmanship of the Committee of Ministers from Cyprus to the current Czech Chairmanship took place on 19 May 2017. The Czech Republic will hand over the Chairmanship to Denmark on 15 November 2017.

The main priorities of the current Czech Chairmanship relate to the protection of the human rights of persons belonging to vulnerable or disadvantaged groups and to promoting gender equality. The focus is thereby laid in particular on:

- The implementation of the recommendations of the European Commission against Racism and Intolerance (ECRI) and the implementation of the [Framework Convention for the Protection of National Minorities](#) (1995) (ETS No. 157) and of the [European Charter for Regional and Minority Languages](#) (1992) (ETS No. 148).
- The human rights of persons belonging to the Roma community in line with the [Strasbourg Declaration on Roma](#) adopted by the Committee of Ministers in 2010.
- The human rights of migrant children, and, in particular, the detention of migrant children and its alternatives in line with the [Council of Europe Action Plan on Protecting Refugee and Migrant Children in Europe \(2017-2019\)](#), adopted on 19 May 2017 in Nicosia (Cyprus) during the 127<sup>th</sup> Session of the Committee of Ministers.
- Encouraging the broadest possible ratification and implementation of the [Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse](#) (CETS No. 201 - Lanzarote Convention) as well as securing the effective implementation of the [Council of](#)

[Europe Strategy for the Rights of the Child \(2016-2021\)](#), adopted by the Committee of Ministers in March 2016.

- Promoting gender equality in line with the [Council of Europe Gender Equality Strategy \(2014-2017\)](#) with an emphasis on the collection of gender equality data

## 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 last spoke before you, France, Ukraine and Turkey have extended the declarations of derogations under Article 15 ECHR due to the state of emergency in their respective countries allowing them to derogate, in a temporary, limited and supervised manner, from their obligation to secure certain rights and freedoms under the Convention.

With regard to **France**, on 21 December 2016, the Secretary General of the Council of Europe received a notification informing that the application of Act No. 55-385 of 3 April 1955 regarding the state of emergency had been extended for 6 more months until 15 July 2017.<sup>1</sup> This was the fifth time that the state of emergency was prolonged following the large-scale terrorist attacks that had taken place in the Paris region on 13 November 2015.<sup>2</sup> In its Note Verbale, the Government of France recalled that the measures taken under the state of emergency are subject to effective judicial review, as well as to a particularly attentive Parliamentary monitoring and control mechanism.

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 was transmitted to the Secretary General of the Council of Europe by letter dated 21 July 2016. Further declarations concerning the extension of the state of emergency were transmitted to the Council of Europe on 17 October 2016 and 5 January 2017. Currently, the declaration of derogation of certain rights under the state of emergency has been prolonged until 18 July 2017 by letter dated 20 April 2017 and on several occasions the Government of Turkey has provided the Secretary General of the Council of Europe with information concerning the national emergency legal measures adopted.<sup>3</sup> In the meanwhile, the first cases concerning measures taken under the state of emergency have reached the European Court of Human Rights. Applications in four cases<sup>4</sup> have been declared inadmissible on the grounds that all domestic remedies have not been exhausted without the Court thus examining the complaints on the merits. Furthermore, on 8 and 13 June

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<sup>1</sup> Act No. 2016-1767 of 19 December 2016.

<sup>2</sup> The four first times occurred as follows: For a period of three months starting on 26 November 2015, by Law No. 2015-1501 of 20 November 2015, then for a period of three months starting on 26 February 2016 by Law No. 2016-162 of 19 February 2016, then for a period of two months starting 26 May 2016 by Law No. 2016-629 of 20 May 2016 and finally for a period of six months starting 22 July 2016 by Law No. 2016-987 of 21 July 2016.

<sup>3</sup> Most recently by [communication of 23 June 2017](#) concerning the Decree with Force of Law No. 690 dated 29 April 2017.

<sup>4</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.

2017, the European Court of Human Rights communicated to the Government of Turkey six cases<sup>5</sup> of 17 journalists and media workers, who have been detained on suspicion of their alleged links with the Gulenist 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>6</sup> There are more 11,000 applications pending before the Court involving cases that emanate to facts in the aftermath of the failed coup attempt of July 2016.

A concrete result of our cooperation with the Turkish authorities is the recent setting up of the national commission which will examine the cases for persons who have been dismissed, organisations, schools and news outlets that have been closed and private property that has been confiscated. On the occasion of the visit of Mr Bekir Bozdağ, Minister of Justice of Turkey, in Strasbourg on 1 March 2017, the Secretary General of the Council of Europe welcomed the setting up of this commission as a positive sign for allowing judicial oversight of decisions relating to the state of emergency provided that the commission will function independently and on the basis of the ECHR.

Other Council of Europe organs and institutions have already scrutinised measures adopted by Turkey during the state of emergency. I would like to refer in particular to the Venice Commission's ["Opinion of 9-10 December 2016 on Emergency Decree Laws N°s 667-676 following the failed coup of 15 July 2016"](#) (CDL-AD(2016)037) and ["Opinion of 13 March 2017 on the measures provided in the recent emergency decree laws with respect to freedom of the media in Turkey"](#) (CDL-AD(2017)007). The Venice Commission acknowledges the right of a democratically elected government to defend itself including by resorting to extraordinary measures. But the Venice Commission also emphasises that measures such as mass liquidations of media outlets on the basis of the emergency decree laws, without individualised decisions, and without the possibility of timely judicial review are unacceptable under international human rights law.

Lastly, with regard to **Ukraine**, I would like to recall that on 9 June 2015 the Secretary General of the Council of Europe was notified by the Government of Ukraine of its decision to have recourse to Article 15 of the ECHR until further notice. 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) ECHR as well as Article 2 (freedom of movement) of Protocol No.4 to the ECHR. Since then, the Government of Ukraine has on three occasions - most recently on 2 February 2017<sup>7</sup> - transmitted to the Secretary General of the Council of Europe an updated list of localities in Donetsk and Luhansk regions under control or partially controlled by the Government of Ukraine covered by the derogation. In this respect, Ukraine underlined the need to adopt a very careful approach in establishing whether the said areas were under effective control and jurisdiction of either Ukraine or the Russian Federation.

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<sup>5</sup> ECHR, [Sabuncu and Others v. Turkey](#), no. 23199/17, communication of 8 June 2017; ECHR, [Tas and Aksoy v. Turkey](#), no. 72/17 and 80/17, communication of 13 June 2017; ECHR, [Altan and Altan v. Turkey](#), no. 13237/17 and 13252/17, communication of 13 June 2017; ECHR, [Bulac v. Turkey](#), no. 25939/17, communication of 13 June 2017; ECHR, [Ilicak v. Turkey](#), no. 1210/17, communication of 13 June 2017; ECHR, [Alpay v. Turkey](#), no. 16538/17, communication of 13 June 2017.

<sup>6</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>7</sup> The previous communications were of 4 November 2015 and 30 June 2016.

*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>8</sup> case.<sup>9</sup> The applicant is still detained despite the fact that the European Court found - in a binding judgment more than three 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. A Secretariat mission under the Secretary General's Article 52 ECHR inquiry took place in January 2017 and Azerbaijan submitted an action plan to the Committee of Ministers including the adoption of legislative measures for the execution of the ECHR judgment in the case. However, as the Committee of Ministers previously underlined in December 2016, the continuing arbitrary detention of Ilgar Mammadov constitutes a flagrant breach of the obligations under Article 46 (1) ECHR and may justify starting proceedings under Article 46 (4) ECHR (refer to the Court the question whether that Party has failed to fulfil its obligations concerning the binding force and execution of judgments of the European court of Human Rights).

**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 Revised [Council of Europe Convention on Cinematographic Co-Production](#) (CETS No. 220) was opened for signature on 30 January 2017 in Rotterdam (the Netherlands) and will enter into force for the three member States of the Council of Europe that have already ratified it (Norway, the Slovak Republic and Sweden) on 1 October 2017.<sup>10</sup>
- The [Council of Europe Convention on Offences relating to Cultural Property](#) (CETS No. 221) was opened for signature on 19 May 2017 in Nicosia (Cyprus) on which occasion it was already signed by six States (Armenia, Cyprus, Greece, Portugal, San Marino and Mexico), and a seventh signature by Slovenia has taken place this week. In this respect, I would like to highlight the importance and exceptional nature for the Treaty Law within the Council of Europe that a non-member State, in this case Mexico, signed one of our conventions during the ceremony of the opening for signature.

The Convention aims to prevent and combat the illicit trafficking and destruction of cultural property in the framework of the Council of Europe's action to fight terrorism and organised crime. The Convention is the only international treaty specifically dealing with the criminalisation of the illicit trafficking of cultural property establishing, in this regard, a number of criminal offences, including theft, unlawful excavation, importation and exportation, illegal acquisition and placing on the market. It also criminalises the falsification of documents and the destruction or damage of cultural property when committed intentionally. The Convention further aims at fostering international co-operation to fight these crimes, which are destroying the world's cultural heritage. The Convention will enter

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<sup>8</sup> ECHR, *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, Chamber judgment of 22 May 2014.

<sup>9</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).

<sup>10</sup> The revised Convention has been signed by 11 further States (Cyprus, Greece, Italy, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Serbia, Slovenia and Spain).

into force when it has been ratified by five States including at least three member States of the CoE.

- The negotiations regarding the Protocol amending the [Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data](#) (ETS No. 108) were finalised at the expert level (Ad Hoc Committee on Data Protection - CAHDATA) in June 2016 and the draft has since been discussed in the Rapporteur Group on Legal Cooperation (GR-J) of the Committee of Ministers of the Council of Europe. Still no solutions have been found for the outstanding issues (EU voting rights, national security exceptions, transborder data flows, entry into force) so far. One of the controversies delaying the process is the issue of the way in which the Amending Protocol would enter into force – through a tacit acceptance clause or by the standard procedure of entry into force via signature and ratification. While delegations could see the benefits of a tacit acceptance clause for a swift entry into force of the amended Convention, they hesitate to deviate from the standard clause especially with regard to such an important subject matter as data protection and even some of these delegations raised their concerns as to the impossibility of subjecting themselves to an automatic entry into force through a tacit acceptance clause for constitutional reasons.

### **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 221 are open to non-member States.

Since July last year we have had the following 24 accessions and signatures (6 accessions, 18 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): Senegal
- [Convention on Mutual Administrative Assistance in Tax Matters](#) (ETS No. 127): Burkina Faso, Malaysia, Saint Vincent and the Grenadines, Samoa, St. Christopher and Nevis, Pakistan, Panama, Cook Islands, Saint Lucia, Marshall Islands, United Arab Emirates, Kuwait, Lebanon and Bahrain
- [Convention on Cybercrime](#) (ETS No. 185): Senegal, Chile, Tonga, and its [Additional Protocol](#) (ETS No. 189): Senegal
- [Additional Protocol to the Anti-Doping Convention](#) (ETS No. 188): Belarus
- [Council of Europe Convention on preventing and combating violence against women and domestic violence](#) (CETS No. 210): European Union
- [Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health](#) (CETS No. 211) – “Medicrime”: Burkina Faso
- [Council of Europe Convention on Offences relating to Cultural Property](#) (CETS No. 221): Mexico.

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): Burkina Faso



- [Convention on the Transfer of Sentences Prisons](#) (ETS No. 112): Ghana, Brazil
- [Convention on Mutual Administrative Assistance in Tax Matters](#) (ETS No. 127): Brunei and Mauritania
- [Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse](#) (CETS No. 201): Tunisia

10 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, Bahamas, Belarus, Chad, Dominican Republic, Grenada, Qatar, Trinidad and Tobago and Vanuatu
- [Convention on Cybercrime](#) (ETS No. 185): Nigeria

### III. 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 Pedro COMMISSÁRIO AFONSO**, the Chairperson of the ILC during your 68<sup>th</sup> Session, for having participated in the CAHDI meeting last year and for his very interesting presentation.

Thank you very much for your attention.