Seminar on
"The Contribution of the European Court of Human Rights to the Development of Public International Law"
on the margins of the 59th CAHDI meeting in Prague

Concluding Remarks by Ambassador Emil Ruffer,
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I wish to thank the Chair of CAHDI, Mr Petr Válek, for the kind invitation to this seminar and allow me to make several concluding remarks, inspired by the excellent presentations of our panellists.

I could make a general observation that the relationship between public international law and the system of the European Convention on Human Rights ("Convention" or "ECHR") is currently more important than ever. But this is a *cliché* used far too often. So instead I would claim that international law has always been important for the Convention system and reflected, in different ways, in the jurisprudence of the European Court of Human Rights ("ECtHR" or "Court"). In addition, despite the rich and comprehensive debate we had today, we certainly have not exhausted this important topic and we could easily organise a similar seminar in five or ten years, or even next year (when we might already have the important decisions of the Austrian Constitutional Court regarding the right to effective remedy in compliance with ECHR in staff disputes with international organisations, which were mentioned in the very interesting presentation by Mr Helmut Tichy).

Now I would like to try to draw some conclusions from the presentations we heard. I think it is safe to claim that the international law develops – rather slowly and at its own pace, but it evolves. And so does its interpretation, as was clearly demonstrated by Judge Linos-Alexander Sicilianos (ECtHR) in his treatment of the topic of evolutive interpretation (also called "living instrument doctrine") employed by the ECtHR when interpreting the provisions of the Convention. However, this doctrine is not without limits and such interpretation must not go *contra legem*, must be in conformity with the object and purpose of the Convention and reflect the present-day conditions, rather than prejudge future developments.

Further, it is important to recall that the ECtHR has never been an isolationist court, as was stressed by Professor Pavel Šturma (Chair of the International Law Commission), but it has been aware of international law concepts applicable in its jurisprudence. However, in terms of state responsibility, the Court's approach to establish the respondent state's jurisdiction (cf. Article 1 ECHR) gave rise to certain inconsistencies with the concept of "attribution" within the meaning of the Articles on Responsibility of States for Internationally Wrongful Acts. Nevertheless, it seems that there is a "moderate shift" towards the rules on attribution in some recent judgments of the Court. Moreover, the relationship between the ECtHR and international law is a two-way street, meaning that the ECtHR also brings certain innovations into international law doctrine, such as "equivalent protection" established in the *Bosphorus* case or "ultimate control" instead of "effective control" in disputes with extraterritorial element.

The slow development of international law was well illustrated by Professor Georg Nolte (Humboldt University), who reminded us about debates in 1920 concerning the sources of

international law (in the context of drafting the Statute of the Permanent Court of International Justice), which are still relevant 100 years later. With regard to the ECtHR, it might seem at first glance that it is not too concerned with distinguishing among sources of law and about their binding nature. However, while being also attentive to non-binding instruments, the Court still works with the established sources (treaties, customary law and general principles), as was confirmed, *inter alia*, in the assessment of the International Law Commission on this subject. Interestingly enough, we can find another invention by the Court, namely reference to "European consensus" when interpreting the scope of Convention's rights, which in fact very much corresponds to the notion of "the general principles of law recognized by civilized nations" (Article 38(1)(c) of the Statute of the International Court of Justice).

The ECtHR never ignored international law and does not put the autonomy of the Convention system above everything else. Nevertheless, it hesitated for a while in taking on board and referring to certain areas of international law, such as international humanitarian law, as was well explained by Ms Julie Tenenbaum (International Committee of the Red Cross). As regards the respect of the Court for the UN Charter and binding acts adopted on its basis by the UN Security Council when imposing targeted sanctions, Ms Alina Orosan (Director General for Legal Affairs from the Ministry of Foreign Affairs of Romania), critically analysed the caselaw in this sensitive area. While the ECtHR did not find any normative conflict between the Convention and UN Charter, it nevertheless established an "obligation of diligence" for Council of Europe member states to safeguard Convention rights when implementing the UN Security Council's sanction resolutions and urged them to use their margin of appreciation. As was also recalled by Mr Lucio Gussetti (Director on External Relations, Legal Service of the European Commission), a very similar approach, not excluding judicial review, was also taken in the caselaw of the Court of Justice of the EU ("CJEU") with regard to implementation of UN sanctions. This is thus one example of convergence between the ECtHR and CJEU jurisprudence. While such convergence in itself is a good thing, the content of this caselaw and principles contained therein from the international law perspective is another matter and might raise certain concerns. Seen from this perspective, no matter what the European (or other national) courts decide, definitive solutions for accommodating human rights may eventually only be found at the UN level, through a well-conceived sanctions regime with clear objectives and review mechanisms.

Finally, Mr Helmut Tichy (Legal Adviser, Ministry of Foreign Affairs of Austria) demonstrated the significant impact of the ECHR (namely its Article 6 on fair trial) on Austria's practice as a host state with regard to international organisations. The requirement of protection by means of an effective judicial remedy in staff cases conducted against an international organisation becomes a matter of constitutional law, since the ECHR has a constitutional status in Austria. In turn, the proceedings brought before the Austrian Constitutional Court with regard to compliance with the Convention obligations, directly influence international law and content of headquarters agreements and the scope of respective immunities. In other words, this a good example of the Convention's influence on the development of international law by means of a "proxy" or intermediary, i.e. the Constitutional Court and its jurisprudence.

So are we witnessing more convergence and/or dialogue in the intercourse between the Convention system and international law? I would argue that we do, and this can be proven not only by the contributions to this seminar, but also by activities and practice of the CAHDI itself and the Steering Committee for Human Rights (cf. CDDH Report on the place of the European Convention on Human Rights in the European and international legal order, November 2019). What we could hope for is gradually building a wide "European consensus" on application of

international law by the ECtHR. In turn, such development could then positively influence the rule based international order and have a significant impact on the proper and timely execution of ECtHR judgments involving international law elements under the supervision of the Committee of Ministers.

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