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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

(CAHDI)

Meeting report

45th meeting
Strasbourg, 25-26 March 2013

Public International Law Division,
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I. INTRODUCTION

1. Opening of the meeting by the Chair, Ms Liesbeth Lijnzaad

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 45th meeting in Strasbourg on 25 and 26 March 2013 with Ms Liesbeth Lijnzaad in the Chair. The list of participants is set out in **Appendix I** to this report.

2. Adoption of the agenda

2. The agenda was adopted as set out in **Appendix II** to this report.

3. Adoption of the report of the 44th meeting

3. The CAHDI adopted the report of its 44th meeting (document CAHDI (2012) 20) and instructed the Secretariat to publish it on the Committee's website.

4. Statement by the former Director of Legal Advice and Public International Law, Mr Manuel Lezertua

4. Mr Manuel Lezertua, former Director of Legal Advice and Public International Law (DLAPIL), informed the delegations of recent developments within the Council of Europe. The CAHDI took note in particular of the progress related to the review of the Council of Europe conventions, the recent developments recorded by the Treaty Office of the Organisation, the state of negotiations as regards bilateral agreements concluded between the Council of Europe and host States to regulate the privileges and immunities of the external offices of the Council of Europe and the organisational changes within the DLAPIL. Mr Lezertua's statement is set out in **Appendix III** to this report.

5. The Committee thanked Mr Lezertua for his contribution to the work of the CAHDI and wished him every success in his new professional tasks.

II. ONGOING ACTIVITIES OF THE CAHDI

5. Committee of Ministers decisions of relevance to the CAHDI's activities, including requests for CAHDI opinions

6. The Chair presented a compilation of Committee of Ministers decisions of relevance to the CAHDI's activities (documents CAHDI (2013) 1 and CAHDI (2013) 1 Addendum).

7. She informed in particular the Committee of the follow-up given to the comments adopted by the CAHDI at its 44th meeting on Recommendation 1995 (2012) of the Parliamentary Assembly "The International Convention for the Protection of All Persons from Enforced Disappearance", noting that the Committee of Ministers had followed the advice of the CAHDI when adopting its reply to the recommendation on 16 January 2013.

6. Immunities of States and international organisations

a. State practice and case-law

i. Exchange of views on the issue of "Service of process"

8. The Chair introduced document CAHDI (2013) 4 on "Service of Process" and invited delegations to provide information with regard to the issues at stake in the document.

9. The Portuguese delegation reminded delegations that it had raised the issue of service of process on foreign States at the previous meeting of the CAHDI, at which it had aired certain practical difficulties encountered in the interpretation of the *UN Convention on Jurisdictional Immunities of States and their Property* (2004). It did not dispose of sufficient information allowing the affirmation that its provisions were the reflection of a uniform practice, including at the European level amongst Council of Europe member States. It provided delegations with a brief introduction of document CAHDI (2013) 4 in which two topics had been singled out as giving rise to different interpretations. First, as regards the issue of the form in which service of process was to be effected pursuant to Article 22 paragraph 1 c) of the UN Convention, certain third countries had invoked the existence of a customary norm requiring service of process to be delivered to the foreign embassies in the territory of the State of the forum. Considering that most of the concerned procedures were procedures against embassies, related either to employment contracts subject to national law or issues of non-contractual liability, this form of notification might have been considered as inappropriate. Secondly, with respect to the question of the meaning to give to the words "if necessary" in Article 22 paragraph 3 of the UN Convention, the Portuguese delegation wondered to which extent this provision imposed the translation of judiciary documents.

10. The Austrian delegation referred to the ECHR judgment in the *Wallishauser v. Austria*[1] case and pointed out the *obiter dictum* in the court´s ruling, namely that the UN Convention of 2004 codified rules of international customary law. It underlined that Austria shared this view. In reply to the questions formulated in document CAHDI (2013) 4, it indicated that the practice in Austria was divergent and not always in line with the applicable national and international norms. Under Austrian law, service of process was only properly made to the Ministry of Foreign Affairs and not to the embassy in the State concerned. The Austrian authorities understood the terms "if necessary" as referring to the official language of the State of the forum. For the purposes of judicial procedures in Austria it was therefore necessary to provide a German language translation.

11. The Swiss delegation informed the Committee that the Swiss authorities and tribunals, as well as the Swiss Minister of Foreign Affairs, drew from the UN Convention as reflecting current customary law. Switzerland in practice accepted both ways of transmission: either through its embassies in respondent States to the respective Foreign Ministry, or through the embassy of the foreign State in Switzerland. If there was no embassy in either one, the service of process would be made to the competent embassies. Moreover, the Swiss authorities interpreted the term `if necessary´ as referring to the divergence between the language of the Swiss national procedure and the national language of the respondent State. In case of such a divergence, the competent Swiss tribunal would have to translate the judicial documents.

12. The representative of the United States indicated that the terms ´diplomatic channels´ were defined in the Foreign Sovereign Immunities Act. This Act contemplated four methods for serving process on a foreign State:

- delivery of service under a special arrangement between parties;
- delivery of service pursuant to an applicable convention;
- delivery of service through mail from the court clerk to the head of the Ministry of Foreign Affairs;
- through diplomatic channels: this method would only apply if the previous three were inapplicable. This method entailed delivery by the State Department to US embassy in the respondent State, which transmitted it to the Ministry of Foreign Affairs of the respondent State under cover of a diplomatic note. Service through diplomatic channels did not typically include a notification to the foreign embassy within the United States.

If the United States was the defendant, service of process through diplomatic channels could take two forms. If service was made on the United States by service of the State Department directly, the United States did not expect or require service by the foreign State to the United States

[1] European Court of Human Rights, *Wallishauser v. Austria*, application no. 156/04, judgment delivered on 17 July 2012.

embassy in the forum State. Alternatively, the foreign court could transmit the papers to the Ministry of Foreign Affairs which would transmit the papers to the United States embassy in the forum State which would transmit the papers to the State Department. With respect to the second question raised in document CAHDI (2013) 4, under the Foreign Sovereign Immunities Act, when documents were transmitted from the clerk of the court to the Ministry of Foreign Affairs or through diplomatic channels, a summons and complaint had to include "a translation of each into the official language of the foreign State". There was no express translation requirement for service through a special arrangement between the parties or under an applicable international convention because it was assumed that the arrangement or convention would address any translation requirement. But for service through the clerk of court or diplomatic channels a translation would always be necessary unless English was an official language in the defendant State.

13. The Belgian delegation informed the Committee that in the absence of any applicable convention between the concerned States, Belgium proceeded to service of process through diplomatic channels in conformity with international customary law. Service of process was deemed to be effected upon the acknowledgement of receipt of the service of process by the Ministry of Foreign Affairs of the respondent State. Serving process upon the embassy of the foreign State in the Belgian territory would not be considered sufficient. The Belgian Embassy would transmit the notification to the Ministry of Foreign Affairs. Occasionally, a copy of the notification was sent to the foreign embassy in Belgium in order to expedite the acquisition of knowledge of the concerned acts. However, this could not replace the notification of the documents to the Ministry of Foreign Affairs. The Belgian delegation informed the CAHDI that Belgium was party to the European Convention on State Immunities. It had signed but not yet completed the process allowing for the ratification of the 2004 UN Convention, which Belgium regarded as codifying international customary law. Concerning the second question raised in document CAHDI (2013) 4, Belgium upheld the view that the notified documents were to be understandable for the State concerned.

14. The Russian delegation related that the legal doctrine in its country regarded the UN Convention as an expression of international customary law, despite the fact that the Russian Federation was not party thereto. It referred to the declaration entered into by the Russian Federation upon accession to the *Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* whereby it expressed its understanding of what service of documents through diplomatic channels meant, namely that "*[i]t is highly desirable that documents intended for service upon the Russian Federation, the President of the Russian Federation, the Government of the Russian Federation, the Ministry of Foreign Affairs of the Russian Federation are transmitted through diplomatic channels, i.e. by Notes Verbales of diplomatic missions of foreign States accredited in the Russian Federation*". Accordingly, the Russian Federation delivered service of process upon foreign States through its embassies abroad and would expect that in law suits in which it was a party, foreign governments delivered service of process through their embassies accredited in the Russian Federation accompanied with the necessary translations.

15. The representative of Canada recalled that Canada was not a party to the UN Convention and that in this country, the matter of service of process was governed exclusively through the State Immunity Act. Canada's practice was to transmit the document in question to the Ministry of Foreign Affairs through its network of diplomatic embassies. Occasionally Canada notified the foreign embassy of the State concerned in Canada that an originating document was transmitted to the Ministry of Foreign Affairs in accordance with the State Immunity Act. Canada only accepted service of process through diplomatic channels with the Department of Foreign Affairs. It did not accept service of process attempted at a Canadian embassy or consulate abroad on the basis of the inviolability of the embassy or the consulate premises. It required that an originating document against Canada be translated into one of its official languages, i.e. French or English.

16. The French delegation submitted that in the absence of any applicable bilateral agreement, France followed the diplomatic means, preferably by notifying the foreign embassies in French

territory or in the case of States which refused this procedure, through the French embassy in the foreign States. A translation could be provided, not as an obligatory requirement but rather as a matter of international courtesy. The French delegation referred in this respect to the existence of an EU Regulation on service of documents which did not require a translation; however, should the addressee decline to receive the act, the forwarding entity was then required to re-transmit the act accompanied by a translation.

17. The Irish delegation noted that Ireland was not a party to either the European or the UN convention. The practice in Ireland was to institute proceedings through diplomatic channels to the Foreign Ministry of the respondent State. The limited case law on this issue suggested that it was not appropriate to attempt to serve proceedings on a foreign embassy in Ireland. The Department of Foreign Affairs of Ireland instructed its own embassies abroad not to accept service of legal proceedings if attempted. In such an event, the country was then requested to serve the proceedings through diplomatic channels on the Department of Foreign Affairs and Trade in Dublin. With respect to Article 22 paragraph 3 of the UN Convention, Ireland found it appropriate to provide a translation into one of the official languages of the respondent State when English was not an official language of such State.

18. The Romanian delegation reported that Romania had ratified the UN Convention and perceived most of its provisions as reflecting customary law. In Romania's practice, service of proceedings through diplomatic channels had been interpreted in both ways. Service to the embassy had been considered sufficient as the embassy was viewed as an extension of the sending State and it had the duty of transmitting the documents to the Ministry of Foreign Affairs of the sending State. This policy was practiced actively as well as passively when Romanian embassies were served in foreign countries. In its passive practice, Romania did not require a translation of documents in its official language. The Romanian delegation recalled in this regard that the proposal made by the Special Rapporteur of the International Law Commission on the UN Convention on requiring service of process to be at least in one of the official languages of the UN had been dropped in the final version of the Convention.

19. The delegation of the United Kingdom indicated that it had codified its law and practice on State immunity in the State Immunity Act 1978 which was passed when the United Kingdom ratified the European Convention. Section 12 of this Act provided the basic rule that proceedings against a State were served by transmittance through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs. Service was deemed to have been effected when the writ or document was received at the Ministry. Alternative venues were possible with the consent of the respondent State. Accordingly, in the usual case, documents were sent from the court to the Foreign and Commonwealth Office, from these offices to the relevant diplomatic mission to serve it on the relevant Ministry of Foreign Affairs. There had been a clear indication from the House of Lords in the *Kuwait Airways Corporation v. Iraqi Airways Company and others* case that service could not be carried out by serving the diplomatic mission of the respondent State in the United Kingdom. A translation was not required into another language; although respondent States were given additional time to respond than would normally be granted when English was not one of their official languages.

20. The Norwegian delegation indicated that Norway was party to UN Convention and considered it to be a codification of custom. In Norway, service of process on a sovereign State was conveyed through diplomatic channels, i.e. through a Diplomatic Note to the embassy of the respondent State in Norway as the forum State. The writ of summons was accompanied by a Note Verbale from the Ministry of Foreign Affairs which encompassed a formal request for a reply within a certain time limit. Documents were provided in the language used in Norway's official correspondence with the embassy concerned in Norway, which entailed that they were at times translated. This procedure was implemented in a circular from the Ministry of Justice addressing the courts.

21. The Greek delegation recalled that Greece was a party neither to the European Convention nor to the 2004 UN Convention. Nevertheless, courts in Greece tended to seek guidance from the UN Convention. It stressed that in its view, not all the provisions of this convention could be considered to reflect customary international law, in particular its Article 11 which concerned State immunity in labour disputes. In the absence of a procedure which had been agreed upon in bilateral agreements, Greece served process through the Ministries of Justice or Foreign Affairs.

22. The Czech delegation related that the Czech Republic was a signatory to the UN Convention and had undertaken the process of ratification. It considered the UN Convention to reflect international customary law. The Czech Republic accepted documentation through diplomatic channels, were it in Prague or through its embassies abroad. With respect to the requirement of translation, it was possible in the initial stages of the proceedings to submit documentation to the embassies or the Ministry in a language other than the Czech language, but for the purposes of the proceedings before the Czech courts, documents needed to be in Czech language.

23. Several delegations who contributed information orally announced that they would submit this information in writing, as had been done by the delegation of Cyprus.

24. Upon a proposal by the Austrian and the Portuguese delegations, the Chair concluded the discussions on this topic by indicating that the Secretariat would prepare a questionnaire allowing delegations to submit structured replies. She underscored the practical value of such an exercise and encouraged all delegations to contribute their answers to the questionnaire.

ii. Information with regard to State practice and case-law

25. With regard to State practice regarding immunities of States and international organisations, the CAHDI took note of the updated contributions to the CAHDI database on State practice regarding State Immunities from Austria, Belgium, the Netherlands, Portugal and Spain. The Chair invited delegations, which had not yet done so, to submit or update their contributions to the relevant database at their earliest convenience. In this regard, the Slovenian delegation informed the CAHDI of its intention to submit an update to its contribution of November 2005 before the next CAHDI meeting.

26. The Spanish delegation presented to the CAHDI the main issues of its updated contribution to the database. It informed the members of a judgment of 25 June 2012 rendered by the Supreme Court and which had the purpose of unifying the criteria applied by the Spanish courts concerning the attachment of bank accounts of foreign embassies. The judgment confirmed the indivisibility of the embassies' bank accounts and the existence of the presumption that these bank accounts served *acta iure imperii*. Due to this indivisibility, the bank accounts of a foreign embassy could not be attached even if they served *acta iure gestionis* as well, in accordance with Article 22 of the *Vienna Convention on Diplomatic Relations* (1961). Furthermore, this judgment reaffirmed the duty of the State and specifically the Ministry of Foreign Affairs to cooperate with the courts for the execution of any sentence in this regard.

27. The Belgian delegation informed the CAHDI of recent developments in the cases presented at the previous meeting of the CAHDI, one of which concerned the immunity of an international organisation and the others the immunity of two States. It also presented a new judgment issued on 22 November 2012.

- In connection with the first case, which concerned the execution of an arbitral award and of a judicial decision in favour of private creditors against an international organisation enjoying immunity from jurisdiction and execution, the Belgian delegation recalled that the Brussels Court of First Instance had held that the immunity of the international organisation in question should be waived. Under a judgment of 26 June 2012, the Brussels Court of Appeal had ruled however, that the international organisation's immunity from jurisdiction

and execution did not constitute a disproportionate restriction to the rights of the applicant and that it could therefore not be waived. The Belgian delegation informed the CAHDI that the applicant had lodged an appeal before the Belgian *Cour de cassation* invoking that the Brussels Court of Appeal had not examined whether there existed alternative reasonable ways to protect effectively his rights as guaranteed by the European Convention on Human Rights. A brief had been filed by the Belgian State and the procedure was under way.

- In connection with the other cases:

    - As regards the case concerning a preventive attachment order of the bank account of the Rwandan Embassy in Brussels, the Belgian delegation indicated that its State had accepted to intervene voluntarily before the enforcement judge of the Brussels Court of First Instance. The judgment was expected to be rendered imminently.

    - As regards the judgment issued by the Labour Court – sentencing Ethiopia to pay damages to a worker who had been recruited locally in Brussels by the Ethiopian Embassy and then dismissed – and following which the Embassy's account had been attached, the Belgian delegation informed the CAHDI that a judgment had been issued in October 2012, which had not granted the lifting of this attachment by asserting the State's immunity on account of the fact that the applicant did not dispose of alternative ways to obtain the execution of the sentence. The Belgian delegation drew a parallel between this judgment and the *Waite and Kennedy* case of the European Court of Human Rights[2].

- Finally, the Belgian delegation informed the CAHDI of a judgment of the Belgian *Cour de cassation* of 22 November 2012 where the Court had recognised the application of Articles 22 and 25 of the *Vienna Convention on Diplomatic Relations* (1961) to the protection of bank accounts assigned to the functioning of a diplomatic mission and established that the *ne impediatur legatio* rule had the binding force of an international custom.

28. The Dutch delegation referred to the case introduced against the United Nations and the Netherlands relating to the genocide in Srebrenica and invited delegations to take note of this judgment which appeared in the CAHDI database. It underlined that the key issue at stake was the relationship between immunity on the one hand and access to court on the other and noted the interest of examining how this balance was resolved by the various national jurisdictions.

29. The Portuguese delegation noted the difficulty of dealing with the issue of the seizing of bank accounts of foreign embassies and thanked the delegations which had provided information in this regard. It encouraged other delegations to contribute to the database and informed the CAHDI that Portugal would submit a further contribution to the database with an emphasis on the situation in third countries with regard to this specific issue.

30. The United States representative informed the CAHDI of recent developments in the cases presented at the previous meeting of the CAHDI, in particular with regard to the immunity of several sitting heads of State and former foreign officials. By a decision dated October 23 2012, the US Court of Appeals for the District of Columbia Circuit (D.C. Circuit) had affirmed the District Court's ruling acknowledging the immunity from testifying of former President of Columbia, Mr Alvaro Uribe Velez. The D.C. Circuit had held that the plaintiffs' "mere allegations" of illegal acts or *jus cogens* violations were insufficient to overcome former President Uribe's immunity from being compelled to testify. With regard to the *Samantar v. Yousuf* case, the United States representative informed the CAHDI that in November 2012, the U.S. Court of Appeals for the Fourth Circuit had ruled that Mr Samantar was not immune on the grounds that he was alleged to have engaged in *jus cogens* violations. Mr Samantar had requested review by the Supreme Court.

[2] European Court of Human Rights, *Waite and Kennedy v. Germany*, application no. 26083/94, judgment delivered on 18 February 1999.

31. The Japanese representative informed the CAHDI that the long established practice of the Japanese courts under the doctrine of absolute immunity had changed in 2006 to restrictive immunity. He referred in particular to a judgment issued in 2009 regarding a contract of employment between a foreign State and an individual in which the Supreme Court had quashed the decision of the court of prior instance and refused to grant immunity to the appellant (a foreign government agency) pursuant to Article 11 paragraph 2.d. of the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (2004). Furthermore, the Japanese representative provided information to the CAHDI on a case brought against Japan by an Iranian national, seeking reparation in relation to his criminal detention in Japan.

32. The Canadian representative informed the CAHDI of the recent developments in the *Kazemi v. Islamic Republic of Iran* case, which had been brought before the Supreme Court. Furthermore, he provided information with regard to civil suits brought against Chinese leaders by members of the Falun Gong movement, noting that Canada refrained from intervening in proceedings in the absence of a request from the courts or of constitutional challenges to the Canadian State Immunity Act. Finally, he reported that a number of proceedings before Canadian courts had been filed with regard to the newly adopted Canadian *Justice for Victims of Terrorism Act*, allowing victims of terrorism to sue perpetrators of such acts as well as their supporters.

33. The representative of the European Union questioned the compatibility with the *Vienna Convention on Diplomatic Relations* (1961) of the restrictive measures taken by States resulting in the freezing of the bank assets of an embassy. He informed the CAHDI of the existence of a general clause within the EU legislation aimed at safeguarding the effectiveness of restrictive measures against any circumventing measures. He underlined that it was up to the embassy in question to prove that the bank account was being used for the normal activity of the embassy. In case of divergences between what was considered normal for the activity of the embassy and the movements appearing on the bank account, it would be possible to maintain the freezing of the bank assets, in full or in part, depending on the situation.

34. The Austrian delegation announced that it was preparing, together with the delegation of the Czech Republic, a proposal regarding the immunity of State-owned cultural property which it would present to delegations at a future meeting.

35. Regarding document CAHDI (2012) 18 on *"Exchange of national practices on possibilities for the Ministry of Foreign Affairs to raise public international law issues in proceedings pending before national tribunals and related to States' or international organisations' immunities"*, the Chair noted that no delegation had contributed to this document since the last meeting of the CAHDI and invited delegations which had not yet done so to submit or update their responses to this questionnaire.

b. UN Convention on Jurisdictional Immunities of States and of their Property

36. In connection with the stocktaking of signatures and ratifications of the *UN Convention on Jurisdictional Immunities of States and of their Property* (2004), the Chair informed the Committee that since the previous meeting of the CAHDI, no State represented within the CAHDI had signed, ratified, accepted, approved or acceded to this Convention..

7. Organisation and functions of the Office of the Legal Adviser of the Ministry of 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 website entries

37. The CAHDI examined the issue of the organisation and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs and took note in this respect of the updated contributions from Denmark, Hungary, the United Kingdom and "the former Yugoslav Republic of Macedonia". The Chair underlined the usefulness of the database and invited the delegations which had not yet done so to submit or update their contributions.

8. National implementation measures of UN sanctions and respect for human rights

38. The Chair noted that Hungary and the European Union had updated their contributions and that Slovenia had submitted a new contribution to the database. Furthermore, the Chair observed that document CAHDI (2012) 3 regarding *"Cases that have been eventually submitted to national tribunals, by persons or entities removed from the lists established by the UN Security Council Sanctions Committees"* had remained unchanged since the 43rd meeting of the CAHDI (Strasbourg, 29-30 March 2012). Delegations were invited to submit or update their contributions to the database at their earliest convenience.

39. The delegation of the Netherlands informed the CAHDI of a judgment handed down by the Supreme Court on 14 December 2012 concerning United Nations' Resolution 1737, and European Union Common position adopted in compliance with this resolution, which require member States to take the necessary measures to prevent specialised teaching or training of Iranian nationals in disciplines which would contribute to Iran's sensitive nuclear activities and the development of nuclear weapon delivery system. In this case, the applicants, all of dual Dutch and Iranian nationality, had instituted proceedings against the Dutch State claiming that the Dutch implementing act was in violation of the prohibition of discrimination enshrined in the Dutch Constitution, *Protocol No. 12 to the European Convention on Human Rights*, the *International Covenant on Civil and Political Rights* and Article 18 of the *Treaty on the Functioning of the European Union*. In confirming the judgments of the District and Appeal's Courts, the Supreme Court had stated that Resolution 1737 does not require States to make a distinction based on nationality and that the Dutch State had not made every effort to prevent discrimination. In its ruling, the Supreme Court had referred to the judgment of the European Court of Human Rights in the case of *Nada v. Switzerland*[3] and underlined that the Charter of the United Nations does not prescribe how Member States must implement Security Council's Resolutions adopted under Chapter VII.

40. The CAHDI took note of the information supplied by the representative of the European Union on developments relating to the European Union sanctions regime since the 44th meeting of the CAHDI as set out in a document made available to all delegations.

41. The representative of the European Union informed the Committee that the Council of the European Union had held an exchange of views on the notions of direct and indirect control that would lead to a more homogenous approach of members States to the issue of European Union restrictive measures. Furthermore, the representative referred to document CAHDI (2013) Inf 5 and presented the main aspects of the Advocate General's opinion in the *Kadi* case. The Advocate General had considered that the improvements in terms of independence and impartiality made at the United Nations level of the Office of the Ombudsperson justified a less extensive judicial review of sanctions designations by the Court of Justice of the European Union. The representative informed the Committee that the decision of the Court was expected by the end of the year 2013.

42. The Finnish delegation welcomed the emphasis placed by the Advocate General on the positive developments of the United Nations sanctions system and on the cooperation between the European Union and the United Nations in ensuring its effectiveness and legitimacy. With regard to national legislation, the delegation supplied recent information on the proposed *Act on the Freezing of Funds with a view to Combatting Terrorism* introduced before the Parliament in June 2012. It

[3] European Court of Human Rights, *Nada v. Switzerland*, application No. 10593/08, judgment delivered on 12 September 2012.

aimed at regulating the freezing, in an administrative procedure, of funds and economic resources of (1) persons and entities suspected, prosecuted or convicted in Finland of involvement in terrorist crimes, (2) persons and entities designated by the Council of the European Union as being involved in terrorist acts but whose funds have not been frozen by a directly applicable EU Regulation (the so-called "EU internal terrorists"), (3) on the basis of a well-founded request by another country, persons and entities identified in that request as being involved in terrorism, and (4) entities owned or controlled by any of the above. The responsible committee had submitted its report and recommended that the act be adopted in the form proposed by the Government. The act was expected to be adopted in the near future. Furthermore, the delegation indicated that the inter-agency working-group mandated to conduct a comprehensive examination of the current status of the implementation of international sanctions in Finland and to review the responsibilities of different authorities in the implementation of sanctions had submitted its report to the Ministry of Foreign Affairs in February 2013. The report showed that the system worked properly and presented recommendations to further improve it: (1) to enhance the use of information stored in various government registries to more effectively search for, locate and freeze funds and economic resources, (2) to assign a duty to search for funds and economic resources and to take action to ensure that the funds are properly frozen to the enforcement agencies and (3) to develop more effective means of communicating sanctions issues to the private sector. Finally, the delegation informed the Committee that a proposal made on the basis of these recommendations had been circulated by the Government to various stakeholders and that this proposal was expected to be introduced in Parliament by the end of the year 2013 in case of favourable comments.

43. The representative of Canada underlined the efficiency of the Office of the Ombudsperson in addressing the issue of transparency and providing a remedy for persons on the United Nations Security Council's sanctions lists. The representative updated the Committee on the case of M. Abdelrazik presented in document CAHDI (2012) 3. In January 2011, M. Abdelrazik had submitted a request for delisting to the 1267 Sanctions Committee and had been delisted on 30 November 2011 on the basis of the report of the Ombudsperson. Following his delisting, M. Abdelrazik had abandoned his constitutional challenge of the Canadian legislation implementing United Nations Security Council's sanctions. Finally, the representative indicated that the civil action for damages of M. Abdelrazik before Canadian courts continued.

44. The Austrian delegation welcomed the Advocate General's position in the *Kadi* case that an intensive judicial review by the Court of Justice of the European Union would interfere with the competencies of the Security Council of the United Nations in determining the existence of a threat to international peace and security and that account should be taken of the progress made in the United Nations sanctions system.

9. European Union's accession to the European Convention on Human Rights

45. The CAHDI considered the issue of the European Union's accession to the European Convention on Human Rights (ECHR) and took note of the report of the 76th meeting of the Steering Committee for Human Rights (CDDH) and the reports of the second, third and fourth negotiation meetings between the CDDH and the European Commission on the accession of the European Union to the ECHR (*ad hoc* Group 47+1).

46. Mr Erik Wennerström, observer of the CAHDI to the *ad hoc* Group 47+1, presented the most recent state of negotiations on the accession of the European Union (EU) to the ECHR.

47. He referred in particular to the latest proposals under Articles 1, 3 and 7 of the draft accession agreement, respectively on the scope of the accession (and the subsequent amendments to Article 59 of the ECHR), the co-respondent mechanism and the participation of the European Union in the Committee of Ministers of the Council of Europe.

48. He informed the CAHDI that the *ad hoc* Group 47+1 would resume its deliberations on 3 April in Strasbourg, at its 5th and last meeting. The presentation of Mr Wennerström is set out in **Appendix IV** to the present report.

10. Cases before the European Court of Human Rights involving issues of public international law

49. The Chair invited delegations to keep the Committee informed of any judgments or decisions, pending cases or relevant forthcoming events.

11. Peaceful settlement of disputes

50. In the context of its consideration of issues relating to the peaceful settlement of disputes, the CAHDI took note of the International Court of Justice's jurisdiction under selected international treaties and agreements and, in particular, the situation concerning the Council of Europe's member and observer States (document CAHDI (2010) 3). The Chair invited delegations to submit to the Secretariat any relevant information on this matter.

51. The Chair recalled that a number of States had accepted the International Court of Justice's jurisdiction in respect of particular treaties since the 44th meeting of the CAHDI (Paris, 19-20 September 2012).

52. The delegation of the Netherlands informed the Committee about a meeting to be organised by the International Court of Justice, the Permanent Court of Arbitration and the Municipality of The Hague on the occasion of the 100th anniversary of the Peace Palace in The Hague. The meeting would be devoted to the peaceful settlement of disputes. It would be chaired by the Minister of Foreign Affairs of the Netherlands, with the participation of the President of the International Court of Justice and the Secretary General of the Permanent Court of Arbitration.

53. The Austrian delegation pointed out that the International Court of Justice's jurisdiction could also result from a provision of a bilateral treaty. The delegation cited as an example a bilateral agreement on the exchange of cultural objects concluded between Austria and Albania providing for jurisdiction of the International Court of Justice in case of dispute.

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

54. In the framework of its activity as the European Observatory of Reservations to International Treaties, the CAHDI examined a list of outstanding reservations and declarations to international treaties. The Chair presented the documents updated by the Secretariat setting out these reservations and declarations (documents CAHDI (2013) 2 and CAHDI (2013) 2 Addendum prov) and opened the discussion.

55. With regard to the ***reservation from Tajikistan*** to the *Convention on the recognition of foreign arbitral awards*, several delegations expressed their concern and informed the Committee that they were reviewing the scope of the reservation.

56. With regard to the ***late declaration from Honduras*** to the *Convention on the recognition of foreign arbitral awards*, the Committee took note that Honduras had acceded to this Convention in 2000. One delegation stated that it was assessing the depositary's note while another delegation indicated that it was considering reacting against this declaration.

57. With regard to the ***declaration from Ecuador*** to the *United Nations Convention on the Law of the Sea*, concerns were voiced with respect to the use of the term "sovereignty" and questions were raised as to the interpretation to be given to this term and its applicability to all maritime

waters. The uncertain status of the Santiago Declaration was mentioned and reference was made to the distance to which the economic zone should refer.

58. With regard to the ***reservations and the declaration made by the United Arab Emirates*** to the *Convention against torture and other cruel, inhuman or degrading treatment or punishment*, a number of delegations expressed their concern about the declaration and its reference to national law. The decisions of the UN Committee against Torture concerning sanctions under national law were recalled. Several delegations indicated that they were considering objecting.

59. With regard to the ***declarations made by Lao People's Democratic Republic*** to the *Convention against torture and other cruel, inhuman or degrading treatment or punishment*, a number of delegations expressed their concern about the first declaration and in particular the reference therein to national law. These delegations were considering objecting.

60. With regard to the ***reservation made by Namibia*** to the *International Convention for the suppression of the financing of terrorism*, it was recalled that Egypt, Jordan and the Syrian Arab Republic had made similar reservations to this Convention, to which a number of CAHDI delegations had objected. Several delegations were concerned about this reservation and expressed their intention to object.

61. With regard to the ***reservation and declarations made by Viet Nam*** to the *United Nations Convention against transnational organized crime*, several delegations pointed to the reference to national law contained in the first declaration as potentially problematic.

62. With regard to the ***declarations made by Malaysia*** to the *Optional protocol to the Convention of the rights of the child on the sale of children, child prostitution and child pornography*, one delegation indicated that it would not raise an objection.

63. With regard to the ***declaration made by Turkey*** to the *International Convention for the suppression of acts of nuclear terrorism*, a number of delegations expressed their understanding that the notion of "international humanitarian law" should cover customary international law.

64. With regard to the ***declarations by Italy and Poland*** to the *Council of Europe Convention on preventing and combating violence against women and domestic violence*, it was noted that the declarations had been made at the stage of the signature of the Convention. A number of delegations made reference to Article 78 of the Convention limiting the possibility of entering into reservations. The Committee's practice as regards reservations which refer generally to national law was recalled.

65. The Chair informed delegations that the Secretariat would update the table of objections and circulate it for comments.

66. The Secretariat gave a presentation detailing the Council of Europe rules and policy on access to documents and their impact on the CAHDI documents, in particular on documents under the item of the agenda devoted to the examination of reservations. Delegations expressed their concern about preserving the quality and openness of discussions on reservations. The Committee tasked the Secretariat to prepare a document, to be presented at its next meeting, explaining how discussions under this item may be reported to delegations while maintaining the confidentiality of debates and remaining in conformity with Resolution CM/Res(2001)6 on access to Council of Europe documents.

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

13. Exchange of views with Ms Sabine Bauer, Senior Legal Adviser, Organization for Security and Co-operation in Europe (OSCE)

67. Senior Legal Adviser of the OSCE, Ms Sabine Bauer, gave a presentation entitled "*OSCE: a process or an international organization? OSCE – a unique place of international law in the making*". Her presentation covered three topics: the development of the OSCE from a conference to an "organisation", the legal status of the organisation and the OSCE´s contribution to international law-making.

68. In her presentation Ms Bauer provided an historical overview of how the OSCE had developed through a process of institutionalisation in the 1990s from a diplomatic conference established in the 70s (originally named the CSCE) to an organisation with a more permanent organisational structure.

69. Ms Bauer recalled that despite these developments the legal status of the OSCE remained to be clearly and uniformly defined by its participating States. She noted in this regard that less than one third of the 57 participating States had adopted unilateral laws or legal instruments regulating the status of the Organisation and that only 5 out of 16 field operations of the OSCE had concluded Memoranda of Understanding regulating their privileges and immunities.

70. Ms Bauer referred further to the draft Convention on International Legal Personality, Legal Capacity and Privileges and Immunities of the OSCE, which had been produced in 2007 by an open-ended working group of experts established by a decision at ministerial level. The conclusion of this Convention had been hindered by the addition of three footnotes to its text making its adoption contingent on the prior or at least simultaneous adoption of a Charter which would set out the main goals, principles and institutional set-up of the OSCE.

71. The Senior Legal Adviser of the OSCE stated that the lack of a legal status and of a uniform system of privileges and immunities was costly for the OSCE and entailed confusion, fragmentation, and at times unjustified discrimination amongst OSCE staff, as to the applicable legal standards.

72. Ms Bauer addressed the capacity of the OSCE to contribute to the development of international law. Important treaties had been finalised in the OSCE framework and a number of politically binding recommendations and guidelines adopted within this organisation had contributed to further strengthen and facilitate the implementation of legally binding international norms, including in the field of human rights.

73. Finally, Ms Bauer evoked the strong cooperation between the OSCE and Council of Europe, which relied *inter alia* on the work of a formalised co-ordination group. The presentation of Ms Bauer is set out as **Appendix V** to the present report.

74. The Chair of the CAHDI thanked Ms Bauer for her presentation and invited any delegation who so desired, to comment or ask questions.

75. The Russian delegation recalled that its authorities had been amongst the initiators of the negotiations on a Charter regarding the OSCE and expressed the regret that such negotiations had been stalling.

76. Ms Bauer commented that the resumption of negotiations on the Charter would require finding a compromise between two fundamentally different views on this issue: the first upheld the more traditionalist approach according to which an international organisation requires a legally binding Charter in order to be functional; the second took the more liberal stand that an international body which looked and acted like an organisation *was* an international organisation irrespective of whether its nature as such has been enshrined in a clear normative framework. Ms Bauer referred in this regard to the question of the potential impact of a legally binding framework

on the *acquis* of the organisation and of the relationship between legally binding norms and politically binding norms.

77. The representative of the European Union drew the Committee's attention to Article 220 of the *Treaty on the Functioning of the EU*, which referred to cooperation between the EU and the OSCE alongside three international organisations enjoying legal personality. He recalled that on the basis of this provision, the EU and the OSCE had concluded a Memorandum of Understanding. In addition, the representative of the EU recalled that Article 21 of the Treaty on European Union mentions the Final Act of Helsinki and the aims of the Paris Charter as reference points for defining common policies and actions in all international relations and in particular for the pursuit of the preservation of peace, the prevention of conflict and the reinforcement of international security. The representative of the European Union expressed his view that the Court of Justice of the European Union might consider these reference points whenever a case on one of these issues would be brought before it in the future.

78. The Greek delegation recalled that although most of the OSCE documents reflected soft law, they nevertheless had played an important role in international law, notably by inspiring a number of Council of Europe treaties such as the Framework Convention for the Protection of National Minorities. The Greek delegation noted that for many scholars, the OSCE displayed elements which justified qualifying it as an international organisation, namely the Helsinki Final Act, the dispute settlement mechanisms in place and an object and purpose which largely coincided with those of the UN. It expressed the opinion that participating States should grant the OSCE legal personality.

79. In reply to a question from the Swiss delegation, Ms Bauer indicated that the Council of Europe and the UN were the only international organisations with which the OSCE had established an institutionalised form of cooperation. She specified further that the OSCE was seeking to conclude cooperation agreements with other international organisations and that the broadening of its cooperation with the Council of Europe would require the consensus of all OSCE participating States.

80. In response to a question from the Portuguese delegation which referred to the test for legal personality as formulated by the ICJ in the *Reparation for Injuries* case, Ms Bauer pointed out the broad and comprehensive competences of the OSCE in the field of security as justifying the recognition of a *de facto* legal personality.

81. The representative of Interpol reported that Interpol faced similar difficulties regarding legal personality. He aired his view that such difficulties were not exclusively of a legal nature, but primarily of a political nature, owing on the one hand to the lack of the necessary political will on the part of concerned States to engage in negotiations and on the other, to the need to seek parliamentarian approval. In the opinion of the representative of Interpol, States would have had to assess whether the needs of the international community could be fully and satisfactorily served by an organisation which did not possess the entire range of legal means at the disposal of international organisations.

82. The Austrian delegation noted that the increasing competences of the OSCE had created the potential for the organisation to cause damage and to be held liable for it and expressed the view that the OSCE fulfilled most of the criteria applying to an international organisation with legal personality. It underscored that in the pursuit of a solution to the OSCE's lack of legal personality, the political nature of commitments made by participating States ought to be preserved.

83. In addition, the Austrian delegation pointed out that the cooperation of the OSCE with the Council of Europe had contributed to the development of soft law in many fields, in particular with respect to the work of the High Commissioner on National Minorities which had been referred to in the reply of the Committee of Ministers to the recommendation of the Parliamentary Assembly to develop on additional protocol to the Convention on Human Rights on this issue. The Austrian

delegation recalled that in this document the OSCE was referred to as an international organisation. Finally, it stated that the time had come for the OSCE to consider submitting a request for observer status in the CAHDI to further its cooperation with the Council of Europe.

84. In reply to a question from the Slovenian delegation, Ms Bauer indicated that to her knowledge, the concept of responsibility to protect had not been discussed by the OSCE at the higher political level but that very likely, it was taken into account at the level of the Human Dimension Committee as well as the Office for Democratic Institutions and Human Rights (ODIHR). With respect to the national minorities issues, Ms Bauer commented on the role of the High Commissioner as an "early warning" instrument and an instrument of mediation to prevent and solve situations of strife which had the potential of negatively impacting national minorities. She made reference to the guidelines issued by the High Commissioner which had been cited by the European Court of Human Rights.

85. The delegation of the Netherlands expressed its support for the proposal to give further thought to the possibility for the OSCE to become an observer within the CAHDI. It expressed the view that the history of international organisations showed that in situations where there had not been sufficient political will to reach an agreement on the legal personality, the practical problems entailed by the lack thereof ultimately had imposed giving consideration to this matter. The delegation of the Netherlands recognised the relevance of the lists prepared by the Secretariat of the OSCE which enumerated the practical problems faced by the organisation owing to its lack of legal personality and the importance for participating States to act responsibly in this regard.

86. The Swedish delegation stated that it had hoped for the adoption of a convention without the footnotes as it sets out important provisions on the legal status of the OSCE. It mentioned the risks related to the adoption of a general treaty on the organisation (i.e. the undermining of the organisation's acquis and the loss of independence of certain OSCE institutions) as outweighing the merits of adopting such a treaty. The Swedish delegation confirmed that the High Commissioner is involved in the preventive aspects of the responsibility to protect and cited certain very useful thematic recommendations which had been issued by the Commissioner such as the Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations, the Lund Recommendations on the Effective Participation of National Minorities in Public Life and the Hague Recommendations Regarding the Education Rights of National Minorities.

87. The Chair thanked Ms Bauer for her presentation and invited delegations to give thought to the possibility of having the OSCE as an observer to the Committee.

14. Consideration of current issues of international humanitarian law

88. The representative of the International Committee of the Red Cross (ICRC) gave a presentation to the CAHDI members on the work of ICRC in addressing the new challenges of modern warfare. The presentation addressed three issues in particular.

89. Firstly, with respect to strengthening legal protection for victims of armed conflicts, the representative of the ICRC focused on the work done regarding the "detention track" of Resolution 1, adopted at the 31st International Conference of the Red Cross and the Red Crescent in 2011. He noted that the ICRC had held three out of four planned expert meetings on this issue (in Pretoria, San Jose, and Montreux) and presented the four main areas of the law which were discussed. The representative indicated that the report of the Montreux meeting was expected to be shared with the participants for comment in April 2013 and the synthesis report, summarising the main conclusions on the four regional consultations, would be drafted and presented to the permanent missions in Geneva in the fall of 2013.

90. Secondly, another outcome in the last International Conference was Resolution 5 on Health Care in Danger. On this issue, the ICRC had organised, in cooperation with partners, workshops in December 2012 and February 2013 in Oslo, Cairo and Tehran. As an outcome of these meetings

the relevance of the "Safer Access Framework" had been confirmed as well as the need for better implementation of existing national legislation in addressing the safety of health care personnel. The representative of the ICRC informed the Committee that further workshops were planned in 2013 and 2014 and that the recommendations resulting from these workshops would be presented in a global report prepared by the ICRC for the International Conference of the Red Cross and Red Crescent in 2015.

91. Thirdly, the representative of the ICRC provided information with regard to the issue of "incapacitating chemical agents". The ICRC had been involved in examining the current legal framework addressing the use of so-called "incapacitating chemical agents" which fall under the prohibition of the Chemical Weapons Convention (CWC). In order to explore the implications of using other toxic chemical weapons the ICRC had held two expert meetings in 2010 and 2012 which had highlighted three major risks associated with the use of these agents. First the risk to the life and health of victims; secondly the risk of proliferation of "incapacitating chemical agents"; and thirdly the risk that proliferation would create a slippery slope towards the reintroduction of chemical weapons in armed conflict. The two expert meetings in 2010 and 2012 organised by the ICRC had concluded that international law prohibits the use of toxic chemical as weapons other than the legitimate use of riot control agents. To avoid ambiguity, the ICRC was calling on all States to reaffirm on a national level the approach of the use of ´riot control agents only´. The ICRC was also calling on States to promote this approach at the international level, in particular at the 3rd Review Conference of the CWC. The statement by the ICRC representative is set out in **Appendix VI** to this report.

92. The Swiss delegation gave an update on the work of the Swiss government with the ICRC on the follow-up on Resolution 1. On 13 July 2012, a first meeting of States had been convened which provided the opportunity to appraise the problem of non-compliance with international humanitarian law. States present had indicated that there was a need for a more regular dialogue and the establishment of an institutional framework to this end. Switzerland and the ICRC thus intended to convene more meetings to discuss the structure and configuration of such an institutional system. The next meeting on this issue would be held in June in Geneva. The Swiss delegation noted that consultations held so far had shown that a forum of States would usefully focus on issues that would establish trust and avoid politicisation. It would also need to include exchanges of views on best practices on implementation. Furthermore, dialogue would need to respect regularity and the forum would have to be universal. For the purposes of an in depth analysis of an effective compliance system and of the features of an institutional framework and in preparation of the meeting in June 2013, Switzerland had carried out consultations with a number of States in November 2012 and would hold further consultations in April 2013, the conclusions of which would be distributed to all States. The Swiss delegation invited delegations to deliver input or submit proposals on the issue of improving international humanitarian law compliance.

93. The Danish delegation drew the Committee's attention to the Copenhagen process on the handling of detainees in international military operations, which had been concluded in 19 October 2012 with the adoption of the Copenhagen Process Principles and Guidelines and the finalisation of the commentary thereto (documents are available at: http://um.dk/da/~/media/UM/Danish-site/Documents/Politik-og-diplomati/Fred-sikkerhed-og-retsorden/Copenhagen%20Process/Copenhangen%20Process%20Principles%20and%20Guidelines.pdf and www.asil.org/pdfs/insights/insight121226.pdf). It further noted that the guidelines may contribute to the work of the ICRC on this matter.

15. Developments concerning the International Criminal Court (ICC)

94. The representative of the United States reported that in January 2013, President Obama had signed into the legal expansion of the War Crimes Rewards Program. The new law allowed the Secretary of State to offer rewards up to $5 million for information leading to the arrest, transfer, or conviction of designated foreign nationals accused of crimes against humanity, genocide, or war crimes by any international criminal tribunal, including the ICC. Furthermore, he reported that on 18 March 2013, Bosco Ntaganda, former alleged Deputy Chief of the Staff and commander of operations of the *Forces Patriotiques pour la Libération du Congo*, had handed himself over to the US Embassy in Kigali. The United States had cooperated with the Dutch and Rwandan authorities to transfer him to the ICC in The Hague, where he was in custody. His confirmation charges hearing had been set for 23 September 2013.

16. Implementation and functioning of other international criminal tribunals (ICTY, ICTR, Sierra Leone, Lebanon, Cambodia)

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

17. Topical issues of international law

96. The Danish delegation referred to the meeting of the legal working group of the Contact Group on Piracy off the Coast of Somalia (CGPCS - Working Group 2) scheduled on 10-11 April 2013 in Copenhagen back to back with a meeting of the Working Group 5 headed by Italy and supplemented with a special and invitation-only meeting between investigators and prosecutors in order to ensure a better flow of information with the purpose of getting hold of the organisers and the financiers behind Somali piracy. It informed the Committee that the Contact Group would meet under the chairmanship of the United States of America on 1 May 2013, in New York. The Danish delegation called upon interested members to participate in this meeting, which would deal *inter alia* with the future organisation of the international work to counter piracy off the coast of Somalia.

97. The Belgian delegation referred to an issue which had already been raised at the previous meeting of the CAHDI, regarding an initiative by Belgium, the Netherlands and Slovenia aimed at improving the international legal framework applying to mutual legal assistance and extradition with respect to the most serious crimes affecting the international community, namely genocide, crimes against humanity and war crimes. Considering that most often the suspects, the evidence, the witnesses and the assets linked to such crimes were not exclusively located on the territory of one single State, it had been found that mutual judicial assistance between States needed to be reinforced in order to improve domestic investigations and prosecutions of such crimes in line with the principle of complementarity enshrined in the Rome Statute. The Belgian delegation noted that these three countries had formulated a series of proposals to this end and had identified the United Nations Commission on Crime Prevention and Criminal Justice as the appropriate forum for carrying out this initiative. States party to the Rome Statute as well as States represented in the United Nations Commission had been approached and had expressed a keen interest on this initiative.

98. The Slovenian delegation complemented the intervention of the Belgian delegate by reporting that the next step in this initiative would be the presentation of a draft resolution at the forthcoming meeting of the United Nations Commission on Crime Prevention and Criminal Justice. The aims of this resolution would be (i) the strengthening of the legal framework applying to international cooperation in the field of the prosecution of international crimes, as well as (ii) encouraging States to establish and/or reinforce the authorities in charge of international cooperation in criminal matters and (iii) addressing the existing *lacunae* in the relevant legal framework and inviting the Commission to examine such *lacunae*. As for the reason for electing the United Nations Commission on Crime Prevention and Criminal Justice as the forum for this initiative, the Slovenian delegation cited paragraph 21 of the *Salvador Declaration on Comprehensive Strategies for Global Challenges: Crime Prevention and Criminal Justice Systems and their Development in a Changing World* which called on the Commission to review the issue of

possible gaps in relation to international cooperation in criminal matters and to explore the need for various means of addressing gaps that were identified. The Slovenian delegation further informed delegations that a side event would be organised for practitioners to discuss concrete examples of existing *lacunae* and how to address them.

99. The Austrian, Irish and Hungarian delegations expressed their support to the initiative of Belgium, the Netherlands and Slovenia.

100. The representative of the United States informed the Committee that the US National Group had announced its intent to nominate Judge Joan Donoghue for re-election to the International Court of Justice (ICJ) in 2014. Judge Donoghue had been a career lawyer at the State Department and had been elected to the ICJ in September 2010. The representative noted that Judge Donoghues' candidacy reflected the importance and seriousness which the United States placed upon the work of the Court and expressed the hope that CAHDI members would give consideration to supporting her candidacy.

IV. OTHER

18. Exchange of views on the request for observer status within the CAHDI submitted by Belarus

101. Following an introduction by the Director of Political Affairs, Mr. Alexandre Guessel, on the current state of relations between the Council of Europe and Belarus, delegations held an exchange of views on the request for observer status within the CAHDI submitted by Belarus.

102. Certain delegations mentioned the merits of entertaining a dialogue with Belarus such as raising this country's awareness on issues of international law.

103. A number of delegations expressed concern as regard this country's commitment towards international law, in particular with respect to human rights.

104. Delegations took note of the participation of Belarus as an observer to certain Council of Europe intergovernmental committees, such as the Steering Committee for Human Rights (CDDH), the European Committee on Legal Co-operation (CDCJ) and the Steering Committee on Media and Information Society (CDMSI). The political circumstances under which Belarus had been admitted to such committees were referred to by a delegation.

105. In any event, it was recalled that the CAHDI was a technical body and that the decision to admit as observer to this committee a non-member State of the Council of Europe which did not enjoy observer status with the Organisation was a political decision which fell within the mandate of the Committee of Ministers.

106. In this context, the representative of the European Union raised the issue of the EU sanctions regime, in particular with respect to the restrictions on admission (visa or travel ban) which apply to certain listed persons and persons associated to them.

107. Delegations indicated that they would expect an observer State to the Committee to commit to certain shared values. It was stated that observer status should serve as a means to promote respect for international law and the principle of the rule of law.

108. Delegations agreed to transmit to the Secretary General the outcome of their exchange of views, at it appears in **Appendix VII** to the present report.

19. Date, venue and agenda of the 46th meeting of the CAHDI

109. The CAHDI decided to hold it 46th meeting in Strasbourg on 16-17 September 2013. 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. Other business

110. The Chair reminded delegations that the current terms of reference of the Committee would be up for renewal in December 2013. She indicated that this would be the time to consider taking up new activities and invited delegations to consider submitting any proposals to this end, either to the Chair, the Vice-chair or the Secretariat.

111. The CAHDI concluded it 45th meeting by adopting its abridged report.

APPENDICES

APPENDIX I

LIST OF PARTICIPANTS

Please contact the Secretariat : cahdi@coe.int

APPENDIX II

AGENDA

I. INTRODUCTION

1. Opening of the meeting by the Chair, Ms Liesbeth Lijnzaad

2. Adoption of the agenda

3. Adoption of the report of the 44th meeting

4. Statement by the former 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 of Foreign Affairs

8. National implementation measures of UN sanctions and respect for human rights

9. European Union's accession to the European Convention on Human Rights (ECHR)

   - Information provided by Mr Erik Wennerström, observer of the CAHDI to the *ad hoc* Group 47+1

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 Ms Sabine Bauer, Senior Legal Adviser, Organization for Security and Co-operation in Europe (OSCE)

14. Consideration of current issues of international humanitarian law

15. Developments concerning the International Criminal Court (ICC)

16. Implementation and functioning of other international criminal tribunals (ICTY, ICTR, Sierra Leone, Lebanon, Cambodia)

17. Topical issues of international law

IV. OTHER

18. Exchange of views on the request for observer status within the CAHDI submitted by Belarus

19. Date, venue and agenda of the 46th meeting of the CAHDI

20. Other business

APPENDIX III

STATEMENT BY MR MANUEL LEZERTUA, FORMER DIRECTOR OF LEGAL ADVICE AND PUBLIC INTERNATIONAL LAW ON THE OCCASION OF THE 45TH MEETING OF THE COMMITTEE F LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

French only

Strasbourg, 25 mars 2013

Madame la Présidente,
Mesdames et Messieurs les membres du CAHDI,

Après notre parenthèse parisienne, au mois de septembre, que nous avons tous appréciés – merci encore chère Edwige – nous sommes très heureux de vous accueillir à nouveau à Strasbourg, à l'occasion de la 45ème réunion du CAHDI.

Chère Liesbeth, permettez-moi de vous remercier une nouvelle fois d'avoir accepté de veiller à la destinée du CAHDI pour les deux années à venir. Je vous souhaite toute la réussite nécessaire. Vous savez que le Secrétariat se tient prêt à répondre à vos besoins.

* * *

Présidence du Comité des Ministres

Du côté du Comité des Ministres du Conseil de l'Europe, la fin de l'année 2012 et le début de l'année 2013 ont coïncidé avec la fin de la Présidence albanaise et avec le début de la Présidence andorrane.

La Présidence andorrane concentre actuellement ses efforts sur l'éducation à la citoyenneté démocratique et aux droits de l'homme, en particulier par des activités de promotion de la Convention européenne des droits de l'homme auprès du grand public. Les activités liées à la jeunesse font également partie des priorités de la Présidence andorrane.

La liste complète des priorités de la Présidence andorrane est reproduite dans le document relatif aux décisions du Comité des Ministres, sous le point 5 de votre ordre du jour.

Actualités du Bureau des traités

L'actualité la plus dense de l'Organisation ces 6 derniers mois est très probablement à regarder du côté des Conventions du Conseil de l'Europe.

Comme je vous l'avais annoncé en septembre, le Quatrième protocole additionnel à la Convention européenne d'extradition (STE n° 24) a été ouvert à la signature, le 20 septembre 2012, à l'occasion de la 31ème Conférence du Conseil de l'Europe des Ministres de la Justice.

L'objectif de ce 4ème Protocole est de renforcer la coopération internationale dans ce domaine en abordant ou précisant les questions de prescription, de requêtes et pièces à l'appui, de la règle de la spécialité, du transit, de la ré-extradition à un Etat tiers et des voies et moyens de communication.

Cette 31ème Conférence des Ministres de la Justice, à l'invitation des autorités autrichiennes, a aussi été l'occasion d'une Cérémonie des Traités au cours de laquelle les Etats membres ont été invités à signer ou ratifier une douzaine de conventions sélectionnées sur la base des résolutions

des deux dernières Conférences des Ministres de la Justice.

Cette cérémonie a donné lieu à 22 signatures, concernant 5 traités et 17 Etats. Il s'agit de la Cérémonie de traités la plus prolifique depuis l'an 2000. Cette réussite souligne la vitalité des Conventions du Conseil de l'Europe.

J'ose y voir le signe d'une attention continue des Etats membres pour nos Conventions et, peut-être, le premier effet de l'exercice de passage en revue des Conventions, qui a amené chacun à faire le point sur les Conventions signées et ratifiées.

A la suite de la Conférence de Vienne, on a noté un effet d'entrainement sur les 12 Conventions que les Etats étaient invités à signer ou ratifier. Des Etats qui n'ont pas pu être présents à Vienne en septembre ont continué à signer ou ratifier les Conventions mises en avant par cette Cérémonie des traités.

Dans l'actualité, il faut également noter que le Comité Directeur pour les Problèmes Criminels a terminé en décembre 2012 ses travaux sur le Projet de convention du Conseil de l'Europe contre le trafic d'organes humains. Le rapport explicatif est désormais en cours de rédaction. Il est prévu que le projet de Convention et son rapport explicatif soient transmis à l'Assemblée parlementaire pour avis au début du mois de juillet.

Par ailleurs, vous n'êtes pas sans savoir que le projet de Protocole n°15 à la Convention européenne des droits de l'homme a été finalisé par le Comité Directeur pour les Droits de l'Homme. Il s'agit d'un protocole d'amendement qui fait suite à la Conférence de Brighton et concerne notamment les conditions d'exercice des fonctions des juges, ainsi que certaines conditions de recevabilité et le rappel de certains principes tels le principe de subsidiarité.

L'avis de l'Assemblée parlementaire est attendu pour sa session de printemps, fin avril. Il est ensuite prévu que le Protocole n° 15 soit adopté à la mi-mai par le Comité des Ministres, et ouvert à la signature fin juin, à l'occasion de la session d'été de l'Assemblée parlementaire.

Quant au projet de Protocole n° 16 à la Convention européenne des droits de l'homme, qui est lui facultatif et qui permet aux plus hautes juridictions nationales de saisir la Cour d'une demande d'avis consultatif dans le cadre d'une affaire pendante, il a été finalisé par le Comité Directeur pour les Droits de l'Homme la semaine passée. Il devrait être transmis à l'Assemblée parlementaire pour avis début avril.

Passage en revue des Conventions

J'ai évoqué plus tôt l'exercice de passage en revue des Conventions. Sachez que quatre réunions de préparation ont été menées ces derniers mois au sein du Comité des Ministres, et plus particulièrement du Groupe de rapporteurs sur la coopération juridique. Une cinquième aura lieu demain matin.

Des projets de décisions ont été élaborés sur l'ensemble des thèmes couverts par le rapport du Secrétaire Général, à l'exception de l'adhésion de l'Union aux Conventions du Conseil de l'Europe, qui sera discuté plus tard, et des Conventions inactives, pour lesquelles il a été décidé de ne pas prendre de mesures spécifiques.

Il est prévu que les Délégués des Ministres procèdent à l'adoption des décisions le 10 avril, clôturant ainsi l'exercice de passage en revue des Conventions, 11 mois après la présentation du rapport du Secrétaire Général sur ce point.

Nous ne manquerons de vous tenir informés du contenu des décisions prises, bien que je ne doute pas que vos délégations à Strasbourg vous tiennent également informés.

Accords bilatéraux portant sur les privilèges et immunités de l'Organisation

J'aimerais également vous informer des récentes activités relatives aux privilèges et immunités du Conseil de l'Europe.

En effet, comme certains d'entre vous le savent, la réorganisation de la présence extérieure du Conseil de l'Europe nous a conduits ces dernières années à renégocier avec certains Etats membres des accords bilatéraux sur les privilèges et immunités de nos bureaux délocalisés et du personnel qui y travaille. Ces accords bilatéraux viennent compléter l'Accord général sur les Privilèges et Immunités du Conseil de l'Europe et en faciliter la mise en œuvre.

Des accords ont d'ores et déjà été signés avec l'Autriche, l'Albanie, la Géorgie, la République de Moldova, le Monténégro et la Pologne.

Des négociations viennent par ailleurs de s'ouvrir avec la Belgique, afin de mettre à jour les accords concernant notre Bureau de Bruxelles, qui datent pour l'essentiel de 1974. Je dois dire que la Belgique dispose d'une équipe remarquablement préparée à traiter ce genre de questions, autour du Comité Interministériel pour la politique de siège.

Par ailleurs, dans le cadre de la mise en œuvre de la politique de voisinage voulu par le Secrétaire Général et le Comité des Ministres, nous avons également finalisé en début d'année un accord avec la Tunisie, régissant le statut de notre nouveau bureau de Tunis.

Cet accord est plus complet que les Accords bilatéraux que nous signons avec les Etats membres. Il faut en effet savoir que l'Accord Général sur les Privilèges et Immunités du Conseil de l'Europe n'a pas vocation à être ratifié par un Etat non membre. Un accord signé avec un Etat non membre doit donc, en quelque sorte, compenser l'inapplicabilité de l'Accord Général. Sachez que des négociations sont également en cours avec le Royaume du Maroc pour notre bureau de Rabat.

Réunion sur les amendements de Kampala

Je dois également vous rappeler l'événement organisé en parallèle de votre réunion, à l'initiative de la Représentation du Liechtenstein, sur « la ratification et la mise en œuvre des amendements de Kampala sur le crime d'agression dans le contexte européen ». Cette réunion se tiendra demain après-midi de 14h30 à 17h30, dans cette même salle. Je tiens à souligner que le Secrétaire Général du Conseil de l'Europe, M. Thorbjorn Jagland, a tenu à être présent et dira quelques mots d'introduction au début de la réunion.

Direction de la DLAPIL

Je dois enfin vous informer que j'ai formellement quitté mes fonctions de Directeur du Conseil juridique et du droit international public à compter du 1er mars de cette année. M. Paul Dewaguet a été nommé Directeur *ad interim*, en attendant les résultats de la procédure visant à remplir la vacance du poste de Directeur.

Un avis de vacances, rappelant les critères d'éligibilité fixés par le Cabinet du Secrétaire Général et la Direction des Ressources Humaines, sera en principe publié demain sur le site Internet du Conseil de l'Europe.

Je tenais toutefois à vous accueillir une dernière fois à Strasbourg, où j'ai eu l'honneur de vous accueillir en de si nombreuses occasions. Cela a été un honneur pour moi, en tant que Jurisconsulte du Conseil de l'Europe, de pouvoir travailler avec vous, dans le cadre de ce Comité ou dans le cadre de relations bilatérales.

J'ai la conviction de vous laisser entre de très bonnes mains, Paul ayant été mon adjoint depuis de nombreuses années.

Paul assurera avec compétence et clairvoyance la continuité du service, avec le soutien de votre Secrétaire Christina Olsen, et en attendant qu'il soit procédé à une nouvelle nomination au poste de Directeur de la DLAPIL.

* * *

Il me reste à vous souhaiter une très agréable 45ème réunion.

APPENDIX IV

PRESENTATION BY MR ERIK WENNERSTRÖM, OBSERVER OF THE CAHDI TO THE *AD HOC* GROUP 47+1 ON THE EUROPEAN UNION'S ACCESSION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The negotiations on EU accession to the ECHR that are now taking place in the 47 + 1 format, have carried forward the results of the CDDH-UE informal working group through four meetings, most recently in January this year.

The basis for the negotiations is the draft legal instrument produced by the 7 + 7 format, the CCDH-UE, modified through these negotiations. You will find the most recent version of the text in document 47+1 (2013) 006. The main elements of the accession instrument are still:

- a draft accession agreement (AA)
- a draft explanatory report to the accession agreement, and
- draft amendments to the rules of the Committee of Ministers of the Council of Europe.

Since my previous report to you, proposals have been made by the EU and the non-EU CDDH members have presented a joint document with views on the EU proposals, or suggestions for amendments to the draft legal instrument.

Most written comments and the current status of negotiations are focused on three main provisions: Articles 1, 3 and 7.

Article 1 – Scope of the accession and amendments to Article 59 of the Convention

Here, the open issues relate to technicalities and to the technique for bridging the Accession Agreement with the Convention. It is also in this context that we find the scope of accession as well as any limitations to accession.

There was initially a fairly long list of clarifications suggested, that if they had all been included in the Convention it would have burdened it to an extent disproportionate to the accession of one additional High Contracting Party. Most of these clarifications are currently found in the texts particular to the accession of this acceding party, i.e. either the accession agreement (Article 1 (5)) or its explanatory report; not the Convention. To make this possible, the suggested modification to Article 59 (2) of ECHR that will act as a *passerelle* (lifting in the accession agreement into the ECHR, thereby permitting accession to take place with only minor modifications to the ECHR) may need to be strengthened. It should be recalled here that the ECHR as an instrument has been developed over the years by either amending protocols or additional protocols. The accession agreement currently being negotiated is a hybrid or *sui generic* instrument, as it contains provisions that will amend the parent convention, but also provisions that only appear in the accession agreement.

Article 1 is also where we find the key attribution clause – a description of the fact that acts and omissions by an EU member States are attributable to that State even when it implements EU law, which does not preclude the EU from being responsible as a co-respondent for a violation that this may result in.

An issue requiring raised at several occasions in this regard is how this attribution can function in relation to EU measures under the CSFP, where the CJEU has no or a limited role.

Article 3 – Co-respondent mechanism

The standing of non-EU member States that implement EU law (such as the Schengen legislation and the Dublin Regulation) is not regulated through the draft legal instrument, which leaves the

current option of 3rd party intervention the only open avenue, which has been a source of concern for some non-EU High Contracting Parties. Their situation is, however, very different than that of EU member States, which is recognized, and the EU is not expected to shoulder the same responsibilities for States that voluntarily apply EU law, as it does for States that through their EU membership are obliged to apply it. The mechanism for ensuring the prior involvement of the CJEU has been modified at several rounds of negotiations and the Article 3(6) now contains a clarification that this prior involvement does not bind the Strasbourg Court in substance.

Article 7 – Participation of the European Union in the Committee of Ministers of the Council of Europe

The issue has two elements: how to safeguard the administration of justice against the potential risk of bloc voting, and the extent of EU participation in the work and proceedings of the Committee of Ministers. These provisions are contained in a combination of Article 7 AA and the proposed amendments to the rules of the Committee of Ministers. This concerns in particular decisions related to referrals to the Court for interpretation of a judgment, infringement proceedings and the adoption of final resolutions. Issues raised in the negotiations include:

a) The participation of the EU in the Committee of Ministers decision making-procedure concerning the execution of Court judgments against the EU; weighing of votes and other options for ensuring the proper administration of justice,
b) The participation of the EU in Committee of Ministers decision-making concerning the execution of judgments against non-EU High Contracting Parties,
c) The participation of the EU in other Convention-related processes in the Committee of Minsiters.

The 47+1 will resume its deliberations in next week, when it meets for the fifth and last time, on the basis of the draft instrument (as it appears in doc 006), as well as proposals made at previous meetings together with new proposals from the Chair (006) and the Secretariat (004 and 005).

APPENDIX V

PRESENTATION BY MS SABINE BAUER, SENIOR LEGAL ADVISER, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (OSCE) ON

"OSCE: A PROCESS OR AN INTERNATIONAL ORGANIZATION? OSCE - A UNIQUE PLACE OF INTERNATIONAL LAW IN THE MAKING"

Dear Ladies and Gentlemen,

Thank you for giving me the opportunity to address you with a topic of "international organization-building". For an institutional lawyer, it has decidedly an important impact in terms of participation in legal transaction and relations to States and other commercial and non-commercial entities. The OSCE is probably one of the very few international organizations of such size, a geographical breath of operations, and its rather broad and comprehensive mandates in security issues, possessing quiet clearly all the *de facto* attributes of an international organization, without however ever been officially granted international legal personality by its participating States.

I have decided to cover three topics in my presentation: first the development of the OSCE from a conference to an 'organization'; second the legal status of the organization (or perceived lack thereof); and finally why I consider that the OSCE contributes in some form and fashion to international law making. I would like to add that this is my personal assessment and does not necessarily reflect the opinion of participating States or the Secretary General.

1. **From a diplomatic Conference to an Organization and "regional arrangement under Chapter VIII of the UN Charter"**

It all started as a conference in the 70ies to mark the East-West *détente* period and to build a common secure space in Europe. Foundations of this diplomatic conference, known as the CSCE, were laid in form of the Helsinki Final Act. This Act was signed in 1975 by Heads of States of 35 countries and embodied a set of 10 principles which in some jurisdictions could pass as a basic constituent document of basic commitments, principles and goals. These ten principles, also known as 'The Helsinki Decalogue', are to date still valid and often recited in the decisions of the highest OSCE decision-making bodies but also by international lawyers and scholars as they are broadly encompassing the fundamental principles enshrined in the Charter of the UN and also major human rights treaties:

1. Sovereign equality, respect for the rights inherent in sovereignty
2. Refraining from the threat or use of force
3. Inviolability of frontiers
4. Territorial integrity of States
5. Peaceful settlement of disputes
6. Non-intervention in internal affairs
7. Respect for human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief
8. Equal rights and self-determination of peoples
9. Co-operation among States
10. Fulfillment in good faith of obligations under international law

Yet, although a lawyer may speculate in discovering some attributes of a treaty-like document in the Helsinki Final Act, this Act was never considered to be more than a political declaration thus only politically binding among its signatories. In accordance with the 1975 Final Act itself, the latter "*is not eligible for registration under Article 102 of the Charter of the UN*" as would have been the case for an international treaty: this was a necessary conclusion given the intrinsic difficulty to legally implement all the above stated principles and commitments and even today States would arguably struggle being legally obliged to implement those principles.

Nonetheless, already at this time, significant ground rules for what was to become the Conference for Security and Co-operation in Europe (CSCE) and later renamed the OSCE were laid down.

For example, the consensus principle was agreed upon by 35 Ministers and some basic rules of procedure for the Conference were adopted which also included provisions for making interpretative statements, points of order, rotation of Chairmanship and an initial scale of contributions for financing the Conference. Further, Ministers outlined the substantive topics that concerned the States related to security, which were exceptionally broad and ranged from military security over environment and economic issues to human rights and the rule of law. These Rules, commonly known as the "Blue Book", were formally adopted by Ministers. In spite of this impressive basis, it was clear that the CSCE remained, throughout the 70ies and the 80ies, a periodic standing conference without fixed institutions and deprived of most of the typical attributes of an international organization, such as autonomy towards its participating States and *vis-à-vis* other international actors.

A rather important change to the institutional set-up occurred in the early 90ies: the CSCE underwent a radical transformation due to the geopolitical circumstances in Europe at that time, *i.e.* the emergence of new, independent and sovereign states, as well as the breakup of a war in the Former Yugoslavia and other internal civil strives in Eastern Europe and Central Asia. Due to these political circumstances, a strong institutionalization took place, mostly reflected in the "Charter of Paris for a New Europe" (1990). This was an important document as Foreign Ministers decided from that point onwards to meet regularly to consult on issues of peace and security. At the same time, in close successive order, the Office for Free Elections (later renamed ODIHR), the Conflict Prevention Centre and a Secretariat were established and only a year later a Secretary General, as the Head of Secretariat and Chief Administrative Officer, was appointed with a broad mandate to assist an annually rotating Chairmanship. The High Commissioner for National Minorities was appointed in 1992, the High Representative of the Freedom of the Media in 1997. All these institutions were equipped with a high degree of autonomy in carrying out the implementation of their mandates and were given fixed budgets as well as staff positions to carry out their tasks.

Also in 1992, an exception to the otherwise rather vigorously enforced consensus principle was agreed upon, namely 'consensus minus one'. This exception was nevertheless clearly limited for a specific purpose. Only in the event of clear, gross and uncorrected violations of relevant CSCE commitments in the field of human rights, democracy and the rule of law, measures could be adopted without the consent of the violating State. This led to the exclusion from participating in the conference of the then Socialist Federal Republic of Yugoslavia in July 1992, which in a way had the character of a sanction, which regularly would only be applied in a system with clear legally binding norms. Several semi-permanent missions were set up as tools for conflict prevention, conflict resolution and post conflict rehabilitation.

The gradual institutional build-up of the CSCE unsurprisingly resulted in another land-mark decision of the Budapest Summit, renaming it into the OSCE in 1994. This decision stated that "*the Change in Name alters neither the character of [our] CSCE commitments nor the status of the CSCE and its institutions"*. Although the decision specifically did not grant separate legal personality or capacity to the OSCE, it considered that *"future arrangements of a legal nature"* could be explored.

Finally, in the first half of the 90ies, the OSCE also experienced an outward expansion in terms of co-operation/coordination of its activities *vis-à-vis* other international actors, such as the UN and also the Council of Europe, culminating *inter alia* in an observer status granted to the OSCE in the General Assembly.

In conclusion, the 90ies could be regarded as concluding the process of institutionalization and arguably transferred the periodic conference-setting into a more permanent organizational structure:

- with standing central decision-making bodies,
- an annually rotating Chairmanship at its helm,
- a strengthened engagement of the Secretary General,
- a system of semi-permanent field operations, and
- [a process to hold to account a severe non-compliance with OSCE's political commitments.]

It is therefore less surprising that some renown international lawyers have concluded that in terms of OSCE's **objectives, resources and the actual acceptance** by UN bodies (such as the Security Council of the UN to which the Secretary General reports annually) that the OSCE indeed constitutes a regional "arrangement" under Chapter VIII of the UN Charter.

2. The OSCE and international legal personality

Clarity in an organization's legal status is definitely an important tool for any multilateral entity to act efficiently, effectively and in accordance with international law principles.

Legal status is commonly understood as encompassing two main and a third tangential elements:

- Legal personality (a subject of international law distinct from its members, able to negotiate and conclude bilateral or multilateral agreements in its own name and also to assume responsibilities);
- Legal capacity (to contract, acquire and dispose of property and to institute and participate in legal proceedings);
- Privileges and immunities (which assist the organization to carry out functions independently and without interference from national interests – often related but not in principle with the legal status).

Almost 17 years have passed since the Rome Council Decision (1993). This was the only OSCE (then CSCE) milestone decision acknowledging that it was useful to grant legal capacity – not however legal personality – under the respective domestic laws and in line with individual states' constitutional requirements, to the CSCE institutions and field operations; it also determined that it was appropriate to grant a set of concrete privileges and immunities to the institutions and field operations and their staff, to the extent necessary for the effective performance of their functions. Regrettably, less than 1/3 of all 57 participating States (and none in which OSCE field operations are located) adopted unilateral laws or legal instruments regulating the status of the Organization.

To date, only 5 out of 16 field OSCE's operations succeeded to conclude Memoranda of Understanding, which were ratified by the respective national parliament in the host countries. Although the extent of privileges and immunities granted to the operations vary greatly, the ratified MoUs clearly facilitate the operations (such as opening of bank-accounts, dealing with landlords and premises issues, issues of inviolability, tax returns and freedom of movement). Several, though not all, host-countries of the institutions including the Secretariat, have passed national laws providing legal status for the institutions operating in the countries. Some of these legislative acts align the OSCE status to that granted to UN structures in the country concerned. Yet, even those countries were not able to conclude host-country agreements with the OSCE, which are standard documents in international law.

Diplomatic consultations on an appropriate "legal arrangement" were held and reached some progress of an initial draft Convention in early 2000. However the discussions stalled until 2005, when a Panel of Eminent Persons made two essential recommendations: 1) "*participating States should devise a concise Statute or Charter of the OSCE containing its basis goals, principles, and commitments as well as the structure of its main decision making bodies"* and 2) *"to agree on a convention recognising the OSCE's legal capacity and granting privileges and immunities to the OSCE and its officials, not diminishing in any way the political binding character of OSCE*

commitments". Interestingly, while looking at this text though, the political binding character of OSCE commitments in the first recommendation on devising a concise Charter is not mentioned at all. This leaves open for speculation whether the Panel ever considered that such a Charter could be, as the Helsinki Final Act is, just a politically binding document and not a legally binding one like the draft Convention.

Following this recommendation, a Decision at the Ministerial level was passed in 2006, establishing an open-ended working group on an expert level to devise a Convention text by the next Ministerial Council.

In 2007, this working group produced a text of a Draft Convention on International Legal Personality, Legal Capacity and Privileges and Immunities of the OSCE. The obstacle for the adoption of this Convention however are 3 footnotes that were added into the text making its adoption contingent on the prior or at least simultaneous adoption of a Charter.

Since then, discussions are on-going under the auspices of the annually rotating Chairmanship in various informal *fora* on how to resolve this impasse in discussions. Consensus building is hampered over the issue whether the OSCE requires on top of the Convention a legally binding Charter or a document that would set out the main goals, principles and outline the main institutional set-up. A vast majority of states would only agree to such a document if the fundamental political nature of the organization and the continuous validity of the OSCE commitments made thus far are preserved.

Apart from a few, participating States remain silent on the question whether the OSCE possesses if not *de jure,* at least *de facto* international legal personality. Some legal scholars, including the famous International Law Commission (ILC), clearly expressed their view that the OSCE is a "*de facto*" international organization enjoying all the attributes – except a legally binding treaty – and therefore must be treated as such.

The dichotomy between the reality and the political discourse has real and sometimes also negative consequences for the operational capacity of the OSCE and can only be solved if a compromise is struck in future between those countries that consider organization-building in a traditional sense and advocate for a legally binding normative structure, and the other school of thought that considers that any organization which for all its purposes acts as one, is an organization under international law.

As the OSCE has grown in size – along with its specialization of scope – so have its risks. Overall, the organization has grown from a conference type of setting and no more than 100 staff members in the early-mid, 90ies to include 57 participating States, 11 Partners for Co-operation, a regular budget of around 144,000 mio EUR and a staff of about 2800 persons, including about 500 alone at headquarters level. Currently there are 16 field operations, 4 separate institutions and a Parliamentary Assembly, all operating under the name of the OSCE. The fragmentation of applicable rules, principles, privileges and immunities resulting from a consensus position sometimes allows arbitrary interpretations by host-countries of the applicable rights and obligations of the respective operations and protection of its staff. It results that the executive structures of the OSCE have plenty of obligations but no real venue or recourse to defend or asserts theirs rights; often the staff is not sufficiently protected; and even conferences with high-level diplomatic representatives in some participating State or Partner for Cooperation not seldom suffer from a lack of adequate protections or privileges (such as a VAT exemption privilege or a diplomatic status). In sum, the lack of a legal status and the uniform system of privileges and immunities is costly for the organization. From a legal perspective, the lack of uniformity and disparity in the application of laws to the OSCE creates confusion, fragmentation and at times, discrimination among staff.

On the other hand, one potential positive consequence – if one can talk of such – is that in the event of a collective compensatory claim against the OSCE (*e.g.* due to an environmental

catastrophe in the course of an OSCE programmatic activity in arms control), it may provide potentially a legal remedy against all participating States, being jointly and severally liable.

Thus explicitly granting legal personality the OSCE, by way of a Convention and/or even a Charter or other constituent document, may need to remain on the agenda for the years to come. A good opportunity for resolving this issue would be the OSCE's 40th anniversary in 2015. Even in the European Union as such, it took some years (from 1992 Maastricht to Lisbon Treaty in 2009) to recognize that the explicit conferral of legal personality to the Union itself would be necessary and important for the Union's standing and competencies in foreign and security policy, irrespective of the legal personality conferred upon the European Communities.

Let me close this area of my presentation by saying that of course, legal personality is not an end in itself. It is not a panacea for all the legal, financial and other risks that any international organization faces. Yet, the granting of formal legal personality is going to assist the OSCE transitioning more smoothly into a 5th decade and also may limit the risk of potentially extensive liabilities for participating States.

Finally, let me address the third and final part of my presentation as set out in the title.

3. OSCE: a unique place of international law in the making

It may initially look as a contradiction that the OSCE, as an arrangement explicitly subscribing only to political commitments, might hold a unique place of international law in the making. But actually at the second glance there is more than meets the eye.

For instance, although the OSCE does not profess to be in the law-making business, two major legal treaties (the CFE treaty and the Open Skies Treaty) both emerged in the broader framework of the CSCE/OSCE. Other means of arms verifications binding for participating States exist such as the Vienna Document mechanism (recently updated in 2011), which requires them to share information on their military forces, equipment and defense planning. The same document also provides for inspections and evaluation visits that can be conducted on the territory of any participating State that has armed forces.

Generally speaking, if one looks at the text and terminology used in several political declarations, charters and decisions, it is frequently legal in nature and often interpreted on the basis of general principles of international law.

In 1992, the 'Court of Conciliation and Arbitration' was created among States by a treaty which has been ratified to date by 33 participating States. It is deemed to be a peaceful venue for settling disputes (through conciliation or even binding arbitration). Yet it is regrettable that this dispute settlement mechanism is not even used by the countries that have ratified the Convention which set up the mechanism. The option is however available, imprinted as it is with the OSCE flexibility.

In addition, in the interdependent world we live in, legally binding conventions and politically binding commitments do interact or complement in order to effectively realize the shared goals of international actors. In this sense, the political commitments adopted in the OSCE framework (e.g. the already referred to "Helsinki Decalogue") are inspired by legally binding international agreements (such as the UN Charter). They aim at the full implementation of those legally binding agreements, and in turn contribute to interpreting, clarifying and oftentimes expanding the scope of the legal provisions.

This complementarity can be seen also in the domain of the third dimension of the OSCE relating to the human rights aspects of security: OSCE commitments and European Convention of Human Rights, as well as other conventions adopted in the framework of the CoE which are complementary and contribute to afford the highest standards of protection of individuals. Applicable political guidelines/codes – and in the wider sense political commitments – are used by

the judiciary of the ECHR to interpret broader principles in constitutions or international Conventions and international law principles:

- One ECHR High Chamber judgment cited the opinion of the Venice Commission which adopted an opinion interpreting the OSCE/ODIHR guidelines on drafting laws on freedom of assembly with regard to the regulation of public meetings. (The European Commission for Democracy through Law (the Venice Commission) at its 64th plenary session (21-22 October 2005)).

- Several ECHR cases confirmed the "adherence to the purposes and principles of (…) the Helsinki Final Act and the other documents of the Conference on Security and Cooperation in Europe (…)" or denouncing a violation which "contravene[s] **international instruments** such as (…) the Helsinki Final Act and the Charter of Paris for a New Europe".

- Some other judgments cite recommendations and guidelines expressed by the Representative of Freedom of the Media on media issues – as "supporting international material".

- ODIHR's election monitoring reports but also its trials monitoring reports are widely cited by the ECHR as supporting "international" documents. In fact, many countries adopt and change their national laws following the analysis of draft laws by the Representative of the Media and other institutions like ODIHR or the High Commissioner for National Minorities.

- Interesting also the ICJ in 1986 concerning military and paramilitary activities in and against Nicaragua (*Nicaragua v. United States of America*), referred to the Helsinki Final Act as evidence of *opinio juris*, thus opening up the possibility that the Final Act (and perhaps also other OSCE documents) may qualify as customary international law. (In this context the ICJ emphasized in its report related to this case that the attitude of States toward the OSCE's Helsinki Final Act, as well as the "*effect of the consent to the text*" were evidence - "*with all due caution*" of *opinio juris*.)

Therefore, the fact that OSCE commitments are not legally binding does not detract from their efficacy. Having been signed at the highest political level, they have an authority that is arguably as strong as any legal statute under international law. As two rather well-known international lawyers (Pieter Van Dijk and Emmanuel Roucounas) said already many years ago "*a commitment does not have to be legally binding in order to have binding force; the distinction between legal and non-legal binding force resides in the legal consequences attached to the binding force, not in the binding force as such (…) violation of politically, but not legally binding agreements is as inadmissible as any violation of norms of international law. In this respect, there is no difference between politically and legally binding rules*".

Hence one can draw a conclusion that political commitments substantially influence and complement the development of international and national laws.

This is also reflected in the interaction between the OSCE and CoE, which is the OSCE's only formalized and institutionalized co-operation agreement/scheme with an international organization, *de facto* on-going since the early 90ies and formally adopted by OSCE participating States in 2004/2005. A Co-ordination Group was established, examining co-operation between the two organizations in 4 priority areas (human trafficking, fight against terrorism, the protection of the rights of persons belonging to national minorities, and the promotion of tolerance and non-discrimination) and making concrete proposal for follow-up including legislative action.

Different OSCE institutions and thematic departments of the Secretariat actively participate in about 20 Committees of the CoE and the field operations also mutually exchange information relating to their respective mandates and coordinate their activities.

In conclusion, one can say that also the treatment of the OSCE (institutions) by the CoE shows that the OSCE remains a strong, though institutionally unique international partner, in the field of security and stability in Europe and beyond.

The OSCE and its political commitments which may later be turned into the norm-setting commitments of other international and national venues (including the CoE) or their usefulness to reinforce and clarify international legal commitments serve to jointly work in a complementary manner on the realization of peace and security for all in the 21st century.

APPENDIX VI

PRESENTATION BY THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) REGARDING THE CONSIDERATION OF CURRENT ISSUES OF INTERNATIONAL HUMANITARIAN LAW

2013 is a special year for the ICRC. It marks the 150 years of the ICRC. During this century and a half, the nature of warfare has continuously evolved, raising new challenges both for humanitarian action and for international humanitarian law.

Today - as it has always done - the ICRC endeavours to adapt its humanitarian response to face such new challenges, building on its history and its operational experience with the sole ambition of protecting and assisting victims of armed conflicts and other situations of violence. As the "guardian" of IHL, the ICRC is and remains dedicated to ensure that this body of law is adapted to effectively address the humanitarian needs of the victims of armed conflicts.

I would like to illustrate the work we are currently undertaking to ensure that IHL in general, and the ICRC's humanitarian action in particular, remain effective in addressing the challenges of modern warfare. To this end I will give a brief update on three different areas of interest namely: 1) the ICRC initiative on strengthening legal protection for victims of armed conflict; 2) our work on addressing the issue of health care in danger; and 3) the ICRC views in relation to so-called "incapacitating chemical agents".

Strengthening legal protection for victims of armed conflict - Follow-up on Resolution 1 of the 2011 International Conference

As you will recall, Resolution 1 adopted at the 31st International Conference of the Red Cross and Red Crescent in 2011 invited the ICRC "*to pursue further research, consultation and discussion (...) to identify and propose a range of options and its recommendations to: i) ensure that international humanitarian law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict; and ii) enhance and ensure the effectiveness of mechanisms of compliance with international humanitarian law*". My colleague Valentin Zellweger from Switzerland will describe the work done on our joint initiative to strengthen compliance with IHL; I will therefore limit my update to the work done regarding the "detention track".

The ICRC launched in November 2012 a series of four regional consultations with government experts aimed at exploring whether and how the substantive rules of IHL governing deprivation of liberty in non-international armed conflicts (NIACs) should be strengthened. These meetings have sought to highlight regional perspectives on specific humanitarian problems related to the deprivation of liberty in NIACs. Consultations have examined ways to strengthen IHL in this area; and have also begun to identify options for a way forward, with an eye toward possible outcomes of the process.

The ICRC has so far held three out of four of the planned meetings: the first in Pretoria jointly with the South African Government (covering the African continent); the second in San Jose under the auspices of the Costa Rican Government (with the participation of Latin America and the Caribbean); and most recently in Montreux (covering North America, Europe and Israel). A fourth meeting gathering experts from Asia, the Pacific and the Middle East will take place in Kuala Lumpur next month.

To date, one hundred and twenty-seven experts from seventy-six states have attended the first three initial consultations. These experts have expressed wide agreement with the ICRC on the main humanitarian challenges arising from detention in NIAC, and importantly, on the need to address these challenges. Discussions broadly covered four main areas of the law which the ICRC

identified as in need of strengthening: conditions of detention, vulnerable categories of detainees, transfers of detainees, and grounds and procedures for internment.
During the Montreux meeting, government experts from twenty-one countries, many of the countries are present in this room, shared their often first-hand experience grappling with many of the challenges of interpreting and applying IHL in NIAC. The report from the Montreux meeting is currently being drafted and is expected to be shared with the participants for comment next month, before being published.

A synthesis report, summarizing the main conclusions of the four regional consultations, will be presented to the Permanent Missions in Geneva this fall. This will also be the opportunity to look into the next steps to further advance in the consultations. We stand ready to share further information anytime and welcome in the meantime any suggestions States may have.

Health Care in Danger - Follow-up on Resolution 5 of the 2011 International Conference

Another outcome of the last International Conference was Resolution 5 on Health Care in Danger. This Resolution conferred on the ICRC a mandate to undertake a process of consultation with the aim of formulating practical recommendations to increase the security of health services in armed conflict and other emergency situations. Following the adoption of Resolution 5 the ICRC organised, in cooperation with partners, three workshops in December 2012 and February 2013.

Workshops held respectively in Oslo and in Tehran were targeted towards National Societies of the Red Cross and Red Crescent but were also attended by representatives of both States and of NGOs. The aim of these workshops was to discuss 1) the challenges faced by National Societies in delivering health care; 2) operational measures which permit to increase the acceptance, access and security of National Societies in their delivery of health care services; and 3) possible strategies for advocacy and communication by National Societies with all pertinent actors, including States, their armed forces, other weapon-bearers but also the health community and the public at large.

The third workshop organised in Cairo was aimed at the wider community of health professionals, with the notable participation of the World Medical Association, the WHO, national professional medical associations and other NGOs. This workshop focused on the security of the provision of pre-hospital emergency care.

To give some examples of the progress to date, the workshops have confirmed the relevance of the “Safer Access Framework”. This is a tool developed by the ICRC for National Societies with the aim of increasing the safety and security of their personnel intervening in emergency situations. The workshops have confirmed, and this is certainly of particular interest to colleagues here, the need for better implementation of, or improvements in, existing national legislation in addressing the safety of health care personnel. In relation to the particular role of National Societies as auxiliaries to public authorities in the humanitarian fields it was further stressed that while their staff will often cooperate closely with authorities in the fulfilment of pertinent tasks related to health care, they must at all times be able to adhere to the Fundamental Principles of the International Red Cross and the Red Crescent Movement. Other topics discussed at the workshops have proven to be more difficult to yield recommendations on how to address them, e.g. the risks of deliberate secondary explosions (this refers to a practice when, after a first attack, health care personnel on the scene to assist the sick and wounded are deliberately targeted in a follow-up attack). Controversial was the discussion concerning the appropriateness of the use by healthcare personnel of protective clothing like helmets, bullet proof vests or gas masks, and the suitability of providing reinforced structures for ambulances.

Further workshops are planned for this year and next year among others in Mexico on the protection of ambulances; in Ottawa and in Pretoria on the security of medical infrastructure; in Sydney on the role and responsibilities of State armed forces; and finally, in Brussels on the

repression of violations of IHL and human rights law in regards to the endangering of health care, and on national legislation to implement existing obligations.

The recommendations resulting from these workshops will be presented in a report prepared by the ICRC for the International Conference of the Red Cross and Red Crescent in 2015. The objective of this initiative is to ultimately improve the security of the provision of health care in the field.

"Incapacitating chemical agents"

Finally, in line with the ICRC's humanitarian mandate to protect lives and to prevent suffering through the promotion and strengthening of IHL and humanitarian principles, the ICRC has been involved in examining the current legal framework addressing the use of so-called "incapacitating chemical agents". There has been persistent, possibly increasing interest among some military and law enforcement agencies in using certain toxic chemicals as weapons, in particular dangerous anaesthetic drugs. The aim of these weapons – which are labelled "incapacitating chemical agents" – would be to render people unconscious or incapacitated by severely impairing the brain function. Under the Chemical Weapons Convention (CWC) these are classified as 'toxic chemicals'. They are not 'riot control agents' – 'tear gas' – which are permitted for law enforcement and are distinguished under the CWC as having only temporary effects, which normally dissipate shortly after exposure. In an effort to explore the implications of using other toxic chemicals as weapons the ICRC held two expert meetings – in 2010 and 2012.

There are three major risks associated with the use of "incapacitating chemical agents" which have been highlighted by the ICRC and others. The first concern is the risk to the life and health of the victims; for those exposed to these agents there will be a significant risk of death, and survivors are at risk of debilitating injuries, such as permanent brain damage. Secondly, there is a risk that proliferation of "incapacitating chemical agents" will undermine the international prohibition of chemical weapons. Considering that some of these chemicals can be as toxic as traditional chemical warfare agents, such as nerve agents, their use as weapons runs against the object and purpose of the CWC. Thirdly and somewhat related, there is a risk that proliferation would create a 'slippery slope' towards the reintroduction of chemical weapons in armed conflict. If you consider law enforcement operations within the context of an armed conflict, particularly where such operations may be mixed with conduct of hostilities, or escalate from one to other, or the legal classification of the situation or operation is disputed, then you can see the dangers of arming forces with weapons designed to deliver highly toxic chemicals.

The two expert meetings organised by the ICRC explored the applicable international law in detail. In this respect it is important to reiterate that in armed conflict there is an absolute prohibition of the use of any toxic chemicals as weapons. This includes a prohibition on the use of riot control agents as a method of warfare.

Outside armed conflict, the ICRC's assessment is that the applicable legal framework – including international human rights and drug control law – leaves little room, if any, for the use of toxic chemicals as weapons, other than the legitimate use of riot control agents. This reflects overwhelming State practice. In light of this and to avoid ambiguity, ICRC is calling on all States to reaffirm on a national level the approach of the use of 'riot control agents only', to the exclusion of "incapacitating chemical agents", and to ensure that they have in place legislation to that effect. The ICRC is also calling on States to promote this approach at the international level, in particular next month at the 3rd Review Conference of the CWC.

I thank you for your attention.

APPENDIX VII

OUTCOME OF THE EXCHANGE OF VIEWS OF THE COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI) ON THE REQUEST FOR OBSERVER STATUS WITHIN THE CAHDI SUBMITTED BY BELARUS

By letter dated 9 January 2013 and addressed to the Secretary General of the Council of Europe, the Minister of Foreign Affairs of the Republic of Belarus requested the status of observer to the CAHDI. On 13 March 2013, the Secretary General informed the Committee of Ministers of his intention to consult the CAHDI in this regard. During its 45th meeting, the CAHDI held an in depth exchange of views on the request for observer status submitted by Belarus.

Delegations presented their views on the granting of such status to a non-member State of the Council of Europe. It was noted that Belarus has an observer status within three intergovernmental committees (CDCJ, CDDH and CDMSI). The Committee recalled the primarily technical/legal nature of its mandate and noted that the granting of observer status to a non-member State which does not have observer status at the Council of Europe is a political matter falling within the mandate of the Committee of Ministers[1].

In light of its mandate, the CAHDI underlined that the Committee of Ministers may grant observer status to States that are committed to the peaceful settlement of disputes, the codification and the progressive development of international law, respecting their treaty obligations as well as the principles of the rule of law. The CAHDI invited the Committee of Ministers to take into account these elements when considering a request for observer status to the CAHDI from a non-member State of the Council of Europe.

[1] As provided by *Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods.*