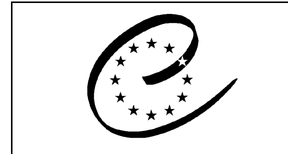

Strasbourg, 02/02/01

CAHDI (2000) 21

AD HOC COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

(CAHDI)

20th meeting
Strasbourg, 12 and 13 September 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 20th meeting in Strasbourg, 12-13 September 2000. The meeting was chaired by Ambassador Dr. R. Hilger (Germany), Chairman of the CAHDI. 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 unanimously as it appears in Appendix II.

3. Communication by the Secretariat

3. Mr Guy De Vel, Director General of Legal Affairs, addressed the Committee. On behalf of the Secretary General, he thanked the German authorities, and in particular Ambassador Hilger, for the perfect organisation, following his kind invitation, of the 19th meeting of the CAHDI and of the DI-E-RIT at the premises of the Federal Ministry of Foreign Affairs of Germany in Berlin last March. He further noted with satisfaction Ambassador Hilger's interest in and commitment to the success of the CAHDI activities.

4. He recalled the key role of the CAHDI in the intergovernmental structure of the Council of Europe which is largely recognised within and outside the Council of Europe.

5. In this connection, he recalled participation at recent meetings of the CAHDI of relevant personalities including the Secretary General of the Council of Europe, the President of the European Court of Human Rights, the President, Vice-President and members of the Bureau of the International Court of Conciliation and Arbitration, as well as a number of important scholars and researchers, which highlights the importance attached to the Committee.

6. In this connection, he also referred to the participation at this meeting of the CAHDI of the Deputy Secretary General of the Council of Europe, Mr Krüger, the Special rapporteur of the International Law Commission of the United Nations (UN) on reservations to international treaties, Professor Pellet, and of the Head of the UN Treaty Section, Mr Kohona.

7. Further to that, he welcomed new representatives and members of the Committee, including Mrs Sola, Mr Horak, Mrs Letho, Mrs Dumpe, Mr Constantin, Mr Rogachev, Mr Lindenmann, Mr Leir, Mr Tellier, Mr Aslanov and Mrs Handizic.

8. He then referred to the activities of the CAHDI and stressed its importance. Regarding the activity on reservations to international treaties, he highlighted the usefulness of Recommendation No. (1999) 13 on responses to inadmissible reservations to international treaties and more recently the adoption of a text on key issues regarding the formulation of reservations to international treaties which is a guide to practice and is likely to prevent problems concerning the formulation of reservations to international treaties which often arise. He also stressed the importance of the European Observatory of Reservations to International Treaties which allows the CAHDI to examine outstanding reservations and declarations to international treaties concluded within and outside the Council of Europe and which has in some instances resulted in a very useful dialogue with the reserving State about the underlying reasons for its reservations, thus fostering understanding and avoiding objections in certain cases and, in others, resulting in the withdrawal or narrowing of the reservation.

9. He also referred to the contribution by the CAHDI to the celebrations of the 50th anniversary of the European Convention on Human Rights, namely the preparation of a report by Professor Meron on the implications of this Convention on the developments of

public international law. This report was discussed at the 19th meeting of the CAHDI and submitted to the Committee of Ministers, the President of the European Court of Human Rights and the President of *The Convention* responsible for the preparation of a Charter of Fundamental Rights of the European Union (EU). Moreover it has met with significant interest in the Council of Europe, the EU and the international community.

10. He referred to the ongoing activity on expression of consent by States to be bound by a treaty. He welcomed the interest of members as well as observers to the CAHDI and the preparation under the aegis of the CAHDI of an analytical report by the British Institute of International and Comparative Law, which illustrate the excellent relations between the CAHDI and the scientific community.

11. He also referred to developments concerning the International Criminal Court. He recalled the organisation by the Council of Europe, following the joint initiative of the CAHDI and of the CDPC, of a multilateral consultation meeting on the implications for the member States of the Council of Europe of the ratification of the Rome Statute in Strasbourg, 16-17 May 2000 and the conclusions adopted by participants therein. This exercise proved extremely useful and the conclusions have received significant attention by governments and international organisations.

12. He then brought to the CAHDI members' attention the topical issues that could be the subject of CAHDI activities in the short term such as, for instance, final clauses of treaties, multiplication of systems for the peaceful settlement of disputes and consequent risk of fragmentation, the position of sub-State entities in public international law and particularly regarding treaty-making, articulation of human rights vis-à-vis international humanitarian law and international criminal law.

13. He expressed the wish that the CAHDI pursue its valuable work for the benefit of member States, observers and the international community.

14. Concerning more generally the Council of Europe, he noted that Armenia, Azerbaijan, Bosnia and Herzegovina, Belarus, Monaco, Federal Republic of Yugoslavia are candidates for accession and the Parliamentary Assembly is considering or will consider their requests. The first three countries mentioned above currently have special guest status with the Parliamentary Assembly while that status was suspended for Belarus. In addition, Canada, Israel and Mexico have observer status with the Parliamentary Assembly. Moreover, five countries have observer status with the Council of Europe: Canada, the Holy See, Japan, Mexico and the United States of America. In addition, the Committee of Ministers has established the criteria for the granting of observer status in the future.

15. There have also been developments regarding the Secretariat structure following the 104th session of the Committee of Ministers in Budapest, 6-7 May 1999, and this has had a considerable impact on the organigram of the Secretariat General including the Directorate General of Legal Affairs. These reforms are currently completed while some questions regarding the status and working conditions of the staff are still pending.

16. 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 covers freedom of expression and information, functioning and protection of democratic institutions including political parties and free elections, the functioning of the judiciary, local democracy, the death penalty, the police and the security forces.

17. As far as the co-operation activities (ADACS programmes) are concerned, they constitute a pillar of the Council of Europe actions and will be pursued at bilateral and multilateral level. In this connection, the Council of Europe attaches particular importance to Kosovo where activities are carried out in co-operation with UN and OSCE. Following Mr Kouchner’s request, the Council of Europe is carrying out several activities in the legal field with a view to eliminating from the legal order applicable in this territory what is incompatible

with the standards of the Council of Europe, regarding in particular the judiciary, civil register and property registers as well as in the preparation of a code of conduct for the police. These projects form part of the Council of Europe's contribution to the Stability Pact for South East Europe in which the Council of Europe is a leader organisation and acts as sponsor of several working tables and task forces including the task force on Good Governance.

18. He referred to the XXIst European Conference of Ministers of Justice on the efficiency of justice, held in London last June. On this occasion several European conventions were signed and ratified by various countries.

19. Regarding the European Treaty Series, he referred to several developments that had occurred since the last meeting of the CAHDI. These can be consulted in the internet site conventions.coe.int set up by the Council of Europe with a view to providing up-to-date information about the state of signature and ratification of the European conventions and the declarations and reservations made thereto. The texts of European conventions and their explanatory reports can be found there as well.

20. In this connection, he recalled the possibility given to States by the Secretary General of the Council of Europe to avail themselves of general full powers which, if allowed by the Constitution of the States concerned, would facilitate the tasks of national delegations as well as of the Secretary General of the Organisation acting as depositary.

21. 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 25 members including Bosnia and Herzegovina and the United States of America. GRECO has already had several meetings and has begun its first evaluation round. Moreover, at its 106th meeting at ministerial level, the Committee of Ministers adopted Recommendation No. R (2000) 10 *on Codes of Conduct for Public* Officials including a *Model Code of Conduct for Public Officials*. With this instrument, the Council of Europe completes the arsenal of international legal texts at the disposal of its member States to combat corruption, including the Criminal Law Convention against Corruption (ETS 173), open for signature on 27 January 1999 which has been signed by over 34 countries and the Civil Law Convention against Corruption (ETS 174) open for signature on 4 November 1999 and so far signed by over 14 States.

22. 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 23 member States and ratified by 6. As a result, it entered into force on 1 December 1999. The protocol to this convention on the prohibition of cloning human beings (ETS 168) has been signed by 25 States and ratified by 4.

23. Mr De Vel highlighted the dynamism of the CAHDI activities and membership, which is illustrated by a growing number of observers. In this connection, he referred to the recent request by the *Ligue Internationale contre le Racisme et l'Antisémitisme* (LICRA) to be admitted as observer and noted that the decision that the CAHDI would be taking in this respect would have significant consequences for the future operation of the Committee as an intergovernmental committee (see item 17 below). The CAHDI dynamism is also illustrated by a growing number of requests for the CAHDI's opinion. In this connection, he recalled the request by the Committee of Ministers for the CAHDI's opinion on Parliamentary Assembly Recommendation 1458 (2000) *Towards A Uniform Interpretation of Council of Europe Conventions: Creation of a General Judicial Authority* and the report relating thereto, which support the Czech proposal to the Committee of Ministers for the possible establishment of a General Judicial Authority in the Council of Europe. He noted that the CAHDI had decided to consider this proposal at its own motion but at its last meeting decided to postpone the item pending the imminent adoption by the Parliamentary Assembly of a report.

24. He concluded by encouraging members of the CAHDI to pursue their excellent work 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. He highlighted the significant challenges put before the CAHDI. The response of the CAHDI will satisfy the ever-pressing need of the international community for peace and stability.

25. 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 stressed the importance of the Council of Europe's activities in the legal field and welcomed the Secretariat General's satisfaction and the general appreciation of the CAHDI's activities.

B. ONGOING ACTIVITIES OF THE CAHDI

4. Decisions by the Committee of Ministers concerning the CAHDI

26. The Secretariat called the attention of the CAHDI to Resolution (2000) 2 of the Committee of Ministers regarding the Council of Europe's information strategy and informed members of the Committee of the instructions given by the Committee of Ministers relating thereto.

5. The law and practice relating to reservations and interpretative declarations concerning international treaties

27. The Chairman of the Group of Experts on Reservations to International Treaties (DI-E-RIT), Ambassador Magnuson, referred to the 3rd meeting of the Group held in Berlin, 10 March 2000, and the work carried out on this occasion[1]. Further to that, he noted that members of the Group had agreed that in the future the functions of the European Observatory of Reservations to International Treaties should be carried out by CAHDI directly, the DI-E-RIT's assistance no longer being indispensable and that therefore the DI-E-RIT should not pursue its work as a separate committee.

28. The CAHDI agreed to this suggestion and the Chairman thanked Ambassador Magnuson and the members of the DI-E-RIT for their excellent work and paid tribute to the contribution made by Ambassador Cede, former Chairman of the DI-E-RIT, to this work.

a. Exchange of views with Professor A. Pellet, Special Rapporteur of the United Nations and member of the International Law Commission

29. The Chairman of the CAHDI welcomed Professor Pellet and thanked him for agreeing to participate in the meeting. Furthermore, he stressed the importance of Professor Pellet's work and of the significant role of the International Law Commission (ILC). Finally he welcomed the consolidation of co-operation between the ILC and the CAHDI illustrated by the regular participation of ILC members in the meetings of the CAHDI and the participation of the Secretary of the CAHDI in the sessions of the ILC.

30. Professor Pellet thanked the Chairman for his invitation to the meeting and said he was very honoured to be present. He stressed that it was important for an ILC special rapporteur to see that its work meets with the interest of States. Further to that he stated that he was very worried about the lack of interest and support that ILC has from Governments as shown in the Sixth Committee of the United Nations General Assembly, which has no

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[1] See draft meeting report, document DI-E-RIT (2000) 2.

clear position about new subjects to be considered by the ILC or reports already prepared by the ILC.

31. He was comforted by the interest that the ILC activity on reservations to international treaties has received from States and from the CAHDI in particular. In this respect, he welcomed the adoption by the Committee of Ministers of the Council of Europe of Recommendation No. (99) 13 on *responses to inadmissible reservations to international treaties* which was prepared by the CAHDI and that provided practical solutions and valuable indications about issues of concern to the States in this area. He took note of this text and noted that he would draw inspiration from it in due course.

32. He also welcomed the preparation by Professor Meron at the request of the CAHDI of a very interesting report[2] as a contribution of the CAHDI to the celebrations of the 50th anniversary of the European Convention on Human Rights. In this connection, he stated that he did not share the thrust of General Commentary 24[3] of the UN Committee on Human Rights and stressed that this approach should not be fostered.

33. Further to that he referred to his 5th report on reservations to international treaties submitted to the ILC. This report takes stock of recent developments in the field of reservations to international treaties. He noted that the UN Sub-Committee on Human Rights has asked its British member to prepare a report regarding reservations to international treaties in the field of human rights and questioned the use of such an initiative with the consequent risk of overlapping with the ILC work, but he stated that the ILC was willing to co-operate with this Sub-Committee if they were to pursue this work.

34. The 5th report contained two parts. The first one (in Addendum 1) deals with alternatives to reservations to international treaties and aims at exploring means other than reservations to achieve the same result for political or technical reasons. He acknowledged that these alternatives existed as a matter of fact. He stressed that a position should be taken on whether *opting out* clauses are reservations to international treaties or not. In his view they are reservations while *opting in* clauses are not. He noted that the ILC had followed his position and adopted the first chapter of the Guide of Practice on reservations to international treaties. He noted that his draft appears in Addendum 2 to the fifth report and the final text is included in the report of the ILC.

35. The second part deals with the procedure relating to reservations to international treaties and interpretative declarations, which includes 2 chapters. The second chapter deals with dialogue –an alternative fostered by the CAHDI- and shows that there are solutions other than the acceptance or refusal by objection. He stressed that dialogue is therefore extremely advisable. He noted that he could not present this part of his report at the last ILC session and that he could only introduce the first part of the first chapter of the report concerning the moment of formulating reservations to international treaties, contained in addenda 3 and 4.

36. Professor Pellet admitted that some delegations are worried about the slow pace that the ILC is following in carrying out the activity. In this connection, he noted that the ILC priority for this session was to complete the subject of State liability on which it concentrated, postponing consideration of other items such as reservations to international treaties.

37. Moreover, he recognised that when he undertook the task of special rapporteur on reservations to international treaties he thought it would be an easy one but it turned out that it was extremely complex from the political, theoretical and practical points of view. He was therefore unable to move faster because of the complexity of the subject, the working methods of the ILC and the lack of an assistant.

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[2] *The Implications of the European Convention of Human Rights for the Development of Public International* Law. Council of Europe Publishing – June 2000. ISBN 92-871-4290-4. Also available in French.

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

38. Regarding the follow-up to his work, Professor Pellet informed the members of the CAHDI that during next year he would be focusing on the "licéité" (lawfulness) of reservations to international treaties, which is at the basis of the question of their admissibility, the core of the subject where he has no *a priori*. However, he recognised that it is unlikely that the ILC will be able to complete this item at its next session.

39. The Chairman noted that in his view the *Strasbourg approach* (cf. Human Rights Committee General Commentary No. 24) cannot be pursued at universal level. Moreover, he welcomed the inclusion by Professor Pellet of a reference to dialogue, a practice which has been regularly encouraged by the CAHDI and which is reflected by the CAHDI consultation process which takes place in the context of the CAHDI's operation as European Observatory of Reservations to International Treaties.

40. Although the delegate of Sweden expressed the wish that Professor Pellet could move forward faster in his work, he agreed that the subject of reservations to international treaties was a complex one and that preparing guidelines was therefore a difficult task, particularly regarding chapter V. In this respect, he recognised that the Vienna Convention on the Law of the Treaties does not always give appropriate answers.

41. Furthermore he referred to addendum 4 to Professor Pellet's fifth report which raised the difficulties resulting from the depositary practice of the UN Secretary-General, namely whether late reservations are allowed and what their content can be. He welcomed the fact that Professor Pellet was dealing with these issues and encouraged him to pursue further consideration of these difficult and hard core questions.

42. The delegate of France observed that the ILC had devoted considerable efforts to providing clear definitions and stressed that this will facilitate the ILC work with a view to dealing with the regime of reservations to international treaties since both aspects are closely connected. He therefore did not consent that the ILC was moving too slowly in its work in this area.

43. However he expressed doubts regarding the possibility of formulating late reservations to international treaties. Contrary to the case of interpretative declarations, which can be formulated at a later stage, late reservation are problematic and their admission would provide a wrong signal about the extent of the State commitment. Such a practice is regrettable and would increase the risk of a multiplication of late reservations under the heading declarations. He observed that Professor Pellet had not dealt with this issue in his fifth but in his fourth report.

44. The delegate of Germany reiterated his country's wish, expressed at the last meeting of the 6th committee, that the ILC move further and deal with substantive issues connected with reservations to international treaties, such as legality, permissibility, severability, etc. Regarding Professor Pellet's fifth report, he recognised that it deals with more substantial issues. He regretted that due to its heavy agenda the ILC could not concentrate so much on reservations to international treaties and encouraged Professor Pellet to pursue his work which has been significantly advanced by the fact that the ILC has already adopted some draft guidelines.

45. The delegate of the United Kingdom stressed that reservations to international treaties is an important practical question which affects States in their everyday life. He also encouraged Professor Pellet to move further and expressed his hope that next year he will be able to deal with the issue of admissibility of reservations to international treaties.

46. Professor Pellet thanked delegations for their comments and stressed that in his views definitions are part of the substantial issues. He agreed that reservations to international treaties are a practical subject but stressed that they require also a theoretical approach. Regarding interpretative declarations, interpretation of the Treaty should always be possible –this is what the ILC calls *interpretative declarations of a simple nature*- and that *conditional* interpretative declarations should only be possible at the time of expressing

consent. Moreover, he expressed doubts about the correctness of the Strasbourg approach and concluded by regretting the fact that the European Commission had not replied to the ILC questionnaire on reservations to international treaties.

47. The representative of the European Commission noted that the European Community is not a member of the UN but took note that it should have provided a reply and would report to his authorities.

b. European Observatory of Reservations to International Treaties

48. In the context of its operation as European Observatory of Reservations to International Treaties, the CAHDI undertook the examination of outstanding reservations and declarations to international treaties on the basis of the document prepared by the Secretariat[4]. The Secretariat was asked to include in future lists of outstanding declarations and reservations to international treaties to be considered by the CAHDI, the reservations regime of the conventions concerned.

49. The delegate of France referred to the reservation or declaration of 3 April 2000 by Slovakia, to the convention relating to the status of stateless persons (1954)[5] and asked about the underlying reasons for this reservation which may be incompatible with the object and purpose of the Convention. Moreover, he called the attention of the members of the CAHDI to the fact that the term *declaration* was used although the text constitutes a reservation, particularly in view of its formulation.

50. The delegate of Slovakia noted that his government considers this to be a declaration and that it was requested by the Ministry of Interior with a view to ensuring that a person should always go through a domestic procedure in order to have an identity card. The domestic procedure is intended to serve as control because a residence permit will allow the person to have an ID.

51. The declaration merely states the requirement to conform to an internal procedure. It does not aim at excluding the application of article 27 of the convention but to spell out that obtaining travelling documents requires going though certain procedures as it would be impossible to deliver travelling documents without a valid identity card.

52. The Chairman referred to the communications relating to Macau of 19 October by China to the Vienna Convention for the Protection of the Ozone Layer (1985) and to its Montreal Protocol of 1987 and noted that they follow the model used on the occasion of the transfer of sovereignty over Hong Kong and do not appear to be problematic.

53. The delegate of Ukraine referred to the communication of 10 July 2000 concerning their reservation to the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and noted that it was intended to correct errors of transmission and that the substance of their reservation remained unchanged and the deadline for reaction was still standing.

54. The delegate of France referred to the reservation or declaration of 20 June 2000 by Georgia to the European Convention for the Prevention of Torture and Inhuman or Degradating Punishment or Treatment (1987)[6] and noted that in his view it constituted a territorial exclusion declaration due to political reasons. In view of the fact that according to

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[4] Document CAHDI (2000) 16.

[5] *Declaration: The Slovak Republic shall not be bound by Article 27 to that effect it shall issue identity papers to any stateless person that is not in possession of a valid travel document. The Slovak Republic shall issue identity papers only to the stateless persons present on the territory of the Slovak Republic who have been granted long-term or permanent resident status.*

[6] *Georgia declares that it will not be responsible for violations of the provisions of the Convention and the safety of the members of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment on the territories of Abkhazia and the Tskhinval region until the territorial integrity of Georgia is restored and full and effective control over these territories is exercised by the legitimate authorities.*

Article 21 of this Convention reservations are not possible, it is essential to know whether the text constitutes a reservation or a declaration. If it was to be considered a reservation it would not be allowed even if called a declaration.

55. In this connection, the delegate of Germany observed that, regardless of the title given to the text, in view of its wording his delegation had some doubts, particularly due to the fact that it concerned a treaty which is at the heart of values that the Council of Europe stands for.

56. The delegate of Georgia noted that they expected such a reaction from delegations. They consider the text to be a declaration because they do not exclude any part of the territory from the application of the Convention although they do not exercise effective control of it. They therefore cannot guarantee that the Convention is enforced or applied in these areas because the Central Government cannot be responsible for what it cannot do. In this connection, they would welcome monitoring presence.

57. The Chairman called upon members of the CAHDI to engage in a dialogue in this respect and suggested that the declaration should refer to actions by forces which are not under the control of the Georgian Government.

58. The delegate of Sweden referred to the reservation or declaration of 26 June 2000 by Azerbaijan to the Framework Convention for the Protection of National Minorities (1995)[7] and asked whether the text constituted a declaration or a reservation.

59. The observer of Azerbaijan noted that it was a declaration.

60. The Secretariat observed that the Convention does not contain any provisions on reservations, therefore the general reservations regime of the Vienna Convention applied. The text communicated by Azerbaijan is *verbatim* the text of one of the provisions of the Convention, therefore it should not in principle raise any problem.

61. In this connection, the Chairman noted that Azerbaijan is highlighting a particular provision of the Convention in view of the political situation.

62. The delegate of Germany referred to the reservation or declaration of 30 November 1999 by Moldova to the European Convention on Nationality (1997)[8] and stressed that as a matter of principle States should make the necessary internal legal adaptations before expressing their consent to be bound by a treaty.

63. In this connection, the delegate of France referred to paragraph 3 of the Moldovan text and stated that it was not in conformity with the treaty which leaves no margins of appreciation but provides an obligation.

64. The delegate of Moldova noted that there is no legislation on refugees in Moldova and a new law on citizenship was adopted only recently. The declaration in paragraph 3 is made in

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[7] *The Republic of Azerbaijan, confirming its adherence to the universal values and respecting human rights and fundamental freedoms, declares that the ratification of the Framework Convention for the Protection of National Minorities and implementation of its provisions do not imply any right to engage in any activity violating the territorial integrity and sovereignty, or internal and international security of the Republic of Azerbaijan.*

[8] *1. Concerning the application of Article 6, paragraph 4, lit. (g), the Republic of Moldova declares that it will be able to apply it only after the adoption of the proper legal framework for the definition of the refugees statute in the Republic of Moldova, but no later than one year after the entry into force of the Convention for the Republic of Moldova.*

2. Concerning Article 7, paragraph 1, lit. (g), the Republic of Moldova reserves its right to recognise the right to keep the nationality of the Republic of Moldova to a child who has the nationality of the Republic of Moldova, was adopted abroad and acquired the foreign nationality as a consequence of his or her adoption.

3. Concerning Article 22, lit. (a), the Republic of Moldova reserves its right to recognise that a person who has his habitual residence on the territory of the Republic of Moldova and has been exempted from his military obligations in relation to one State Party is not deemed having fulfilled his military obligations in relation to the Republic of Moldova.

4. Concerning Article 22, lit. (b), the Republic of Moldova declares that in the Republic of Moldova the age referred in Article 22, lit. (b) is considered to be the completion of the age of 27.

view of this fact and because the age and residence questions regarding military service have not been decided on pending the adoption of legislation.

65. The Chairman called upon delegations to pursue a dialogue with Moldova in respect of this declaration or reservation.

6. Expression of consent by States to be bound by a treaty

66. The CAHDI considered a draft report on expression of consent by States to be bound by a treaty including an analytical report prepared by the British Institute of International and Comparative Law on the basis of the replies provided by delegations as well as national reports provided by delegations.

67. The CAHDI thanked the British institute for its thorough comparative work. Several delegations including Belgium, France, Greece, Liechtenstein, Netherlands, Slovak Republic, Sweden and Ukraine indicated that they would be providing comments and amendments to the analytical report and/or to the country reports they had provided earlier on and called upon the authors of the analytical report to be extremely careful in interpreting constitutional law provisions.

68. The observer of the OECD called the attention of the authors of the analytical report to the section on reservations that states that “reservations can generally be made at any time”.

69. The Chairman asked delegations to provide the Secretariat with any comments before 15 October 2000. The comments would then be submitted to the authors of the analytical report for consideration.

70. The CAHDI agreed that a revised version of the analytical and country reports would be submitted to the CAHDI with a view to authorising its publication at the next meeting of the CAHDI.

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

71. The Chairman recalled that the CAHDI had decided to consider this item on its own initiative at its 19th meeting in Berlin, 13-14 March 2000, and that on this occasion the CAHDI had decided to postpone consideration of the item pending the adoption by the Parliamentary Assembly of a recommendation and a report on the subject.

72. Further to that, the Secretariat informed the members of the CAHDI that at its 707th meeting (Strasbourg, 26 April 2000), the Committee of Ministers had given terms of reference to the CAHDI and asked the Committee to give an opinion on the Council of Europe’s Parliamentary Assembly Recommendation 1458 (2000) *Towards A Uniform Interpretation of Council of Europe Conventions: Creation of a General Judicial Authority*[9].

73. Therefore, members of the CAHDI were asked to consider the Czech Proposal for the setting up of a General Judicial Authority of the Council of Europe in the light of the terms of reference given by the Committee of Ministers in relation to the Parliamentary Assembly recommendation.

74. The Chairman thanked the Czech delegation for their proposal and asked it to advise the Committee about the underlying reasons.

75. The Czech delegate noted that in its recommendation the Parliamentary Assembly supported the Czech proposal for the setting up of a “general judicial authority” of the Council of Europe and recommended that the Committee of Ministers set up such an authority, which would provide the mechanism for the uniform interpretation of Council of

[9] See decision No. CM/751/26042000.

Europe treaties starting with those still to be concluded and with a selected number of the existing conventions and which should have a number of competencies[10].

76. He observed that there were both legal and political reasons for the Czech proposal. He recalled that article 3 of the Statute of the Council of Europe provides that "Every member of the Council of Europe must accept the principles of the rule of law". The rule of law implies the existence of a jurisdiction to guarantee uniform interpretation of law. In as far as Council of Europe conventions are concerned, the setting up of such a general judicial authority as suggested by the Parliamentary Assembly would guarantee a uniform interpretation, which so far only exists in the case of the European Convention on Human Rights.

77. In addition to the legal reasons, he stressed that there was political support for the setting up of such an authority. Since the 1960s three recommendations of the Parliamentary Assembly, as well as the report of the Wise Persons Committee, have supported the search for a means of ensuring the uniform interpretation of Council of Europe international instruments, in view of the fact that very few of them provide for a control mechanism solution to such a situation. Parliamentary Assembly Recommendation 1458 (2000) now provides the political support on the part of parliamentarians to move forward in that direction.

78. He stressed that the general authority that the Council of Europe should establish should therefore be of a judicial nature. Two possibilities then appeared: to set up a new authority altogether or extend the competencies of the European Court of Human Rights (ECHR). His delegation would favour the second option as the ECHR could ensure these functions given its prestige and authority and the fact that it regularly applies public international law. Moreover, this solution would have low cost and a limited impact on the ECHR's workload.

79. Furthermore, he noted that a draft agreement in this respect had been prepared already in Parliamentary Assembly Recommendation 231 (60).

80. He admitted that there was some reticence by judges but overall the ECHR was willing to accept these new tasks. He also referred to the psychological barrier that governments are facing in this respect but observed that this barrier already existed when the ECHR began to function and it took the Court more than ten years to adopt its first decision.

81. With the decision by the European Council of the European Union to prepare a EU charter of fundamental rights (see item 16 below) there is a real risk of fragmentation in the interpretation of human rights and the need to ensure uniform interpretation of Council of Europe treaties is all the more acute.

82. He concluded by stressing that the Czech initiative supported by the Parliamentary Assembly is not an academic exercise but a response to a real political and legal need that the Council of Europe is facing.

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[10] Para. 9 of Parliamentary Assembly Recommendation 1458 (2000) *Towards A Uniform Interpretation of Council of Europe Conventions: Creation of a General Judicial Authority:*

> *For these reasons the Assembly recommends that the Committee of Ministers set up a "general judicial authority" of the Council of Europe which would provide the mechanism for the uniform interpretation of Council of Europe treaties starting with those still to be concluded and with a selected number of the existing conventions. The competencies of the "general judicial authority" would be three-fold:*
>
> *i. to give binding opinions on the interpretation and application of Council of Europe conventions at the request of one or several member states or at the request of the Committee of Ministers or of the Parliamentary Assembly;*
>
> *ii. to give non-binding opinions at the request of one or several member states or of one of the two organs of the Council of Europe;*
>
> *iii. to make preliminary rulings, at the request of a national court, on lines similar to those of Article 177 of the Rome Treaty of 1956 establishing the European Economic Community.*

83. The delegate of the Slovak Republic stressed that in his view it was not clear whether opposition from governments was to the idea of providing a means for uniform interpretation of Council of Europe conventions or to the setting up of a new institution in the context of the Organisation. He supported the establishment of a uniform interpretation mechanism which would take into account domestic circumstances and would also support allocating that competence to the ECHR. However, he noted a practical difficulty in as far as parties to some Council of Europe conventions are required by virtue of these instruments to submit reports regarding the application of the convention and that often implies interpretation of the convention provisions.

84. The delegate of Portugal stated that the setting up of such an authority would change significantly the operation of the Council of Europe as a whole. She stressed that this was more a political issue than a legal one. However, she recognised that the existence of an authority with power to interpret all other conventions could perhaps increase the visibility of the organisation as a whole.

85. The delegate of the United Kingdom stressed that he was unconvinced about the demonstrable need for such a general authority, which would have various inconveniences as it would cut across existing systems for peaceful settlement of disputes and would ignore the fact that the International Court of Justice is competent to solve disputes arising from Council of Europe treaties as well.

86. Moreover, a number of Council of Europe conventions have conventional committees to consider also questions arising out of these conventions including interpretation. These committees have operated well and in a sensible manner. They are not judicial systems but they have utilised the system of public international law, namely its flexibility. In addition, some other conventions of the Council of Europe provide even more judicial systems for settling disputes. In any event, the authors of all these conventions did not wish to provide any other system of interpretation and if there would be need to change that system protocols could be adopted.

87. He stressed that the implementation of Parliamentary Assembly recommendations or any such proposals would need additional resources and declared his delegation was not sure that it was sensible to devote the time and resources of the Council of Europe to this project.

88. He concluded by declaring that they would not support allocating new competencies to the ECHR or any other body such as the Venice Commission given that these bodies have their own competencies and concentrate on a certain type of issue and are not exclusively staffed by public international lawyers.

89. The delegate of Austria noted two practical reservations concerning the implementation of the Parliamentary Assembly recommendation. He referred to the exchange of views that the CAHDI held at its 19th meeting (Berlin, 6-7 March 2000) with the President and Vice-President of the International Court of Conciliation and Arbitration and recalled their call to Governments to make use of this court. He noted that this illustrated the fact that States wonder about the real need for new institutions even if they are attached to already existing ones.

90. In as far as allocating the general interpretative competence to the ECHR he questioned whether it would really add little to the ECHR's workload and noted that if that was the case, its usefulness would be limited and if that was not the case, the ECHR could not possibly deal with the new workload.

91. He concluded by stressing that the reluctance of States to carry out this proposal is too important.

92. The delegate of Greece shared the rationale behind the Czech proposal. However, she recalled the existence of the European Convention for Peaceful Settlement of Disputes

which could provide a response to the need to ensure uniform interpretation if that need existed and if necessary protocols could be concluded. Moreover, she stressed that if conventions did not provide for a system of uniform interpretation it was because parties did not want to have such system.

93. Further to that she noted that if Governments wished to have a uniform system of interpretation of European conventions the establishment of a new court would be required. She would not support assigning the competence to the ECHR for practical reasons and because it would be called upon to give opinions on very different issues where it has no expertise.

94. The representative of the European Commission observed that the Czech proposal seems to combine two different jurisdictions: *inter-State cases* and *preliminary rulings*, which are quite different hypotheses. He wondered about the legal need to set up such a general authority given that there are no links between most Council of Europe conventions and that the only recurrent issues concern questions such as entry into force or accession.

95. He also questioned the need for preliminary rulings which would result in bringing the Council of Europe system into domestic legal orders with the consequent problems of constitutional law. In this respect, he noted that the European Community is party to a number of European conventions and that in the EU context only the Court of Justice of the European Communities is competent to give preliminary rulings. The implementation of the Parliamentary Assembly recommendation would therefore have also significant implications for European Community law.

96. The delegate of Spain highlighted the fundamental problems resulting from the implementation of the Czech proposal and the Parliamentary Assembly recommendation. He stressed that the European human rights systems including the system established by the European Convention on Human Rights have their own justification and that other European conventions either have their own conventional mechanisms or simply form part of the system of public international law.

97. He express his concern about the fact of receiving specific terms of reference from the Committee of Ministers to give an opinion as a committee given that the CAHDI could only have an exchange of views but not come to a single opinion.

98. The delegate of Sweden supported the interventions by the United Kingdom, Austria, Greece and Spain and stressed that he failed to see the need for a general authority in the Council of Europe. He recalled that there were different types of conventions in the Council of Europe and that their diversity is such that not all of them allow for applying the notion of impartial justice. Moreover, as it was said before, some European conventions have conventional committees that carry out a similar job. He therefore supported the Spanish position that a simple opinion could not be reached.

99. The delegate of France also stated that his delegation was not convinced of the need or usefulness of a new judicial authority and warned about the current proliferation of judicial authorities which lead to fragmentation. In the Council of Europe context such an authority was not necessary or useful given the diversity of the European conventions and their few points in common which result in a lack of unity and coherence among these conventions as a matter of fact. These conventions are autonomous regarding the member states and the control mechanisms. Moreover it is important to preserve their relative character.

100. Further to that, he referred to paragraph 9. i) of Parliamentary Assembly Recommendation 1458 (2000) which recommends that the new instance would have the competence “to give binding opinions on the interpretation and application of Council of Europe conventions at the request of one or several member states” but does not specify whether they need to be party to the convention in question and noted that this was a delicate question.

101. The delegate of Finland referred to paragraphs 56-58 of the report of the Parliamentary Assembly[11] and noted that they raised difficulties. He stressed that there was no demonstrated need for such an authority and that the setting up of such a body would create serious difficulties, some of a constitutional nature. Therefore he supports the interventions by prior speakers.

102. The Chairman concluded that it was unlikely that the CAHDI could adopt a single opinion reflecting the position of the Committee as a whole. He recalled that a political process regarding the Parliamentary Assembly recommendation was under way and that it would be useful for the Committee of Ministers to have arguments in favour and against the implementation of such a recommendation. Therefore, he instructed the Secretariat to prepare a draft in pursuance of the terms of reference given by the Committee of Ministers. This text would not represent a single position of the Committee but would provide the main arguments put forward for and against the implementation of the Parliamentary Assembly recommendation. The draft would be circulated to the delegations for comments with a view to approval by written procedure. On the basis of the comments received and in accordance with the Chairman's instructions, if the draft met with opposition from delegations, the Secretariat would inform the Committee of Ministers, request an extension of the terms of reference - due to expire on 31 December 2000 - and include the item on the agenda for the 21st meeting of the CAHDI to be held in March 2001. If the draft met with delegations' agreement, the Secretariat would submit it to the Committee of Ministers[12].

103. The draft was approved by written procedure as it appears in Appendix III.

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[11] Report *Towards a uniform interpretation of Council of Europe conventions: creation of a General Judicial Authority*, Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe, Strasbourg, 14 March 2000. Doc. 8662.

> *56. In its Recommendation 1361 (1998) our Assembly proposed a real system of co-decision on Council of Europe conventions between the Committee of Ministers and the Assembly. Thus both main organs of the Council of Europe would be able to play fully their legislative roles. In respect of the uniform interpretation of Council of Europe treaties it is also in need of a clear, transparent and independent body which can give legal decisions on the interpretation and application of Council of Europe conventions. Here the Council of Europe – which is so heavily insisting on the respect of pluralist democracy, the rule of the law and the separation of powers in its member states – should not accept a watered-down solution which would dishonour its own principles. The proposal made by the Czech government is therefore to be warmly welcomed and a general judicial authority of the Council of Europe should be set up. This could be done in two ways. A first solution might be to set up a new Council of Europe body, another would be to ask the European Court of Human Rights to perform this task. There are good reasons for both solutions and this report does not give any preference in this respect.*
>
> *57. Having said this one should, however, add that, when speaking of a general judicial authority of the Council of Europe – one should not immediately think of a huge new institution to be added to the existing structures of the Organisation. On the contrary! The general judicial authority could easily be set up on an ad hoc basis with judges or members elected by the Assembly on the proposal of the Committee of Ministers who would only meet in Strasbourg when there was necessity to do so. At the beginning at least the conflicts on the interpretation of our conventions are likely to be rare, not exceeding one or two a year. After consulting the Secretary of the Committee on Legal Affairs and Human Rights, he thought that it might take him not more than a third of his time to assure the Secretariat of such a body – at least at the beginning.*
>
> *58. On the other hand, a general judicial authority of the Council of Europe in such a modest form would certainly not make redundant any of the existing Council of Europe steering committees or any of the conventional committees, but could reduce their workload enabling them to meet less or for shorter periods of time in Strasbourg. For conventions to be concluded it may in some cases no longer be necessary to provide for any special conventional committees. Thus a considerable amount of savings could be made which would easily compensate the minimal costs of a general judicial authority as described above.*

[12] Following the Chairman's instructions, the Secretariat prepared a draft which was circulated to delegations on 6 November 2000. No delegation expressed comments against the draft. The Secretariat therefore, considered the draft approved by written procedure.

8. Discussion on possible new activities

104. The Chairman noted that although the CAHDI would continue to function as European Observatory of Reservations to International Treaties, the activity on reservations to international treaties carried out with the assistance of the DI-E-RIT had been terminated with the adoption of Recommendation (1999) 13 and invited delegations to submit proposals for core subjects that could be included in the programme of activities of the CAHDI. He referred to some proposals made by the Secretariat, including: federated and regional entities and treaty-making, articulation between international humanitarian law-human rights-international criminal law, peaceful settlement of disputes, final clauses of treaties, etc.

105. The delegate of Norway noted that there is significant confusion regarding the use of terms in the context of human rights instruments. He therefore stressed that it would be useful if some time could be devoted to this matter and in particular to considering where the various bodies of international law (protection of human rights, international humanitarian law and international criminal justice) overlap, what their links are, and provide some uniform terminology.

106. The observer of Israel called the attention of the CAHDI to the question of universal jurisdiction with respect to gross violations of human rights which has become a topical issue, particularly since the *Pinochet case*. He noted that several academic and research institutes are currently dealing with this matter. He invited the CAHDI to carry out an activity in this field by comparing national legislation relating thereto.

107. The Chairman thanked the delegations of Norway and Israel for their proposals and invited all delegations to come back to this issue at its next meeting while stressing the need to identify one or several core subjects that the CAHDI could consider as from next year. In this respect, he noted that the CAHDI is open to political developments, the international law aspects of which are regularly considered by the Committee.

9. Adoption of the draft specific terms of reference of the CAHDI for 2001-2002 and possibly of any subordinate group

108. The Chairman referred to the draft specific terms of reference of the CAHDI for 2001-2002 prepared by the Secretariat[13].

109. These draft specific terms of reference were approved unanimously by the CAHDI as they appear in Appendix IV and were submitted to the Committee of Ministers for adoption.

C. GENERAL ISSUES ON PUBLIC INTERNATIONAL LAW

10. The work of the Sixth Commission of the General Assembly of United Nations and of the International Law Commission (ILC)

110. The Chairman referred to the provisional version of the Report of the 52nd session of the International Law Commission, obtained thanks to the co-operation between the Secretariat of the CAHDI and the ILC. Moreover, he referred to the report prepared for the attention of the CAHDI by Professor B. Simma, member of the ILC, on the work of the International Law Commission at its 52nd Session.

111. The delegate of Sweden asked the Chairman to convey the gratitude of the Committee to Professor Simma for his useful report.

112. The Vice-Chairman, who was also Vice-Chairman of the ILC, reported on the state of implementation of the ILC work programme. In 2001 is expected that the ILC will finalise the activity on *State responsibility* and the preparation of a draft convention on *State intervention*,

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[13] Document CAHDI (2000) 17.

while the activities on *Diplomatic protection* and *Unilateral acts of States* are still in a preliminary stage.

113. Regarding State responsibility the delegate of the United Kingdom drew the CAHDI's attention to the questions *serious breaches* and *countermeasures* which require careful attention.

114. In this connection, the delegate of France noted that State responsibility had been the key topic of the 2000 ILC session and that, in his view, developments went in the right direction. He noted that the Special rapporteur draws a distinction between *Etats lésés* and *States with a legal interest*, which they consider to be correct. Regarding *countermeasures* they are dealt with separately; they should, however, be included in the general frame. Finally, regarding *crimes* he stressed that it was not enough to replace this term by another and called for careful consideration.

11. The role of depositary : Exchange of views with Mr. Palitha Kohona, Chief of the Treaty Section of the United Nations regarding the practice of the United Nations Secretary General on the deposit of multilateral treaties

115. The Chairman welcome Mr Kohona and thanked him for accepting the invitation to hold an exchange of views with the members of the CAHDI regarding the practice of the United Nations Secretary General on the deposit of multilateral treaties.

116. Mr Kohona stressed how pleased he was to attend the meeting and conveyed the best wishes of the UN legal counsel, Mr Correll.

117. Regarding the UN Secretary-General's practice as depositary (the depositary), he noted that the Vienna Convention on the Law of the Treaties is not exhaustive relating to the practice of the depositary. Moreover, times and needs have changed following political developments which posed a challenge to the depositary itself. At the level of the UN, the depositary has been generally conservative but has also taken into account current, namely: maintaining certainty and integrity of the law.

118. With regard to the acceptance of reservations after a specified time, the depositary accepts reservations after accession to or ratification of the treaty and circulates them to the parties. This practice has existed for a number of years and has never been challenged by parties. Originally the depositary would give parties a three-month deadline for reacting. As a result of this practice, States would in some cases withdraw or partially withdraw their original reservations; yet, in certain cases, the situation has been ambiguous and the depositary was therefore not able to ascertain whether there was indeed a partial withdrawal or an extension of the original reservation.

119. Two basic situations could be identified as a result of this state of affairs: formulation of late reservations and partial withdrawal of a prior reservation.

120. In the first case, a State would formulate a late reservation, the depositary would accept it and circulate it to the parties which were given three months to react, in the absence of reaction, the reservation was deemed accepted for deposit.

121. In the second case, a State would proceed to a partial withdrawal of an original reservation. This raised doubts and practical problems.

122. Regarding the three-month deadline for reaction, it was not enough since the period was counted as from the date of the letter of notification and in some instances there were long delays before this letter would reach the parties. The depositary has taken measures to correct this situation and ensure that notifications reach missions to the UN within twenty-four hours from the date indicated in the letter of notification. Moreover, the deadline for objection has been extended from three to twelve months from the date indicated in the letter of notification. This extension of the deadline for reaction takes into account the fact that parties may wish to consult with each other and that there are generally more parties to treaties.

123. He then referred to instances where the depositary has played a proactive role taking into account current circumstances, such as for instance the denunciation by Trinidad and Tobago of the Optional Protocol to the UN International Covenant of Civil and Political Rights and reaccession the same day with reservations. In this particular case, the country explained to the depositary the underlying reasons for the formulation of a reservation and they seemed sensible. The UN Human Rights Committee discussed the reservation in question and decided to disregard it. As a result, Trinidad and Tobago decided to denounce and not re-accede to the ICCPR. The depositary then entered into a dialogue with this country in order to persuade it not to denounce the ICCPR but did not succeed.

124. Similarly, in the case of the communication by China of 19 October 1999 in relation to Macao regarding the Vienna Convention for the Protection of the Ozone Layer (1985), the depositary played a proactive role taking into account current circumstances and, as a result of a fruitful dialogue, China elaborated further its declaration which in fact amounted to a reservation and explained this in the last paragraph of its communication.

125. Finally, he referred to the position of the depositary relating to declarations of territorial exclusion.

126. The Chairman thanked Mr Kohona for his introduction and recalled that CAHDI has discussed at length the role of the depositary in general and that in recent meetings it has expressed concern about developments regarding the practice followed by the UN Secretary-General in this respect.

127. The delegate of France referred to the work of the ILC on reservations to international treaties which should provide some light regarding issues with which the depositary is confronted. Regarding the formulation of late reservations and withdrawal or modification of reservations, his delegation has had difficulties understanding the depositary practice, in particular the setting up of a three-month deadline for objection and the fact that one single objection by a party would render the reservation null and void.

128. In his view, a distinction should be drawn between, on the one hand, late reservations and modifications of reservations which amount in fact to an extension of the original reservation, and, on the other hand, modifications of reservations which result in a limitation of the original reservation or partial withdrawal. In accordance with the Vienna Convention the first should be null and void while the second should be acceptable. The problem with the current practice of the depositary is that it has applied one and the same system to both types of situation.

129. As for the questions relating to the deadline for objection and the effects of a single objection, in the absence of any other regime, the Vienna Convention should apply. Therefore, the deadline for objection should be twelve months and an objection should affect only the relations between the reserving State and the objecting State.

130. The delegate of the Netherlands welcomed the depositary's decision to extend the three-month deadline for reaction which she recalled was also used for the Convention on the Elimination of All Forms of Racial Discrimination and proved very unsatisfactory. She noted further that, it was the three-month deadline itself that is inadequate.

131. Moreover, she referred to the issue of territorial exclusion of the application of a treaty and stressed that the choice to remain within the Kingdom of the Netherlands is a result or extension of the right to self-determination. Territories are free to decide whether they want a treaty to apply to them or not. There are many examples of cases where the application of a treaty is extended to territories but not to the metropolis, e.g. the Cartagena Convention. Thus, if the Netherlands decides to exclude the application of a treaty to a certain territory it is because it may not be relevant.

132. The delegate of Germany referred to current developments concerning the modifications of reservations to international treaties. He also welcomed the extension of the

deadline for reaction to twelve months and understood this change to be a result of the dialogue that members of CAHDI held with the depositary.

133. As far as the legal effects of a single objection to a modification of a reservation are concerned, he stressed that where the modification would effectively amount to a partial withdrawal it would not be acceptable that a single objection could render the modification null and void. He therefore called upon the depositary to effectively consider whether a modification constitutes a real partial withdrawal or an extension of a reservation and act accordingly.

134. Finally, he referred to the incident concerning the objections by Germany and Finland to the modification by the Maldives of their reservation to the Convention on the Elimination of all Forms of Discrimination against Women. This modification was paradigmatic in amounting to an extension of the original reservation. The depositary notification relating thereto reached missions almost three months after the date of notification. As a result, the objections made by Finland and Germany were considered as late reactions and recorded as simple communications. This was regrettable and doubtful from the legal point, even under the then existing practice.

135. The delegate of Spain expressed the hope that dialogue with the depositary would be pursued at the meeting of legal advisers on the margin of the General Assembly. Moreover, he supported the statements by Germany and France that the issue of the modification of reservations merits careful examination and although he admitted progress, he stressed that the question of the legal effect of the objection to the modification has not been addressed and that the depositary is derogating from the rules of the Vienna Convention and making a judgement about the value of the modification of the reservation in so far as the fact that one State considers unsatisfactory the modification of a reservation should not prevent other States who think it is acceptable from having treaty relations with the State concerned.

136. The delegate of Finland agreed to the need, stated by the delegate of France, to draw a distinction between, on the one hand, late reservations and modifications of reservations which amount in fact to an extension of the original reservation, and on the other hand, modifications of reservations which result indeed in a limitation of the original reservation or partial withdrawal. In this connection, he stressed that the depositary is the most important one and a model for other depositary and that makes it more important that its practice be adequate.

137. The delegate of Croatia referred to the issue of State succession in respect of treaties where the role of the UN Secretariat acting as a depositary is also of considerable significance[14].

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[14] The statement is recorded as follows:

> *Croatia has a longstanding relationship and practice with the UN Secretariat acting as a depositary of many treaties.*
>
> *It lasts as of the date of the establishment of the Republic of Croatia as one of the five successor states to the former SFRY that ceased to exist as the consequence of its dissolution.*
>
> *Since at that time the UN Convention on the Succession of States in respect of treaties was not in force, the Republic of Croatia has in close co-operation with the UN Secretariat, and under its guidance, decided on the steps to be taken in respect of Croatia's succession to the treaties to which the former SFRY was a state party.*
>
> *Croatia was invited to notify its succession in respect of each and every treaty it wished to be a State Party to. All the other successor states which expressed their wish to regulate their status (Slovenia, Bosnia and Herzegovina, and Macedonia) were advised in the same way*
>
> *However, it seems now, at least in the latest interpretation of the UN Secretariat acting as a depositary, that these actions (single notifications of succession) were not needed and that today they represent a certain disadvantage for the states which were instructed to do so.*
>
> *Namely, there is a new tendency in interpretation that the international law itself provides for the general succession in respect of treaties for all successor states, and that in this respect a unilateral general*

notification of continuation (not succession) by one of the successor states to the former Yugoslavia, Serbia and Montenegro, later the Federal Republic of Yugoslavia (FRY), may be sufficient.

In this way an artificial (legally unfound) difference seems to be made between four successor states on one hand, which notified succession to each international instrument, and the FRY on the other, which made unilateral notification of continuation to this end.

It is sometimes even implied that four successor states have discredited themselves by notification of succession, instead of notifying their continuation in respect to all treaties in a single document.

In addition, the depositary often cites that the depositary cannot act without the relevant decisions of the UN bodies (or treaty bodies), and that until then - its only obligation is to preserve status quo.

However, certain actions by the depositary de facto constitute a departure from the status quo.

The UN Secretariat as a depositary seems to accept the unilateral declaration (notification) of continuation by the FRY – although it has been challenged by a number of states, including all other successor states to the former SFRY.

This is visible from the fact that it accepts a number of subsequent notifications by the FRY (Serbia and Montenegro) in respect of the treaties and attributes them to "YUGOSLAVIA" – the common predecessor state of all five successor states, which is still listed (although non-existent) as a state party to the UN treaties.

In this way, the depositary de facto changes the status quo. Without any decision taken in this respect by the relevant UN bodies, it attributes to the former SFRY the actions of one of its successor state – the joint state of Serbia and Montenegro, later named the FRY, which accidentally uses the same abbreviate name "Yugoslavia" as our common predecessor used to have.

However, it should be noted that although being instructed differently, the four successor states would not object to the uniform notification of the FRY (which is based on its Declaration of 27 April 1992 adopted on the date when the FRY was established) if this notification takes effect as of that date.

In other words, the four successor states would not object if the FRY is considered to be the State Party to the treaties of the former SFRY as of 27 April 1992, when the joint state of Serbia and Montenegro was constituted and named the FRY.

This issue is closely linked to the ambiguous status of YUGOSLAVIA in the UN.

Although the relevant Security Council (777/1992) and General Assembly (47/1) resolutions stated that the state formally known as the Socialist Federal Republic of Yugoslavia (SFRY) ceased to exist and that the FRY (Serbia and Montenegro) cannot continue the membership of the former SFRY and that it should apply for membership in the UN, the Legal Council of the UN Secretariat in its letter ambiguously interpreted these resolutions, which led to the fact that certain symbols of the former SFRY (flag, nameplate) have still been preserved in the UN – 8 years after its dissolution.

The Legal Council's interpretation of the respective resolutions was based on the opinion that these resolutions neither suspended nor terminated the membership of Yugoslavia in the UN.

These presumptions are only partly true, due to the fact that the SFRY dissolved and ceased to exist and the non-existing state could not have been expelled or suspended from the UN membership. These resolutions really did not have the constitutive character (with the effect of terminating the membership as of the date of their adoption), but a declaratory one, stating the pure fact that the former SFRY ceased to exist.

The reasoning of the Legal Council, however, precluded, at that time, the removal of the symbols of the former SFRY in the UN.

It should be noted that such situation was expected to last a short period of time and was thus tolerated as an interim solution. The Legal Council itself stated that "this situation shall be terminated when the FRY applies for the UN membership".

In this respect, due to the fact that the FRY has been a state involved in international crises, a certain de facto working status of the FRY in the UN was tolerated in order to keep certain channels of communication open. It should also be noted that the expectation of the State Members of the UN as well as of the UN Secretariat was that this situation was going to last a limited period of time, until the FRY's application. The former president of the FRY, Mr. Panić, at that time, even announced the FRY's intention to apply for the UN membership.

Since this situation has continued without any legal grounds and the FRY has not applied for the UN membership, the UN General Assembly /48/88 (1993)/ invited the Secretariat to end the de facto working status of the FRY in the UN.

I would like to take this opportunity to inform this forum that this ambiguous situation is still pending unsolved within the UN.

That situation should be brought to an end and all symbols of the former SFRY from the UN should be removed, in the same way as it was done after the dissolution of the SFRY in 1992, within the Council of Europe or within the Hague Conference on Private International Law.

Finally, let me finish with the following:

138. In this connection, the Chairman noted that the CAHDI has considered State succession at length. He also noted that a recent practice of entering into dialogue regarding succession in respect of treaties has been followed by a number of States. Although this dialogue is not required by international law, it has proved particularly useful as a matter of clarification.

139. Mr Kohona thanked delegations for their comments which he would be reporting to the Legal Office of the UN and concluded by stressing the fact that modification of reservations is not covered exhaustively by the Vienna Convention and therefore, the depositary treats modifications as reservations only in case of doubt.

140. The Chairman thanked Mr Kohona for his participation at the meeting and the fruitful dialogue with the members of the Committee.

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

141. The delegate of Switzerland called the attention of the meeting to the ongoing discussion within the international Movement of the Red Cross and the Red Croissant about emblems.

142. The observer of Canada stressed the importance of this matter given the humanitarian nature of the organisation involved and encouraged States to work constructively.

143. The delegate of Norway thanked the Swiss delegation for their efforts in trying to achieve agreement. He further noted that already in 1977 Norway, together with Libya, had submitted a draft resolution for a new emblem. This resolution was not adopted but it met with support from Israel and some Arab countries. In the light of that experience he stressed the need to undertake appropriate preparatory work in order to ensure the adoption of the 3rd protocol. He stressed that although consensus would highly desirable it would also be extremely important that no one single State obtain the right of veto. Finally, he referred to the UN Secretary General's Bulletin in respect of humanitarian forces and the guidelines published therein on 24 August 2000. He expressed Norway's support for the idea but cautioned that the guidelines required careful attention. Thus, for example, he stressed the need to avoid the use of the concept of combatants in relation to UN operations.

13. Developments concerning the International Criminal Court : Conclusions of the consultation meeting on the implications of the ratification of the Rome Statute of the International Criminal Court on the internal legal order of the member States of the Council of Europe

144. The Secretariat informed the members of the CAHDI about the organisation by the Council of Europe last May, following the joint initiative of the CAHDI and the European Committee on Crime Problems (CDPC), of a multilateral consultation meeting on the implications of the ratification of the Rome Statute for an International Criminal Court in the legal order of the member States of the Council of Europe and the conclusions adopted by participants at this meeting.

145. The Chairman thanked the Secretariat for the successful organisation of this meeting which had proved very useful for delegations and called upon the Committee to follow developments relating to the International Criminal Court closely.

146. The delegate of the Russian Federation informed the meeting that his authorities have completed internal procedures with a view to signing the Rome Statute shortly.

As one of five equal successor states to the former SFRY, the FRY should apply for the membership in the UN as all other successor states have done, and it should be treated as a State Party to the treaties of the former SFRY as of the date of its establishment in 1992.

147. The observer of Canada informed the meeting that Canada has recently ratified the Rome Statute and that they are mindful of the need for early ratification. He encouraged States to raise the issue of signature with non-signatory States. Finally, he stressed that implementation of the Rome Statute was also a delicate issue which required significant work by his authorities. He offered to share their experience with other countries facing the same situation.

148. The observer of Mexico informed the meeting that Mexico had signed the Statute on 8 September 2000.

149. The delegate of the United Kingdom informed the meeting that a draft bill has been prepared and that they were willing to share it with other delegations.

150. Mr Kohona (UN Treaty Office) advised the meeting about the current state of signatures and ratifications: 110 signatures and 19 ratifications.

14. Implementation and functioning of the Tribunals established by UN Security Council Resolutions 827 (1993) and 955 (1994)

151. The delegate of Croatia stressed that the newly elected Government of Croatia wished to pursue further its co-operation with the International Criminal Tribunal for Yugoslavia and its Prosecutor, and that it is the only country which, together with Bosnia-Herzegovina, exercises full co-operation with this Tribunal. She noted that the recent arrests of persons with dual nationality who allegedly perpetrated war crimes in Bosnia and Herzegovina illustrate the political will of the Government to co-operate with the international community in this respect.

152. The delegate of the United Kingdom informed the meeting of a recent case concerning a person wanted by the International Criminal Tribunal for Rwanda. This person is resisting prosecution on the ground that he could be subjected to inhuman or degrading treatment.

15. The Law of the Sea : Protection of the Sub-aquatic Cultural Heritage

153. The Chairman informed the meeting about recent developments concerning this issue currently being discussed at UNESCO. He stressed the need to look carefully at the legal implications connected with the preparation of any international instrument relating thereto.

16. Developments concerning the preparation of a Charter of Fundamental Rights in the European Union: Exchange of views with Mr. H.C. Krüger, Deputy Secretary General of the Council of Europe

154. The Chairman thanked Mr Krüger, Deputy Secretary General of the Council of Europe, for accepting to take part in the meeting and report about recent developments concerning the preparation in the context of the EU of a Charter of Fundamental Rights in his capacity of representative of the Council of Europe in the work of *The Convention*.

155. Mr Krüger thanked the Chairman for the invitation. He stressed that the preparation of a EU Charter of fundamental rights is a political exercise designed to give a new dimension to the EU and orient it also to European values other than economy. He noted that the legal nature of the Charter had not yet been decided. The Charter should constitute a statement of rights and freedoms which could become legal in nature at any moment although it is unclear whether this will actually happen.

156. The working party responsible for drafting the Charter is entitled *the Convention* and brings together representatives of EU member State governments, members of European Parliament and representatives of EU national parliaments. These three groups meet

separately and only the meetings of representatives of EU national parliaments are public. The three groups also meet together in a plenary, *the Convention*.

157. The draft Charter (draft Convention No. 46)[15] includes 4 parts:

a) Civil and political rights. The drafting of this part follows closely the European Convention on Human Rights, although it is not identical because this Convention is considered outdated and because the aim of the exercise is not simply to copy the European Convention. However, different formulation of civil and political rights carries a consequent risk of different meaning.

b) Social and economic rights. This part is derived mostly from the Social Charter and revised Social Charter.

c) Union citizens' rights. These rights are oriented to EU citizens, nationals of EU member States, although some are extended to all persons resident in the EU.

d) Horizontal provisions include limitations of rights and prohibition of abuse.

158. In his view the draft will not undergo many substantial changes although a number of changes have been proposed and there is still a lot of room for improvement. The main difficulties have arisen in connection with social and economic rights.

159. He recalled that the Council of Europe position is that no new system of human rights should be created and no dividing lines should be introduced. Therefore, it is crucial that the EU Charter of fundamental rights is drafted as closely as possible to the European Convention. He called on the member States of the Council of Europe to convince the EU to accede to the ECHR although he acknowledged that this would be difficult in the light of the negative opinion of the Court of Justice of the European Communities (ECJ) and of the fact that the EU has no legal personality. Moreover, *The Convention* has no mandate to consider the issue of EU accession to the European Convention. He also noted that the House of Lords has supported the accession of the EU to the ECHR.

160. The delegate of Austria welcomed the preparation of a EU Charter of Fundamental Rights which is extremely useful in provoking a reflection on future directions in Europe. He supported EU accession to the European Convention and recalled the evolution that the Council of Europe has undergone in respect of this matter since there was a time when Council of Europe officials stressed that the only solution was accession and no other solution was either envisaged or imaginable.

161. The Finnish delegate referred to document CAHDI (2000) Inf. 8 which also deals with the accession issue. Although he agreed that *Convention* has no mandate to consider this matter, yet the issue should be considered.

162. The delegate of the United Kingdom stated that there should be a firm link between the EU Charter and the European Convention as this is important for both texts and for preserving the integrity of the system established by the European Convention.

163. The delegate of Norway stated that they are very concerned about the implications of the EU Charter for the European Convention, the possible undermining of the integrity of the latter system and the risk of fragmentation by developing two parallel systems. He therefore called on member States of the EU and of the Council of Europe to preserve the unity of human rights protection and strengthening as a result of the EU initiative.

164. Similarly, the Swiss delegate expressed much concern about ensuring the unity of the system established by the European Convention, although he acknowledged that the EU initiative is a logical development as fundamental rights form part of the political project that the EU represents.

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[15] Available at http://db.consilium.eu.int/df/default.asp?lang=en

165. Mr Krüger thanked delegations for their comments. He stressed that the EU exercise is very difficult, yet the need to protect the integrity of the system established by the European Convention and the unity of human rights protection is unanimously shared by all the members of *The Convention*. In this connection, he referred to article 53 of the draft Charter which states that "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective field of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by Member States' constitutions".

166. He then referred to the accession issue which is also a complicated one. He noted that he is supporting it because accession would solve many issues. In this respect, he observed that the Council of Europe has suggested that the ECJ could have an advisory role in the system established by the European Convention and the ECHR. However the ECJ is not keen on this solution because of the nature that its opinion would have.

167. To illustrate possible problems that could arise from the existence of two separate systems for the protection of human rights, he referred to a German case concerning an importer who was fined by the ECJ. This person then appealed to the ECHR. Another recent case is Mathew v. the United Kingdom concerning the right to stand for election in Gibraltar. He therefore called on member States of the EU to assume their responsibility in the EU.

168. The Chairman thanked Mr Krüger for the fruitful discussion with the members of the CAHDI and noted that this item should remain on the CAHDI agenda. Moreover, he stressed that it was the view of the CAHDI that there should be no competing systems for the protection of human rights in Europe and that the integrity of the ECHR system should be preserved.

D. <u>OTHER</u>

17. Request by the *Ligue Internationale contre le Racisme et l'Antisémitisme (LICRA)* for observer status with the CAHDI

169. The Chairman referred to the request by the Secretary General of LICRA to be admitted as observer to the CAHDI and to the current list of observers to the Committee which include only States or Intergovernmental organisations.

170. The Secretariat advised members of the CAHDI about the rules concerning the admission of observers to intergovernmental committees and the specificities concerning the admission of non-governmental organisations. The Secretariat also noted that LICRA had requested admission as observer to a number of other steering and ad hoc committees including the CDDH and the CAHAR.

171. The CAHDI thanked LICRA for its interest in the work of the Committee and concluded therefore that in view of LICRA's statutory aim and activities the CAHDI would not be the most suitable committee for LICRA to attend as observer and suggested that other committees for which LICRA had requested observer status would be more fitting. Moreover, it recalled that most CAHDI documents are widely available to the public.

18. Election of the Chair and the Vice-Chair of the CAHDI

172. Following the proposal by the delegate of Sweden, Ambassador Tomka (Slovak Republic) was elected Chairman of the CAHDI for one year.

173. Following the proposal by the delegate of France, Ambassador Michel (Switzerland) was elected Vice-Chairman of the CAHDI for one year.

174. Ambassadors Tomka and Michel thanked the members of the CAHDI for the trust put in them and stressed their commitment to pursuing the important work carried out by the Committee.

175. The abridged report of the meeting appears in Appendix VI to this report.

19. Date, place and agenda of the 21st meeting of the CAHDI

176. The CAHDI decided to hold its next meeting in Strasbourg, 6 - 7 March 2001 and adopted the preliminary draft agenda in Appendix V.

20. Other business

177. The delegate of Sweden advised the meeting that following a joint initiative by Sweden, Canada and Poland a meeting of legal advisers is convened in New York in the margin of the meeting of the Sixth Committee of the UN.

21. Closing

178. On behalf of the members of the CAHDI, the newly elected Chairman of the CAHDI, Ambassador Tomka, thanked the outgoing Chairman of the CAHDI, Ambassador Hilger, for his dedication, courtesy and high professionalism in chairing the last four meetings of the Committee and recalled in particular the success of the 19th meeting of the CAHDI held in Berlin following the kind invitation by Ambassador Hilger. He concluded wishing Ambassador Hilger well for his future diplomatic endeavours as Ambassador to Switzerland and Liechtenstein.

179. Ambassador Hilger thanked Ambassador Tomka and the members of the CAHDI for their appreciation of his work as Chairman of the Committee. He stressed his commitment to the CAHDI and recalled the importance of this Committee as a unique body concerning general international law which brings together legal advisers from all over Europe and a significant number of observers. He thanked the Secretary General of the Council of Europe for his support of the CAHDI activities as illustrated by his participation at CAHDI meetings as well as the participation of the highest authorities of the Organisation. Finally, he thanked the Secretary of the CAHDI for his valuable support.

APPENDIX I

LIST OF PARTICIPANTS

ALBANIA/ALBANIE: Mrs Ledia HYSI, Director of the Legal and Consular Department, Blvd. "Zhan d'Ark", Ministry of Foreign Affairs

ANDORRA/ANDORRE: Mme Iolanda SOLA, Assessora juridica, Ministère des Relations extérieures

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

BELGIUM/BELGIQUE: Mme A.M. SNYERS, Conseiller Général, Direction Générale des Affaires Juridiques, Ministère des Affaires Etrangères

BULGARIA/BULGARIE: Mrs Katia TODOROVA, Director, Human Rights Directorate, Ministry of Foreign Affairs

CROATIA/CROATIE: Ms Andreja METELKO-ZGOMBIĆ, Head of the international law Department, Ministry of Foreign Affairs

CYPRUS/CHYPRE: Mrs Evie GEORGIOU-ANTONIOU, Counsel of the Republic

CZECH REPUBLIC/REPUBLIQUE TCHEQUE: Mr Jaroslav HORAK, Legal Director, Ministry of Foreign Affairs

Mr Jiři MALENOVSKÝ, Judge of the Constitutional Court

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FINLAND/FINLANDE: Mr Esko KIURU, Ambassador, Deputy Director General, Legal Department, Ministry for Foreign Affairs

Mrs Marja LEHTO, Counsellor Director, Unit for Public International Law, Ministry for Foreign Affairs

FRANCE: Monsieur Jean-Luc FLORENT, Ministère des Affaires étrangères, Direction des Affaires Juridiques

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

GEORGIE: Mr Gela BEZHUASHVILI, Ambassador, Director of International Law Department, Ministry of Foreign Affairs

GERMANY/ALLEMAGNE: Dr Reinhard HILGER, Ambassador, Director of the Public International Law Division, Federal Foreign Office (**Chairman/Président**)

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

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HUNGARY/HONGRIE: Mr György SZÉNÁSI, Ambassador, Head of International Law Department, Ministry of Foreign Affairs

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ITALY/ITALIE: M. Umberto COLESANTI, Ministre plénipotentiaire, Chef adjoint du Contentieux diplomatique, Ministère des Affaires étrangères

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LIECHTENSTEIN: M. Daniel OSPELT, Vice-Directeur de l'Office pour les Affaires étrangères

LITHUANIA/LITUANIE: Mr Sigute JAKŠTONYTĖ, Minister Counsellor, Deputy Director of Legal and International Treaties Department, Ministry of Foreign Affairs

LUXEMBOURG: M. Paul STEINMETZ, Directeur du Service Juridique, Ministère des Affaires étrangères

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NETHERLANDS/PAYS-BAS: Dr Liesbeth LIJNZAAD, Deputy Head, International Law Department, Ministry of Foreign Affairs

NORWAY/NORVEGE: Mr Hans-Wilhelm LONGVA, Ambassador, Director General, Legal Affairs Department, Royal Ministry of Foreign Affairs

POLAND/POLOGNE: Prof. Anna WYROZUMSKA, Director of the Legal and Consular Department, Ministry of Foreign Affairs

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ROMANIA/ROUMANIE: M. Anghel CONSTANTIN, Directeur adjoint des Affaires Juridiques et des Traités, Ministère des Affaires Etrangères

RUSSIAN FEDERATION/FEDERATION DE RUSSIE: Mr Ilya ROGACHEV, Head of Section of the Legal Department, Ministry of Foreign Affairs

SAN MARINO/SAINT MARIN: -

SLOVAK REPUBLIC/REPUBLIQUE SLOVAQUE: Mr Peter TOMKA, Ambassador, Permanent Representative to the UN (**Vice-Chairman/Vice-Président)**

SLOVENIA/SLOVENIE: Mr Andrej GRASSELLI, Head of the International and Law Department, Ministry for Foreign Affairs

SPAIN/ESPAGNE: Mr Aurelio PEREZ GIRALDA, Ambassadeur, Directeur du Département de Droit International, Ministère des Affaires Extérieures

M. Maximiliano BERNAD Y ALVAREZ DE EULATE, Professeur de Droit international public et d'Institutions et droit communautaire européens, Université de Zaragoza

SWEDEN/SUEDE: Mr Lars MAGNUSON, Ambassador, Director General for Legal Affairs, Ministry for Foreign Affairs

SWITZERLAND/SUISSE: M. l'Ambassadeur Nicolas MICHEL, Jurisconsulte, Directeur de la Direction du Droit international public, Département fédéral des affaires étrangères

M. Jürg LINDENMANN, Suppléant du Jurisconsulte, Direction du Droit international public, Département fédéral des Affaires étrangères

"THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA"/"L'EX-REPUBLIQUE YOUGOSLAVE DE MACEDOINE": -

TURKEY/TURQUIE: Mme Nehir ÜNEL, Conseiller Juridique, Ministère des Affaires étrangères, Section juridique

UKRAINE: Mr Markiyan KULYK, Legal and Treaty Department, Ministry for Foreign Affairs

UNITED KINGDOM/ROYAUME-UNI: Mr Christopher WHOMERSLEY, Legal Counsellor, Foreign and Commonwealth Office

SPECIAL GUESTS/INVITES SPECIAUX

Professeur Alain PELLET, Rapporteur spécial des Nations Unies sur les réserves aux traités internationaux, membre de la Commission de Droit International

Mr Palitha T.B. KOHANA, Chief of the Treaty Section, Office of Legal Affairs

EUROPEAN COMMUNITY/COMMUNAUTE EUROPEENNE

EUROPEAN COMMISSION/COMMISSION EUROPEENNE: Mr Esa PAASIVIRTA, Member of the Legal Service, Legal Service

OBSERVERS/ OBSERVATEURS

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Mr Alain TELLIER, Conseiller, Mission Permanente du Canada auprès de l'Office des Nations Unies à Genève

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M. Pierre DREYFUS, Assistant, Consulat Général du Japon, Tour Europe

UNITED STATES OF AMERICA/ETATS-UNIS D'AMERIQUE: Mr Robert E. DALTON, Assistant Legal Adviser for Treaty Affairs – Department of State

MEXICO/MEXIQUE: Ambassador Miguel Angel GONZÁLEZ FELIX, Chief Legal Adviser Ministry of Foreign Affairs

AUSTRALIA/AUSTRALIE: -

ISRAEL: Mr Alan BAKER, Ambassador, Legal Adviser, Ministry of Foreign Affairs

NEW ZELAND/NOUVELLE ZELANDE: -

THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW/CONFERENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVE: Apologised/Excusé

NORTH ATLANTIC TREATY ORGANISATION/ORGANISATION DU TRAITE DE L'ATLANTIQUE NORD: M. Baldwin DE VIDTS, Conseiller Juridique, Service juridique de l'OTAN

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT/ORGANISATION DE COOPERATION ET DE DEVELOPPEMENT ECONOMIQUES: Mr David H. SMALL, Director of Legal Affairs, OECD

ARMENIA/ARMENIE: Apologised/Excusé

AZERBAIJAN/AZERBAIDJAN: Mr Rashad ASLANOV, Referent of the Treaty Legal Department, Ministry of Foreign Affairs

BOSNIA-HERZEGOVINA/BOSNIE-HERZEGOVINE: Mrs Jasmina HANDZIĆ, Department for the International Legal Affairs, Ministry of Foreign Affairs

SECRETARIAT GENERAL

M. H.C. KRÜGER, Deputy Secretary General of the Council of Europe/Secrétaire Général adjoint du Conseil de l'Europe

M. Guy DE VEL, Director General of Legal Affairs/Directeur Général des Affaires Juridiques

M. Alexey KOZHEMYAKOV, Head of the Department of Public Law/Chef du Service du droit public

Mr Rafael A. BENITEZ, Secretary of the CAHDI/Secrétaire du CAHDI, Department of Public Law/Service du Droit public

M: Jörg POLAKIEWICZ, Deputy Head of Legal Advice Department and Treaty Office/Adjoint au Chef du Service du Conseil Juridique et Bureau des Traités

Mme Francine NAAS, Assistant/Assistante, Department of Public Law/Service du Droit public,

INTERPRETERS/INTERPRETES

M. Norman EDWARDS

M. Jean SLAVIK

APPENDIX II

AGENDA

A. INTRODUCTION

1. Opening of the meeting by the Chairman, Ambassador Dr. Hilger

   - *Draft meeting report of the 19th meeting (Berlin, 13-14 March 2000)* CAHDI (2000) 12

2. Adoption of the agenda CAHDI (2000) OJ 2 rev 2

3. Communication by the Director general of Legal Affairs, Mr. De Vel

B. ONGOING ACTIVITES OF THE CAHDI

4. Decisions by the Committee of Ministers concerning the CAHDI

   - *Resolution (2000) 2 of the Committee of Ministers on "Council of Europe's information strategy*" CAHDI (2000) 14

5. The law and practice relating to reservations and interpretative declarations concerning international treaties :

   - *Draft* meeting *report of the 3rd DI-E-RIT meeting (Berlin, 10 March 2000)* DI-E-RIT (2000) 2

   a. Exchange of views with Professor A. Pellet, Special Rapporteur of the United Nations and member of the International Law Commission CAHDI (2000) Inf 2
   CAHDI (2000) Inf 2 Addendum
   CAHDI (2000) Inf. 4
   CAHDI (2000) Inf. 7

   b. European Observatory of Reservations to international Treaties
   CAHDI (2000) 16

6. Expression of consent by States to be bound by a treaty CAHDI (2000) 13
   CAHDI (2000) 13 Addendum

7. Proposal for the setting up of a General Judicial Authority of the Council of Europe
   CAHDI (2000) 9
   CAHDI (2000) 9 Addendum
   CAHDI (2000) 9 Addendum 2

8. Discussion on possible new activities

   - *Report of the European Commission for Democracy through law on Federated and Regional Entities and international Treaties* CDL-INF (2000) 3

   - *Colloquy of the French Society for International Law "International Law and the time factor*" CAHDI (2000) Inf 3

9. Adoption of the draft specific terms of reference of the CAHDI for 2001-2002 and possibly of any subordinated group CAHDI (2000) 17

D. GENERAL ISSUES ON PUBLIC INTERNATIONAL LAW

10. The work of the Sixth Commission of the General Assembly of United Nations and of the International Law Commission (ILC)

    - *Report of the 52nd session of the International Law Commission* CAHDI (2000) Inf. 4

- *The work of the International Law Commission at its 52nd Session*

CAHDI (2000) Inf. 7

11. The role of depository : Exchange of views with Mr. Palitha Kohona, Chief of the Treaty Section of the United Nations regarding the practice of the United Nations Secretary General on the deposit of multilateral treaties

CAHDI (2000) Inf. 5

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

13. Developments concerning the International Criminal Court : Conclusions of the consultation meeting on the implications of the ratification of the Rome Statute of the International Criminal Court on the internal legal order of the member States of the Council of Europe Consult ICC (2000) Concl

14. Implementation and functioning of the Tribunals established by UN Security Council Resolutions 827 (1993) and 955 (1994)

15. Law of the Sea : Protection of Sub aquatic Cultural Heritage

16. Developments concerning the preparation of a Charter of Fundamental Rights in the European Union: Exchange of views with Mr. H.C. Krüger, Deputy Secretary General of the Council of Europe CAHDI (2000) Inf. 6

D. OTHER

17. Request by the *Ligue Internationale contre le Racisme et l'Antisémitisme (LICRA)* for observer status with the CAHDI CAHDI (2000) 19

18. Election of the Chair and the Vice-Chair of the CAHDI CAHDI (2000) 18

19. Date, place and agenda of the 21st meeting of the CAHDI

20. Other business

21. Closing

APPENDIX III

OPINION OF THE CAHDI ON THE PARLIAMENTARY ASSEMBLY RECOMMENDATION 1458 (2000) TOWARDS A UNIFORM INTERPRETATION OF COUNCIL OF EUROPE CONVENTIONS: CREATION OF A GENERAL JUDICIAL AUTHORITY

The *Ad Hoc* Committee of Legal Advisers on Public International Law (CAHDI) held its 20th meeting in Strasbourg, 12-13 September 2000. The agenda included an item entitled "Proposal for the setting up of a General Judicial Authority of the Council of Europe”. The CAHDI decided to consider this proposal submitted by the Czech Republic to the Committee of Ministers at its own initiative.

In the framework of this item and pursuant to the Committee of Ministers’ decision No. CM/751/26042000 (707th meeting – Strasbourg, 26 April 2000), the CAHDI was also asked to give an opinion on the Council of Europe’s Parliamentary Assembly Recommendation 1458 (2000) *Towards A Uniform Interpretation of Council of Europe Conventions: Creation of a General Judicial Authority*.

In its recommendation, the Parliamentary Assembly of the Council of Europe supports the Czech proposal for the setting up of a “general judicial authority” of the Council of Europe and recommends that the Committee of Ministers set up such an authority, which would provide the mechanism for the uniform interpretation of Council of Europe treaties starting with those still to be concluded and with a selected number of the existing conventions.

The Parliamentary Assembly recommends that such an authority should have the following competencies: to give binding opinions on the interpretation and application of Council of Europe conventions at the request of one or several member states or at the request of the Committee of Ministers or of the Parliamentary Assembly, to give non-binding opinions at the request of one or several member states or of one of the two organs of the Council of Europe, and to make preliminary rulings, at the request of a national court, on lines similar to those of Article 177 of the Rome Treaty of 1956 establishing the European Economic Community.

The CAHDI was advised by the Czech delegation about the underlying reasons for the proposal which are both legal and political and try to respond to a real need, i.e.: to ensure the uniform interpretation of Council of Europe international instruments, in view of the fact that very few of them provide for a control mechanism. In this perspective, the Czech delegation understood that there were two basic options in order to implement the recommendation: to empower a newly created authority or to extend the competencies of an existing body such as the European Court of Human Rights and supported the second one.

The CAHDI held an exchange of views on the Parliamentary Assembly recommendation to the extent possible within the time available, and concentrated, in accordance with its terms of reference and its role in the Council of Europe intergovernmental structure, on what it understood to be the public international law issues connected with the Parliamentary Assembly Recommendation.

From the onset, the CAHDI considered that the implementation of the Parliamentary Assembly Recommendation would change the very way in the which the Council of Europe has operated until now.

The CAHDI, having conducted a debate on this issue, concluded that it would not be possible to deliver a single opinion on behalf of the Committee as a whole. Instead it decided to provide a summary of arguments for and against the implementation of the Parliamentary Assembly Recommendation which were submitted by delegations.

Arguments in favour

Since the 1960s three recommendations of the Parliamentary Assembly, as well as the report of the Wise Persons Committee have supported the search for a means of ensuring the uniform interpretation of Council of Europe international instruments, in view of the fact that very few of them provide for a control mechanism solution to such a situation. Parliamentary Assembly Recommendation 1458 (2000) now provides the political support on the part of parliamentarians to move forward in that direction.

Article 3 of the Statute of the Council of Europe provides that "Every member of the Council of Europe must accept the principles of the rule of law". The rule of law implies the existence of a jurisdiction to guarantee uniform interpretation of law.

In as far as Council of Europe conventions are concerned, the setting up of such a general judicial authority as suggested by the Parliamentary Assembly, would guarantee a uniform interpretation.

The European Court of Human Rights could ensure these functions given its prestige and authority and the fact that it regularly applies public international law. Moreover, this solution would have low cost and a limited impact on the Court's workload.

Finally, the implementation of Parliamentary Assembly Recommendation 1458 (2000) would contribute in increasing the visibility of the Organisation as a whole.

Arguments against

Council of Europe conventions are very diverse regarding their substance and autonomous regarding their contracting parties and supervisory mechanisms. Therefore, they hardly represent a uniform and coherent body of international law. Some conventions make provision for committees which consider questions arising from the application of these texts, including interpretation. Although they may not be judicial in nature, they have operated well and have brought in the flexibility which is inherent to the system of international law. Other conventions expressly do not provide for such control or interpretation mechanism and form part of the general system of international law. States may have become parties to these conventions precisely because of this character which should be preserved. Where the establishment of a mechanism for judicial interpretation of a particular convention was required, it was always possible to conclude an appropriate protocol to the convention in question.

The creation of a new general judicial authority would require significant resources.

In addition, it would contribute further to the proliferation of international judicial authorities and to the fragmentation of international law which would be highly undesirable. It is not justified in as far as the Council of Europe already has a Convention for the Peaceful Settlement of Disputes to which States may become parties. In addition, the International Court of Justice could solve disputes arising from the application or interpretation of Council of Europe conventions.

The allocation of new competences to an already existing body, such as the European Court of Human Rights, would also raise legal and practical problems. The Court forms part of a legal system which has its own justification. Pursuant to its new role, the Court would be compelled to give opinions on a variety of issues, some of which lying far beyond its traditional field of expertise. As far as the workload is concerned, it is far from certain that the allocation of new competencies to the Court would not entail an excessive increase in the Court's workload at the cost of efficiency in performing its primary tasks. Moreover, if it only entailed a minor increase in work, the question would arise about the usefulness of the new role altogether.

Moreover, it should be noted that the European Community is party to some Council of Europe conventions. The setting up of a general judicial authority could conflict with the

competencies of the Court of Justice of the European Communities in this respect.

Finally, it should noted that paragraph 9, i) of the Parliamentary Assembly Recommendation provides that a general judicial authority should have the competence to give binding opinions on the interpretation and application of Council of Europe conventions at the request of one or several member states. However, it is not indicated whether this or these member States have to be party to the convention in question and this raises a delicate question.

Conclusions

The CAHDI concluded that at present time, the reluctance on the part of a significant number of States is too high for the Parliamentary Assembly Recommendation to be pursued in whatever form. The CAHDI therefore suggests reverting to consideration of this issue in the future when appropriate conditions are met.

Moreover, the CAHDI, inspired by the Czech proposal and the Parliamentary Assembly Recommendation, suggests that the question of interpretation be considered for future conventions to be concluded in the framework of the Council of Europe and that, where appropriate, suitable means for interpretation be provided for.

APPENDIX IV

DRAFT SPECIFIC TERMS OF REFERENCE

1. Name of committee: COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

2. Type of committee: *Ad hoc* committee of experts

3. Source of terms of reference: Committee of Ministers

4. Terms of reference:

Under the authority of the Committee of Ministers, the Committee is instructed to examine questions of public international law, to exchange and, if appropriate, to co-ordinate the views of member States at the request of the Committee of Ministers, Steering Committees and *Ad Hoc* Committees and at its own initiative.

5. Membership of the Committee:

   a. The Committee is composed of experts by member States, preferably chosen among the Legal Advisers to the Ministries of Foreign Affairs. Travel and subsistence expenses of one expert per member State (two for the State assuming the Chair of the Committee) are borne by the Council of Europe budget.

   b. The European Community may send representatives, without the right to vote or to a refund of expenses, to meetings of the Committee.

   c. The following States having observer status with the Council of Europe may send a representative without the right to vote or to a refund of expenses to meetings of the Committee: Canada, Holy See, Japan, United States of America and Mexico.

   d. The following non-member States or organisations may send a representative, without the right to vote or to a refund of expenses (1), to meetings of the Committee:

      * Armenia (1)
      * Azerbaijan (1)
      Australia
      * Bosnia-Herzegovina (2)
      New Zealand
      Israel (3)
      The Hague Conference on Private International Law
      NATO (4)
      The Organisation for Economic Co-operation and Development
      The United Nations and its specialised agencies (5).

6. Structures and working methods: The CAHDI may set up working parties and have recourse to consultant experts.

7. Duration: The present terms of reference expire on 31 December 2002.

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(1) Except in the case of special provisions application to States marked with *. Adopted: see CM/Del/Concl(91)455/24, Appendix 5, Revised: (1) see CM/Del/Dec(96)557, item 2.1.

(2) Subject to their request.

(3) Admitted as observer "for the whole duration of the Committee" by the CAHDI, 17th meeting, Vienna, 8-9 March 1999. The same is valid for subordinated committees. This decision was confirmed by the Committee of Ministers at its 670th meeting, Strasbourg, 18 May 1999. See CM/Del/Dec(99)670, item 10.2.

(4) see CM/Del/Dec/Act(93)488/29 and CM/Del/Concl(92)480/3.

(5) For specific items, at the request of the Committee.

APPENDIX V

PRELIMINARY DRAFT AGENDA FOR THE 21ST MEETING OF THE CAHDI

A. INTRODUCTION

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

B. ONGOING ACTIVITES OF THE CAHDI

4. Decisions by the Committee of Ministers concerning the CAHDI
5. The law and practice relating to reservations and interpretative declarations concerning international treaties : European Observatory of Reservations to international Treaties
6. Expression of consent by States to be bound by a treaty
7. Discussion on possible new activities

C. GENERAL ISSUES ON PUBLIC INTERNATIONAL LAW

8. Communication and exchange of views with the President of the International Court of Justice, Mr Guillaume
9. Implementation of international instruments protecting the victims of armed conflicts
10. Developments concerning the International Criminal Court
11. Implementation and functioning of the Tribunals established by United Nations Security Council Resolutions 827 (1993) and 955 (1994)
12. Law of the Sea : Protection of Sub aquatic Cultural Heritage
13. Developments concerning the preparation of a Charter of Fundamental Rights in the European Union: Exchange of views with Mr Krüger, Deputy Secretary General of the Council of Europe and Mr Fischbach, Judge at the European Court of Human Rights.

D. OTHER

14. Date, place and agenda of the 22nd meeting
15. Other business
16. Closing

APPENDIX VI

LIST OF ITEMS DISCUSSED AND DECISIONS TAKEN AT THE 20TH MEETING OF THE CAHDI

1. The *Ad Hoc* Committee of Legal Advisers on Public International Law (CAHDI) held its 20th meeting in Strasbourg, on 12 and 13 September 2000. The meeting was chaired by Ambassador Dr Hilger (Germany), Chairman of the CAHDI. The list of participants appears in Appendix I and the agenda appears in Appendix II.

2. The CAHDI was informed by the Director General of Legal Affairs, Mr De Vel, about recent developments concerning the Council of Europe. Moreover, the CAHDI was informed of the decisions taken by the Committee of Ministers concerning the Committee.

3. The CAHDI held a fruitful exchange of views with Mr Krüger, Deputy Secretary General of the Council of Europe, and one of the representatives of the Organisation in the "Convention", regarding developments on the preparation of a Charter of Fundamental Rights in the European Union. The CAHDI agreed that there should be no competing human rights systems between the EU and the Council of Europe. Moreover, it decided to keep this item on its agenda and to serve as a clearing house for the distribution of information relating thereto.

4. The CAHDI examined a draft analytical report on “Expression of consent by States to be bound by a treaty” prepared by the British Institute of International and Comparative Law on the basis of the replies by 37 member States and 5 observer States. Delegations and observer States which have not yet sent their reply and those who wish to make comments to the document are kindly invited to submit their contributions shortly.

5. Following the Committee of Ministers’ request (cf. Decision No. CM/751/26042000, 707th meeting – Strasbourg, 26 April 2000), the CAHDI considered the Parliamentary Assembly Recommendation 1458 (2000) *towards a uniform interpretation of Council of Europe conventions: creation of a general judicial authority* as well as the report of the Parliamentary Assembly relating thereto. The CAHDI was informed by the Czech delegation about the underlying reasons for the proposal by the Czech Republic for the setting up of a General Judicial Authority of the Council of Europe which was at the basis of the Parliamentary Assembly recommendation. The CAHDI concluded that it was not possible to deliver a single opinion representing the position of the Committee as a whole and adopted by subsequent written procedure the opinion in Appendix III.

6. In the context of its activity on the law and practice relating to reservations to international treaties carried out with the assistance of the Group of Experts on Reservations to International Treaties (DI-E-RIT), the Chairman of the DI-E-RIT, Ambassador Magnuson (Sweden) informed members of the CAHDI about the third meeting of the DI-E-RIT. The CAHDI adopted the report relating thereto.

Also in the context of this activity at the DI-E-RIT’s request, the CAHDI held a fruitful exchange of views with Professor Pellet, member of the International Law Commission (ILC) of the United Nations and Special Rapporteur on reservations to international treaties about developments concerning the implementation of this activity by the ILC and in particular Professor Pellet’s fifth report on reservations to international treaties.

In the context of its operation as *European Observatory of Reservations to International Treaties*, the CAHDI considered a list of outstanding declarations and reservations to international treaties.

7. The CAHDI held a fruitful exchange of views with Mr Kohona, Chief of the Treaty Section of the United Nations regarding the practice of the United Nations Secretary General on the depositary of multilateral treaties.

8. The CAHDI held an exchange of views on developments concerning the International Criminal Court and was informed about the organisation by the Council of Europe of a consultation meeting on the implications of the ratification of the Rome Statute of the International Criminal Court on the internal legal order of the member States of the Council of Europe (Strasbourg, 16-17 May 2000).

9. The CAHDI held an exchange of views on the work of the Sixth Commission of the General Assembly of United nations and of the ILC. In this context, the CAHDI examined a non-edited version of the Report of the 52nd Session of the ILC (Geneva, 1 May to 9 June and 10 July to 18 August 2000), obtained as a result of Council of Europe and United Nations inter-secretariat contacts at the CAHDI's request, and a report of the 52nd session of the ILC, prepared by Professor Simma, member of the ILC, for the attention of the members of the CAHDI.

10. The CAHDI was informed about developments concerning the implementation of international instruments protecting the victims of armed conflicts as well as the implementation and the functioning of the Tribunals established by UN Security Council Resolutions 927 (1993) and 955 (1994).

11. The CAHDI held an exchange of views on developments concerning protection of sub aquatic cultural heritage and work under way within the framework of UNESCO.

12. The CAHDI examined the request by the *Ligue Internationale contre le Racisme et l'Antisémitisme (LICRA)* for observer status with the CAHDI. The CAHDI thanked LICRA for its interest in the work of the Committee but concluded that in view of LICRA’s statutory aim and activities the CAHDI would not be the most suitable committee for LICRA to attend as observer and suggested that other committees for which LICRA had requested observer status would be more fitting.

13. The CAHDI adopted draft specific terms of reference for 2001-2002 as they appear in Appendix IV and decided to request their approval by the Committee of Ministers.

14. The CAHDI elected Ambassador Tomka (Slovak Republic) and Ambassador Michel (Suisse) respectively as Chair and Vice-Chair for one year.

15. The CAHDI decided to hold its next meeting in Strasbourg, from 6 to 7 March 2001 and adopted the preliminary draft agenda in Appendix V.