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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

List of items discussed and decisions taken Abridged report

42nd meeting

Strasbourg, 22-23 September 2011

Secretariat of the Public International Law and Anti-Terrorism Division,
Directorate of Legal Advice and Public International Law, DLAPIL

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**COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW
(CAHDI)**

42nd meeting, Strasbourg, France, 22-23 September 2011

**List of items discussed and decisions taken
Abridged report**

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 42nd meeting in Strasbourg on 22 and 23 of September 2011 with Ms Edwige Belliard (France) in the Chair. The list of participants is set out in Appendix I of the meeting report¹.

2. The CAHDI adopted its agenda as set out in **Appendix I** of the present report. It also adopted the report of its 41st meeting (Strasbourg, 17-18 March 2011), and authorised the Secretariat to publish it on the CAHDI's website.

3. The CAHDI took note of the developments concerning the Council of Europe since the last meeting of the Committee, as presented by Mr Manuel Lezertua, Jurisconsult and Director of Legal Advice and Public International Law (DLAPIL). The intervention on this matter is set out in Appendix III of the meeting report. The CAHDI took note in particular of the progress of the work concerning the reform of the Organisation, the developments concerning the Council of Europe Treaty Series and the information relating to certain recent conventions of the Council of Europe.

4. The CAHDI considered the decisions of the Committee of Ministers relevant to its work, and in particular the decisions regarding the follow-up given by the Committee of Ministers to the opinions of the CAHDI on Recommendation 1913 (2010) of the Parliamentary Assembly on "The necessity to take additional international legal steps to deal with sea piracy" and Recommendation 1920 (2010) of the Parliamentary Assembly on "Reinforcing the effectiveness of Council of Europe treaty law".

5. The CAHDI considered national practices and case-law regarding State immunities on the basis of information provided by the delegations and invited delegations to submit or update their contributions to the relevant CAHDI database. The Committee also took stock of the state of ratifications of the United Nations Convention on Jurisdictional Immunities of States and Their Property by the member and observer States of the Council of Europe.

Furthermore, the CAHDI agreed to maintain on the agenda of its forthcoming meeting the exchange of views on possibilities for the Ministry of Foreign Affairs to raise public international law issues in procedures pending before national tribunals and related to States' or international organisations' immunities.

6. The CAHDI further considered the issue of organisation and functions of the Office of the Legal Adviser of the Ministry for Foreign Affairs on the basis of contributions from delegations. The delegations were invited to submit or to update their contributions to the relevant database at their earliest convenience.

7. The CAHDI further took note of the information regarding cases that have been submitted to national tribunals by persons or entities removed from the lists established by the UN Security Council Sanctions Committees. The delegations were also invited to submit or to update their contributions to the database on national implementation measures of UN sanctions and respect for human rights.

¹ Document CAHDI (2011) 17 prov

8. The CAHDI considered the issue of the accession of the European Union to the European Convention on Human Rights. In this respect, the Committee thanked Mr Erik Wennerström, observer of the CAHDI to the Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH – UE) for his presentation on the progress of the work undertaken by this Group. The CAHDI took note that the Draft legal instruments on the Accession of the European Union to the European Convention on Human Rights will be considered at the Extraordinary Meeting of the Steering Committee for Human Rights (CDDH) on the Accession of the European Union to the European Convention of Human Rights and at the Meeting of the CDDH informal Working Group on the accession of the European Union to the European Convention of Human Rights (CDDH-UE) with the European Commission, which will be held in Strasbourg on 12-14 October 2012.

9. The CAHDI took note of cases brought before the European Court of Human Rights (ECtHR) involving issues of public international law and further invited delegations to keep the Committee informed of any judgments or decisions, pending cases or relevant forthcoming events.

10. In the context of its consideration of issues relating to the peaceful settlement of disputes, the CAHDI invited the delegations to submit to the Secretariat any relevant information for the update of the document CAHDI (2011) 7 containing information on the International Court of Justice's jurisdiction under international treaties and agreements.

11. In the framework of its activity as the European Observatory of Reservations to International Treaties, the CAHDI considered a list of outstanding reservations and declarations to international treaties and the follow-up given to them by the delegations.

12. The CAHDI further held an exchange of views with Mr Stephen Mathias, Assistant Secretary-General for Legal Affairs of the United Nations. The exchange of views concerned, *inter alia*, the legal aspects of the "Arab Spring", as well as the concept of the "responsibility to protect", the issue of credentials of Libya, the state of play of the UN-established and UN-backed international criminal courts and tribunals and finally the issue of "fair and clear procedures" for United Nations sanctions regimes.

13. The CAHDI took note of the report of the International Law Commission (ILC) on the work of its 63rd Session. In this regard, Ms Concepción Escobar Hernández, Member of the ILC and Vice-Chair of the CAHDI, presented recent activities of the ILC. The Committee was also informed of the results of the exchange of views between the ILC, the Chair of the CAHDI and the Director of DLAPIL, which took place on 8 July 2011 in Geneva.

14. The Committee recalled that the Council of Europe is currently analysing the relevance of its Conventions and that this initiative is one of the priorities of the Secretary General in 2011. The CAHDI took note that the Committee was asked to forward to the Secretary General the outcome of its discussions on the Preliminary Draft Report of the Secretary General on the Outline of Council of Europe Convention review (document SG/Inf(2011)21) with a view to present the above-mentioned draft report to the Committee of Ministers on 30 September 2011 by the Secretary General.

In this regard, the CAHDI held an exchange of views on the Preliminary Draft Report of the Secretary General on the Outline of Council of Europe Convention review. The results of these discussions are set out in **Appendix II** of the present report.

15. With regard to consideration of current issues of international humanitarian law, the CAHDI held an exchange of views with Mr Maurizio Moreno, President of the International Institute of Humanitarian Law and took note of information provided by the delegations.

16. On the basis of contributions from delegations, the CAHDI took stock of recent developments concerning the International Criminal Court (ICC) and developments concerning the implementation and functioning of other international criminal tribunals.

17. Likewise, based on contributions of Ms Marta Requena, Council of Europe Counter Terrorism Coordinator, and Mr David Scharia from United Nations Security Council Counter-Terrorism Committee Executive Directorate (CTED), the CAHDI took note of information on work undertaken by the Council of Europe and other international fora in the area of the fight against terrorism. These contributions concerned, in particular, the outcomes of the Special meeting of the United Nations Security Council Counter-Terrorism Committee (CTC) with International, Regional and Sub-Regional Organisations, hosted by the Council of Europe on 19-21 April 2011.

18. As far as topical issues of international law are concerned, the CAHDI examined the request of the Steering Committee for Human Rights (CDDH) on the possibility of introducing a simplified procedure for the amendment of certain provisions of the ECHR. Following this examination, the CAHDI adopted its opinion as set out in **Appendix III** to the present report.

19. The CAHDI held an exchange of views on the CAHDI's Draft Terms of Reference for 2012-2013 and adopted the Terms of Reference as set out in **Appendix IV** to the present report. The Committee asked the Secretariat to submit the said Terms of Reference to the Committee of Ministers for approval.

20. Moreover, the CAHDI took note of the reform process undertaken by the Council of Europe, and in particular the CAHDI held an exchange of views on the CAHDI's priorities for 2012-2013, in light of the Organisation's priorities for 2012-2013 (document CM(2011)48 rev). The priorities of the CAHDI for 2012-2013 are set out in **Appendix V** to the present report and the Committee asked the Secretariat to transmit them to the Committee of Ministers together with the CAHDI's Terms of Reference.

21. In accordance with the statutory regulations, the CAHDI re-elected Ms Edwige Belliard (France), and Ms Concepción Escobar Hernández (Spain), respectively as Chair and Vice-Chair of the Committee for a mandate of one year, as of 1 January 2012.

22. The CAHDI decided to hold its 43rd meeting in Strasbourg on 29-30 March 2012. It instructed the Secretariat, in liaison with the Chair of the Committee, to prepare in due course the provisional agenda of the meeting.

APPENDIX I

AGENDA

I. INTRODUCTION

1. Opening of the meeting by the Chair, Ms Edwige Belliard
2. Adoption of the agenda
3. Approval of the report of the 41st meeting
4. Statement by the Director of Legal Advice and Public International Law, Mr Manuel Lezertua

II. ONGOING ACTIVITIES OF THE CAHDI

5. Committee of Ministers' decisions of relevance to the CAHDI's activities, including requests for CAHDI's opinion
6. Immunities of States and international organisations
 - a. State practice and case-law
 - recent national developments and updates of the website entries
 - exchange of national practices on possibilities for the Ministry of Foreign Affairs to raise public international law issues in procedures pending before national tribunals and related to States' or international organisations' immunities
 - b. UN Convention on Jurisdictional Immunities of States and Their Property
7. Organisation and functions of the Office of the Legal Adviser of the Ministry for Foreign Affairs
 - a. Questions dealt with by offices of the Legal Adviser which are of wider interest and related to the drafting of implementing legislation of international law as well as foreign litigation, peaceful settlements of disputes, and other questions of relevance to the Legal Adviser
 - b. Updates of the website entries
8. National implementation measures of UN sanctions and respect for human rights
9. European Union's accession to the European Convention of Human Rights (ECHR)
 - Information provided by Mr Erik Wennerström, observer of the CAHDI to the Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH – EU)
10. Cases before the European Court of Human Rights involving issues of public international law
11. Peaceful settlement of disputes

12. Law and practice relating to reservations and interpretative declarations concerning international treaties: European Observatory of Reservations to International Treaties
 - List of outstanding reservations and declarations to international treaties

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

13. Exchange of views with Mr Stephen Mathias, Assistant Secretary-General for Legal Affairs of the United Nations
14. The work of the International Law Commission (ILC) and of the Sixth Committee
 - Exchange of views between the ILC, the Chair of the CAHDI and the Director of DLAPIL, Geneva, 8 July 2011
15. Exchange of views on the Council of Europe Convention Review
16. Consideration of current issues of international humanitarian law
 - Intervention by Mr Maurizio Moreno, President, International Institute of Humanitarian Law
17. Developments concerning the International Criminal Court (ICC)
18. Implementation and functioning of other international criminal tribunals (ICTY, ICTR, Sierra Leone, Lebanon, Cambodia)
19. Fight against terrorism - Information about work undertaken by the Council of Europe and other international bodies
 - Intervention by Mr David Scharia, United Nations Security Council Counter-Terrorism Committee Executive Directorate (CTED)
20. Topical issues of international law
 - Request of the Steering Committee for Human Rights (CDDH) on the possibility of introducing a simplified procedure for the amendment of certain provisions of the ECHR

IV. TERMS OF REFERENCE OF THE CAHDI FOR 2012-2013

V. OTHER

21. Election of the Chair and Vice-Chair
22. Date, place and agenda of the 43rd meeting of the CAHDI
23. Other business

APPENDIX II

RESULTS OF THE DISCUSSIONS IN THE COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI) ON THE PRELIMINARY DRAFT REPORT OF THE SECRETARY GENERAL ON THE OUTLINE OF COUNCIL OF EUROPE CONVENTION REVIEW

1. The members of CAHDI generally noted the importance and appropriateness of the stocktaking exercise on conventions from the wider angle of the current reform in the Council of Europe. They welcomed the work of the Secretary-General in formulating the preliminary draft report, one of the benefits of which has been to highlight certain issues that could be the subject of more in-depth discussions.

2. The delegations noted that the study initiated by the Secretary-General raised major substantive questions on both the internal functioning of the Council of Europe and the means being envisaged of encouraging member States and non-member States to accede to the conventions in question.

3. Given the issues raised by this study, the CAHDI members pointed out that they had not been able to examine the preliminary draft report in detail in the allotted time, as it would necessitate consultations at the national level with the departments concerned because of the variety of the fields covered by the conventions in question.

4. On a preliminary non-exhaustive basis, the following points were mentioned:

- the necessity to devote time to a thorough analysis of the preliminary draft;
- the importance of distinguishing between the Council of Europe's role as a depository of the conventions and the role of the States concerned;
- the need to carefully examine the proposed categorisation of the existing conventions. It was noted that the distinction between "key conventions" and "active conventions" was unclear;
- the difficulties of drawing up, for each category, an exhaustive list of conventions which would reach a consensus;
- the need for examining the reasons why few or no Council of Europe member States had ratified certain conventions;
- the doubts as to the appropriateness of some of the proposed measures, in particular for conventions which could be considered as obsolete conventions;
- the concerns about the resource implications of the measures envisaged.

5. Given the importance of the exercise of the Convention review, delegations stated that they were ready to transmit to the Committee of Ministers a more thorough analysis of the preliminary draft report at the end of the next CAHDI meeting in March 2012.

APPENDIX III

OPINION OF THE COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

ON THE REQUEST OF THE STEERING COMMITTEE FOR HUMAN RIGHTS (CDDH) FOR THE INTRODUCTION OF A SIMPLIFIED PROCEDURE FOR AMENDMENT OF CERTAIN PROVISIONS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

1. On 22 June 2011, the Steering Committee for Human Rights (CDDH) addressed a request to the Committee of Legal Advisers on Public International Law (CAHDI) for an opinion on the introduction of a simplified procedure for the amendment of certain provisions of the European Convention on Human Rights (ECHR).

2. In particular, the CDDH wished to obtain the opinion of the CAHDI on the compatibility, with public international law and the national law of the Member States, of the adoption of a Statute of the Court containing certain provisions of the ECHR, as well as other items which do not currently appear in the Convention.

3. During this exchange of views, the delegations examined the main questions posed by the introduction of a simplified procedure for amendment.

4. The first question was that of the legal procedures which would make it possible to introduce the simplified procedure of amendment.

- One solution would be to introduce to the Convention a provision establishing the simplified procedure for amendment and mentioning the provisions of the ECHR which are covered by the procedure. This solution would require the adoption of a Protocol of Amendment to the Convention, which would have to be ratified by the Member States.

- Another solution would be to adopt a Statute of the Court containing a final provision establishing the simplified procedure for amendment. This Statute would include provisions withdrawn beforehand from the Convention, in addition to new provisions. This solution would also require the adoption of a Protocol of Amendment to the Convention, which would have to be the subject of a ratification procedure by the Member States.

Thus, whatever the chosen solution, the delegations highlighted the need to proceed by means of a Protocol of Amendment to the Convention, which would have the status of an international agreement and be the subject, in each Member State, of a ratification procedure in accordance with the rules of internal law.

5. The second question concerned the simplified procedure for amendment in its own right.

- With regard to the nature of the provisions likely to be amended by means of the simplified procedure, it is necessary to limit them to ensure that the procedure is compatible with the constitutional requirements of the Member States. Thus, only provisions relating to organisational questions and without any impact on the rights and obligations of States and applicants should be included and presented in a clear and exhaustive list. This is the condition for it to be possible to implement the simplified procedure for amendment without it being necessary for States to apply the ratification procedure, requiring parliamentary authorisation, for each amendment.

Thus, by way of example, Article 35 of the Convention on the exhaustion of all domestic remedies is a provision which could not be subject to amendment by means of a simplified procedure, as modification of the Article would have consequences for the rights and obligations of applicants. However, a provision such as paragraph 2 of Article 24, which provides that the Court should be

assisted by rapporteurs, is essentially organisational and could therefore be the subject of a simplified procedure.

- In terms of the choice of a simplified procedure for amendment, it is clear that unanimous adoption of amendments would be more acceptable than a qualified or non-qualified majority for certain Member States, given their constitutional requirements. This adoption could be express or tacit, using an "opt-out" procedure (six-month period, for example, in which to object to the adoption of an amendment, at the end of which, in the absence of any objection, the amendment would come into force for all Member States).

6. Lastly, the CAHDI delegations insisted on the fact that these replies in no way prejudice the need or not, for certain Member States, to transcribe the provisions thus adopted into national law.

7. As things stand, the delegations considered themselves unable to conduct a more in-depth analysis of the question. Only in the light of a given draft proposal, transmitted to the CAHDI by the Committee of Ministers, could a more precise opinion be formulated.

APPENDIX IV

TERMS OF REFERENCE OF THE CAHDI FOR 2012-2013

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| 1. Committee name | Committee of Legal Advisers on Public International Law (CAHDI) |
| 2. Committee type | Ad hoc committee |
| 3. Source of terms of reference | Committee of Ministers |
| 4. Terms of reference | |

Having regard to:

the Resolution Res(2005)47 on committees and subordinate bodies, their terms of reference and working methods, adopted by the Committee of Ministers on 14 December 2005;

the need for the development of legal and judicial systems and of law enforcement systems respectful of the rule of law and human rights, as reflected in the Action Plan adopted by the Third Summit of Heads of State and Government of the Council of Europe (Warsaw, 16-17 May 2005), namely in Chapter I – Promoting common fundamental values: human rights, rule of law and democracy;

conclusions and decisions of the Committee of Ministers (CM/Del/Concl(91)455/24, Appendix 5, extended by CM/Del/Dec(2004)904, item 10.1, para. 4 and Appendix 11).

Within the framework of the Programme and Budget 2012-2013, under Programme Rule of Law: Common standards and policies – Development and implementation of common standards and policies, the Committee is instructed to:

- examine questions related to public international law;
- conduct exchanges and co-ordinate views of member states;
- provide opinions at the request of the Committee of Ministers or at the request of other Steering Committees or Ad hoc Committees, transmitted via the Committee of Ministers.

5. Composition of the Committee

A. Members

Governments of member states are entitled to appoint representatives, experts in the field of public international law, of the highest possible rank, preferably chosen among the Legal Advisers to the Ministries of Foreign Affairs.

The Council of Europe budget will bear the travel and subsistence expenses on one representative from each member state (two in the case of the state whose representative has been elected Chair)

B. Other Participants

i. The European Commission and the Secretariat General of the Council of the European Union may send representatives to meetings of the Committee, without the right to vote or defrayal of expenses.

ii. The states with observer status with the Council of Europe (Canada, Holy See, Japan, Mexico, United States of America) may send representatives to meetings of the Committee,

without the right to vote or defrayal of expenses.

iii. The following intergovernmental organisations may send representatives to meetings of the Committee, without the right to vote or defrayal of expenses:

- The Hague Conference on Private International Law;
- North Atlantic Treaty Organisation (NATO);¹
- The Organisation for Economic Co-operation and Development;
- The United Nations and its specialised agencies;²
- European Organisation for Nuclear Research (CERN);³
- International Criminal Police Organisation (INTERPOL).

C. Observers

The following non-member states and non-governmental organisations may send representatives to meetings of the Committee, without the right to vote or defrayal of expenses:

- Australia;
- Israel;⁴
- New Zealand;
- International Committee of Red Cross (ICRC).⁵

6. Working structures and 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 2013.

-- Notes -----

Note 1 See CM/Del/Dec/Act(93)488/29 and CM/Del/Concl(92)480/3.

Note 2 For specific items at the request of the Committee.

Note 3 For specific items at the CERN's request and subject to the Chair's approval.

Note 4 Admitted as observer "for the whole duration of the Committee" by the CAHDI, March 1998. The same is valid for subordinated committees. Decision confirmed by the Committee of Ministers (CM/Del/Dec(99)670/10.2 and CM(99)57, para.D15). See CM/Del/Dec(2000)735/2.1a, para. 4 and SG/Inf(2000)48, para. 34. See CM/Del/Dec(2001)742/10.1 and Appendix 8, see CM/Del/Dec(2002)816/10.1 and Appendix 7.

Note 5 Admitted as observer for the whole duration of the Committee, see CM/Del/Dec(2003)861/10.1, para. 2 and CM(2003)146, para; 12; see CM/Del/Dec(2004)883/10.1, para. 1 and Appendix 16.

Decision References

29/11/2006 CM/Del/Dec(2006)981, Item 10.1b -- CM/Del/Dec(2006)981/10.1, Appendix 3 valid until 31/12/2008

APPENDIX V

CAHDI PRIORITIES FOR 2012-2013

For 2012-2013, the Committee of Legal Advisers on Public International Law (CAHDI) establish the following priorities:

Examine topical questions of public international law ;

Respond to requests for opinion or exchanges of views requested or transmitted by the Committee of Ministers ;

Continue its active role as the European Observatory of Reservations to International Treaties ;

Deepen exchanges of views on the work of the International Law Commission and of the Sixth Committee ;

Continue to update and improve databases managed by the Committee which are related to States practice on immunities of States; organisation and functions of the Office of the Legal Adviser of the Ministry for Foreign Affairs and implementation of United Nations sanctions ;

Review recent developments regarding international disputes, namely cases before the European Court of Human Rights involving issues of public international law ;

Maintain contacts with lawyers and legal services of other entities or international organisations.