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AD HOC COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

(CAHDI)

19th meeting
Berlin, 13 and 14 March 2000

MEETING REPORT

Secretariat Memorandum
prepared by the Directorate General of Legal Affairs

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A. INTRODUCTION

1. Opening of the meeting

1. The ad hoc Committee of Legal Advisers on Public International Law (CAHDI) held its 19th meeting in the Federal Ministry of Foreign Affairs, Berlin, 13-14 March 2000. The meeting was chaired by Ambassador R. Hilger (Germany), Chairman of the CAHDI, who gave a short presentation on the history of the meeting room. The list of participants appears in Appendix I.

2. Adoption of the agenda

2. The Chairman referred to the draft agenda. The agenda was adopted as it appears in Appendix II, following comments by the Turkish delegate in relation to paragraph 35.

3. Communication by the Secretariat

3. Mr Guy De Vel, Director General of Legal Affairs, addressed the Committee on behalf of the Secretary General of the Council of Europe. On behalf of the Secretary General, he thanked the German authorities, and in particular Ambassador HILGER, for the work they had done to organise this meeting and the one that preceded it concerning reservations to international treaties under the chairmanship of Ambassador MAGNUSON. In this connection, he paid tribute to Ambassador CEDE, appointed Ambassador to the Russian Federation, for his commitment and contribution to the success of the activity on reservations to international treaties.

4. He recalled the key role of the CAHDI in the intergovernmental structure of the Council of Europe. Further to that, the participation of the Secretary General of the Council of Europe, Mr. Walter SCHWIMMER, and the President of the European Court of Human Rights, Mr. Luzius WILDHABER, at the last meeting of the CAHDI, illustrate the interest that the highest authorities of the Organisation attach to the CAHDI. Similarly, the participation at this meeting of Professeur MERON, internationally reputed scholar, and of Mr Robert BADINTER, Mr Hans-Dietrich GENSCHER, Monsieur Lucius CAFLISCH et Monsieur Luigi FERRARI BRAVO, respectively President, Vice-President et members of the Bureau of the International Court of Conciliation and Arbitration, highlight the importance of this Committee.

5. Further to that, he referred to developments concerning the Council of Europe since the last meeting of the Committee. Armenia, Azerbaijan, Belarus, Monaco and Bosnia and Herzegovina are candidates to accession and the Parliamentary Assembly is considering or will consider their requests. The first three countries mentioned currently have special guest status with the Parliamentary Assembly while that status was suspended for Belarus. In addition, Canada and Israel have observer status with the Parliamentary Assembly.

6. Four countries have observer status with the Council of Europe: Canada, the United States of America, Japan and Mexico which was granted such status recently. The Holy See has a similar status. In addition, the Committee of Ministers has established the criteria for the granting of observer status in the future.

7. There have also been developments regarding the Secretariat structure. At its 104th session in Budapest, 6-7 May, the Committee of Ministers adopted a report on the reform of Council of Europe structures. Significant changes have taken place since then following the recommendation of the Committee of Wise Persons' report, which the CAHDI has considered in the past. These changes are in particular the adoption of a new organigramme of the Secretariat General with the creation of several Directorates General.

8. As a result, the Directorate General of Legal Affairs now counts two Directorates : one for legal co-operation and one for local and regional democracy. The first includes three departments : Public Law - responsible for the CAHDI Secretariat; - private law and crime

problems.

9. Monitoring of member States' compliance with their commitments at the time of accession is pursued at the level of the Committee of Ministers and of the Parliamentary Assembly. It currently deals with the death penalty and the control of the police.

10. As far as the co-operation activities (ADACS programmes) are concerned, they have acquired lately significant importance. The Council of Europe is a key partner of the Stability Pact for South East Europe and has been given major responsibilities as *leader* organisation of several working tables and task forces relating thereto. As a result, the Secretariat has made considerable effort with a view to securing appropriate contribution to the Pact in the light of the Organisation's experience and expertise.

11. Following the adoption by the Committee of Ministers of Resolution (99) 50 setting up the post of Commissioner of human rights of the Council of Europe, the newly appointed Commissioner, Mr. Alvaro GIL ROBLES, has deployed an intense activity in sensitive areas including Chechnya.

12. Regarding the *European Treaty* Series, several developments have taken place since the last meeting of the CAHDI. A new Internet site (http://conventions.coe.int) has been set up providing up-to-date information about the state of signature and ratification of the European conventions, the declarations and reservations made thereto, etc.

13. He further referred to other activities under the responsibility of the Directorate General for Legal Affairs. In the field of the fight against corruption, the « Group of States against Corruption (GRECO) » an enlarged and partial agreement, i.e. open to member and non-member States on an equal footing, entered into force recently once the number of 14 accessions was achieved. GRECO now counts 22 members including Bosnia and Herzegovina. Its first meeting took place on 4 October 1999. Moreover, the Criminal Convention against corruption, open for signature on 27 January 1999 has been signed by 31 countries and ratified by 1. The Civil convention against corruption was open for signature on 4 November 1999 and has so far been signed by 15 States.

14. In the field of bioethics, the Convention for the protection of human rights and dignity in respect of biology and medicine (ETS No. 164) has been signed by 28 member States and ratified by 6. As a result, it entered into force on 1 December last. The protocols to this convention have been signed by 28 States and ratified by 4.

15. Regarding activities in the field of criminal law, Mr De Vel refers to the initiative that the CAHDI is carrying out together with the European Committee on Crime Problems (CDPC) for the organisation of a meeting on the implications of the ratification of the Rome Statute for an International Criminal Court on the legal order of member States. This initiative has aroused significant interest in the member States of the Council of Europe. According to the CAHDI wishes, the meeting will take place in Strasbourg, 16-17 May.

16. Mr De Vel stressed the Secretariat's satisfaction at the consolidation of the CAHDI's key role in the intergovernmental structure of the Council of Europe, as shown by outstanding activities such as the Pilot project on State Succession and Issues or Recognition, the Recommendation recently adopted by the Committee of Ministers on Reactions to Inadmissible Reservations to International Treaties (No. R (99) 13) or, more recently, the activity on Expression of Consent by States to be bound by a Treaty, as well as the various exchanges of views with significant personalities in the field of international law.

17. He concluded by asking the members of the Committee to pursue the excellent work and taking advantage of the CAHDI's privileged position as the only forum where the legal advisers of the Ministers of Foreign Affairs of the member States of the Council of Europe and a significant number of observer countries and organisations can exchange views and possibly co-ordinate their positions regarding public international law, thus contributing to development and application.

18. The Chairman of the CAHDI thanked the Director General for his report which illustrated well the significant activities carried out under the responsibility of the Directorate General for Legal Affairs. He further noted that the Council of Europe is the European organisation which carries out the most important set of legal activities in the field of intergovernmental co-operation and assistance. Furthermore, the Chairman thanked him for the support provided by the Secretariat to the activities of the Committee.

B. ONGOING ACTIVITIES OF THE CAHDI

4. Contribution of the CAHDI to the celebration of the 50th anniversary of the European Convention on Human Rights (ECHR): Presentation of the report of Professor T. Meron: "Implications of the European Convention on Human Rights on the development of Public International Law" and exchange of views.

19. The Chairman referred to the celebration this year of the 50th anniversary of the ECHR and to the report commissioned on this occasion to Professor Theodore Meron. He further observed that the title of the report had been suggested by Mr Whomersley (United Kingdom) and invited Professor Meron to introduce the report which appears in Appendix III to this meeting report.

20. Professor Meron thanked the CAHDI for having entrusted him with the preparation of the report and noted how daunting he found his task of drawing up a report on European matters as an American citizen.

21. He drew attention to the tension of human rights lawyers between having specific rules to increase the respect for and the efficiency of human rights, for instance by means of reservations, *ius* cogens, etc., and the desire to have human rights as a general part of international law. He continued by highlighting the importance of normativity in the ECHR and the departure from notions of reciprocity. The Vienna Convention on the Law of Treaties (VCLT) did not really deal with normative multilateral treaties and so experience from the ECHR was important in the development of this area of the law. He then stressed that the notion of imputability is different whether considered in or outside the context of the ECHR and concluded by noting the importance of the concept of proportionality in International Humanitarian Law, how the European Court of Human Rights (the Court) had developed this concept and how its jurisprudence on this subject had influenced other human rights systems but not international law as a whole.

22. On behalf of the CAHDI members the Chairman thanked Professor Meron for his report which he described as an excellent, clear and pertinent report on the topic contained in the title and which had, in the best tradition of American scholarship, gone into cases and practice rather than staying too much on theory. The Chairman then opened the floor to debate.

23. Mr Michael Wood, Legal Adviser (United Kingdom) expressed his pleasure in being able to participate in the CAHDI for the first time. Regarding the report, he suggested taking a step back and remembering how ground-breaking the ECHR was when it came into being 50 years ago. Some of its authors would be surprised by its input into international law. The ECHR had recently been incorporated into the domestic law of the United Kingdom and though it would not be effective generally until 2 October 2000, there was already a flourishing case law on the ECHR in Scotland.

24. He expressed concern about the increasing number of specialised international tribunals which all are called upon to interpret and apply international law in their own systems, with the associated danger of each going their own way because these bodies are made up of specialised lawyers. He therefore stressed that the international community should be careful in dealing with *general* public international law.

25. He then referred to the issue of *interpretation* which he considered a crucial one. He observed that the Court considers the ECHR as a *living instrument* and this could be one of the most important contributions of the ECHR to the development of international law given that the very fact that the Court did not feel bound by its previous decisions led to interesting legal questions. He encouraged other countries to contribute to the Court's jurisprudence as much as the United Kingdom has.

26. He further expressed much concern about the Court's approach to *reservations* as, if States felt they could not rely on reservations, it might make it harder for them to ratify treaties and protocols.

27. He ended by noting that the ECHR has avoided the notion of imputability by developing a set of positive obligations such as for instance the *due diligence standard* although this concept was not as important in the ECHR as it was in the United States of America legal system.

28. The delegate of Finland expressed the view that Professor Meron's report could have an impact on the ongoing activity with a view to the drafting of a Charter of Fundamental Rights in the European Union. Already the Amsterdam treaty is far more specific than the Maastricht treaty as its article 6 makes a direct reference to human rights and to the need for compliance. The “Convention”, which is the working group on the Charter, expects to present a list of fundamental rights by the end of the year and the Council of Europe is permanently represented on it by Mr Marc Fischer, Judge at the Court, and Mr Hans Christian Krüger, Deputy Secretary General.

29. He proposed that Mr Krüger should bring the attention of the working group to this report and suggested that he point out the fact that the ECHR is a living document as this is an important feature particularly in relation to environmental law rights or international humanitarian law. In this respect, he noted that some members of the working group proposed to include environmental law rights in the Charter although it is not clear whether they are to be considered substantial human rights and as such, protected by the ECHR.

30. This proposal was also supported by the delegates of Germany, Sweden, Austria and Latvia.

31. The delegate of Sweden further pointed out that some of those in the working group were not aware that the ECHR had a “living” nature, adopting to the present, and therefore considered it an outdated instrument.

32. The delegate of Austria noted that the political approach of the parliamentarians had to be reconciled with the more legal approach of the Court and the CAHDI and stressed that the end result should not be the EU initiative weakening the protection of the ECHR system. Moreover, he observed that with the accession of Central and Eastern European States, the ECHR was now making a contribution to the interpretation of the Status of the Council of Europe itself. Before 1990, not much thought had been given to what the term “democracy” meant in the preamble of the founding Statute as all the member States had a common conception of what it meant.

33. He further stressed that his country had incorporated the ECHR into its constitutional law 35 years ago and that Austrian courts are therefore bound to apply it directly and not as a result of international law.

34. The delegate of Switzerland noted that the EU initiative to draw up a Charter of Fundamental Rights was understandable given the constitutional nature of the EU, the progressive development of political unity and the desire to formalise the basic underlying principles of this process. However, this initiative would have significant consequences for those member States of the Council of Europe who were not members of the EU. He further suggested that the CAHDI may have a role here, possibly acting as an intermediary or

clearing house for these kinds of issues and therefore proposed that this topic be on the agenda for the next meeting.

35. This proposal was agreed by the Committee and the Secretariat was asked to secure relevant information on this item.

36. The Latvian delegate further suggested that the report be forwarded to the Committee of Ministers before they decided on Protocol 12 to the ECHR. She further proposed that for the next meeting of the CAHDI, an opinion should be drawn up on what the impact of Protocol 12 would be on international law.

37. The Chair noted that the preparation of a Charter of Human Rights in the EU was an important area for the Strasbourg institutions.

38. The delegate of Italy observed that while the ECHR had developed a subjective element, a role of *opinio juris* in view of the definition of rights connected to the dignity of the human being. Its application had also resulted in an objective contribution in the affirmation of these rules, now making it clear that international rules on human rights have a *jus cogens* or obligatory nature setting obligations *erga omnes*. He then observed that the ECHR's impact has also spread out from human rights law to international humanitarian and international criminal law as shown by the setting up of the International Criminal Court. He concluded by informing the meeting that these aspects will be stressed at the celebrations of the 50th anniversary of the convention that will take place in Rome this year.

39. The delegate of Greece pointed out that the ECHR can act as a barrier against State acts.

40. The delegate of Slovakia observed that the ECHR system had been followed in other regions such as America or Africa. Moreover, in the field of States succession, the special "living" nature of the ECHR has been considered by the UN Special bodies. He concluded by asking Professor Meron if he might give his personal opinion on the problem of reservations, which was currently under consideration by the International Law Commission.

41. The Irish delegate welcomed the report for being an outside view. She agreed with the identification of tensions experienced by human rights lawyers and highlighted the fine balance for human rights institutions between verifying compliance by States so as to remain credible and not going too far in antagonising States, particularly powerful ones. As the ECHR is a judicial body it has been more cautious over certain issues, such as the right to life, than other bodies such as the UN Human Rights Committee have been.

42. Moreover, the ECHR has proceeded carefully regarding what States are expected to do. It has considered that it is not enough that States do not interfere but that they do what is necessary in order to ensure compliance. The ECHR strategy therefore goes beyond the due diligence approach to criminalise certain conducts by enshrining the prohibitions of slavery, genocide, hostage taking, etc. In other areas, eg the right to private life, the Court has asked States to take the necessary legislative steps. The ECHR further balances individual interests with the general interest of society.

43. She noted that Professor Meron was asked to examine the impact of the ECHR on international law and stressed that this has been a two-way process and international law has also had a profound impact on human rights at European level. Indeed Europe has not always been in the lead, as for example regarding the principle of equality as the International Covenant on Civil and Political Rights (ICCPR) has had equality provisions for several decades while the ECHR only had a non-discriminatory approach.

44. The observer of Israel referred to the titled of Professor Meron's report which goes from European to global or universal and asked to what extent a European concept of interpretation of treaties could be relevant to global practice, which has another framework with different traditions.

45. The delegate of Russia stated that he shared the main thrust of the report in the sense that international law was moving away from States towards individuals. Nonetheless, he wondered how appropriate it was to place arms control and disarmament issues in the context of other areas of law, such as human rights since the former underline reciprocity and national interest while the latter imply common values. The extrapolation could be admitted possibly regarding the abolition of inhuman weapons such as mines.

46. Professor Meron followed by replying to the comments made. He shared the concern of the delegate of the United Kingdom about the fragmentation of international law caused by having various different bodies interpreting the law. Having a wide range of bodies is not necessarily negative as it stimulates development of international law and allows it to reach into new areas, it is still important to maintain the credibility and unity of international law.

47. He further agreed that he should have limited discussion of due diligence notion as, although conceptually interesting, it had not really been taken up by the ECHR.

48. Moving on to the problem of responsibility of individuals, he stated that there was no question that one of the weaknesses of current international law, whether on human rights or humanitarian issues, was how it regulated sub-State entities and there are no simple replies or solutions but questions. The strategy that had been followed by the international community in this respect had been a criminal as opposed to a normative one.

49. Regarding the comments by the Russian delegate, Professor Meron agreed that parity, State interests and reciprocity were important in the context of arms control. Moreover, the problem of automatic succession to some arms treaties was pressing particularly in view of the importance of stability in the international. He therefore stressed that the extrapolation of this area to the field of human rights was warranted although it should be carefully thought over. Moreover, he observed that in his report he used tentative language in this respect.

50. Regarding equality, it is a far richer and more potent idea than discrimination and the move by the ECHR to accepting Protocol 12 has tremendous implications, as can be seen by the experiences of the Human Rights Committee which understood that any lack of equality could expose the State concerned responsibility. This meant a move from purely civil and political rights to economic and social ones, as was shown in the Netherlands case, for which the Human Rights Committee is not competent at least in the views of the Dutch Government. The development is welcome but one should be careful to consider its implications.

51. On the subject of the right to life, Professor Meron stressed that it was interesting to see that the ICJ stated with regard to the interpretation of Article 6 of the ICCPR on the arbitrariness of taking life that it would be appropriate to consider international humanitarian law (including the principles of proportionality and non-indiscriminate use of force against civilians) as *lex specialis*.

52. Finally he moved onto the question of reservations to international treaties and noted on the one hand, that the UN Special rapporteur, Professor Pellet, appears to believe that the relevant provisions of the VCLT (Articles 19-22) match well with human rights and can effectively deal with this area but he disagreed and considered that the VCLT, although a very wise and useful treaty, has not responded satisfactorily. On the other hand he recognised that Commentary 24 of the HRC went too far beyond what is considered reasonable but that the ILC approach is too restrictive. In his view, the answer should be a halfway house, particularly regarding the issue of severability, that does not require revising the VCLT. There are serious issues of State sovereignty involved but the ILC's approach so far will not satisfy the international human rights community. Perhaps a more moderated approach has to be found.

53. At the close of the discussion, the Chairman asked the Secretariat to forward Professor Meron's report together with the abridged report of this meeting to the Committee of Ministers and to the EU working group and the appropriate bodies in the Council of Europe.

5. Decisions of the Committee of Ministers concerning the CAHDI

54. The Secretariat informed members of the CAHDI about the decisions concerning the Committee, taken by the Committee of Ministers at its 670th meeting of the Deputies (Strasbourg, 18 May 1999), in particular, the ad hoc terms of reference given to the CAHDI for the formulation of an opinion on the Parliamentary Assembly's Recommendation 1427 (1999) on Respect for International Humanitarian Law in Europe.

55. The Chairman referred to the draft opinion on the Parliamentary Assembly's (PACE) Recommendation, prepared by the Secretariat in consultation with the Chairman of the Committee. He invited the meeting to consider the draft.

56. The delegate of the Netherlands pointed out that there is more to international humanitarian law than the Geneva Conventions. She felt that the draft opinion overstated the amount of monitoring mechanisms that exist at present.

57. The delegate of Finland agreed with this and felt that the importance of the principle of proportionality should be stressed in the light of Professor Meron's report.

58. The delegate of the United Kingdom did not agree with the part of the PACE Recommendation requesting States to lift reservations as many states had made reservations for good reasons. However he welcomed the establishment of international humanitarian law committees.

59. The delegate of Switzerland highlighted the importance of international humanitarian law for not just world stability but also for the victims of conflict. He pointed out that the UN has published a bulletin for the obligations of armed forces acting under its auspices, that these obligations are now fairly well known and that so far all troops in UN missions had come from countries that had ratified the Geneva Convention. He raised the question whether such troops were in fact combatants. Finally he suggested urging governments to implement all measures needed to make the ICC effective.

60. In this connection, the delegate of the Netherlands pointed out that a number of States had reacted against the text of the UN bulletin and so she did not support referring to it.

61. The delegate of Finland proposed making a reference to the Plan of Action adopted by the 27th International Conference of the Red Cross and Red Crescent (Geneva, 31 October – 6 November 1999) in the opinion.

62. In this connection, the delegate of the Netherlands pointed out that the Plan of Action was drawn up after the Recommendation was adopted.

63. The delegate of Turkey believed that the second part of the PACE Recommendation and paragraphs (e) and (g) dealt with matters that were for individual States to decide. She added that providing for unrestricted access to the Red Cross was not really what was envisaged in the 1948 Convention, whereby the Red Cross would offer its services and it would be up to a State to accept them or not.

64. The CAHDI decided to convene a working party to finalise the drafting of the opinion in view of the above comments. The party would consist of interested States, namely: Switzerland, Russia, the United Kingdom, the Netherlands, Finland and Turkey, but it was stressed that any other interested delegations were welcome to take part.

65. As a result a revised draft opinion was submitted and approved by the CAHDI as it appears in Appendix IV to the report.

6. The law and practice relating to reservations to treaties and interpretative declarations concerning international treaties[1]:

a. 3rd meeting of the Group of Experts on Reservations to International Treaties (DI-E-RIT), Berlin, 10 March 2000

66. Ambassador Magnuson (Sweden), Chairman of the Group of Experts on Reservations to International Treaties (DI-E-RIT) informed the CAHDI about the third meeting of the Group.

67. Following the kind invitation of the German authorities, the 3rd meeting of the DI-E-RIT this year was held in Berlin, 10 March 2000. 16 member States took part together with representatives of 3 observer states and 1 international organisation.

68. The DI-E-RIT considered and approved a paper on *Practical issues regarding reservations to treaties*[2] which was proposed as a guide to practice for States on these issues similarly to the Committee of Ministers Recommendation No. (99) 13 on responses to inadmissible reservations, which included model responses and was also drawn up by the DI-E-RIT.

69. This paper was prepared by the delegation of the Netherlands and the DI-E-RIT thanked their representative for this excellent draft, which was unanimously considered to be a lucid, practice-oriented and valuable contribution to the Council of Europe's work on reservations to international treaties. The DI-E-RIT agreed on a number of changes to the draft document and in particular discussed modifications to reservations and denunciation of a treaty with the sole purpose of re-acceding to the treaty with reservations.

70. The DI-E-RIT wished to propose to the CAHDI the adoption of the paper and its submission to the Committee of Ministers with a view to publication, as a contribution to the work under way in the International Law Commission of the United Nations.

71. In the context of the CAHDI's operation as a European Observatory of Reservations to International Treaties, the DI-E-RIT considered a list of outstanding reservations and declarations to international treaties[3]. The DI-E-RIT agreed that some of the reservations contained therein raised doubts as to their admissibility, namely those by:

- *Guyana* to the Optional Protocol to the International Covenant on Civil and Political Rights (New York, 16 December 1966). Some member states have already objected to this reservation and others plan to object. It is an example of denunciation of a treaty followed by recession with reservations, a practice that should be discouraged.
- *Qatar* to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (New York 10 December 1984), which several member states intend to object to.

72. The DI-E-RIT was enlightened about the underlying considerations for the declaration by the United Kingdom to the Agreement for the Implementation of Provisions of the UN Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (New York, 4 August 1995).

73. The DI-E-RIT was also informed about the dialogue entered into by some member states with Azerbaijan concerning a reservation to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty (New York, 15 December 1989) and about the objections made by some member

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[1] The list of documents examined by the DI-E-RIT since the implementation of this activity appears in document DI-E-RIT (99) list docs.
[2] See document DI-E-RIT (99) 5 rev 2
[3] See document DI-E-RIT (2000) 1 and Addendum.

states and those that other member states intend to lodge. The DI-E-RIT was interested in hearing any comments the observer of Azerbaijan to the CAHDI may have on this point.

74. The DI-E-RIT wished the CAHDI to avail itself of the presence of the representative of Portugal to obtain further information about a number of reservations formulated by China to various international instruments. These reservations are prompted by the transfer of sovereignty of Macao. It was further noted that the Chinese reservations were discussed at a recent meeting of the Working Group on International Public Law (COJUR) of the Council of the European Union and suggested that this matter not be taken any further.

75. The DI-E-RIT also wished the CAHDI to avail itself of the presence of the representative of Latvia concerning its reservation to the Convention Relating to the Status of Stateless Persons (New York, 28 September 1954).

76. The DI-E-RIT considered reservations to Council of Europe treaties and was advised about the underlying reasons for some of these reservations. In this context the DI-E-RIT agreed that the discussion of such reservations would have benefited from the presence of the relevant member states.

77. The DI-E-RIT held a very interesting discussion about recent developments concerning the UN Secretary General's practice as depository of multilateral treaties regarding in particular the modification of reservations. This practice has raised concern for delegations and the EU member States have entered into a dialogue with the UN Secretariat General. In this connection the DI-E-RIT agreed to invite Mr Hans Corell, UN Under Secretary General for Legal Affairs and former Chairman of the CAHDI or his representative to the next meeting of the DI-E-RIT or the CAHDI in order to exchange views on this matter.

78. The DI-E-RIT agreed about the usefulness of pursuing the already fruitful co-operation with the ILC and decided to invite the UN Special Rapporteur on reservations to international treaties, Professor Alain Pellet, to the next meeting of the DI-E-RIT or the CAHDI. It was hoped that by then Professor Pellet would have managed to make progress with his current report.

79. It was also suggested that the CAHDI consider inviting the President of the International Court of Justice (ICJ), Mr Gilbert Guillaume, who is an outstanding expert on reservations to international treaties and a former member of the CAHDI. The delegate of Switzerland expressed caution about this idea in case the ICJ had to judge a case concerning reservations in the near future.

80. The proposal was also put forward that the function as European Observatory of Reservations to International Treaties be carried out by the CAHDI itself as this would enhance the discussion, in particular concerning reservations made by member States which do not participate in the meetings of the DI-E-RIT. In-depth consideration of general questions relating to reservations to international treaties, on the other hand, may have to be dealt with at the level of a subordinated party to the CAHDI given the heavy agenda of CAHDI.

81. The Chairman of the CAHDI thanked Ambassador Magnuson and the members of the DI-E-RIT for their excellent work and asked the CAHDI to take action on the DI-E-RIT requests.

82. Further to that, the delegate of the United Kingdom noted that the DI-E-RIT had produced significant results and completed the tasks assigned to it and that in the future it might therefore not be necessary to convene it as a separate meeting but that the item of reservations to international treaties be dealt directly by the CAHDI, particularly regarding exchanges of views with distinguished guests and consideration of outstanding reservations to international treaties in the context of the CAHDI operation as a European Observatory of Reservations to International Treaties.

b. Key issues concerning the formulation of reservations to international treaties

83. The CAHDI considered the paper entitled *Key issues concerning the formulation of reservations to international treaties* prepared by the DI-E-RIT and agreed to change the title to *Practical issues regarding reservations to treaties*. Members of the CAHDI thanked the delegation of the Netherlands for their valuable contribution and adopted the paper and decided to submit it to the Committee of Ministers for publication in the Official Gazette as it appears in Appendix V to this report.

84. The CAHDI further asked the Secretariat to ensure that this document be submitted to the ILC as a practical contribution of the CAHDI to the ongoing work of the ILC in the field of reservations to international treaties[4].

c. European Observatory of reservations to international treaties

85. The CAHDI took note of the consideration of outstanding reservations to international treaties by the DI-E-RIT. The Chairman referred in particular to the various reservations by the Government of China resulting from the transfer of sovereignty over Hong Kong. He informed members of the CAHDI that these reservations had been considered by the COJUR and that this Working Group of the Council of the EU concluded that it was not necessary to follow up this matter any further.

7. Consideration of conventions under the responsibility of the CAHDI: Examination of the European Convention on Consular Functions and its protocols (ETS 61, 61A & 61B)

86. The CAHDI examined the European Convention on Consular Functions and its Protocols (N° 61, 61A, 61B in the European Treaty Series) on the basis of the document prepared by the Secretariat[5].

87. The Chairman stated it was self-evident that this Convention had not received wide acceptance amongst the member States. Therefore it should not be considered to be a crucial instrument requiring speedy accession by member States.

88. The delegate of Slovakia noted that only 4 member States were parties to the convention and that there was no strong interest in becoming a party to it. He further recalled that there was an effort in the early 1990s by Czechoslovakia and Austria to put forward a proposal relating to this area which was not taken up.

89. The delegate of Austria confirmed this information and supported the proposal that the CAHDI no longer deal with this item.

90. The delegate of Finland referred to Resolution (64) 10 of the Committee of Ministers relating to the publication of digests of State practice in the field of public international law which recommends that Governments "publish digests concerning national practice in the field of public international law and follow certain principles in order to comply as far as possible with certain uniform standards in order to make the digests readily accessible and comparable with each other". In pursuance of this resolution Nordic countries publish their practice from the previous years in the *Nordic Journal of International Law*.

91. With the examination of this convention, the CAHDI concluded consideration of Council of Europe conventions under its responsibility and therefore decide to drop this item from the agenda in future.

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[4] In accordance with the CAHDI's instructions, once examined by the Committee of Ministers, this paper was submitted to the UN Special Rapporteur on Reservations to International Treaties, Professor Alain Pellet, who would took it into account for the preparation of its 5th report on reservations to international treaties.

[5] See document CAHDI (00) 2. For an overview of the legal texts under the responsibility of the CAHDI see document CAHDI (00) 8.

8. Consent by States to be bound by a treaty

a. Draft Report on consent by States to be bound by a treaty

92. The Secretary of the CAHDI outlined the proposals for the activity on this subject. Following the CAHDI's decision at its September 1999 meeting, a questionnaire had been sent out to all member States and observers and there had been a significant number of responses. The Secretariat informed the Committee that preliminary contacts had been made with the British Institute of International and Comparative Law (BIICL) with a view to the preparation of an analytical report on the basis of the replies received. This report would be submitted to the CAHDI at its September 2000 meeting together with the compilation of replies to the questionnaire or country report. This text would be subsequently published and presented to the Secretary General of the Council of Europe at the March 2000 meeting.

93. The delegate of the United Kingdom stressed that the large number of replies indicated the interest in this activity. He welcomed the contacts made with the BIICL, which he noted now had a Norwegian director so was not a purely British organisation, and was confident that they would do an excellent job.

94. The delegate of Bulgaria who participated in the CAHDI meetings for the first time stressed her satisfaction at taking part in such an outstanding committee. Further to that she apologised for her country not having submitted a reply due to the fact that a new law on treaties was in the process of being passed and as it would be submitted to the Council of Ministers on 6 April, it might be amended afterwards in Parliament so it would not be possible to complete the questionnaire until after this time.

95. The Secretariat invited delegations not having yet done so to submit their reply as soon as possible although the deadline had expired.

96. The CAHDI endorsed the Secretariat's proposals for further action.

b. General Full Powers

97. At the request of the Treaty Office of the Council of Europe, the Secretariat explained to the members of the CAHDI that it was now possible for Permanent Representatives to be given Full Powers for any treaty for which the Secretary General was the depository and that a number of member States had already availed themselves of this possibility.

98. The delegate of Germany said that his country had looked into this possibility but that their constitution only allowed Full Powers to come from the President.

99. The Chairman noted that these general Full Powers would facilitate the work of national delegations and also the Secretariat and invited delegations to advise their governments to avail themselves of this possibility where possible, in accordance with the law and the constitution.

9. Proposal for the setting up of a General Judicial Authority of the Council of Europe

100. The Director General of Legal Affairs informed the meeting that the Parliamentary Assembly would have a report out on this subject the following week and that it would be discussed during the April session.

101. The Chairman of the CAHDI therefore suggested that this item be moved to the agenda of the next meeting and this was agreed on.

C. GENERAL ISSUES OF INTERNATIONAL PUBLIC LAW

10. Communication and exchange of views with the President and Vice-President of the International Court of Conciliation and Arbitration, Mr. R. Badinter and Mr. H.D. Genscher and with Mr L. Caflisch and Mr L. Ferrari Bravo, members of th Bureau of the International Court of Conciliation and Arbitration

102. The Chairman welcomed Mr. Badinter, Mr. Genscher, Mr Caflisch and Mr L. Ferrari Bravo and thanked them for accepting the CAHDI's invitation to hold an exchange of views with the members of the CAHDI regarding developments concerning the International Court of Conciliation and Arbitration (ICCA).

103. On behalf of the representatives of the ICCA its President, Mr Badinter, thanked the CAHDI for giving them the possibility to discuss the ICCA with the legal advisers of the member States of the Council of Europe.

104. He began his statement by posing the question Why is there yet another institution in Europe? He replied that the ICCA is a response to a specific wish: at the time that Europe is enlarging to the east a flexible institution is needed for solving disputes between countries. The ICCA was not envisaged as a Court to adjudicate law in Europe because other international courts already existed. The ICCA's role was to solve disputes between States. The model used for the ICCA was that of conflict resolution in the private sector and not on a formalistic legal model. It was taken from the Stockholm Convention of 1992 focused on conciliation rather than arbitration.

105. The advantages of bringing a case to this ICCA are numerous. They refer to the type of disputes and the type of conciliation. Concerning the first, the ICCA is not intended to state fundamental principles but rather to smooth the path to harmonious co-existence, for example, where frontiers should lie. It is inevitable that disputes will arise, for example, freedom of circulation, cultural laws, teaching of languages, environmental problems. These are not decisive problems but are important and do require rapid solutions. Concerning the second, the model for conciliation used by the ICCA is both classical and flexible. The ICCA's bureau designates three mediators and each party chooses another.

106. In order for the ICCA to fulfil its role it has to enjoy the States' trust, which means that States are free to chose the conciliators.

107. The ICC's seat is in Geneva thanks to the kind offer of the Swiss Government. Already 28 countries have ratified the Stockholm Convention to date – out of 33 countries that have signed it – and most of these have designated their 2 conciliators and arbitrators. These have subsequently elected the members of the bureau which includes three former ministers of foreign affairs, one former minister of justice and various judges of the European Court of Human Rights. It is therefore clear that all the States involved can draw on serious and high-quality people. Yet, the ICCA is not functioning. This is surprising since on the one hand, the institution has not been criticised, but on the other hand, States parties are not submitting their claims to the ICCA.

108. The President of the ICCA concluded by stressing that the ICCA is a low cost alternative, fully operational. Mr Badinter called upon member States of the Council of Europe parties to the Stockholm Convention to make use of the ICCA particularly in view of the fact that there are outstanding disputes between signatory states.

109. Mr Genscher, Vice-President of the ICCA, stressed that given the function of the CAHDI members in their respective countries, they could give the ICCA a boost which would symbolise the new spirit of Europe. He called upon members of the CAHDI to help awake the courage to turn to the ICCA and said that looking at the situation in the real world it is not appropriate that a

court such as the ICCA remain unused and that it was unusual for such an institution to be crying out for cases.

110. Mr Caflisch, member of the ICCA Bureau and judge at the ECHR, expressed his satisfaction in attending the meeting, having previously been a member of the CAHDI. Regarding the ICCA he noted that the ICCA is called upon to solve disputes peacefully and that the original feature of the Stockholm Convention is the conciliation procedure which has the great advantage of flexibility and while it has to follow the rules governing international relations, it does not have to strictly follow public international law and moreover it does not have a judicial character. Proposals for settlement by the ICCA are optional similarly to those of a mediator and they only become mandatory if all the parties agree and accept them, thereby themselves creating the rules to govern the situation. Further to that, there is scope for a political solution and he observed that a great many mediators, especially in Europe, do not follow the interests of anyone except the international community's interest in having a settlement. Parties can formulate rules of procedure and select conciliators themselves. Surely this is the least unacceptable means of solving problems as the powers and make-up of the panel can be tailor-made to reflect the type of dispute and concerns of each party. Finally, given that the members of the ICCA are of such high calibre this gives their decisions even more authority.

111. Mr Ferrari Bravo, member of the ICCA Bureau and judge at the ECHR, was also delighted to be present at the meeting, having previously been chairman of the CAHDI. He noted that it would be possible to have an outsider chairing a case such as an American or Japanese. The ICCA could have a dissuasive effect and could prevent lightning striking in the first place. Other courts have had to bide their time, such as the International Maritime Court in Hamburg and the International Tribunal of the Law of the Sea. Its first case concerned small islands in the Caribbean and was rather fabricated to show the world that this court existed. There are now three cases before it, one of them major and relating to blue tuna around Australia and New Zealand. States should therefore have the courage to submit a controversy, even if a minor one, to see how the ICCA will work and then to be able to correct matters, otherwise the mechanisms will start to rust.

112. The Chairman of the CAHDI thanked the representatives of the ICCA for their statements and he stressed he was disappointed the ICCA had not been used as so much effort had been put into setting it up and wondered why enthusiasm had not led to cases.

113. The delegate of Sweden asked about the proposal that the OSCE may ask for official opinions from the ICCA.

114. Mr Badinter pointed out that at the time the war started in Yugoslavia work had already commenced on setting up the ICCA. At that time nobody could respond to the need for resolution and if the ICCA had existed at that time, much could have been avoided.

115. The delegate of Switzerland referred to the infrastructure of the ICCA provided by the Swiss authorities and noted that the Swiss Parliament, as any national parliament although convinced of the utility in providing facilities provided for the ICCA was concerned with their effective use. He then asked whether the ICCA could deal with disputes opposing two countries which are not parties to the Stockholm Convention.

116. Mr Badinter replied saying he certainly could imagine this happening. He further noted that the ICCA could prove its usefulness by considering a dispute so difficult that it could not be solved using normal diplomatic means.

117. The delegate of Italy asked the representatives of the ICCA what legislative changes would be necessary to render the ICCA operational, particularly in respect of the member States of the Council of Europe.

118. Mr Badinter replied that this question by the delegate of Italy was crucial. He referred to the CAHDI's agenda which included a proposal of the Czech Republic for the possible setting up of a general judicial authority. He noted that the ICCA was a conventional court operating in

a conventional area and that the possibility of the ICCA operating beyond this area was not envisaged. Yet the ICCA is not linked to the OSCE but to the conventional area the OSCE has created.

119. The delegate of Finland focused on conciliation, which he saw as an important tool in finding solutions, particularly as it is not binding. His first question related to publicity – could parties submit a dispute to conciliation without the fact that they had done so and any resulting recommendation becoming public? Secondly, noting that many of the conciliators are very prominent people who follow conflicts that take place, would it be possible for them to approach parties involved in a dispute and make it known that they could use the ICCA's services for this particular dispute.

120. The delegate of Slovakia observed that there was a certain degree of paradox in the fact that while no cases had been brought before the ICCA, there certainly had been disputes between States. Perhaps the process of conciliation was not well enough known. It is always possible to solve disputes on bilateral bases and to a certain extent all of this contributes to better diplomatic relations. He then asked how the ICCA could take the initiative in a dispute and put forward a subsequent opinion.

121. Regarding the question of publicity, Mr Caflisch replied that publicity is not the rule in the ICCA procedures but the exception. It would be up to the parties to decide whether they would like the proceedings to be public or not subject to national law. Yet, confidentiality is the rule for the ICCA procedures.

122. Regarding the possibility of ICCA taking initiatives in disputes, Mr Badinter referred to the fact that the President of the ICCA could take the initiative of approaching the parties to a dispute. Yet, although possible in theory this would not be likely to happen in practice because of the ICCA should not bring cases to itself and he is not in favour of it. He stressed that it is up for States to take the initiative of bringing a case before the ICCA.

123. The delegate of Croatia stressed that many difficult issues are yet unsolved in the context of the former Yugoslavia. Successor states are trying to work out solutions together and consideration had been given to taking disputes to international courts but that they were still at a negotiating phase and it was not yet time to bring in the lawyers.

124. In this respect, he observed that an ad hoc commission had been set up. Yet, in as far as the Federal Republic of Yugoslavia is not a party to the Stockholm Convention, members of the ICCA have a certain reticence about dealing with cases relating to the former Yugoslavia.

125. Mr Caflisch continued by saying it was quite correct that publicity was not necessary and that was an advantage the mechanisms of the Court offered. If the parties to a dispute so desire, there can be public disclosure, but this is an exception to the rule. Of course in some countries domestic legislation will force them to disclose the proceedings. This principle of non-disclosure is even more important when it comes to the process of conciliation.

126. Turning to the question of the possibility of the Court taking the initiative, he stated that while the President of the Court should not pick up the telephone at a moment's notice on hearing of a dispute, he could imagine the Court taking the initiative. Occasionally he met States experiencing problems and told them of the option of using the Court. While these states are often interested, their interest has remained academic.

127. The delegate of the Czech Republic referred to the proposal by his country for the possible setting up of a general judicial authority and observed that this possible judicial authority and the ICCA would have different competences. The first would be called upon to ensure a uniform interpretation of the legal instruments adopted in the context of the Council of Europe while the second would be called upon to deal with specific cases. Further to that, he agreed with the other speakers that there was a kind of psychological barrier in taking a case to the ICCA and that it was easier to rely on the status quo. Yet, he observed that one could not imagine speaking against the ECHR today but that it took nine years for a case to be brought to

the ECHR and then a further eleven years before the ECHR gave its first ruling. Despite these facts, the ECHR is today an integral part of the European judicial structure.

11. Implementation of international instruments protecting the victims of armed conflicts

128. The Swiss Delegation drew the attention of the members of the CAHDI to current developments concerning the implementation of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, of 12 August 1949.

12. Developments concerning the International Criminal Court (ICC)[6]

129. The Secretariat presented a progress report on the consultation meeting, to be organised by the Council of Europe, on the ratification of the Rome Statute for an ICC to be held in Strasbourg in May 2000.

130. The delegate of Italy informed the meeting about an informal intersessional meeting of the Preparatory Commission for the ICC on "Elements of Crime" held at Syracuse between 31 January and 6 February 2000.

13. Implementation and functioning of the Tribunals established by United Nations Security Council Resolutions 827 (1993) and 955 (1994)[7]

131. The delegate of Croatia informed the meeting about co-operation by her country with the International Criminal Tribunal for the former Yugoslavia (ICTY) since the last meeting of the CAHDI. Following the election of a new government on 3 January 2000 and the subsequent election of a new president, the situation had changed substantially. Truly the issue of co-operation was a major issue during the elections. A new agreement between the UN and the Croatian government regarding co-operation with the ICTY prosecutor's office was extremely important as it contained provisions allowing assistance from the State and almost unlimited access to evidence. The new government has inherited many problems and the situation is still rather sensitive, as the *Blaskic* case[8] showed. In this case, a Croat commander in Bosnia was sentenced to 45 years imprisonment, though new evidence has been found which might reduce the sentence on appeal. Recently the Government decided to elaborate a new platform on even closer co-operation with the ICTY which will be finalised shortly. It is expected that all the main perpetrators will be arrested and prosecuted. There is at last the political will needed to arrest those still at large and the new Croatian government is determined to co-operate with the Tribunal in every way.

132. The delegate of Italy informed the Committee that a draft bill for co-operation with the International Criminal Tribunal for Rwanda.

133. The delegate of Switzerland announced that the Swiss Parliament had recently completed the first reading on the Bill regarding the ICC and one potential issue that had arisen related to evidence about diplomats and civil servants.

14. Law of the Sea : Protection of Sub-Aquatic Cultural Heritage

134. The Chairman of the CAHDI opened discussion by informing the meeting that there was an ongoing discussion in UNESCO on this item and that the law of the sea might be touched upon as a result.

135. The delegate of the United Kingdom noted that his country attached a great deal of importance to the negotiations under way in UNESCO and had been very disappointed in the way in which they had been handled as they may not result in a successful conclusion. The subject is extremely complicated and the main subject of interest for this meeting is the need to

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[6] For information concerning the International Criminal Court, see www.un.org/icc.

[7] For information concerning these tribunals, see www.un.org/law.

[8] Case **IT-95-14.**

ensure the resulting convention is fully in conformity with the UN Convention on the Law of the Sea (UNCLOS) and this point has already been stressed by the UN General Assembly Resolution on the law of the sea. The contentious issue is essentially the extension of coastal State responsibilities. Three options are contained in the draft convention and *options one* and *three* are wholly unacceptable in that they contravene the law of the sea involving an extension of State jurisdiction. He supported *option two* drawn up by the United Kingdom. Moreover, the United Kingdom is seeking to introduce a new provision about mutual information from coastal States which find underwater cultural heritage in their continental shelf and Exclusive Economic Zone as a way of striking a balance. He concluded by urging other States to look at this issue and a document containing comments made by the United Kingdom to UNESCO was circulated to the members of the CAHDI at the request of this delegation.

136. The delegate of Italy felt the real problem was how to interpret UNCLOS, though the CAHDI was not the right place to do so. A meeting will be organised in Paris in May with the Italian mission to UNESCO and he urged the delegate from the United Kingdom to speak there.

137. The delegates of Norway and Sweden felt it was important to make sure there were proper representations to the bodies discussing this matter. They further observed that negotiations had been led by experts from ministries other than those of foreign affairs and stressed that representation of the latter was crucial.

138. Further to that the delegate of Finland supported the United Kingdom concerns and observed that Finland had recently submitted comments to UNESCO.

139. The Chairman concluded this item by stressing that lawyers should participate in UNESCO negotiations under way and he praised the delegation of the Netherlands for its efforts with a view to a prompt opening to signature of the legal instrument.

D. OTHER

15. Election of the Vice-Chair of the CAHDI

140. The Chairman of the CAHDI explained the current situation and informed the committee that Ambassador Tomka (Slovak Republic) was standing for re-election.

141. Pursuant to article 17 of Appendix 2 of Resolution (76) 3 of the Committee of Ministers, the CAHDI re-elected Ambassador Tomka for one year. Mr Tomka thanked the members of the CAHDI for their trust.

16. Date, place and agenda of the 20th meeting of the CAHDI

142. The CAHDI decided, in accordance with the intergovernmental programme of activities and the budget of the Council of Europe for the year 2000, to hold its 20th meeting in Strasbourg, on 12 and 13 September 2000. In addition, the CAHDI instructed the Secretariat to convene a separate meeting for the DI-E-RIT depending on whether those persons proposed to be invited could attend.

143. The CAHDI examined the provisional agenda for the next meeting of the Committee. The Chair referred in particular to the proposals to include the following items: (a) Developments concerning the preparation of a Charter of Fundamental Rights in the context of the EU and (b) Protocol 12 to the ECHR (c) UN Secretary General practice as depositary of multilateral treaties. Further to that, in connection with proposed item (c) the delegate of Finland proposed inviting a representative of the Treaty Office of the UN in order to hold an exchange of views.

144. The CAHDI agreed to include the item (a) only for information as clearly the CAHDI had no remit to discuss the substance. The CAHDI further agreed to include item (c) and

invite a representative of the UN Treaty Office. Finally, the CAHDI decided not to include item (b).

145. The CAHDI approved the preliminary draft agenda for the 20th meeting, which appears in Appendix VI.

17. Other business

146. The delegate of Germany referred to the work in the UN context and in particular to the discussion next 22 March 2000 of a Protocol on the Sale of Children and Protection against Child pornography to the UN Convention on the Rights of the Child. He noted that the latter convention enjoys wide acceptance and that States parties to it would be called to bind themselves further. He supported the proposal that the Protocol envisaged should be called “protocol” and not “additional protocol”. Moreover he observed that it would be open to all member States, but he supported pursuing the practice of reserving accession to the protocol to those States already parties to the original convention. He recalled that a similar problem arose in the context of the discussion of another protocol relating to the protection of children in times of war.

18. Closure of the meeting

147. The Chairman closed the meeting of the CAHDI by thanking the members of the Committee for their aid, stressing the quite exceptional role of the CAHDI in the framework of the Council of Europe.

148. The CAHDI approved an abridged report for the attention of the Committee of Ministers, which appears in Appendix V of this report.

APPENDIX I

LIST OF PARTICIPANTS

ALBANIA/ALBANIE: Mrs Ledia HYSI, Director of the Legal and Consular Department

ANDORRA/ANDORRE: -

AUSTRIA/AUTRICHE: Mr Hans WINKLER, Ambassador, Legal Adviser, Ministry for Foreign Affairs

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BULGARIA /BULGARIE: Mrs Katia TODOROVA, Deputy Director, International Law Directorate, Ministry of Foreign Affairs

CROATIA /CROATIE: Ms Ljerka ALAJBEG, Ambassador, Chief Legal Adviser, Ministry of Foreign Affairs

CYPRUS /CHYPRE: Mrs Georghia EROTOKRITOU, Attorney of the Republic of Cyprus

CZECH REPUBLIC /REPUBLIQUE TCHEQUE: Mr Jiřri MALENOVSKÝ, Ambassador, Director General of the Legal and Consular Section, Ministry of Foreign Affairs

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Mr Esko KIURU, Ambassador, Deputy Director General, Legal Department, Ministry for Foreign Affairs

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Mme Frederique COULEE, Ministère des Affaires étrangères, Direction des Affaires Juridiques, sous-direction du droit international public

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Dr Ernst MARTENS, Deputy Head of the Treaty Division, Federal Foreign Office

M. Klemens MÖMKES, Conseiller, Droit international public, Federal Foreign Office

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EUROPEAN COMMISSION/ COMMISSION EUROPEENNE: *Apologised/Excusé*

OBSERVERS/ OBSERVATEURS

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UNITED STATES OF MEXICO/ ETATS UNIS DU MEXIQUE: Ambassador Miguel Angel GONZÁLEZ FELIX, Ambassador, Chief Legal Adviser, Ministry of Foreign Affairs

AUSTRALIA/AUSTRALIE: -

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APPENDIX II

AGENDA

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4. Communication by the Director General of Legal Affairs, Mr G. De Vel CAHDI (2000) Inf. 1

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APPENDIX III
THE IMPLICATIONS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS FOR THE DEVELOPMENT OF PUBLIC INTERNATIONAL LAW

By Theodor Meron°

1. Introduction

As the first international convention on human rights, and one with the most advanced mechanisms of judicial resolution of individual and interstate complaints, it is natural that the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) [1] and the unparalleled, in both quantity and quality, case law generated by the Commission (no longer in existence since the entry into effect of Protocol 11) and the Court, should have an important impact on the development of public international law, an impact reaching beyond the field of human rights and the geographical parameters of the Council of Europe. Nevertheless, because of the doctrine emphasising the specificity of international human rights (virtual elimination of reciprocity, contraction of domestic jurisdiction, and operation of the law not between theoretically equal sovereign entities, but between governments - subject to duties - and individuals benefiting from rights, all that mostly within the nation State), the significance for general public international law of the normative system developed in Strasbourg cannot be taken for granted. It merits discussion and comment.

This report will be limited to the ECHR. Accordingly, it will not address the impact on public international law of other European conventions. The ECHR has had a profound influence on the decisions of the Court of Justice of the European Communities, the Maastricht Treaty, the inclusion of human rights clauses in the economic and development agreements with States not members of the European Union and the recognition of the constitutional traditions common to the member States as general principles of community law and thus as fundamental rights enforceable before the Court of Justice.[2] The ECHR has had a major impact on the development by the European Communities and the OSCE of what Professor Charles Leben called the "triad of human rights/democracy/rule of law."[3] Beyond Europe, the ECHR has also had a major influence on other regional human rights systems, especially the jurisprudence of the American Court of Human Rights, as well as on the universal human rights system.

2. Character of Human Rights Treaties

Strasbourg institutions have articulated the theory of the objective character of the ECHR, emphasising its normativity and the departure from the reciprocity underlying the law of treaties in general. Thus, in the case of *Austria v. Italy*, the European Commission of Human Rights stated:

> the obligations undertaken by the High Contracting Parties in the Convention are essentially of an objective character, being designed rather to protect the

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[1] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, in force 3 September 1953, EUR. T.S. No. 5, 213 UNTS 221.

[2] See for example, Wachauf v. Germany, Court of Justice of the European Communities, Case 5/88, [1989] ECR 2609.

[3] Charles Leben, *Is there a European Approach to Human Rights?, in* THE EU AND HUMAN RIGHTS 69, 93 (Philip Alston ed. 1999).

> fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.[4]

In *France et al. v. Turkey,*[5] the Commission held that:

> the general principle of reciprocity in international law and the rule in Article 21, para. 1 of the Vienna Convention on the Law of Treaties, concerning bilateral obligations under a multilateral treaties do not apply to the obligations under the European Convention, which are "essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringement by any of the High Contracting parties than to create subjective and reciprocal rights for the High Contracting Parties themselves" (Austria v. Italy, Yearbook 4, 116, at page 140).[6]

In the *Loizidou* case, the Court emphasised the "special character of the Convention as a treaty for the collective enforcement of human rights and fundamental freedoms"[7] and the need not to "diminish the effectiveness of the Convention as a constitutional instrument of European public order (*ordre public*)."[8]

Although these characterisations were designed for the ECHR only, they may, in the long run influence the interpretation and application of other normative and multilateral treaties which implicate common values rather than just the interests of the individual State parties. Possible candidates for such a development include treaties concerning the environment and arms control. The jurisprudence of the European Court of Human Rights may thus contribute to filling the void left by the Vienna Convention on the Law of Treaties;[9] which hardly dealt with the special problems raised by multilateral normative treaties. This Strasbourg jurisprudence will continue to drive the movement of international law from its State-centered focus to an orientation towards individuals.

3. Reservations

Much has been written about the Strasbourg jurisprudence on reservations to the ECHR. Both because of the ample literature and the continuing work on this subject in the framework of the Committee of Legal Advisers (CAHDI), my discussion will be brief. This jurisprudence draws on the special character of the Convention and turns essentially on the application of Article 57 (former Article 64) and only secondarily on the more general criterion of compatibility with the object and purpose of the Convention derived from the Vienna Convention on the Law of Treaties. As Pierre-Henri Imbert noted, there is no equivalent at the universal level to the Strasbourg institutions, and Article 57 enabled the Court (except with regard to the reservations by Turkey), to avoid addressing the incompatibility criteria of the Vienna Convention.[10] Imbert acknowledged the fact that the Strasbourg jurisprudence

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[4] Decision of the Commission as to Admissibility of Application No. 788/60 lodged by the Government of the Federal Republic of Austria against the Government of the Republic of Italy, 4 YB. EUR. CONV. H.R. 116, 140 (1961).

[5] France, Norway, Denmark, Sweden, Netherlands v. Turkey, European Commission of Human Rights, Appl. No. 9940-9944/82 (joined), Decision on admissibility of 6 December 1983, 35 EUR. COMM'N DEC. & REP. 143 (1984).

[6] *Id.*, at 169, para. 39.

[7] Case of Loizidou v. Turkey (Preliminary Objections), European Court of Human Rights, Judgment of 23 March 1995, 310 EUR. CT. H.R. REP. (SER. A), para. 70 (1995).

[8] *Id.*, para. 75.

[9] Vienna Convention on the Law of Treaties, *opened for signature* 23 May 1969, UN Doc. A/CONF.39/27 and Corr.1 (1969), 1155 UNTS 331, *reprinted in* 63 AJIL 875 (1969), 8 ILM 679 (1969).

[10] CAHDI, Group of Specialists on Reservations to International Treaties, 2nd meeting, Paris, Sept. 1998, Statement by Pierre-Henri Imbert.

had more of an impact on the work of the Human Rights Committee established under the International Covenant on Civil and Political Rights[11] (CCPR) than on the practice of States belonging to the Council of Europe. This jurisprudence emphasises the requirement of specificity,[12] which Åkemark regards as a reflection of a regional customary law,[13] the exclusion of reservations which may render the Convention ineffective and the severability of inadmissible reservations. Inadmissible reservations would thus be excluded, while maintaining the validity of the reserving State's consent to the Convention (see, in particular, the *Belilos* and *Loizidou* cases[14]).

The European jurisprudence has had a critically important impact on the universal system of human rights as manifested by General Comment No. 24 of the Human Rights Committee and on the jurisprudence of the Inter-American Court of Human Rights. Although provisions similar to Article 57 (former Article 64) can be found in many Council of Europe treaties, I note the conclusion of Åkermark that that jurisprudence does not appear to have been supported by the majority of the members of the Council of Europe,[15] at any rate outside of the ECHR (the decisions of the Court are of course binding on the State parties before the Court). Moreover, two members of the Council of Europe, France and the United Kingdom, have strongly dissented from General Comment No. 24,[16] especially questioning the competence of the Committee to decide on invalidity and separability.[17]

Outside the Council of Europe, the United States has questioned the legal foundation of the Committee's approach.[18] The Pellet reports and the recent work of the International Law Commission (ILC) demonstrate strong resistance to the Strasbourg jurisprudence and to General Comment No. 24 as a paradigm for the law of treaties in general. They reflect a preference for the maintenance of the reservations system established by the Vienna Convention on the Law of Treaties. Time will tell whether the Strasbourg jurisprudence on reservations will have an impact, and how much of an impact, on other normative multilateral conventions. Although so far that impact outside human rights treaties has been insignificant, in the long run the assertive stand taken by the Strasbourg institutions may prove useful in tempering the *laissez-faire* of the Vienna Convention's system.

4. Interpretation of Treaties

Sir Ian Sinclair observed that human rights bodies, in particular the European institutions, have put emphasis on the "object and purpose" of human rights treaties to such an extent that they sometimes overrode the "ordinary meaning" of the text or ignored such evidence of the parties' intention as found in the *travaux préparatoires*.[19] Sinclair gave as an example the *Golder* case, where the Court read into Article 6 of the ECHR not only the

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[11] International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200A, 19 December 1966, *in force* 23 March 1976, 21 UN GAOR (Suppl. No. 16), at 53, UN Doc. A/6316 (1967).

[12] Åkermark, *Reservations: Breaking New Ground in the Council of Europe*, 24 EUR. L. REV. 499, 503 (1999).

[13] Åkermark, *Reservations Clauses in Treaties Concluded within the Council of Europe*, 48 I.C.L.Q. 479, 493 (1999).

[14] Belilos Case (Switzerland), European Court of Human Rights, Judgment of 29 April 1988, 132 EUR. CT. H.R. REP. (SER. A) (1988). Case of Loizidou v. Turkey, *supra* note 7.

[15] Åkermark, *supra* note 12, 504-507.

[16] Committee on Human Rights, General Comment No. 24(52), adopted on 2 November 1994, Report of the Human Rights Committee, 50 UN GAOR (Supp. No. 40), UN Doc. A/50/40, Annex V.

[17] Report of the Human Rights Committee, Vol. I, 50 UN GAOR (Supp. No. 40), UN Doc. A/50/40, Annex VI, (1995) (UK); 51 UN GAOR (Supp. No. 40), UN Doc. A/51/40, Annex VI (1996) (France).

[18] Report of the Human Rights Committee, Vol. I, 50 UN GAOR (Supp. No. 40), UN Doc. A/50/40, Annex VI, (1995).

[19] Ian Sinclair, THE VIENNA CONVENTION ON THE LAW OF TREATIES 133 (2nd ed., 1984).

procedural safeguards in legal proceedings, but also a right of access to courts.[20] This approach of the Court to the interpretation of the Convention has been criticised by Judge Fitzmaurice:

> But what I find it impossible to accept is the implied suggestion that because the Convention has a constitutional aspect, the ordinary rules of treaty interpretation can be ignored or brushed aside in the interests of promoting objects or purposes not originally intended by the parties. Such a view moreover overlooks the patent fact that, even in the case of constitutions proper, and even allowing for certain permissible interpretational differences of treatment between treaties and constitutions as indicated in paragraph 32 of the dissenting part of my opinion in the Golder case, there are rules of interpretation applicable to constitutions, and these rules have in large measure a character closely analogous to those of treaty interpretation [...].[21]

In contrast, Jonathan Charney noted that "to the extent that these Courts may have adopted a teleological approach, it seems to be more consistent with the role of the treaty's purpose as intended in the Vienna Convention. It has rarely, if ever, been used to sacrifice the text in order to carry out judicially created purposes."[22]

Bruno Simma pointed out that another principle of interpretation has been developed by the European Court of Human Rights, *i.e.*, that the ECHR must be interpreted in "in the light of present day conditions."[23]

The need to interpret treaties in light of human rights concerns, as developed by the European Court of Human Rights, has influenced the jurisprudence of the European Court of Justice on fundamental rights as a part of the general principles of law. Those fundamental rights are derived from the national constitutions of member States and from treaties to which they are parties. In the *Nold* case,[24] the European Court of Justice, after referring to the "constitutional traditions common to the Member States," noted that "[i]nternational treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community Law."[25] The Court then took note of the ECHR and, in particular of the First Additional Protocol which protects the right of property.[26]

5. State Sovereignty, Consent to the ECHR and Admission to International Organizations

Although it is not uncommon for international organisations to insist that various commitments be made by the applicant States as a condition for admission to membership,

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[20] Golder Case (United Kingdom), European Court of Human Rights, Judgment of 21 February 1975, 18 EUR. CT. H.R. REP. (SER. A) (1975).

[21] National Union of Belgian Police Case (Belgium), European Court of Human Rights, Judgment of 27 October 1975, 19 EUR. CT. H.R. REP. (SER. A), Dissenting Opinion of J. Fitzmaurice, para. 9 (1975); *See also* dissenting opinion in Golder Case, *supra* note 20.

[22] Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 COLLECTED COURSES 101, 188 (1998); *also* Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AJIL 1, 18-20 (1985).

[23] Simma, *International Human Rights and General International Law*, IV(2) COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 155, 185 (1993), citing the Court in the Tyrer Case (United Kingdom), European Court of Human Rights, Judgment of 25 April 1978, 26 EUR. CT. H.R. REP. (SER. A), at 15-16 (1978).

[24] Nold, Kohlen-und Baustoffgroßhandlung v. Commission of the European Communities, Court of Justice of the European Communities, Case 4/73, [1974] ECR 491, 507, para. 13.

[25] *Id.*

[26] First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20 March 1952, in force 18 May 1954, EUR. T.S. No. 9.

the Council of Europe has gone further. Before the Parliamentary Assembly (PA) recommends that the Committee of Ministers (CM) invite an applicant State to become a member of the Council, the PA must satisfy itself that such applicant State has met the conditions of Article 3 of the Statute of the Council, accepts the principle of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and is willing to collaborate sincerely and effectively in the realisation of the aims of the Council. In essence, accession to the Council presupposes that an applicant State has brought its institutions and legal system into line with the basic principles of democracy, the rule of law and human rights. The PA further requires that an applicant State accepts and ratifies the ECHR and a number of additional protocols. All this amounts to a robust and innovative use of admission to international organisations as a tool to compel States to comply with the Strasbourg system of human rights and to ratify several human rights treaties. It establishes a model that may be followed by other organisations.[27]

6. Due Process Standards

The jurisprudence of the ICTY and of the Rwanda tribunal is replete with references to the jurisprudence of the ECHR with regard to judicial guarantees and due process protections and procedures. Here, Strasbourg Institutions have already had a tangible impact on international humanitarian law, on international criminal law and on the rules of procedure and evidence of these tribunals.

7. Protection of Environment

The relationship between human rights and environmental protection has been envisaged in different perspectives. One is to recognise a human right to a satisfactory, decent, or healthy environment. A second approach is to consider the quality of the environment as intertwined with existing human rights, such as the right to life, to health or to an adequate standard of living.[28] A third is to elaborate a set of "environmental rights" applied specifically in an environmental law context. These are essentially procedural rights, such as a right to participation in decision-making, a right to information and a right of access to remedies.[29] The Strasbourg institutions have focused primarily on the second and the third of these perspectives.

None of the universal or regional human rights texts concerned with the protection of human rights currently in force - the International Covenants on Economic, Social and Cultural Rights, and on Civil and Political Rights, the American Convention on Human Rights (ACHR), the ECHR and the European Social Charter, and the African Charter on Human Rights and People's Rights - provide for a generic individual "right to environment."[30] The Strasbourg institutions have, however, showed the way towards the development of

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[27] *See* Meron & Sloan, *Democracy, Rule of Law and Admission to the Council of Europe*, 26 ISRAEL Y.B. HUMAN RIGHTS 137 (1997).

[28] Merrills, *Environmental Protection and Human Rights: Conceptual Aspects*, *in* HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 25, 39-40 (Alan E. Boyle and Michael R. Anderson eds, 1996); Cançado Trindade, *The Contribution of International Human Rights to Environmental Protection, with Special Reference to Global Environmental Change*, *in* ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 244, 271 *ff* (Edith Brown-Weiss ed., 1992).

[29] Kiss, *Le droit à la conservation de l'environnement*, 2(12) REVUE UNIVERSELLE DES DROITS DE L'HOMME 445, 447-448 (1990).

[30] International Covenant on Economic, Social and Cultural Rights, UN General Assembly Resolution 2200, 19 December 1966, 21 UN GAOR (Supp. No 16), at 49, UN Doc. A/6316 (1967); International Covenant on Civil and Political Rights, *supra* note 11; European Social Charter, Turin, 18 October 1961, EUR. T.S. No. 35, 529 UNTS 89; American Convention on Human Rights, San Jose, 22 November 1969, *reprinted in* 9 ILM 673 (1970); African Charter on Human Rights and People's Rights, Banjul, 27 June 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981), *reprinted in* 21 ILM 58 (1982).

environmental protection and the right to a healthy environment through such existing rights as the right to life, right to the respect of one's private life, right to health and right to property, and also with regard to remedies and to the right to information. I shall give some examples of the pertinent decisions which are likely to have a broad influence on the international law of environment.

The Strasbourg institutions have thus considered that the protection of the right to life involves positive obligations. In *L.C.B. v. United Kingdom*, the applicant, who suffered from leukemia since childhood, complained of the failure of the State to warn and advise her parents of the risks entailed by the alleged exposure of her father to radiation at Christmas Island at the time of the United Kingdom's nuclear tests. The Court considered that:

> [...] the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. [...] It has not been suggested that the respondent State intentionally sought to deprive the applicant of her life. The Court's task is, therefore, to determine whether, given the circumstances of the case, the State did all that could have been required of it to prevent the applicant's life from being avoidably put at risk.[31]

However, the Court did not find it established that:

> given the information available to the State at the relevant time [...] concerning the likelihood of the applicant's father having been exposed to dangerous levels of radiation and of this having created a risk to her health, it could have been expected to act of its own motion to notify her parents of these matters or take any special action in relation to her.[32]

In *Balmer-Schafroth and others v. Switzerland*, the applicants alleged violations of Article 6 (right to a tribunal) and Article 13 (right to a remedy for violations of the Convention) for not being allowed to challenge a decision of the Swiss Federal Council to permit the extension of the operating licence of a nuclear power station. The Court considered that the right on which the applicants relied on was "the right to have their physical integrity adequately protected from the risks entailed by the use of nuclear energy," a right recognised in Swiss law. However, it held that Article 6 was not applicable since the applicants had not establish[ed] a direct link between the operating conditions of the power station [...] and their right to protection of their physical integrity, as they [had] failed to show that the operation of the [...] power station exposed them personally to a danger that was not only serious but also specific and above all, imminent. [33]

In the *Guerra and others v. Italy* case, the applicants complained that the failure of the authorities to inform the public about the hazards and the procedure to be followed in the event of a major accident infringed their right to freedom of information. The Court found that the State had not fulfilled its obligation to secure the applicants' right to respect for their private and family life, by not providing essential information that would have enabled the applicants to assess the risks they and their families might run.[34]

Other cases concerned the environmental implications of respect of private life, home and property under the Convention.

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[31] Case of L.C.B. v. United Kingdom, European Court of Human Rights, Judgment of 9 June 1998, III REPORTS JUDG. & DEC., para. 36 (1998).

[32] *Id.*, para. 41.

[33] Case of Balmer-Schafroth and others v. Switzerland, European Court of Human Rights, Judgment of 26 August 1997, IV REPORTS JUDG. & DEC., para. 40 (1997).

[34] Case of Guerra and others v. Italy, European Court of Human Rights, Judgment of 19 February 1998, I REPORTS JUDG. & DEC., paras. 60-62 (1998).

In *S. v. France*, the applicant alleged that the erection of a nuclear power station at less than three hundred meters from her house had transformed the rural surroundings into an industrial environment with several negative consequences: alteration of the natural site, noise pollution, industrial light during the night, a microclimate modification and loss of value of the property.[35] Although the application was found inadmissible, the Commission noted, on the applicability of Article 8, that noise nuisances of a considerable level could not only affect the physical well-being of an individual, but also prevent him from enjoying the amenities of his home. It further noted that the State had the duty not only to refrain from direct interferences but also the duty to prevent interferences by individuals.[36]

In the *López Ostra* case, the Commission and the Court found a breach of the Convention as a consequence of environmental harm. The applicant had filed an application asserting that she had been unable to obtain relief under Spanish law for the noxious emissions of a water purification and waste treatment station constructed near her home. She claimed that the passive attitude of Spanish authorities with regard to the smells, noise and polluting fumes caused by the plant constituted a violation of Articles 3 and 8 of the Convention. Both the Commission and the Court found a breach of Article 8, but not of Article 3.[37] The Court, putting the question in the framework of environmental protection, stated:

> Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however seriously endangering their health.[38]

In this case, the interference was not directly attributable to public authorities, but the Court pointed out that the case could be approached either from the perspective of an omission, the tolerance of the operation of the station, or from the perspective of a positive interference, since the land on which the station was erected on was public property and a State subsidy was provided for the construction. The Court seems to have favoured the positive duty approach, *i.e.*, establishing whether the authorities took the measures necessary for protecting the applicant's rights. It found that after the initial relocation of the inhabitants of the neighbourhood, the municipality had failed to take such measures. But the main criticisms levelled by the Court against the behaviour of the public authorities were positive acts, *inter alia*, resisting the decisions of lower tribunals ordering the closing down of the station. Cases such as *López Ostra* involve a delicate assessment of the fair balance to be struck between the economic well-being of the community and individual interests.

As regards the right of property, the European Commission has taken the view that there will be a breach of Article 1 of Protocol I where pollution and other environmental degradation result in a substantial fall in the value of the property, which is not subsequently compensated.[39]

The Strasbourg institutions have also recognised a right of access to environmental information held by public authorities. The right to environmental information may be associated with the right to life, freedom of expression, and to the right of respect for one's private life. It has been invoked before the Strasbourg organs under all these headings. In *Guerra and others v. Italy*, the applicants lived in a town near a chemical factory. They alleged that the lack of measures to reduce pollution levels and accident hazards arising out of the factory's operation infringed their right to respect for their lives and physical integrity

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[35] S. v. France, European Commission of Human Rights, Appl. No. 13728/88, Decision of 17 May 1990, *reprinted in* 3 REVUE UNIVERSELLE DES DROITS DE L'HOMME 236 (1991) (in French).

[36] *Id.*, at 237.

[37] Case of López Ostra v. Spain, European Court of Human Rights, Judgment of 9 December 1994, 313C EUR. CT. H.R. REP. (SER. A), para. 31 (1994) (the text of the Commission's opinion is annexed to the judgment).

[38] *Id.*, para. 51.

[39] Weber, *Environmental Information and the European Convention on Human Rights*, 12(5) H.R.L.J. 177, 181 (1991).

(Article 2); and that the failure of the authorities to inform the public about the hazards and the procedure to be followed in the event of a major accident infringed their right to freedom of information (Article 10). The Court rejected the Commission's findings that freedom of information could entail a duty to collect and disseminate environmental information. Recalling its earlier jurisprudence, it reiterated that freedom of information "basically prohibits a government from restricting a person receiving information that others wish or may be willing to impart to him," and it "cannot be construed as imposing on a State, in circumstances such as those of the present case, positive obligations to collect and disseminate information of its own motion."[40] The Court then proceeded to examine the complaints under Articles 2 and 8. Under Article 8, the Court held that, by not providing essential information that would have enabled the applicants to assess the risks they might run, "the respondent State [had] not fulfil[led] its obligation to secure the applicants' right to respect for their private and family life, in breach of Article 8 of the Convention."[41]

Similarly, the Court held in the *McGinley and Egan* case, which concerned the supply of information on radiation levels following the British nuclear tests on Christmas Island, that:

> Where a Government engages in hazardous activities, such as those in issue in the present case, which might have hidden adverse consequences on the health of those involved in such activities, respect for private and family life under Article 8 requires that an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information.[42]

From the *McGinley and Egan* and the *Guerra* cases, it has been inferred that the Court has recognized a right to environmental information on the basis of Articles 2 or 8 of the Convention. A State has the duty to provide or disseminate information it holds when this information is likely to contribute to the protection of guaranteed rights. The Court may have been influenced by parallel developments in general international environmental law, especially some European texts providing for a right of access to certain environmental information held by public authorities.[43]

8. State Responsibility: *Erga Omnes* Obligations

The ECHR provides that "[a]ny High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party."[44] Standing to submit claims against any other party to the convention is not dependent on any special interest or nexus with the victim. The Convention thus anticipated the principle of *erga omnes* obligations stated by the International Court of Justice in the *Barcelona Traction* case.[45] Of course, while the ECHR recognises the principle of obligations *erga omnes contractantes*, the *Barcelona Traction* case contemplated such obligations under general international law.[46]

The ECHR may also have influenced treaties other than human rights treaties. In the environmental field, the Bern Convention thus provides that:

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[40] Case of Guerra and others v. Italy, *supra* note 34, para. 53.

[41] *Id.*, para. 60.

[42] Case of McGinley and Egan v. United Kingdom, European Court of Human Rights, Judgment of 9 June 1998, III REPORTS JUDG. & DEC., para. 101 (1998).

[43] Maljean-Dubois, *La Convention européenne des droits de l'homme et le droit à l'information en matière d'environnement. A propos de l'arrêt rendu par la CEDH le 19 février 1998 en l'affaire Anna Maria Guerra et 39 autres c. Italie*, 4 REVUE GENERALE DE DROIT INTERNATIONAL PUBLIC 995, 1011-1012 (1998).

[44] Article 33 (former Article 46).

[45] Barcelona Traction, Light, and Power Company (Second Application) (Belgium v. Spain), International Court of Justice, Judgment of 5 February 1970, [1970] ICJ REP. 3, at 33.

[46] Theodor Meron, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 190-196 (1989).

> Any dispute between Contracting Parties concerning the interpretation or application of this Convention which has not been settled on the basis of the provisions of the preceding paragraph or by negotiation between the parties concerned shall, unless the said parties agree otherwise, be submitted, at the request of one of them, to arbitration [...].[47]

Most obligations under the Convention concern national measures for the conservation of wild flora, wild fauna and natural habitats. A State party would probably not be required to have suffered a specific injury to challenge another Party's performance.

9. State Responsibility: Diplomatic Protection

Human rights approaches to remedies against violating States and to the responsibility of the State to ensure the human rights of all persons subject to its jurisdiction, and especially Article 33 (former Article 46) of the ECHR, are having an obvious impact on the traditional law of diplomatic protection. It is a part of the trend to present as human rights issues claims which in the past would have been presented as diplomatic protection of citizens abroad.

This development may well be illustrated by the recent application presented by Denmark against Turkey for alleged violations of the ECHR "on behalf" of a Danish national. Denmark's application includes both elements of diplomatic protection - infringements by a foreign State of the rights of one of its nationals - and elements more characteristic of human rights regimes - violations of the Convention by a State in regard of its own nationals. Denmark thus requested the Court of Human Rights to examine both the treatment of its citizen and whether the interrogation techniques applied to him were used in Turkey as a widespread practice.[48] Thus, rather than continue the classical competition between a minimum or national treatment standard, the Danish application does not only challenge the treatment of an alien, but also the treatment by the foreign State of its own nationals.

Even with regard to claims submitted by individuals against a State party to the Convention, an element of diplomatic protection is, however, preserved in Article 36(1) which allows a party, one of whose nationals is an applicant in proceedings against another party, to submit written comments and to take part in hearings.

10. Responsibility and Territoriality

The ECHR and its jurisprudence have had an effect on the territorial scope of responsibility of States under international law. The protection provided by the CCPR, the ECHR and the ACHR extends to persons "within the territory of a State or subject to its jurisdiction" (CCPR), to persons "within the jurisdiction of" of a State (ECHR) or to persons "subject to the jurisdiction" of the State (ACHR).[49] In the *Soering* case, the European Court stated that:

> Article 1 cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an

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[47] Convention on the Conservation of European Wildlife and Natural Habitats, Bern, 19 September 1979, in force 1 June 1982, EUR. T.S. No. 104, Article 18.

[48] Denmark v. Turkey (Preliminary Objections), European Court of Human Rights (First Section), Appl. No. 34382/97, Decision as to admissibility of 8 June 1999. (The decision is available at <http://www.echr.coe.int/hudoc/>).

[49] *See* Meron, *Extraterritoriality of Human Rights Treaties*, 89 AJIL 78 (1995).

> individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention. [...][50]

Nevertheless, the Court held that the decision to extradite a fugitive may engage the responsibility of a contracting State under the Convention where there exist substantial grounds for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country. The Court added that:

> In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. [...] Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. [...] In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society"[...].[51]

Thus, Article 1 is pertinent to the application of extradition agreements concluded by the parties to the ECHR. Another aspect of the interpretation and application of Article 1 of the Convention, and one which has influenced the work of the Human Rights Committee, has been to construe the word "jurisdiction" as extending to areas outside of a State's national territory where that State's authorities exercise power over people there present. [52] This has implications for international humanitarian law as well.

Thus, the Commission declared admissible a petition filed by Cyprus against Turkey, alleging murders of civilians, repeated rapes, forcible eviction, looting, robbery, unlawful seizure, arbitrary detention, torture and other inhuman treatment, forced labour, destruction of property, forced expatriation and separation of families in the context of occupation.[53] In another case, the Commission reiterated that:

> [...] the authorised agents of the State, including diplomatic or consular agents and armed forces, not only remain under its jurisdiction when abroad but bring any other persons or property 'within the jurisdiction' of that State, to the extent that they exercise authority over such persons or property. Insofar as, by their acts or omissions, they affect such persons or property, the responsibility of the State is engaged.[54]

Françoise Hampson thus commented that "[i]t is the nexus between the person affected, whatever his nationality, and the perpetrator of the alleged violation which engages the possible responsibility of the State and not the place where the action takes place."[55]

In another case also related to the attribution of responsibility for acts committed in the northern part of Cyprus, the Commission held that:

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[50] Soering Case (United Kingdom), European Court of Human Rights, Judgment of 26 June 1989, 161 EUR. CT. H.R. REP. (SER. A), para. 86 (1989).

[51] *Id.*, para. 87. The same principles were applied in cases of expulsion, Case of Cruz Varas and Others v. Sweden, Judgment of 20 March 1991, 201 EUR. CT. H.R. REP. (SER. A) (1991); Case of Vilvarajah and Others v. the United Kingdom, Judgment of 30 October 1991, 215 EUR. CT. H.R. REP. (SER. A) (1991); Case of Chahal v. the United Kingdom, Judgment of 15 November 1996, V REPORTS JUDG. & DEC. (1998).

[52] Meron, *supra* note 49, 79-81 (1995).

[53] Cyprus v. Turkey, European Commission on Human Rights, Appl. No. 6780/74 and 6950/75, Report of 10 July 1976, 2 EUR. COMM'N DEC. & REP. 1254 E.H.R.R. 482 (1975).

[54] W. v. Ireland, European Commission on Human Rights, Appl. No. 9360/81, Decision on admissibility of 28 February 1983, 32 EUR. COMM'N DEC. & REP. 211, 215 (1983); *also* Cyprus v. Turkey, *id.*, 136.

[55] Hampson, *Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts*, 31 REVUE DE DROIT MILITAIRE ET DE DROIT DE LA GUERRE 119, 122 (1992).

> Authorised agents of a State, including armed forces, not only remain under its jurisdiction when abroad but also bring any other persons 'within the jurisdiction' of that State to the extent that they exercise authority over such persons.[56]

It then distinguished between acts imputable to Turkey and those imputable to the Northern Cyprus authorities by reference to a criterion of "actual control." In that same context, the Court held that:

> Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action - whether lawful or unlawful - it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through subordinate local administration.[57]

11. State Responsibility for Non-Governmental Acts and Imputability (*Drittwirkung*)

Human rights have had an impact on imputability, on the responsibility of a State for unauthorised acts of its officials and even for acts committed by non-governmental agencies or individuals in the country. This may be important for the law of State responsibility also in matters not involving human rights, but environmental and other subjects, including matters in the economic area and compliance with international sanctions. Normally, States are responsible only for conduct attributable to them, that is mainly the conduct of State apparatus.[58] This is reflected in Article 10 of the ILC draft articles on State responsibility (part one).[59] While the American Court of Human Rights has resorted to such state responsibility terms as due process and imputability, the European Court of Human Rights has emphasized the positive duty of governments to ensure compliance with their obligations under the Convention even as between non-governmental actors.

Although contemporary human rights law focuses on the duty of governments to respect the human rights of individuals, human rights violations committed by one private person against another (e.g. deprivation of life and liberty or the perpetration of acts of egregious discrimination) cannot be placed outside the ambit of human rights law if that law is ever to gain significant effectiveness. This is true of some other rights and obligations under international law. In our era, many activities are carried out by non-State entities. Making them comply with applicable rules of international law may be essential. The ICJ acknowledged this reality when, in a different context, it deplored "[t]he frequency with which at the present time the principles of international law . . . are set at naught by individuals or groups of individuals ..."[60] Because the purpose of human rights law is to protect human dignity, and because some essential human rights are often breached by private persons, the obligation of States to observe and ensure respect for human rights and to prevent violations cannot be confined to restrictions upon governmental powers but must extend to the prevention of some private "interferences" with human rights.[61] States should prevent

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[56] Chrysostomos and Papachrysostomou v. Turkey, European Commission on Human Rights, Appl. No. 15299/89 and 15300/89, Report of 8 July 1993, 86 EUR. COMM'N DEC. & REP. 4, at paras. 96 and 170. The Council of Ministers agreed with the report of the Commission: Resolution DH (95) 245 of 19 October 1995.

[57] Loizidou v. Turkey, *supra* note 7, para. 62.

[58] *See generally* Theodor Meron, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 155-171 (1989).

[59] [1975] 2 YB INT'L L. COMM'N 60, UN Doc. A/CN.4/Ser.A/1975/Add.1 (1976).

[60] United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), International Court of Justice, Judgement of 24 May 1980, 1980 ICJ REP. 4, 42.

[61] Forde, *Non-Governmental Interferences with Human Rights*, 56 BRIT. YB. INT'L L. 253 (1985). Note particularly the discussion of the practice of the European Commission of Human Rights and the European Court of Human Rights with respect to non-governmental interference with human rights. *Id.*, at 271-8. *See* Andrew Clapham, HUMAN RIGHTS IN THE PRIVATE SPHERE 178-244 (1993).

violations by non-governmental actors. The standard of care required would depend on the character and the importance of the norm protected. When prevention fails, States should resort to criminal proceedings against the perpetrator of human rights violations and should ensure that their internal law provides the victim with effective civil remedies against the responsible private actor.

Human rights obligations stated in international humanitarian and human rights instruments increasingly extend to private individuals and to private action. In some areas of international law, such as that governing labour rights and conditions of work, the relevant international labour conventions routinely regulate relations between private employees and employers. The prohibitions of slavery and genocide apply, of course, also to private persons and groups. So does the prohibition of hostage-taking.

Together with the Human Rights Committee and the Inter-American human rights institutions, the ECHR's Article 1 and Strasbourg institutions have helped to establish the duty of States to ensure compliance by private persons with some of the Covenant's norms, or, at a minimum, to adopt measures "against private interference with enjoyment of the rights..."[62] That Article provides that the "High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

In the *Young, James and Webster Case (Closed Shop Case)* (1981)[63] the Court, applying Articles 1 and 11 (which guarantee the rights of peaceful assembly and freedom of association, including the right to form and to join trade unions), found that Article 11 had been violated . It stated that:

> [a]lthough the proximate cause of the events giving rise to this case was the 1975 agreement between British Rail and the railway unions, it was the domestic law in force at the relevant time that made lawful the treatment of which the applicants complained. The responsibility of the respondent State for any resultant breach of the Convention is thus engaged on this basis. Accordingly, there is no call to examine whether, as the applicants argued, the State might also be responsible on the ground that it should be regarded as employer or that British Rail was under its control.[64]

In the *National Union of Belgian Police Case*,[65] the Commission interpreted Article 11 by taking into account UN human rights instruments and ILO Conventions Nos. 87 and 98. It concluded that the latter Conventions reflect widely accepted labour law standards which are elaborated and clarified by the competent organs of the ILO. As they are a body of special rules binding also on European States, they should not be ignored in the interpretation of Article 11, particularly if the European Convention is to keep pace with the rules of international labour law and if its concepts are to remain in harmony with the concepts used in international labour law and practice.[66]

On this broad international law basis, the Commission concluded that freedom of association stated in Article 11 "may be legitimately extended to cover State responsibility in the sphere of labour management relations".[67]

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[62] Buergenthal, *To Respect and to Ensure: State Obligations and Permissible Derogations*, *in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 77-78 (Louis Henkin ed. 1981); Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 31-32 (1982); Sperduti, *Responsibility of States for Activities of Private Law Persons*, *in* [Instalment] 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 373, 375 (R. Bernhardt ed. 1987).

[63] European Court of Human Rights, Judgment of 13 August 1981, 44 EUR. CT. H.R. REP. (SER. A) (1981); 62 INT'L L REP. 359 (1982).

[64] Id., para. 4962 INT'L L. REP. 376-7 (1982).

[65] Appl. No. 4464/70, 17 EUR. CT. H.R. (SER. B) (1976).

[66] *Id*., at 51. See also *id*., at 49-51.

[67] *Id.,* at 52.

The Commission followed the same approach in *Swedish Engine Drivers' Union* Case.[68] Taking into account once more UN human rights instruments and the ILO's Conventions, the Commission rejected the assertion that Article 11 provided protection only against governmental interference. On the contrary, the Article was "designed to protect unions against all kinds of interference, including interference by employers".[69] Invoking the principle of effectiveness in treaty interpretation, the Commission concluded:

> If it is the role of the Convention and the function of its interpretation to make the protection of individuals effective, the interpretation of Article 11 should be such as to provide, in conformity with international labour law, some protection against "private" interference.[70]

The Court addressed the duty of States to conform to the Convention by adopting legislative measures governing certain relations between private individuals. In the case of *X and Y v. The Netherlands*,[71] the applicant claimed that the right of both his daughter and himself to respect for their private life, guaranteed by Article 8 of the European Convention, had been infringed and that Article 8 required that parents must be able to have recourse to remedies in the event of their children being the victims of sexual abuse. Finding that Article 8 had in fact been breached, the Court stated:

> The Court recalls that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. [...] These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves.[72]

In Osman v. United Kingdom,[73] the European Court of Human Rights considered the alleged failure of public authorities to prevent an individual from deliberately killing the applicant's husband. While finding no violation of Article 2 (right to life), the Court established a standard for positive state obligations, similar, in results if not in legal technique used, to the jurisprudence of the Inter-American Court of Human Rights and the Human Rights Committee:

> The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction. It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties.

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[68] Appl. No. 5614/72, 18 EUR. CT. HR (SER. B), at 42-46 (1977).

[69] *Id.,* at 45.

[70] *Id.,* at 46.

[71] European Court of Human Rights, Judgment of 26 March 1985, 91 EUR. CT. H.R. REP. (SER. A) (1985).

[72] *Id.*, at 11.

[73] Osman v. United Kingdom, App. No. 00023452/94, III REPORTS JUDG. & DEC. (1998). (Judgment of Oct. 28 1998, European Court of Human Rights). (The decision is available at <http://www.echr.coe.int/hudoc/>)

> For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.[74]

To be sure, the applicability of some human rights instruments to private actors does not imply that the conduct of private persons when not carried out in fact on behalf of a state (Article 8 of ILC Draft Articles on State responsibility (part one)) in breach of some instruments is attributable to the State. Rather, the breach is generated by the fact that the State itself violates its obligation under international law by tolerating the occurrence of the prohibited acts.[75]

Thus in the *Velásquez Rodríguez* case, the Inter-American Court of Human Rights suggested that acts of public authority which are imputable to the State do not exhaust all the circumstances in which a State is obligated to prevent, investigate, and punish human rights violations, nor the cases in which the state itself might be responsible for violations.[76] A breach of human rights which is initially not imputable to a State, having been committed by either a private or by an unidentified person, can generate State responsibility not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it according to the requirements of the American Convention on Human Rights. The critical question, therefore, is whether the State has demonstrated lack of due diligence by allowing the act to take place either with its support or acquiescence or by not taking measures designed to prevent the act or to punish those responsible.

To be sure, the fact that a particular human right may not impose obligations on a private person or a private group does not mean that the acts contemplated are lawful. In practice, such acts often constitute breaches of the national law of the State concerned.

The extension of some human rights such as the prohibition of egregious discrimination on grounds of race or sex to encompass private action is impelled by significant community values. This expansion inevitably generates tension with other human rights, such as the freedom of association and the right to privacy, and requires a careful balancing of these values. The alternative, limiting the reach of human rights to public life, would diminish their effectiveness and is thus clearly unacceptable.

The Strasbourg jurisprudence has, however, implications going beyond human rights. In the present world, there is a need to control various types of conduct which does not directly involve the State and its apparatus. Strasbourg jurisprudence provides the tools for addressing this need.

12. International Humanitarian Law: Application of the Principle of Proportionality and Limits to Collateral Damage

One of the most important principles of international humanitarian law is that of proportionality. Strasbourg institutions have applied that principle and have contributed to its development. They have also relied on the principle of proportionality contained in human

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[74] *Id.* at paras. 115, 116 (citations omitted).

[75] *See* [1975] 2 YB INT'L L. COMM'N 71. In its commentary on that Article, the ILC explains that "although the international responsibility of the State is sometimes held to exist in connexion with acts of private persons its sole basis is the internationally wrongful conduct of organs of the State in relation to the acts of the private person concerned." *Id.*, at 82.

[76] Velásquez Rodríguez Case (Honduras), Inter-American Court of Human Rights, Judgment of 29 July 1988, [1988] INTER-AM.CT.H.R. REP. (SER. C), No. 4, paras. 172-173.

rights law, and thus further enriched international humanitarian law. The ECHR is one of the rare human rights treaties with provisions on the use of force. Human rights law establishes that the force used must not be more than absolutely necessary.[77] The principal provision on this subject, Article 2(2) of the ECHR, states that a deprivation of life shall not be regarded as inflicted in derogation of that Article when it results from the use of force which is no more than absolutely necessary. This applies to the use of force by both the military and the police. Article 2(2) has influenced also additional normative instruments, as for example, the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Articles 9 and 10).[78]

The European Court of Human Rights addressed the issue of the planning and conduct of an operation carried out by security forces, in a case involving the killing of a civilian during an alleged armed clash between the Turkish army and the PKK in the vicinity of a village. The applicant, a sister of the victim, alleged that the clash had been an operation of retaliation against the village, while the Turkish Government asserted that it was an ambush operation conducted by the security forces and that the victim had not been killed by a bullet fired by the military side. The Court, following the assessment made by the Commission, found that it had not been proven that the applicant had been intentionally killed by the security forces. Nevertheless, emphasising the principles of necessity, proportionality, and the duty to take sufficient precautions, it held Turkey responsible for a violation of Article 2:

> [...] it is to be recalled that the text of this provision [Article 2] [...], read as a whole, demonstrates that paragraph 2 does not primarily define instances where it is permitted intentionally to kill an individual, but describes the situations where it is permitted to "use force" which may result, as an unintended outcome, in the deprivation of life. The use of the term "absolutely necessary" suggests that a stricter and more compelling test of necessity must be employed from that normally applicable when determining whether State action is "necessary in a democratic society" under paragraphs 2 of Articles 8 to 11 of the Convention. In particular, the force used must be strictly proportionate to the achievement of the aims set out in sub-paragraphs 2 (a), (b) and (c) of Article 2. In keeping with the importance of this provision in a democratic society, the Court must, in making its assessment, subject deprivations of life to the most careful scrutiny, particularly where deliberate lethal force is used, taking into consideration not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination (see the above-mentioned McCann and Others judgement, p. 46, §§ 148-150).
>
> Furthermore, under Article 2 of the Convention, read in conjunction with Article 1, the State may be required to take certain measures in order to "secure" an effective enjoyment of the right to life.
>
> In the light of the above considerations, the Court agrees with the Commission that the responsibility of the State is not confined to circumstances when there is significant evidence that misdirected fire from agents of the State has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life.
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> Thus, even though it has not been established beyond reasonable doubt that the bullet which killed Havva Ergi had been fired by the security forces, the Court must consider whether the security forces' operation had been planned and conducted in

[77] Hampson, *supra* note 55, at 134.

[78] United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Sept. 7, 1990.

> such a way as to avoid or minimise, to the greatest extent possible, any risk to the lives of the villagers, including from the fire-power of the PKK members caught in the ambush.[79]

In the circumstances of the case, the Court found that it could be reasonably inferred that insufficient precautions had been taken to protect the lives of the civilian population.

In a case involving the killing of three IRA members in Gibraltar by members of the British Special Air Service (SAS), the Court has introduced a two-pronged test to determine the compatibility of the use of lethal force with the protection afforded to the right to life:

> [...] in determining whether the force used was compatible with Article 2, the Court must carefully scrutinise, as noted above, not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force.[80]

Applying the first test to the facts of the case, the Court concluded that:

> [...] the soldiers honestly believed, in the light of the information that they had been given, as set out above, that it was necessary to shoot the suspects in order to prevent them from detonating a bomb and causing serious loss of life [...]. The actions which they took, in obedience to superior orders, were thus perceived by them as absolutely necessary in order to safeguard innocent lives.
>
> It considers that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 of the Convention may be justified under this provision where it is based on an honest belief which is perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken. To hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others.[81]

The Court found that the actions of the soldiers in themselves did not give rise to a violation of the Convention. It then turned to the second test, examining the circumstances of the control and organisation of the operation. Here, the Court found against the government of the United Kingdom:

> [...] having regard to the decision not to prevent the suspects from travelling into Gibraltar, to the failure of the authorities to make sufficient allowances for the possibility that their intelligence assessments might, in some respects at least, be erroneous and to the automatic recourse to lethal force when the soldiers opened fire, the Court is not persuaded that the killing of the three terrorists constituted the use of force which was no more than absolutely necessary in defence of persons from unlawful violence within the meaning of Article 2 para. 2 (a) of the Convention.[82]

The Court (by 10 votes to 9) thus reversed the conclusion of the Commission, which had held (by 11 votes to 6) that "the planning and execution of the operation by the authorities [did] not disclose any deliberate design or lack of proper care which might render the use of

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[79] Case of Ergi v. Turkey, European Court of Human Rights, Judgment of 28 July 1998, IV REPORTS JUDG. & DEC., at para. 79 (1998). *See generally*, Reidy, *The Approach of the European Commission and Court of Human Rights to International Humanitarian Law*, INT'L REV. RED CROSS, No. 324, 513, 516, (Sept. 1988).

[80] Case of McCann and Others v. United Kingdom, European Court of Human Rights, Judgment of 5 January 1995, 324 EUR. CT. H.R. REP. (SER. A), at para. 194 (1995).

[81] *Id.,* at para. 200.

[82] *Id.,* at para. 213.

lethal force [...] disproportionate to the aim of defending other persons from unlawful violence."[83]

13. Conclusions

Although it is still early to reach definitive conclusions about the impact of the ECHR on general international law, it is already clear that that impact is significant not only for other regional human rights and universal human rights systems, but also for such different areas as principles of State responsibility, interpretation of treaties, and environmental protection. An area where such an influence has, at least so far, been limited to human rights systems and where it did not extend to general international law is that of reservations to treaties.

[83] McCann and Others v. U.K., 21 EUR. HUM. RTS REP. 97, para. 250 (1996).

APPENDIX IV

OPINION OF THE CAHDI ON PARLIAMENTARY ASSEMBLY RECOMMENDATION 1427 (1999) ON RESPECT FOR INTERNATIONAL HUMANITARIAN LAW IN EUROPE

1. The *Ad Hoc* Committee of Legal Advisers on Public International Law (CAHDI) held its 19th meeting in Berlin on 14-14 March 2000. The agenda included an item on "Decisions of the Committee of Ministers concerning the CAHDI". In the framework of this item, pursuant to the Council of Ministers' decision at their 682nd meeting (Strasbourg, 6 October 1999), members of the CAHDI examined Parliamentary Assembly Recommendation 1427 (1999) on *Respect for International Humanitarian Law in Europe*.

2. The CAHDI held an exchange of views and, in accordance with its terms of reference and its role in the Council of Europe intergovernmental structure, concentrated on what is understood to be the public international law issues connected with the Recommendation and adopted the following:

OPINION

3. International Humanitarian Law, being of the utmost importance for the protection of the victims of armed conflicts and for the international community as a whole, is an important component of international law. Universal respect for international humanitarian law and compliance with it are vital. Recent years have seen continuing serious violations of international humanitarian law and the need to ensure compliance has become ever more essential.

4. In the course of its work the CAHDI has been following developments in this field of international humanitarian law. In pursuance of United Nations General Assembly resolution 52/154 of 15 December 1997, at its 17th meeting (Vienna, 8-9 March 1999) the CAHDI considered a preliminary report on International Humanitarian Law and the Laws of War, prepared by Professor Greenwood, Rapporteur for the Centennial of the first international peace conference. The members of the CAHDI held an exchange of views and agreed with Professor Greenwood that the emphasis should be on improving and extending respect for existing international instruments rather than on adopting new ones.

5. The CAHDI takes note of the adoption by the Parliamentary Assembly of Recommendation 1427 (1999) which acknowledges the importance of international humanitarian law and proposes certain measures which would enhance its effectiveness.

6. In its Recommendation, the Assembly refers to a role for the Council of Europe in this field. The CAHDI recalls the initiatives relating to the implementation of the ECHR taken by the Commissioner of Human Rights of the Council of Europe in pursuance of resolution (99) 50 of the Committee of Ministers and by the Secretary General in accordance with article 52 of the European Convention on Human Rights.

7. With regards to section 8 (i) of the Assembly Recommendation, the CAHDI supports giving greater emphasis to international humanitarian law in drawing up programs for training and for legal co-operation (a) and including compliance with it in monitoring activities where appropriate (b), with a view to preventing breaches rather than having to deal with them *a posteriori*. The CAHDI is willing to advise in this connection. Equally, the CAHDI would be able to assist where appropriate in studying the role that the

Council of Europe could play in enhancing the effective implementation of international humanitarian law (c).

8. Moreover, the CAHDI recalls that in addition to the specific mechanisms provided for under international humanitarian law, the mechanisms contained in the European Convention on Human Rights may contribute to ensuring respect for human rights in particular situations where the European Convention of Human Rights is applicable. For example the CAHDI wishes to point to Article 33 ECHR[1] and Article 52 ECHR[2].

9. As regards section 8 (ii) (a, b, j) the CAHDI would welcome any increase in the number of States, including member States of the Council of Europe, accepting the relevant instruments. Such an increase would not only further the effectiveness of those agreements but would also encourage non-member States to follow suit and consider ratifying them as well. In this context the CAHDI would like to stress the importance of the early entry into force of the Rome Statute of the International Criminal Court.

10. The CAHDI agrees that governments should be invited to keep the implementation of their obligations under review whenever necessary (c). The recommendations under (e) and (g) will facilitate the monitoring of the commitments undertaken by States under international humanitarian law but they are matters for the sovereign decision of individual states.

11. The CAHDI would welcome the establishment of national commissions responsible for international humanitarian law (d).

12. The CAHDI considers the recommendations under (f) and (h) are not within its mandat.

13. As regards (i), the CAHDI considers that the European Committee on Crime Problems (CDPC) is the more appropriate body to give an opinion.

14. The CAHDI is not competent to advise on section 9 which concerns national legislatures.

15. The CAHDI wishes to bring the attention of the Committee of Ministers the Plan of Action adopted by the 27th International Conference of the Red Cross and Red Crescent (Geneva, 31 October – 6 November 1999) which is of particular relevance to the subject matter of the recommendations of the Parliamentary Assembly.

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[1] ECHR, Article 33 - Inter-State cases
Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.

[2] ECHR, Article 52 – Inquiries by the Secretary General
On receipt of a request from the Secretary General of the Council of the 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.

APPENDIX V

PRACTICAL ISSUES REGARDING RESERVATIONS TO INTERNATIONAL TREATIES

I. Negotiations Phase

1. Formulate an appropriate reservations clause

A reservations clause, although it is normally put in the "Final Clauses" section of a Convention, deals with substantive issues. Parties need to consider formulating an appropriate reservations-clause during negotiations. This implies choosing between the options offered by Article 19.a or 19.b VCLT, and formulating a reservations provision accordingly. Article 19.c is basically a residual rule, applicable when no specific rule on reservations has been agreed.

In considering what rule on reservations to formulate, States may wish to take into account the substance of the treaty, and in particular, the core elements of an international instrument. States may wish to prohibit general reservations, for example, by requiring clarification of the reason for formulating a reservation (cf. Article 64.1 European Convention of Human Rights). A reservation clause takes into account issues that may, in future, become the subject of the reservations made.

States may need to consider the implications of a reservations clause on the future role of the depository, and the future role of the other States Parties with respect to reservations.

A State's position on reservation will obviously be inspired by its domestic (constitutional) rules on making reservations.

Depending on the substance of a treaty, States may wish to consider whether a "sunset" reservations clause would be appropriate. Such a provision contains a time limit for the validity of a reservation. This means that, unless a reserving State takes a particular step (such as renewing its reservation), the reservation will "disappear" after a certain period of time. From the point of view of limiting the impact of reservations, a "sunset" provision may have important advantages.

2. Establish a position on a future reservations regime before starting negotiations

It is wise for delegations to establish their position on a reservations clause prior to starting negotiations, on the basis of their views on the core obligations of an international instrument. However, the development of the negotiations may necessitate further choices with respect to reservations clauses.

II. Signature Phase

3. Consider whether to make reservations on signature

Once negotiations are concluded, States need to decide on an individual basis whether a reservation on signature needs to be made. Reservations made at signature have to be repeated on expressing consent to be bound if they are to enter into force (Article 23.2 VCLT).

4. Consider whether to react to reservations made on signature

If reservations have been made on signature, other Parties may need to consider, individually or in a co-ordinated manner, whether there is a need to object to such a reservation (Article 23.3 VCLT).

5. Functions of the depository

The role of the depository in the signature phase is to receive reservations and declarations, and to execute the administrative functions related thereto.

The depository will notify the reservations made on signature to other potential Parties and to States that have already expressed consent to be bound.

The depository will receive and notify the objections made by other signatory States to reservations made on signature to the other States expressing consent to be bound.

III. Ratification Phase

6. Internal considerations with respect to reservations

Prior to expressing consent to be bound, States may wish to consider the need to adapt national legislation in order to prevent the formulation of reservations.

States may consider the possibility of making a “proper” interpretative declaration (for the distinction see Article 2.1.d VCLT), instead of making a reservation.

Prior to submitting a reservation, a State needs to establish that the intended reservation will comply with the convention’s rules or with the general law of treaties (Art. 19).

7. Raising an objection to a reservation

When considering raising an objection to a reservation, States may wish to establish, individually or in a co-ordinated manner, a dialogue with a State that has made a reservation, in order to suggest its reconsideration of that reservation with a view to withdrawing it, within the time limit set by Article 20.5 VCLT.

On expressing consent to be bound, a State needs to consider whether there is a need to object to a reservation previously made by other Parties (art. 20.5 VCLT). They may also consider whether it is desirable to raise an objection in co-ordination with other States (through COJUR or CAHDI, for example).

States that are parties need to consider whether there is a need to object to a reservation being made by a new State Party (Article 20.5 VCLT).

States may consider co-ordinating the formulation of model objections to particular (types of) reservations. Possibilities to do so will clearly depend on a shared opinion on a particular (type of) reservation.

8. Denunciation of a treaty and re-ratification with reservations

Recently, there have been instances where States have denounced a treaty to which they had not made reservations with a view to re-acceding to the treaty with reservations. The VCLT has no specific rules covering this situation. The validity of this action is controversial.

The view has been expressed that this procedure is circumventing the rule that reservations

may only be made when expressing consent to be bound. The view has also been expressed that, although highly undesirable, there are no formal rules against such a procedure

9. Role of the depository in the ratification phase

The depository is to receive reservations and declarations made by the State Parties on the occasion of expressing consent to be bound.

The depository has to establish whether a reservation complies with the treaty's rules on reservations (see Articles 19.a and 19.b VCLT). If a reservation is questionable in the light of the treaty's rules on reservations the depository will have to take action in accordance with the VCLT.

The depository will notify reservations and declarations made to the State Parties and to States entitled to sign the treaty.

The depository will receive the objections made to reservations and notify all States Parties of such objections.

IV. Post-Ratification Phase

10. Modification of reservations

Modification of a reservation is acceptable when it restricts the scope of the original reservation. A modification that expands the scope of the original reservation is contrary to the rule that reservations may only be made when expressing consent to be bound (Art. 2.1.d VCLT).

By analogy with Article 20 para. 5 VCLT, a 12 months time limit should be applicable to the (non)acceptance of such modified reservations.

11. Withdrawal of reservations

States may wish to consider the withdrawal of their reservations and interpretative declarations at regular intervals (Article 22.1 VCLT).

12. Withdrawal of objection

In case a reservation (or interpretative declaration) has been withdrawn, States having made an objection to that reservation may withdraw their objection. This may not be required by law, but should be understood as a gesture of courtesy (article 22.2 VCLT).

13. No new reservations may be made after ratification

As reservations may only be made at the time of expressing consent to be bound (Article 2.1.d VCLT states," When signing, ratifying, accepting, approving or acceding to a treaty.."), consequently, reservations may not be made at a later stage. Presumably, the depository has a role with respect to alerting other State Parties to such out-of-time reservations.

14. Establish a domestic mechanism for monitoring subsequent reservations (formulated by other States)

States may wish to establish a domestic "early-warning" mechanism with respect to reservations or declarations made by other States, in order to be able to react in time (Article 20.5 VCLT: "period of twelve months") to such reservations or declarations by formulating objections, or by starting consultations with the State concerned.

On the basis of consultations with other sections of the Ministry of Foreign Affairs, or with other

government departments, a general policy on acceptable and unacceptable reservations and declarations may be established for guidance.

15. (Co-ordinated) action with respect to objections made by other States

States may wish to establish, either individually or in a co-ordinated manner, dialogue with a State that has made a reservation, in order to suggest its reconsideration of a reservation with a view to withdrawing it. Such consultation needs to be undertaken at an early stage in order to remain within the time-limit set by the Vienna Convention if objections need to be made (Article 20.5 VCLT).

16. After ratification of an instrument by a Party, no new reservations may be made by that Party

The rule that reservations may not be made at a later stage (see Article 2.1.d VCLT) puts an obligation on the depository to take the necessary steps once that is the case. The depository should not accept such “late” reservations, and should return them to the author State. Alternatively, the depository could notify other State Parties of such a “late” reservation indicating the controversial nature of such a reservation.

Recently a number of States have started to explore ways around this prohibition, by denouncing a treaty and re-ratifying the same treaty while formulating reservations.

KEY ISSUES REGARDING RESERVATIONS AT THE VARIOUS STAGES OF THE PROCESS OF CONCLUDING TREATIES (NEGOTIATION, SIGNATURE AND RATIFICATION) AND POST-RATIFICATION STAGE

	NEGOTIATION	SIGNATURE	RATIFICATION	POST-RATIFICATION
LEGAL EFFECT	**1. Individually/Co-ordinated** **Formulate appropriate reservation clauses** (Art. 19.a or 19.b; or 19.c)[1] Issues: - Substance of the convention - Anticipated motives for making reservations - Future role of depositaries - Future role of the Parties - "Sunset" provision on reservations (?) - Constitutional rules on treaty-making	**3. Individually** **Decide whether making a reservation on signature is necessary** (Art. 23.2) **4. Individually/Co-ordinated** **Consider the need to object to a reservation made on signature** (Art. 23.2)	**6. Individually** **A. Decide whether there is a (domestic) need for making a reservation** **B. Consider the possibility of making a "proper" interpretative declaration instead** (Art. 2.1.d) **C. Establish that the intended reservation will comply with the convention's rules or with the general law of the treaties** (Art. 19) **7. Individually/Co-ordinated** **Consider the need to object to a reservation previously made by other Parties** (Art. 20.5) **8. Individually** **Denunciation of a treaty and re-ratification with reservations**	**10. Individually** **Modification of reservations** **11. Individually** **Withdrawal of reservation** (Art. 22.1) **12. Individually** **Withdrawal of objection** (Art. 22.2) **13. No new reservations may be made after ratification** (Art. 2.1.d)
POLITICAL ACTION	**2. Individually/Co-ordinated** **Establish a position on a future reservations regime before negotiations**			**14. Individually** **Establish a domestic mechanism for monitoring subsequent reservations** Issues: - Early warning, time limit in Art. 20.5 - Consultations with other sections or ministries - Political reactions with the reserving State **15. Individually/Co-ordinated** **Establish dialogue with a reserving Party in order to suggest reconsideration or withdrawal of the reservations** (Art. 20.5)
ROLE OF THE DEPOSITORIES		**5. Functions** **A. Receive reservations and declaration** **B. Publish reservations** **C. Receive and publish objections to reservations**	**9. Functions** **A. Receive reservations and declarations** **B. Establish whether the reservation complies with the treaty's reservation clause** (Art. 19.a or b) **C. Publish the reservations** **D. Receive and publish the objections made to reservations**	**16. No new reservations may be made after ratification** (Art. 2.1.d)

[1] All articles concern the Vienna Convention on the Law of the Treaties. See Appendix hereafter.

Appendix

Convention on the Law of Treaties[1]

Article 2

Use of terms

For the purposes of the present Convention:

(d) "reservation" means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty; whereby it purports to exclude or to modify the legal effects of certain provisions of the treaty in their application to that State.

Article 19

Formulation of reservations

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

(a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.

Article 20

Acceptance of and objection to reservations

1. A reservation expressly authorised by a treaty does not require any subsequent acceptance by the other contracting States unless the treaty so provides.

2. When it appears from the limited number of the negotiating States and the object and purpose of a treaty that the application of the treaty in its entirety between all the parties is an essential condition of the consent of each one to be bound by the treaty, a reservation requires acceptance by all the parties.

3. When a treaty is a constituent instrument of an international organisation and unless it otherwise provides, a reservation requires the acceptance of the competent organ of that organization.

4. In cases not falling under the preceding paragraphs and unless the treaty otherwise provides:

(a) acceptance by another contracting State of a reservation constitutes the reserving State a party to the treaty in relation to that other State if or when the treaty is in force for those States;

(b) an objection by another contracting State to a reservation does not preclude the entry into force of the treaty as between the

[1] Signed in Vienna on 23 May 1969 UN Doc. A/Conf.39/27. UN Conference on the Law of the Treaties. Official Records. Documents of the Conference (A/Conf.39/11 Add.2) United Nations, New York 1971, pp. 289-301.

objecting and reserving States unless a contrary intention is definitely expressed by the objecting State;

(c) an act expressing a State's consent to be bound by the treaty and containing a reservation is effective as soon as at least one other contracting State has accepted the reservation.

5. For the purposes of paragraphs 2 and 4 and unless the treaty otherwise provides, a reservation is considered to have been accepted by a State if it shall have raised no objection to the reservation by the end of a period of twelve months after it was notified of the reservation or by the date on which it expressed its consent to be bound by the treaty, whichever is later.

Article 21

Legal effects of reservations and of objections to reservations

1. A reservation established with regard to another party in accordance with articles 19, 20 and 23:

(a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) modifies those provisions to the same extent for that other party in its relations with the reserving State.

2. The reservation does not modify the provisions of the treaty for the other parties to the treaty inter se.

3. When a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

Article 22

Withdrawal of reservations and of objections to reservations

1. Unless the treaty otherwise provides, a reservation may be withdrawn at any time and the consent of a State which has accepted the reservation is not required for its withdrawal.

2. Unless the treaty otherwise provides, an objection to a reservation may be withdrawn at any time.

3. Unless the treaty otherwise provides, or it is otherwise agreed:

(a) the withdrawal of a reservation becomes operative in relation to another contracting State only when notice of it has been received by that State; (b) the withdrawal of an objection to a reservation becomes operative only when notice of it has been received by the State which formulated the reservation.

Article 23

Procedure regarding reservations

1. A reservation, an express acceptance of a reservation and an objection to a reservation must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

2. If formulated when signing the treaty subject to ratification, acceptance or approval, a reservation must be formally confirmed by the reserving State when expressing its consent to be bound by the treaty. In such a case the reservation shall be considered as having been made on the date of its confirmation.

3. An express acceptance of, or an objection to, a reservation made previously to confirmation of the reservation does not itself require confirmation.

4. The withdrawal of a reservation or of an objection to a reservation must be formulated in writing.

APPENDIX VI

PRELIMINARY DRAFT AGENDA OF THE 20th MEETING

A. INTRODUCTION

1. Opening of the meeting by the Chairman, Ambassador Dr Hilger
2. Adoption of the agenda
3. Communication by the Director General of Legal Affairs, Mr De Vel

B. ONGOING ACTIVITIES OF THE CAHDI

4. Decisions of the Committee of Ministers concerning the CAHDI
5. The law and practice relating to reservations and interpretative declarations concerning international treaties :
   a. 4th meeting of the Group of Experts on Reservations to International Treaties (DI-E-RIT) Strasbourg, 11 September 2000*
   b. Exchange of views with Professor A. Pellet, Special Rapporteur of the United Nations and member of the International Law Commission*
   c. European Observatory of Reservations to International Treaties
6. Adoption of specific terms of reference for the CAHDI for 2001-2002 and possibly any subordinate group
7. Expression by States of consent to be bound by a treaty
8. Proposal for the setting up of a General Judicial Authority of the Council of Europe

C. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

9. The work of the General Assembly of the United Nations and the Sixth Committee, and the International Law Commission (ILC)
10. The role of depositories: exchange of views with Mr H. Corell, Under Secretary General of the United Nations regarding the practice of the United Nations Secretary General on the deposit of multilateral treaties*
11. Implementation of international instruments protecting the victims of armed conflicts
12. Developments concerning the International Criminal Court: conclusions of the multilateral consultation conference on the implications of the ratification of the Statute of Rome of the International Criminal Court on the internal legal order of member States
13. Implementation and functioning of the Tribunals established by UN Security Council Resolutions 827 (1993) and 955 (1994)
14. Law of the Sea: Protection of Subaquatic Cultural Heritage

15. Developments concerning the preparation of a Charter of Fundamental Rights in the European Union

D. OTHER

16. Election of the Chair or the Chair and the Vice-Chair or of the Vice-Chair of the CAHDI
17. Date, place and agenda of the 21st meeting of the CAHDI
18. Other business
19. Closing

(*) To be confirmed.