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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

List of items discussed and decisions taken Abridged report

43rd meeting
Strasbourg, 29-30 March 2012

Public International Law Division,
Directorate of Legal Advice and Public International Law, DLAPIL

cahdi@coe.int - fax +33 (0)3 90 21 51 31 - www.coe.int/cahdi

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

43rd meeting, Strasbourg, France, 29-30 March 2012

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

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 43rd meeting in Strasbourg on 29 and 30 of March 2012 with Ms Edwige Belliard (France) in the Chair. The list of participants is set out in Appendix I of the meeting report.¹
2. The CAHDI adopted its agenda as set out in **Appendix I** of the present report.
3. The CAHDI adopted the report of its 42nd meeting (Strasbourg, 22-23 September 2011), and authorised the Secretariat to publish it on the CAHDI's website.
4. 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), 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 including information relating to the drafting of the most recent conventions.
5. The CAHDI considered the decisions of the Committee of Ministers relevant to its work, and took note in particular of the CAHDI's terms of reference for 2012-2013 as adopted by the Committee of Ministers at its 1127th meeting (22-24 November 2011). The CAHDI took note of the decision of the Ministers' Deputies dated 28 March 2012 to communicate to the Committee for information and possible comments the Parliamentary Assembly Recommendation 1995 (2012) - "The International Convention for the Protection of all Persons from Enforced Disappearance" and decided to examine this request at its next meeting.
6. 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 CAHDI took note in this respect of the new contribution from Israel.

The CAHDI pursued its 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. It took note of the reply submitted by Sweden to the relevant questionnaire.

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 States represented within the CAHDI.

7. 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. The CAHDI took note in this respect of the contribution from Italy.

¹ Document CAHDI (2012) 11 prov

8. The CAHDI 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 and in particular of the contribution submitted by Belgium in this respect. 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. The CAHDI took note in this respect of the updated contribution submitted by the European Union.

9. 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. The CAHDI took note of the Report of the Extraordinary Meeting between the Steering Committee for Human Rights (CDDH), the CDDH informal working group on the accession of the European Union to the European Convention of Human Rights (CDDH-UE) and the European Commission, held in Strasbourg on 12 and 14 October 2011.

10. 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.

11. In the context of its consideration of issues relating to the peaceful settlement of disputes, the CAHDI considered the last version of the document (CAHDI(2012)8rev) containing information on the International Court of Justice's jurisdiction under international treaties and agreements and invited the delegations to submit to the Secretariat any relevant information for the update of the document.

12. 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.

13. The CAHDI further held an exchange of views with Mr Luis ROMERO REQUENA, Director General of the Legal Department at the European Commission. The exchange of views concerned "The legal order of the European Union and international public law".

14. The CAHDI further pursued its exchange of views on the Council of Europe Convention review and its examination of the Preliminary Draft report by the Secretary General on the same subject (SG/Inf(2011)21rev). The Committee adopted the document entitled "Observations of the Committee of Legal Advisers on Public International Law (CAHDI) on the Preliminary Draft Report by the Secretary General on the Review of Council of Europe Conventions" as set out in **Appendix II** of the present report, and instructed the Secretariat to transmit it to the Secretary General.

15. With regard to consideration of current issues of international humanitarian law, the CAHDI took note of the presentation made by the representative of the International Committee of the Red Cross.

16. The CAHDI took note of recent developments concerning the International Criminal Court (ICC).

17. The CAHDI took stock of recent developments concerning the implementation and functioning of other international criminal tribunals.

18. As far as topical issues of international law are concerned, the CAHDI took note of the Report of the 3rd meeting of the Committee of Experts on a simplified procedure for amendment of certain provisions of the European Convention on Human Rights (DH-PS), to which the CAHDI had previously transmitted an opinion on the national and/or international legal problems affecting the feasibility of certain possible modalities for the introduction of a simplified procedure for amendment of the Convention.

19. The CAHDI decided to hold its 44th meeting in Paris on 19-21 September 2012. The Committee instructed the Secretariat, in liaison with the Chair of the Committee, to prepare in due course the provisional agenda of this meeting.

20. The CAHDI considered the request for observer status submitted by the International Institute for Humanitarian Law and agreed to postpone the examination of this request at its next meeting and to invite the Institute to attend the meeting in order to present the conclusions of its annual round table.

APPENDIX I**AGENDA****I. INTRODUCTION**

1. Opening of the meeting by the Chair, Ms Edwige Belliard
2. Adoption of the agenda
3. Adoption of the report of the 42nd 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

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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. Luis ROMERO REQUENA, Director General of the Legal Department, European Commission
14. Exchange of views on the Council of Europe Convention Review
15. Consideration of current issues of international humanitarian law
16. Developments concerning the International Criminal Court (ICC)
17. Implementation and functioning of other international criminal tribunals (ICTY, ICTR, Sierra Leone, Lebanon, Cambodia)
18. Topical issues of international law

IV. OTHER

19. Date, place and agenda of the 44th meeting of the CAHDI
20. Other business

APPENDIX II

OBSERVATIONS OF THE COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI) ON THE PRELIMINARY DRAFT REPORT BY THE SECRETARY GENERAL ON THE REVIEW OF COUNCIL OF EUROPE CONVENTIONS

1. In the framework of the general reform of the Organisation, the Council of Europe is currently analysing the relevance of its conventions with a view to introducing follow-up measures *inter alia* to "increase the visibility and the number of parties". To that end, the Secretary General has prepared, a Preliminary draft report on the review of Council of Europe conventions (SG/Inf(2011)21rev2).
2. As envisaged in the Secretary General's Outline of convention review (SG/Inf(2011)2 FINAL), an exchange of views was held on the preliminary draft report at the 42nd meeting of the CAHDI. The CAHDI subsequently notified the Secretary General of the results of its discussions (CAHDI(2011)MISC 4 rev), emphasising the importance and appropriateness of the stocktaking exercise on Council of Europe conventions but pointing out that it required more time for a thorough analysis of the preliminary draft. As a result, the Secretary General suggested to the Committee of Ministers that the CAHDI be given the necessary time to prepare a detailed legal analysis of the document (Secretary General's communication of 28 September 2011).
3. At its 43rd meeting, the CAHDI held an exchange of views on the preliminary draft report on the review of Council of Europe conventions and adopted the present observations.
4. As an opening remark, the CAHDI reiterates the importance and expediency of the review of Council of Europe conventions and welcomes the work of the Secretariat General in formulating the preliminary draft report. The main goal of this process is to improve the efficiency and strengthen the impact of the conventions of the Council of Europe. This exercise, which requires a sustained effort, is particularly delicate as it touches on spheres of competence within the remit of the States, notably in connection with the ratification, amendment or denunciation of conventions or the formulation of reservations. Indeed, the preliminary draft points out, several times, the leading role played by States.

General observations

5. The Committee recalls that the Council of Europe is an international organisation with a regional role whose aim is to "achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress" (Article 1 of the Statute). The principles laid down in Council of Europe conventions are intended to define the standards to be met by its member States in the spheres that are central to the Organisation's values. The participation of non-member States to Council of Europe conventions is possible. However, the applicable texts do confer upon them a status differing from that of the member States.
6. Accordingly, the CAHDI believes that, even though the issue is important, the review of the participation by member States should prevail, in the preliminary draft, over the question of the participation by non-member States. Reference in this respect is made *inter alia* to the use of the criterion of "ratification by non-member States" to determine which conventions belong to Group 1 "Key conventions", as well as to the further section dedicated to them in chapter 3 on "Related issues".
7. Moreover, the CAHDI is of the view that the preliminary draft has a tendency to place in the same position, as regards the conventions of the Council of Europe, non-member States of the Council of Europe on one hand and the European Union on the other hand. However, all the member States of the European Union share the values of the Council of Europe of which they are

all member States. The non-member States of the Council of Europe may also share those values. Additionally, the question of the potential risk of creating “legal dividing lines” between European Union member States and the other States parties to the Council of Europe conventions which are not member States of the European Union has been raised.

8. Furthermore, several of the proposals mentioned in the preliminary draft report require fine-tuning as they might have the effect of jeopardising the existing balance between the States which are parties to conventions on the one hand and the Council of Europe on the other hand. The CAHDI believes it necessary for the preliminary draft to clearly establish that the Organisation cannot be given a role other than the one assigned to it by its Statute and on a case-by-case basis in the conventions.

Classification of Council of Europe conventions

9. The CAHDI underlines the importance of fixing objective criteria for assessing the relevance of Council of Europe conventions. Accordingly, some criteria which are difficult to evaluate should be dropped, such as “role as a model for legislative reforms”, “effective implementation” or “added value on the international scene”.

10. The Committee notes certain inconsistencies in the classification compiled in the preliminary draft. When considering additional protocols, it might be useful to examine whether they should be classified in the same group as the convention they are intended to supplement or amend. Accordingly, the link between a convention and its additional protocols should also be taken into consideration when including a convention or a protocol in a certain group.

11. Furthermore, at this stage of the exercise, the preliminary draft should not draw up an exhaustive list of the conventions belonging to the respective groups and instead go no further than providing a few examples on which there is consensus. It will be the task of the different steering committees to decide on the classification of the conventions into the different groups on a case-by-case basis and to establish lists as complete as possible. The result of the classification by the steering committees should be evaluated at a later stage. At that point, the CAHDI would be ready to provide the Committee of Ministers with additional observations.

12. The categorisation of conventions used in the preliminary draft report may appear artificial and the boundaries between groups are sometimes tenuous.

13. In particular there are doubts as to whether the distinction between “key conventions” and “active conventions” is a pertinent one. These two categories could be merged under the title “conventions with numerous ratifications and considered as key”. This group would include the conventions termed as “flagship” instruments meeting both the criterion of “ratification by 40 member States or more” and, in addition, the criterion of “identification as a convention in a subject area relating to the Organisation’s core values” or “conventions considered important by the steering committees”.

14. Similarly, the distinction between group 2 “active conventions” and group 3 “conventions with few ratifications or limited application” is unclear. As it stands, ratification of a convention by a small number of States may result in it being classified in either one of these groups. In this respect, the second group could cover “conventions with few ratifications so far but considered as key”. This change of name could obviate any risk of confusion.

15. Accordingly, the CAHDI suggests, as an indication, the following classification of the Council of Europe’s conventions:

- Group 1: “conventions with numerous ratifications and considered as key”;
- Group 2: “conventions with few ratifications so far but considered as key”;
- Group 3: “other active conventions”;
- Group 4: “inactive conventions”.

16. The CAHDI sees the category of "conventions for which updating or revision could be considered" as a transversal category which may apply to conventions belonging to groups 1 to 4. Moreover, once again, it would be preferable not to go so far as drawing up a list of the kind appended under group 5, even if it is only indicative. As this category is likely to evolve, mentioning a few universally agreed examples would be a better course of action.

Related issues

17. The CAHDI believes that Chapter 3 "Related issues" raises important questions. It would benefit from being synthesised and incorporated in chapter 4 "Proposed action plan for the Council of Europe conventions". The "Proposed action plan" must be the focal point of the preliminary draft report.

18. As regards the question of participation by non-member States in the life of a convention, this should be examined on a case-by-case basis at the time of the negotiation.

19. Regarding the risk of a potential conflict between the 1969 Vienna Convention on the law of treaties and the Statute of the Council of Europe, the CAHDI considers this not to be an issue. The Vienna Convention, which reflects the rules of customary law applicable in the sphere of treaty law in numerous respects, makes it clear that the law specific to an international organisation may provide grounds for applying derogating rules (article 5).

20. Where reservations to conventions are concerned, the CAHDI points out that the necessity to make specific provisions regarding reservations should be decided for each convention when negotiating it, depending on its purpose and aim. Accordingly, the Committee does not consider it desirable to state a position of principle regarding the advisability or otherwise of clauses restricting or denying the right to formulate reservations. In addition, it notes that the preliminary draft makes no mention of the case of Council of Europe conventions which do not allow any reservations to be formulated.

Proposed action plan for the Council of Europe conventions

21. The first sub-section of chapter 4 on "Measures relating to the promotion of the conventions among member States" places the member States at the heart of the Council of Europe conventions review process. The measures proposed must indeed be aimed first and foremost at the Organisation's member States.

22. The CAHDI questions the relevance of some of the measures proposed. Besides the issue of the impact on the Council of Europe's budget and member States' contributions, certain measures may prove to be of little benefit for achieving the goal of the current exercise:

- Where the budgetary consequences are concerned, the CAHDI believes that it would be advisable to consider the costs generated by some of the measures proposed in the preliminary draft. Promoting conventions at events which are already planned appears to be more appropriate for the goal pursued by the review than organising specific high-level seminars or colloquies intended exclusively to promote one or several conventions.

- Regarding the relevance of some of the measures proposed, the CAHDI suggests that care be taken when considering running a campaign to "raise awareness among judges" of European or domestic courts, which might infringe the principles of the independence of judges and the separation of powers. Furthermore, the "measures to improve the management of conventions" appear to assign a role to the Organisation that would exceed its prerogatives. It is for the States to determine, when negotiating a convention, how that convention is to be managed and, where they deem necessary, to decide to set up a monitoring mechanism.

23. Concerning the "measures relating to inactive conventions", such as for example the adoption of a recommendation of the Committee of Ministers inviting the parties to denounce a convention or the abrogation of a convention by the Committee of Ministers, the CAHDI reiterates that it is for the parties to decide, on the basis of their own considerations, whether they wish to denounce a convention. Given the legal complexity of denouncing a convention, the CAHDI encourages an analysis of different approaches. In this connection, resorting to a conference of Parties is a costly measure which might prove to be of limited effect as the denunciation procedure is not uniform in the 47 member States.

ADDENDUM TO APPENDIX II***Draft classification of conventions***

- Group 1 : the "conventions with numerous ratifications and considered as key";
 - Ratification by 40 or more member States; and
 - Convention considered as key*.

- Group 2 : the "conventions with few ratifications so far but considered as key";
 - Convention considered as key*,
 - and:
 - Recent convention (opened for signature since 2002), or
 - Regular ratifications (at least one every year or two), or
 - Replacement of numerous bilateral agreements, or
 - Influence outside Europe: requests for accession from non-member States.

- Group 3 : the "other active conventions";
 - Active convention which is not considered as key.

- Group 4 : the "inactive conventions".
 - Conventions which have not yet come into force 20 years after being opened for signature (although this may not be an absolute criterion and an examination case by case will be necessary), or
 - Superseding of a convention by more recent conventions, including revised conventions, or
 - Existence of legislation or instruments of the EU or other international organisations which set higher standards superseding or updating those of the Council of Europe convention concerned, or
 - Entry into force of protocols of amendment which are thus incorporated into the parent Council of Europe convention, or
 - The protocols have fulfilled their purposes and lost their *raison d'être*.

* The key conventions are conventions termed as "flagship" instruments, identified as belonging to one of the areas relating to the Organisation's core values or the conventions considered as important by the steering committees.