COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 20/03/14 CAHDI (2013) 17

COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

(CAHDI)

Meeting report

46th meeting
Strasbourg, 16-17 September 2013

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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 46th meeting in Strasbourg on 16 and 17 September 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 45th meeting

3. The CAHDI adopted the report of its 45th meeting (document CAHDI (2013) 6) and instructed the Secretariat to publish it on the Committee's website.

4. Information provided by the Secretariat of the Council of Europe

a. Statement by Mr Jörg Polakiewicz, Director of Legal Advice and Public International Law as from 1 October 2013

4. Mr Jörg Polakiewicz, Director of Legal Advice and Public International Law (DLAPIL) as from 1 October 2013, informed the delegations of recent developments within the Council of Europe. The CAHDI took note in particular of the finalisation of Protocols No. 15 and No. 16 to the European Convention on Human Rights, the modernisation of the Convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data (CETS No. 108), the reviewing process of Council of Europe conventions and the developments relating to the publication on "The Judge and International Custom" following the Conference held in September 2012 on this issue. The information document on the recent activities of the Council of Europe (March 2013 – September 2013) is set out in **Appendix III** to this report.

b. New website of the CAHDI

5. The Secretariat of the CAHDI presented the new website of the Committee together with its collaborative workspace, which it planned to launch in time for the forthcoming meeting of the CAHDI in March 2014. It also presented the model database for the collection and publication of delegations' contributions related to the topics of "Immunities of States and international organisations", the "Organisation and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs" and "National implementation measures of UN sanctions and respect for human rights". The Secretariat informed the Committee that it would submit a report illustrating the concept of the new databases and inviting delegations to comment thereupon.

6. A number of delegations welcomed the new website as well as the proposals regarding the further developments to the CAHDI databases, noting that these user-friendly tools would allow States to interact more intensively.

c. Classification of working documents related to reservations

7. The Secretariat presented the framework applying to the classification of working documents related to reservations on the basis of document CAHDI (2013) Inf 9.

8. The CAHDI took note of this presentation and acknowledged the future classification of working documents related to reservations.

II. ONGOING ACTIVITIES OF THE CAHDI

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

9. The Chair presented and the Committee took note of the draft terms of reference of the CAHDI for 2014-2015, to be adopted by the Committee of Ministers in November 2013.

10. She further presented the document related to the review of Council of Europe conventions by the CAHDI (document CAHDI (2013) 14), foreseeing the adoption of a working plan for 2014-2015. To this end, she suggested focusing specifically on the conventions listed in Group 3 (conventions CETS Nos. 23, 61, 63, 74 and 82), starting with the examination of Convention No. 23 at the meeting in March 2014 and ending with the examination of Convention No. 74 at the meeting in September 2015. She also suggested grouping the examination of the Conventions Nos. 61 and 63. The Committee agreed on this proposal and hence adopted its working plan for 2014-2015.

11. The Chair presented a compilation of Committee of Ministers' decisions of relevance to the CAHDI's activities (documents CAHDI (2013) 8 and CAHDI (2013) 8 Addendum).

6. Immunities of States and international organisations

a. State practice and case-law

i. "Service of process"

12. The Chair introduced document CAHDI (2013) 4 already presented at the 45th meeting of the CAHDI and document CAHDI (2013) 9 containing an elaborated questionnaire with regard to the issue of "Service of process on a foreign State". She invited delegations to provide information with regard to the issues at stake in the documents.

13. The representative of Israel indicated that, according to this State's practice, diplomatic channels were the sole way of servicing documents. This practice had been confirmed by a recent case of the Supreme Court of Israel, which had ruled that since there existed no diplomatic channels between Israel and the State concerned, the service could not be executed and the Court thus had no jurisdiction. The practice had also been supplemented by a chapter in the Foreign States Immunity Law of 2008. The representative of Israel further announced that it would submit a reply to the pertinent questionnaire within few weeks.

14. The Portuguese delegation presented the practice of Portugal with regard to this topic, specifying that service of process should always be effected by diplomatic means where no specific agreement existed on the issue. As a consequence, a court should send a copy of the summons, the complaint and notice of the suit, accompanied by a translation if so required, to the Ministry of Foreign Affairs. Following this action, two options were accepted: a) a copy of the summons was sent to the embassy in the State of the forum or b) the copy was directly sent to the Ministry of Foreign Affairs of the defendant State.

15. The Chair invited delegations, which had not yet done so, to submit their replies to the questionnaire.

ii. "Immunity of State owned cultural property on loan"

16. The Chair presented the topic of "Immunity of State owned cultural property on loan" which had been included in the agenda following the initiative presented at the 45th meeting of the CAHDI of the Czech Republic, supported by Austria and the Netherlands, aimed at elaborating a draft declaration in support of the recognition of the customary nature of the pertinent provisions of the

United Nations Convention on Jurisdictional Immunities of States and Their Property (2004) related to this issue. She invited the Czech and Austrian delegations to present document CAHDI (2013) 10 containing information with regard to this initiative.

17. The Czech delegation presented the *Diag Human* case which had triggered this initiative. In 2011, two paintings and a sculpture owned by the Czech National Gallery and the Moravian Gallery on temporarily loan for an exhibition in Vienna, had been distrained and placed in a court depository, in execution of an order of the Viennese District Court. The court order had been issued following a claim by the Liechtenstein company *Diag Human* asking the Viennese District Court for a declaration of enforceability of an arbitral award of 2008 ordering the Czech Republic to compensate *Diag Human* for damages over a dispute involving the trade in blood plasma. The court decision allowing the seizure of the works of art had later been overturned by the Viennese District Court on the grounds that there existed a rule of customary international law, as reflected by the relevant provisions of the 2004 *United Nations Convention on Jurisdictional Immunities of States and Their Property* (hereinafter "the Convention"), that State owned artefacts not placed or intended to be placed on sale could not be subject to any measure of constraint. By a decision of 16 April 2013, the Austrian Supreme Court had definitively halted the constraint proceedings involving the artefacts owned by the Czech Republic. The Czech delegation informed the Committee that since this case, the Czech Republic had been very cautious about loaning Czech art objects abroad and that it preferred, in this regard, negotiating "letters of comfort" with a number of States in order to avoid such disputes. The Czech initiative, supported by Austria and the Netherlands, aimed at drafting a declaration recognising the customary nature of the pertinent provisions of the Convention and proving the *opinio juris* of States in this regard. The Czech delegation invited member States and observers to contact it should they have had any questions on the draft declaration.

18. The Austrian delegation supplied information with regard to the further process of this initiative. It indicated that the Ministry of Foreign Affairs of the member States of the Council of Europe would probably be contacted by the Czech and Austrian ambassadors in order to solicit signatures of the draft declaration, following which a database would be kept on the status of those signatures.

19. The Finnish delegation indicated that the national practice of Finland had changed following an Act of 2011 prohibiting the seizure of certain exhibition items on loan in Finland and that "letters of comfort" were therefore no longer submitted.

20. The German delegation informed the Committee of two mechanisms for the protection of State owned cultural property on loan in Germany. The first consisted, according the Section 20 of the Cultural Property Protection Act, for the Office of the Federal Government Commissioner for Culture and Media in the Chancellor's Office to issue a legally binding commitment to return cultural property on loan. As a consequence, no third-party claims could be enforced against the return claim of the lender of the cultural property. Discussions were currently taking place with regard to the relationship between this legally binding commitment according to German domestic law and the obligation under Council Directive 93/7/EEC of 15 March 1993 to return cultural objects unlawfully removed from the territory of a member State. The second mechanism was linked to Germany's interpretation of State immunity, according to which cultural property owned by a State was immune from enforcement. Regarding the action which could be undertaken by the CAHDI, the German delegation supported the option presented in the document CAHDI (2013) 10 to include in the CAHDI database on "Immunities of States and international organisations" a section specifically devoted to this issue. As regard the proposal of appointing a rapporteur tasked to examine the issue and report back to the Committee, the German delegation suggested to wait and possibly approach the idea after the revision process of Council Directive 93/7/EEC.

21. The Slovenian delegation underlined the difficulty of expressing a view on the possible content of such a declaration given the existence of certain obligations flowing from international

and bilateral agreements and treaties relating to intellectual property. It expressed its support for the inclusion of the subject in the CAHDI database.

22. The Romanian delegation informed the Committee that Romania supported the declaration which had the value of serving as a proof of the *opinio juris* of States on this issue.

23. The Greek delegation reiterated the support of Greece for this declaration, underlying however that it preferred putting an emphasis on the chapter of the Convention regarding the cultural property element rather than declaring that the entire Convention was part of customary international law. The Greek delegation also expressed its support for the inclusion of the subject in the CAHDI database and informed delegations of its intention to submit information in writing to the Secretariat of the CAHDI on this issue.

24. The Belgian delegation indicated that even if Belgium was not yet party to the Convention, an article in its judicial code regulated the issue in the context of customary international law as codified by the Convention and it could therefore subscribe to the declaration. However, the Belgian delegation wondered whether the declaration would concern not only exhibition material but also other circumstances where property was loaned, for instance for scientific or research purposes.

25. In response to the various questions, the Czech delegation first acknowledged the interpretation given to the declaration as stating *opinio juris*. It indicated that although the initial proposal had been to refer only to the relevant provisions of the Convention in the declaration, it had later been decided not to single out Part IV of the Convention related to this issue in order not to undermine the rest of the Convention. As for the scope of the declaration with regard to other circumstances, the Czech delegation indicated that the intention had been to conform with the text of the Convention, referring only to exhibitions.

26. The delegation of the United Kingdom indicated that although it shared the aim of the declaration, it was not in a position to sign it given the extent and coverage of its domestic legislation. It also expressed doubts about whether Part IV of the Convention reflected customary international law.

27. The Chair summarised the discussions and noted the broad support in favour of the inclusion of a section on the issue in the CAHDI database. She indicated that the Secretariat and the Chair would draft a questionnaire so as to have an overview of the national specific legislations.

iii. "Immunities of special missions"

28. The Chair presented the topic of "Immunities of special missions", included in the agenda at the request of the delegation of the United Kingdom, which had provided a document in this regard (document CAHDI (2013) 15).

29. The delegation of the United Kingdom presented its document, which had been drafted in order to trigger a process of exchanging views and gathering information on the practice and the law on special missions throughout the member States of the Council of Europe and those observing and participating in the work of the CAHDI. It informed the Committee that the United Kingdom was not party to the 1969 *United Nations Convention on Special Missions* (hereinafter "the Convention") but that the question of special missions and of their immunities had often been raised before the UK courts, notably in the *Khurts Bat v. The Investigating Judge of the German Federal Court* case of 29 July 2011. Furthermore, in May 2013, the United Kingdom had put in place an administrative process involving diplomatic missions in London, which aimed at making it easier for the Ministry of Foreign Affairs to demonstrate to the courts that a visit constituted, in their view, a special mission. Given the practical importance of the topic and in particular the usefulness for future cases to establish a way of providing more clear evidence of the consent for the

establishment of a special mission into the United Kingdom, the delegation of the United Kingdom invited the CAHDI members to provide information with regard to their national practice (the processes put in place, the relevant law and the practice of the courts).

30. The German delegation welcomed the proposal by the United Kingdom and underlined that the way of treating special missions in the State practice was of primary importance for all member States and observers.

31. The representative of the United States welcomed the proposal and suggested, in addition to the questions raised by the United Kingdom in the document, to explore other key issues related to this topic, namely: a) the categories of individuals that may enjoy special missions immunity, b) the process by which States accept special missions in advance, and c) the scope of special missions immunity. He illustrated the practical relevance of these questions by referring to a case of 2006 concerning the immunity in a US court of Bo Xilai, then Minister of Commerce of the People's Republic of China, during a visit in the United States at the invitation of the Executive Branch who had been served by the Falun Gong organisation. In the District Court case, the Court had deferred to the Department of State's suggestion of immunity throughout the case.

32. The Norwegian delegation welcomed the initiative and suggested, in addition to the sharing of experience, to possibly contribute to a common understanding on the existence of certain rules of customary law related to this issue, Norway not being party to the Convention. In particular, emphasis should be put on the scope of immunity, specifying that it did not apply to certain international crimes and business. Furthermore, the Norwegian delegation noted the link between this topic and the one of the International Law Commission on "Immunity of State Officials from Foreign Criminal Jurisdiction". It indicated however that it could be argued whether there was a functional need for certain other categories of persons – other that the troika – to be granted the same kind of immunity *ratione personae* and that it was the opinion of Norway that the protection offered by the rules on special missions were insufficient in that regard. The Norwegian delegation also informed the Committee that the domestic courts had no rulings on this issue, that there existed no explicit Norwegian legislation but that the codes for criminal and civil processes contemplated a general obligation to respect international law, including international rules on immunity.

33. The Belgian delegation noted the importance of the issue and its interest in knowing the situation of other member States. It indicated that Belgium was not party to the Convention but that the issue was regulated by international customary law essentially and also bilateral processes, multilateral protocols and headquarter agreements. Some of the Convention's provisions were nevertheless in Belgian law, as declarations of customary international law (for instance the definition of a special mission). Furthermore, the Belgian delegation informed the Committee that following the modification of the Belgian Code of Criminal Procedure and according to international law, any person who was officially invited to stay in Belgian territory by the Belgian authorities or by an international organisation with its headquarters in Belgium having concluded a headquarter agreement enjoyed a personal inviolability during his/her official stay in Belgium. Finally, it indicated that although there existed no procedure in Belgian law for notifying or communicating with domestic courts on this issue, a notification process had been established between the Ministry of Foreign Affairs and the Ministry of Justice, which could send to the prosecuting authorities any information related to the presence in Belgium of persons belonging to a special mission and who therefore enjoyed immunity.

34. The Finnish delegation expressed its support for the initiative and indicated that even if Finland was not a party to the Convention, there existed an Act on the privileges and immunities of international conferences and special missions as well as a decree related to that act in the sense that Finland considered that it was not sufficient to rely only on customary international law in this field.

35. The representative of Japan welcomed the initiative and indicated that Japan was not party to the Convention and that it did not have specific national legislation on this issue. He informed the Committee that Japan considered that, under general international law, a Foreign Minister who visited a foreign State for official purposes enjoyed immunities equivalent to the head of permanent diplomatic missions. Other representatives of government and accompanying members of their delegation who attended an international conference hosted by a foreign State also enjoyed immunities equivalent to the head of diplomatic missions and their staff. Furthermore, he underlined that there had been no cases on this topic before domestic courts, that there had not been issued government statements and that there did not exist a specific system to give explicit consent to special missions for that purpose. However, he noted that there had been cases where immunities of *ad hoc* foreign missions had been at issue but that it was not certain that they fell within the scope of special missions. Furthermore, following the earthquake in Japan in March 2011, there had been concerns regarding the lack of clarity as to whether, and to what extent, the governmental-assisted aid missions enjoyed immunities from national judicial jurisdiction, in case of possible damages arising from their activities. Although it concerned civil procedures, the representative of Japan indicated that theoretically, it could also have involved criminal procedures.

36. The Swiss delegation supported the initiative on the grounds that, even if Switzerland had ratified the Convention, the authorities were increasingly facing requests from Swiss delegations travelling abroad and asking for the extent of their immunities. In particular, it expressed its interest in having more details on the scope of application of those immunities (persons covered and modalities) and the practice of States with regard to the heavy formalities imposed by the Convention.

37. The French delegation expressed its support for the initiative and underlined the practical difficulty of resolving those issues.

38. The Armenian delegation informed the Committee that the Republic of Armenia is not a party to the mentioned Convention. In accordance with Article 6 of the Constitution of the Republic of Armenia: *"International treaties are a constituent part of the legal system of the Republic of Armenia. If a ratified international treaty stipulates norms other than those stipulated in the laws, the norms of the treaty shall prevail. International treaties contradicting to the Constitution cannot be ratified"*. However, despite that, Armenia applies the provisions of the mentioned Convention as customary international law. This question is constantly discussed within framework of CIS countries, as well as at intrastate level. But the final decision has not yet developed.

39. The Latvian delegation indicated that Latvia was not party to the Convention and informed the Committee of problems which had involved missions and branches of the financial institutions. It referred in this regard to a case in which the missions had not agreed to pay taxes even if a member of the mission was a citizen of Latvia.

40. The Chair summarised the discussions and noted that the Committee had agreed to prepare a questionnaire on this issue.

iv. Recent national developments and updates of the website entries

41. 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 States Immunities from Armenia, Canada and Mexico. The Chair invited delegations, which had not yet done so, to submit or update their contributions to the relevant database at their earliest convenience.

42. The Belgian delegation informed the Committee of the recent developments with regard to a case concerning a preventive attachment order of the bank account of the Rwandan Embassy in Brussels. It indicated that Belgium had intervened voluntarily before the enforcement judge of the Brussels Court of First Instance to request that the seizure measure be lifted immediately. Rwanda

had refused to appear considering that it felt within the sphere of Belgium to defend State immunity. The judgment rendered on 28 March 2013 stated that Belgium had proven its legal interest to intervene in the proceedings to support the request for the lifting of the seizure measure and consequently normalise its relations with Rwanda, imperilled by this seizure. It also found that one of the legal conditions for the seizure to be valid had not been fulfilled, namely the precondition of speediness and it therefore ordered that the seizure measure be lifted within 48 hours of the judgment being notified. Following this judgment, the Belgian delegation indicated that the Ministry of Foreign Affairs and the Ministry of Justice had prepared a draft legislation to strengthen immunities and impose more stringent conditions for seizure measures involving bank accounts. This draft legislation required further consideration before a draft bill could be presented to the parliament.

v. 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

43. Regarding document CAHDI (2012) 18, the Chair noted that no delegations had contributed to this document since the 44th 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 Their Property

44. In connection with the stocktaking of signatures and ratifications of the 2004 *UN Convention on Jurisdictional Immunities of States and of their Property* (hereinafter "the Convention"), the Chair informed the Committee that since the previous meeting of the CAHDI, Italy had acceded to the Convention.

45. The Italian delegation informed the Committee that Italy had acceded to the Convention on 6 May 2013. This accession had been motivated by several reasons. First, Italy did not have a specific domestic legislation on this issue. Italian courts had therefore dealt with State immunity entirely by applying customary law. In doing so, they had developed the so-called theory of restricted immunity, according to which States were entitled to invoke immunity from jurisdiction only when they exercised their sovereign power (*acta jure imperii*). If they acted as a private person (*acta jure gestionis* or *privatorum*), they had to submit to the jurisdiction of the State of the forum. However, the practical distinction between *acta jure imperii* and *acta jure gestionis* had posed to the Italian courts a delicate and sometimes arduous task of interpretation and application. Therefore, Italy deemed it necessary to achieve a greater legal certainty on this issue. Secondly, it was the wish of Italy to establish relations between States, individuals and legal entities, with a correct balance between the respect for the custom and principle of sovereign equality among States on the one hand and the respect for the right of judicial protection of individuals on the other hand. The Italian delegation further informed the Committee that along with the instrument of ratification, Italy had also deposited four interpretative declarations aimed at clarifying the terms of the accession. The first declaration stressed that the Convention would be interpreted and applied in accordance with the principles of international law, and in particular with the principle concerning the protection of human rights from serious violations. The second declaration concerned the inapplicability of the Convention to the activities of the armed forces and their personnel where such activities were carried out during an armed conflict as defined under international humanitarian law or in the exercise of official duties. The third declaration stressed that the Convention did not apply where there were special immunity regimes, including the ones concerning the status of armed forces and associated personnel following the armed forces, as well as immunities *ratione personae*. Finally, the last declaration stressed that the express reference, in Article 3 paragraph 2 of the Convention, to Heads of State could not be interpreted so as to exclude or affect the immunity *ratione personae* of other State officials according to international law.

46. The Latvian delegation informed the Committee that Latvia had decided to initiate the process of ratifying the Convention which would soon be sent to the parliament for consultation.

47. The Armenian delegation informed the Committee that Armenia had started the procedure for acceding to the Convention and that the accession would probably take place in the beginning of the year 2014.

48. The Belgian delegation informed the Committee that a procedure was under way in view of Belgium's participation in the Convention.

49. The Portuguese delegation indicated that although the Convention was not yet into force, Portugal applied it as a reflection of customary international law. It suggested that the CAHDI further explore this issue.

7. Organisation and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs

50. 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 Mexico and Switzerland. The Chair invited the delegations which had not yet done so to submit or update their contributions, at their earliest convenience.

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

51. The CAHDI noted that Mexico, Switzerland and the European Union had updated their contributions 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 Committee*" had remained unchanged since the 43rd meeting of the CAHDI (Strasbourg, 29-30 March 2012). Delegations were invited to submit or update their contributions at their earliest convenience.

52. The representative of the European Union referred to the latest contribution of the European Union and updated the CAHDI on the most recent cases relating to restrictive measures decided on by the Court of Justice of the European Union (hereafter the "CJEU"). She informed the CAHDI of an event that would be organised by the European Commission and the European External Action Service in the margins of the meeting of the Sixth Committee of the General Assembly of the United Nations with the purpose of addressing the intricacies between the European Union and the United Nations legal system. The representative of the European Union presented the issues at stake in the appeal judgment handed down by the CJEU on 18 July 2013 in the *Kadi II* case[1]. In this case, the Court had confirmed its earlier jurisprudence by stating that the restrictive measures adopted by the European Union taken in implementation of resolutions of the United Nations Security Council did not benefit from immunity from judicial review and had opted for a strict judicial review. The CJEU had taken the view that the European Union was obliged to fully respect the rights of the defence and to provide the listed individual with, at least, the summary of the reasons supporting the decision adopted against him or her. It had considered that the courts of the European Union may request the disclosure of the information or evidence on which the decision listing or maintaining on the list the individual had been based. In the event of a refusal, the courts should assess whether the reasons relied on by the competent European Union authority to preclude the disclosure were well founded. If the courts considered that these reasons did not preclude disclosure, they should undertake an examination of the lawfulness of the contested measure on the basis of the material disclosed to the individual. If they considered that the reasons precluded disclosure, the courts should take into account considerations regarding the security of the European Union and its members and assess to what extent the failure to disclose confidential information had affected the probative value of the evidence. When conducting the

[1] Judgment of the Court of Justice of the European Union of 18 July 2013 in Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, *Commission, Council, United Kingdom v. Yassin Abdullah Kadi*.

review of the contested decision, if the courts considered that at least one of the reasons mentioned in the summary provided by the Sanctions Committee constituted a sufficient basis to support the contested decision, the latter would not be annulled. In the *Kadi II* case, the regulation of the Commission had been annulled and the appeals dismissed given that the CJEU had considered that no information or evidence had been produced to substantiate the allegations against the listed individual, although the majority of the reasons relied on against him had been sufficiently detailed to allow effective exercise of the rights of the defence. The representative of the European Union noted that the CJEU had been relatively succinct in its appreciation of the improvements of the sanctions system at the United Nations level and underlined that the novel element of this case was that the CJEU considered itself to be able to request that the European Union disclose intelligence information to it and to review such information.

53. The Chair noted that although this issue was internal to the European Union, it specifically dealt with the implementation of measures adopted under Chapter VII of the Charter of the United Nations and, therefore, became an issue of interest to all member States of the United Nations.

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

54. The CAHDI considered the issue of the European Union's accession to the European Convention on Human Rights (ECHR) and took note in this respect of the 78th meeting report of the Steering Committee for Human Rights (CDDH) and of the fifth report of the *ad hoc* Group 47+1 and its final report to the CDDH.

55. 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 to the ECHR. He informed the CAHDI that the negotiations had been concluded on 5 April 2013 with the finalisation of the draft agreement on the accession of the European Union to the ECHR. He placed emphasis on the solutions adopted with regard to Articles 1, 3 and 7 of the draft agreement, respectively on the scope of the accession and the amendments required to Article 59 of the ECHR, the co-respondent mechanism and the participation of the European Union in the Committee of Ministers and other bodies of the Council of Europe. Mr Wennerström referred in particular to the five elements of the so-called "accession package": the draft accession agreement, the draft explanatory report on the accession agreement, a draft declaration by the European Union, a draft memorandum of understanding between the European Union and non-European Union High Contracting Parties to the Convention and a draft amendment to Rule 18 of the internal rules of procedure of the Committee of Ministers of the Council of Europe. He informed the Committee that the main event ahead was the opinion of the CJEU on the accession agreement, requested in July 2013 by the European Commission. The presentation of Mr Wennerström is set out in **Appendix IV** to the present report.

56. The Swiss delegation thanked Mr Wennerström for his work and welcomed the fact that the issues discussed had been resolved in a satisfactory manner, in particular with regard to non-European Union member States.

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

57. The CAHDI took note of documents CAHDI (2013) Inf 10 and CAHDI (2013) Inf 14 submitted, respectively, by the delegations of Austria and Belgium, regarding two recent cases before the European Court of Human Rights involving issues of public international law.

58. The Austrian delegation provided information on the case of *Wallishauser v. Austria II*[2]. This case related to the Austrian law providing that if the employer enjoyed privileges and immunities, the employee had to pay both the employer's and the employee's social security

[2] European Court of Human Rights, *Wallishauser v. Austria (No. 2)*, application No. 14497/06, judgment delivered on 20 June 2013.

contributions. The applicant had complained that this law imposed a disproportionate burden on her. The Court had taken the view that if a State did not enjoy immunity from jurisdiction for certain cases involving issues of private law, it could nevertheless enjoy immunity from execution for these cases. Therefore, the Court had declared that there had been no violation of the rights of the applicant under the European Convention of Human Rights and had dismissed the case. The Austrian delegation underlined that, in its judgment, the Court had considered that the 2004 *United Nations Convention on Jurisdictional Immunities of States and Their Property* reflected customary international law in this regard.

59. The Belgian delegation referred to the judgment handed down by the Strasbourg Court in the case of *Chapman v. Belgium*[3] on 5 March 2013. In this case, the applicant, a former agent of the North Atlantic Treaty Organization (NATO), had sought recognition of his rights before a Belgian domestic court, despite the fact that the provisions of the Agreement on the status of the North Atlantic Treaty Organization, National Representatives and International Staff signed in Ottawa granted immunity of jurisdiction to the Organisation. The Court had considered that the recognition of the immunity of NATO by the Belgian court had not entailed a violation of the right of access to a tribunal of the applicant. The Court had further taken the view that the granting of immunities to an international organisation was essential for its functioning and that the principle of proportionality was respected by the existence of an alternative means, the NATO Appeals Board, to protect the right of the applicant.

60. The delegation of the Netherlands drew the attention of the Committee to the case of *Stichting Mothers of Srebrenica v. the Netherlands*[4] relating to the evacuation of the safe area around Srebrenica in 1995. In its decision, the Strasbourg Court had upheld the immunity of the United Nations, considering that there had been no violation of the right of access to a tribunal of the applicants, and had declared the case inadmissible.

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

11. Peaceful settlement of disputes

62. In the context of its consideration of issues relating to the peaceful settlement of disputes, the CAHDI considered the compulsory jurisdiction of the International Court of Justice on the basis of document CAHDI (2013) 11 and took note in particular of the situation concerning the Council of Europe's member and observer States.

63. The Chair reaffirmed the importance of recognising the compulsory jurisdiction of the International Court of Justice. She also recalled that the jurisdiction of the Court can be accepted by other ways, be it in specific treaties or on an *ad hoc* basis.

64. The Italian delegation informed the Committee that Italy was in the process of accepting the compulsory jurisdiction of the International Court of Justice under Article 36 paragraph 2 of the Statute of the Court.

65. The Romanian delegation informed the Committee of a national debate on the recognition of the compulsory jurisdiction of the International Court of Justice initiated in the first half of 2013. Following this debate, a declaration of acceptance of the compulsory jurisdiction of the Court, containing certain limitations, had been drawn up by the Legal Department of the Ministry of Foreign Affairs. The government and the parliament were in the process of adopting a draft law.

[3] European Court of Human Rights, *Chapman v. Belgium*, application No. 39619/06, judgment delivered on 5 March 2013.
[4] European Court of Human Rights, *Stichting Mothers of Srebrenica and Others v. The Netherlands*, application No. 65542/12, decision of 11 June 2013.

66. The delegation of the Netherlands welcomed the movement forward by Italy and Romania and updated the Committee on the past and forthcoming events regarding the 100th anniversary of the Peace Palace. It mentioned in particular the high-level ministerial meeting held on 28 August 2013, attended by several ministers of foreign affairs and the Secretary-General of the United Nations, which had intended to reaffirm through a joint statement the obligation to settle disputes by peaceful means enshrined in Article 33 of the Charter of the United Nations. The Dutch delegation also referred to other events such as a side-event to the opening of the General Assembly of the United Nations hosted by the Dutch Minister of Foreign Affairs or seminars organised by the International Court of Justice and the Permanent Court of Arbitration.

67. The representative of Mexico congratulated the Netherlands for organising these events and reaffirmed its willingness to participate in them.

68. The Chair underlined the usefulness of these events and the efforts of the City of The Hague to promote better understanding by the public at large of the work done at the Peace Palace by the International Court of Justice and the Permanent Court of Arbitration.

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

69. 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 theses reservations and declarations (documents CAHDI (2013) 12 and CAHDI (2013) 12 Addendum prov) and opened the discussion.

70. With regard to the **declaration from Grenada** to the International Convention on the Elimination of All Forms of Racial Discrimination, one delegation expressed its concern about the reference to national law contained in the declaration and the legal uncertainty brought thereby. This delegation stated that it had already reacted against the declaration but had not opposed the entry into force of the treaty between itself and the reserving State.

71. With regard to the **declaration from Ecuador** to the United Nations Convention on the Law of the Sea, several delegations expressed their concern with respect to the use of the term “sovereignty”. The incompatibility of the declaration with some provisions of the convention and with customary international law was mentioned. Some delegations were considering objecting. It was recalled that reservations to this convention were prohibited.

72. With regard to the **declarations of Lao People’s Democratic Republic** to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, a number of delegations stated that they considered that the first part of the declaration amounted to a reservation and expressed their intention to object. The reference to domestic law was pointed as problematic.

73. With regard to the **reservation of Namibia** to the International Convention for the Suppression of the Financing of Terrorism, concerns were voiced with respect to the limitation embodied in the reservation to the definition of “acts of terrorism”. Some delegations expressed their intention to object.

74. With regard to the **interpretative declaration of Kuwait** to the International Convention for the Suppression of the Financing of Terrorism, it was recalled that Egypt, Jordan and the Syrian Arab Republic had carried out similar actions, to which a number of CAHDI delegations had objected. Several delegations stated that they were assessing the admissibility of the interpretative declaration with regard to the convention and that they were considering objecting.

75. With regard to the **declaration of Turkey** to the International Convention for the Suppression of Acts of Nuclear Terrorism, the Turkish delegation referred to Turkey's obligation to respect the treaties to which it is a party. A number of delegations voiced concerns with respect to the meaning given to "international humanitarian law" in the declaration and wondered whether or not it constituted a reservation. These delegations expressed their intention to object or react in some other way, such as for instance by filing a declaration, while considering that a declaration to clarify what international humanitarian law encompassed would be helpful.

76. With regard to the **reservation of Israel** to the Convention on the Rights of Persons with Disabilities, the representative of Israel informed the Committee on the scope and content of its reservation, by explaining that Israel respects and cannot affect the content of religious laws which determine the personal status of members of the various religious groups.

77. With regard to the **reservation of Malta** to the Convention on the Rights of Persons with Disabilities, one delegation expressed doubts about the admissibility of the declaration.

78. The Norwegian delegation informed the Committee on the scope and content of its declarations made to the Convention on the Rights of Persons with Disabilities. It noted that Norway had taken great care to ensure that it had acted well within its human rights obligations.

79. The Italian delegation informed the Committee that Italy had ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence on 10 September 2013 without any declaration.

80. With regard to the **declarations upon signature of Poland and Lithuania** to the Council of Europe Convention on preventing and combating violence against women and domestic violence, the Polish and Lithuanian delegations informed the Committee on the scope and content of their declarations. Several delegations said they were pleased with the decision of the Italian Government and Parliament to ratify without a reservation and hoped that Poland and Lithuania would follow the Italian example. They considered that it would be better to wait to lift any obstacle to ratification without such declaration, since the declaration amounted to a reservation contrary to the object and purpose of the treaty, as well as to Article 78 of the convention which limited the possibility of entering reservations.

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

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

13. The work of the International Law Commission (ILC) and of the Sixth Committee

a. Exchange of views between the ILC, the Chair of the CAHDI and the Secretary to the CAHDI, Geneva, 10 July 2013

82. With reference to documents CAHDI (2013) Inf 7 and Inf 8, the Committee was informed of the exchange of views on 10 July 2013 between the ILC, the Chair of the CAHDI and the Secretary to the CAHDI.

83. The Chair reported the comments and questions raised during the encounter with the members of the ILC. She referred to the suggestion by a number of ILC members that CAHDI connect with those other regional bodies and regional gatherings of legal advisers having a similar structure to that of the Committee. She further mentioned that two ILC members had questioned the compatibility between the modalities foreseen for the European Union's accession to the European Convention on Human Rights and Article 17 of the draft articles on the responsibility of international organisations. A number of ILC members had also voiced their wish for greater interest in and response to their questionnaires and conveyed their concern that unless member

States contributed their opinions, practices and insight through such questionnaires, it would be difficult for the ILC to provide member States with the thinking that it was tasked with. This had been the case in particular of one of the ILC members, Ms Concepción Escobar-Hernández, a former vice-chair of the CAHDI, and Special Rapporteur for the topic of the immunity of State officials from foreign criminal jurisdiction.

84. The Secretary to the CAHDI completed the Chair's account of the questions and answers session before the ILC by referring to the suggestion by a member of the ILC that the Sixth Committee of the UN General Assembly should have a greater knowledge of what the CAHDI is and what it does. She noted that the Secretariat was envisaging giving a presentation of the new website of the Committee during the International Law week in New York.

b. Presentation of the work of the ILC and of the Sixth Committee by Professor Pavel Šturma, Member of the ILC

85. The 65th Session of the ILC had taken place in Geneva from 6 May to 7 June and from 8 July to 9 August 2013. Professor Pavel Šturma, member of the ILC, presented the recent activities of the ILC. Professor Pavel Šturma's presentation is reproduced in **Appendix V** to this report.

86. The topics discussed by the ILC during its 65th Session had been: subsequent agreements and subsequent practice in relation to the interpretation of treaties; immunity of State officials from foreign criminal jurisdiction; protection of persons in the event of disasters; provisional application of treaties; formation and evidence of customary international law; and, on a preliminary basis, protection of the environment in relation to armed conflict. In addition, two other topics had been considered by the working group and the study group.

87. The first topic discussed in substance during the session had been the topic of subsequent agreements and subsequent practice. The Commission had examined the first report of the Special Rapporteur, Professor Nolte, which was based on earlier work carried out in the framework of the study group on treaties over time. Upon consideration of the report of the drafting committee, the Commission had provisionally adopted five draft conclusions together with commentaries thereto. The draft conclusions dealt with general issues, such as the definitions of subsequent agreements and subsequent practice and their role in the process of treaty interpretation.

88. The Commission had continued its examination of the topic of immunity of State officials from foreign criminal jurisdiction. The ILC had had before it the second report of the Special Rapporteur, Ms Concepción Escobar-Hernández in which six draft articles had been presented. The report had provided an analysis of the scope of the topic, the concepts of immunity and jurisdiction, the difference between immunity *ratione personae* and immunity *ratione materiae*, and the basic norms comprising the regime of immunity *ratione personae*. Following the plenary debate, the ILC had decided to refer all six draft articles to the drafting committee. Upon consideration of the report, the ILC had provisionally adopted three draft articles, together with commentaries, whilst postponing discussions on draft article 2 on definitions to a later stage. The issue of immunity *ratione materiae* had not been taken up by the Commission this year, as it would be the subject of the report from the Special Rapporteur next year.

89. Concerning the topic of the protection of persons in the event of disasters, the Commission had had before it the sixth report of the Special Rapporteur, Mr Eduardo Valencia-Ospina, dealing with aspects of prevention. It had provisionally adopted seven draft articles with commentaries, which it had already discussed in 2012, and two new draft articles, 5ter and 16.

90. In connection with the topic of the formation and evidence of customary international law, the Commission had had before it the first report of the Special Rapporteur, Sir Michael Wood which did not include any draft conclusions or guidelines. The debate in the plenary had addressed, *inter alia*, the scope and methodology of the topic, the range of materials—for example, State practice, case law of international and national courts and tribunals—and the future plan of

work. The Special Rapporteur had held informal consultations on the title of the topic, the consideration of *jus cogens* within the scope of the topic and the need for additional information on State practice. The prevailing view had been that *jus cogens* would not be specifically dealt with in this topic. The Commission had decided to change the title of the topic to "Identification of customary international law." The substance of the topic, however, would include both formation and evidence of customary international law.

91. In relation to the topic of the provisional application of treaties, for which members of the ILC disposed of the first report of the Special Rapporteur, Mr Gómez-Robledo, and a memorandum by the Secretariat tracing the negotiating history of the relevant provision, both in the commissions and at the Vienna conference on the law of treaties, the Commission had held a debate around the purpose and nature of the provisional application of treaties, the relation between international and constitutional law approaches to this issue, as well as the operation of specific issues to be considered in future reports of the Special Rapporteur.

92. The new topic of the protection of the environment in relation to armed conflict had been put on the Commission's agenda only during this 2013 session. The Special Rapporteur, Ms Marie Jacobsson, had presented the Commission with a series of informal working papers with a view to initiating dialogue with members of the ILC on a number of issues relevant to the topic. The issues addressed in the informal consultations had included scope and methodology and the possible outcome of the ILC's work, as well as a number of substantive issues.

93. In connection with the topic of the obligation to extradite or prosecute (*aut dedere aut judicare*), the Commission had reconstituted the working group from the previous quinquennium under the chairmanship of Mr Kittichaisaree. The Commission had taken note of the report adopted by the working group, which would appear as an annex to the 2013 report of the ILC. The question remained as to whether the report would conclude the topic or whether the Commission would continue its work on this topic.

94. Furthermore, the Commission had reconstituted the study group on the topic of the most favoured nation (hereafter "MFN") clause to examine the various factors which seemed to influence investment tribunals in interpreting such clauses.

95. Professor Šturma concluded his presentation by referring to the latest activities of the working group on the long-term programme of work of the ILC. He noted that one of the topics that had been added to the updated list of topics in the long-term programme of work was based on a proposal by Professor Sean Murphy on crimes against humanity. The idea of the proposal had been to try to write draft articles for future conventions that would complete the current international criminal law. The possible merit of such an initiative would be to establish a regime of co-operation, extradition and legal co-operation in criminal matters on a horizontal, state-to-state basis, not a vertical basis, as is the co-operation between States and the International Criminal Court (ICC).

96. The Chair of the CAHDI thanked Prof. Šturma for his presentation and invited any delegations which so wished to take the floor.

97. In reply to the questions raised by the Swiss delegation, Professor Šturma specified that immunities of special missions as well as diplomatic immunities, consular immunities and other special regimes would not be covered by the draft articles on the immunity of State officials. He noted that this was to put in relation with the possibility that the draft articles on immunities of State officials would be more progressive in comparison with older rules of international law and foresee exceptions from immunities. As regards the topic of protection of the environment and armed conflict, Prof. Šturma further explained that measures contemplated "before armed conflict" did not necessarily only refer to the period immediately before the beginning of an armed conflict, but also to the period in the distant time frame. He stressed that the proposals from the new Special Rapporteur were still preliminary and general and that the obligations related to the period preceding the armed conflict were likely to be modest.

98. Responding to a question from the Czech delegation concerning the new topic of the protection of the atmosphere, Professor Šturma recalled that this topic had been placed on the long-term programme of the Commission in 2011 at the end of the previous quinquennium, following which the Commission had conducted informal consultations. Ultimately, it had been only on the last day of the 65th session that the Commission had been able, amid certain difficulties, to reach a decision to include the new topic on the agenda. The decision came as the result of the compromise that the topic should neither touch the existing treaty regimes concerning the protection of the atmosphere, nor any on-going negotiations concerning the atmosphere or specific obligations in the field of the environment. Moreover, the topic should not address the issue of the limitation of the atmosphere, the air and outer space. It should not lead to the elaboration of specific draft articles but rather be limited to general issues relating to the protection of the atmosphere.

14. Consideration of current issues of international humanitarian law

99. The representative of the International Committee of the Red Cross (ICRC) provided CAHDI members with an update on the ICRC's project for strengthening legal protection for victims of armed conflict, focusing on the latest developments and the next steps planned for each of the two tracks of this project, namely strengthening international humanitarian law compliance mechanisms on the one hand, and strengthening the norms protecting persons deprived of liberty in non-international armed conflict on the other hand.

100. Regarding the joint ICRC/Swiss Government initiative on strengthening compliance with international humanitarian law, the most recent consultation meeting had been a second meeting of all States, held on 17-18 June 2013 in Geneva. Among the various functions of an international humanitarian law compliance mechanism that had been discussed, the following four attracted the most interest: first, a periodic reporting system on national compliance with international humanitarian law; secondly, a regular thematic discussion on international humanitarian law issues; thirdly, a fact-finding mechanism, including possible ways to make use of the international humanitarian fact-finding commission and fourthly, the tasks and features of a meeting of States and how it could serve as an institutional anchor for the other elements of a compliance system.

101. Switzerland and the ICRC would study concrete proposals and options regarding these four priority areas, in continued discussions and consultations with States. Prior to the following meeting of all States to be held in summer 2014, there would be two preparatory meetings in Geneva, the first focusing primarily on the form, content and possible outcomes of periodic reporting and thematic discussions and their link to a regular meeting of States; the second focusing on fact finding. The representative of the ICRC encouraged delegations to participate to these two preparatory meetings.

102. Regarding the detention track, the representative of the ICRC informed CAHDI members that the four regional consultations with government experts, which had been planned for 2012-13, had been completed. Although these consultations had not resulted in any final decisions on the substantive aspects or the formal outcome of the process, States had at this stage generally expressed a preference for an instrument of a non-binding nature. Draft reports of each regional consultation would be made publicly available and supplemented by a synthesis report. A meeting would be organised in Geneva at the end of 2013 with the aim of sharing the results of the regional consultations with all States. The representative of the ICRC noted that with respect to the four main areas discussed during the consultations (i.e. the conditions of detention, the protection of particularly vulnerable groups of detainees, the grounds and procedures for internment, and transfers of detained persons) there remained diverging views among experts. Further consultations would be held in 2014 in the course of several centralised thematic meetings. The representative of the ICRC invited delegations to continue supporting this process and encourage other States to participate actively.

103. The German delegation thanked the ICRC and Switzerland for their initiative which would reinforce the importance of developing international humanitarian law as a distinct body of rules to face the challenges of modern warfare and modern forms of conflict. It signalled its support for the idea of a forum to discuss issues of international humanitarian law, such as a regular meeting of States parties, whilst cautioning against the risk of political derailment of such types of fora. The German delegate expressed its support for a reporting mechanism and its openness to discuss ways of intensifying the instrument of fact-finding. It further noted that strengthening legal protection for persons deprived of their liberty in non-international armed conflict was a priority for Germany. To conclude, the German delegation announced that its authorities had adopted a new German service manual on international humanitarian law in armed conflict. The modernised manual was aimed at meeting contemporary challenges of international law while giving soldiers a reliable description of contemporary international humanitarian law. The English language version of the manual would be available early 2014.

104. In support to the initiative taken by Switzerland and the ICRC, the French delegation put forth its view that regular intergovernmental meetings and regular reporting were interesting avenues to explore, without creating cumbersome systems or procedures, especially with regard to the number of reports that were drafted elsewhere.

105. The Swiss delegation shared information about the joint Swiss-ICRC conference, Montreux +5, on the Montreux document on private military and security companies (hereafter “PMSCs”), scheduled to take place in Montreux from 11 to 13 December 2013. It noted that from an initial 17 States in September 2008, the number of participants to the Montreux document had risen to 46 States and one international organisation—the European Union. The conference would provide an opportunity for States and international organisations to share experiences, to learn from good practices and to discuss ways to implement the Montreux document through national legislation. The conference would furthermore offer an opportunity to look at the complementarity between the Montreux document and the international code of conduct. In parallel to the Montreux document, the ICOC provided for roles for the private security sector. Self-regulation and effective implementation of the industry were an additional and complementary layer of the regulatory framework. The Swiss delegation announced that the oversight mechanism of the ICOC would be established in the week following the CAHDI meeting as a Swiss association based in Geneva.

106. The Montreux +5 conference would provide a platform to discuss the role that the Montreux document participant could play in contributing to the implementation of the document through the establishment of a new advisory forum of Montreux document States. It would also represent an occasion to discuss the need for further dialogue on PMSCs. The Swiss delegation invited all States and international organisations to participate in the Montreux +5 conference and to actively contribute to the further development of this document.

107. The Norwegian delegation drew participants’ attention to a global conference that had been hosted by Norway, together with Austria and certain other countries, in May 2013: Reclaiming the Protection of Civilians under International Humanitarian Law. The conference had been organised in co-operation with the ICRC and the Office for the Coordination of Humanitarian Affairs (OCHA), and had concluded a series of regional seminars which had started in 2010. The outcome of the conference had been made available on the website at the Norwegian Ministry of Foreign Affairs, including the co-chair’s non-binding summary and a list of recommendations for follow-up. The Norwegian delegate invited interested States to follow up with a discussion on the way forward on this important topic.

15. Developments concerning the International Criminal Court (ICC)

108. The delegation of Liechtenstein updated the CAHDI on developments regarding the Kampala amendments. Since the 45th meeting of the CAHDI, three States—Estonia, Germany and Botswana—had ratified the amendments, bringing the total number of ratifications to seven. Two further States—Slovenia and Uruguay— were expected to ratify them during the general debate of

the UN General Assembly. It anticipated that Liechtenstein's goal of 10 ratifications, i.e. one third of the total of 30 ratifications needed for activation of the amendment on the crime of aggression, would be exceeded by the end of 2013.

109. The delegate from Liechtenstein informed CAHDI participants that on the occasion of the general debate, the Liechtenstein mission in New York was organising a ministerial panel discussion, taking place on 27 September 2013 at 3 p.m. The event would be opened by the UN Deputy Secretary-General and have as speakers the Foreign Ministers of Liechtenstein, Estonia and Botswana. The delegate reiterated Liechtenstein's availability to provide any assistance to delegations intending to ratify the amendments and recalled that useful material to this end was available on the website www.crimeofaggression.info.

110. The Romanian delegation informed the CAHDI about a conference organised by the Ministry of Foreign Affairs of Romania, the university of Bucharest, and the Romanian Association for International Law and International Relations on the International Criminal Court—its achievements and challenges ahead, in Bucharest on 17 October 2013. The President of the International Criminal Court (ICC), Judge Song, and the President of the Assembly of States Parties, Ambassador Tiina Intelmann, would participate. The delegate from Romania encouraged participation from capitals, especially those from countries which were in the process of ratifying either the Rome Statute itself or the Kampala amendments.

111. The Slovenian delegation confirmed that the Slovenian Parliament had passed a law ratifying the Kampala amendments and that the deposit of Slovenia's instrument of ratification would take place in New York during the general debate of the UN General Assembly. It reminded participants that in the frame of the annual strategic forum organised by Slovenia in September 2013, one of the panels had been devoted to the ICC with the participation of Prosecutor Bensouda. This event had highlighted the limits of the Court, in the light of the tragedy unfolding in Syria. It had focused furthermore on Kenya's consideration of withdrawal from the Rome Statute, which was a cause of serious concern.

112. The German delegation qualified the possible withdrawal of Kenya from the Rome Statute as a worrisome development and suggested that delegations should indulge in *démarches* in order to prevent withdrawal from happening. It reminded participants that most cases concerning Africa had been taken up by the Court upon either a request of the governments of the concerned countries, or the Security Council and that this was an important argument to present in public in those countries as well as in the overall community. The delegate from Germany noted that at the last two Assemblies of States Parties, the view had been widely shared that the ICC must concentrate on its work inside the courtroom to bring forward cases and shorten their duration. Having this in mind, the German authorities were in the process of presenting the candidature of Mr Bertram Schmitt, judge at the Federal Court of Justice since 2005, in view of the election of six new ICC judges to take place at the 2014 Assembly of States Parties. Mr Schmitt had been a practitioner of criminal law and criminal procedural law, with 22 years' experience in the courtroom in the Grand Criminal Chamber and six years as a presiding judge of the Grand Criminal Chamber.

113. The Swedish delegation announced that Sweden was about to launch the candidature of Judge Krister Thelin, who had court experience in criminal law both from national courts and as judge *ad litem* at the ICTY. Judge Thelin had also been sitting on the UN Human Rights Committee.

114. The French delegation mentioned that France too was in the process of selecting a candidate for the ICC.

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

115. The German delegation conveyed its concern regarding the lack of support by the Government of Cambodia for the tribunal of Cambodia, to which Germany had contributed considerable financial assistance.

17. Topical issues of international law

116. The representative from Interpol gave a presentation regarding a new co-operation project for international criminal law developed by its organisation, entitled “e-extradition”. The project, which sought to achieve a system whereby the extradition proceedings would be transferred electronically, proceeded from the realisation that the expansion of international crime was not matched by a comparable evolution in the use of instruments of criminal co-operation, including extradition proceedings, and that the efficiency of pre-extradition proceedings was not paralleled by equally efficient and modern extradition proceedings. Existing extradition procedures were highly formalistic, slow and outdated. Moreover, correspondence via diplomatic channels presupposed access to a vast diplomatic network, of which not all countries benefited. The project concentrated on the material transmission of case files without entailing changes in national legal systems. It aimed at enabling the electronic transmission channel via Interpol as a viable alternative to the traditional ways of transmitting authentic case files.

117. During the two years since the inception of the project, three main challenges had been identified. The first was the need to comply with the requirement of diplomatic transmission provided for in a large number of treaties. Thus, the project had involved the competent authorities for the purposes of diplomatic transmission by including in the transmission network the ministry of justice, as the originator of the extradition request, and the ministry of foreign affairs, which is the last in the transmission chain to transmit the request and the first to receive it in the requested State. Doing so had entailed adopting software within the respective ministries—the ministry of foreign affairs and the ministry of interior. The second challenge had been the question of authentication, which had been dealt with by creating a closed system in which only accredited persons could communicate among themselves and access documents and by integrating the requirements of notarisation, if applicable. The third challenge had related to the integrity and security of documents, which was guaranteed by the encryption of documents.

118. There were many advantages to this system. It was rapid, simple and extremely secure. It standardised procedures for extradition requests and allowed substantive cost gains. The project had been trialled with the participation of a group of around 10 countries of different legal backgrounds. The testing phase had taken roughly three months during which more than 50 extradition requests had been exchanged among the countries concerned. The project was at a crucial stage as the technical aspects of the platform were being analysed in view of expanding the project to a greater number of countries. Moreover, Interpol was in the process of drafting a charter illustrating the features of the system.

119. In reply to a question by the Russian delegation concerning the software used for the “e-extradition” initiative, the representative of Interpol explained that Interpol had set up the technical infrastructure of the system by using the encryption software “PKI”. Within this infrastructure, Interpol’s role was to issue the certificates allowing States to communicate via the system. As the certifying authority, Interpol did not have access to the exchange of communications between the authorised personnel of the participating States. There existed detailed documentation of all the legal and technical aspects of the project which could be made available to interested States.

120. The Belgian delegation raised a question concerning the technical requirements conditioning a State’s participation in the project, to which the representative of Interpol replied by referring to Interpol’s logistical platform which spanned to all 190 member States of this organisation. This platform was used for the purposes of international police co-operation and

could very well be exploited for the purposes of international judicial co-operation. The technical connection of extraditing national authorities to this platform would have to follow the applicable protocol but would not pose a problem.

121. In reply to a question from the Turkish delegation, the representative of Interpol clarified that the system allowed precisely defining both the date on which extradition requests were sent and the date on which they were received by the requested State. As soon as a request was sent, an alert would be sent to the requested State. Failure to react to an alert within a certain number of days would entail the destruction of the extradition file.

122. Another topical issue of international law mentioned during the meeting by the Belgian delegation was the initiative launched by the Netherlands, Slovenia and Belgium with the aim of improving the international framework for mutual legal assistance and extradition on investigating and prosecuting the most serious crimes: genocide, crimes against humanity and war crimes. During the 22nd session of the UN Commission on Crime Prevention and Criminal Justice (UNCCPCJ) held in Vienna in April 2013, this initiative had met with a strong opposition from a group of States, despite the positive feedback it had received during the preparatory work. This had led to the withdrawal of the draft resolution aiming to add to the agenda of the UNCCPCJ the issue of mutual legal assistance and extradition in domestic proceedings against perpetrators of genocide, crimes against humanity and war crimes. This notwithstanding, the draft resolution, which had been initially motioned by eight States, had yielded the co-authorship, towards the end of the session, of twenty-three other States and the support of further States. A meeting of the co-sponsors of the draft resolution would be organised in The Hague on 21 October 2013 in order to determine the best way of moving forward in view of the next session of the UN Commission in April 2014. The keynote speaker for this conference would be Mr Adama Dieng, UN Special Adviser on the Prevention of Genocide. The Belgian delegate announced that States supporting this initiative were preparing a joint draft declaration which would be published during the complementary segment of the upcoming conference of States Parties to the Rome Statute.

IV. OTHER

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

123. In accordance with *Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods*, the CAHDI re-elected Ms Liesbeth Lijnzaad (Netherlands) and Mr Paul Rietjens (Belgium), respectively as Chair and Vice-Chair of the Committee for one year, as of 1 January 2014.

19. Date, venue and agenda of the 47th meeting of the CAHDI

124. The CAHDI decided to hold its 47th meeting in Strasbourg on 20-21 March 2014. 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

125. The Polish delegation informed CAHDI participants that the progamme of the UN Informal Meeting of Legal Advisers of the Ministry of Foreign Affairs was in the process of being finalised. The Polish delegate recalled that apart from Poland, the co-initiators' group, which counted five members, included persons sitting in the CAHDI, i.e. the delegate from Sweden and the representative from Mexico, and thanked the delegates from Belgium and Italy for their support during the preparations. All delegates were cordially invited to attend the meeting.

126. The CAHDI concluded its 46th 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 45th meeting

4. Information provided by the Secretariat of the Council of Europe

   a. Statement by Mr Jörg Polakiewicz, Director of Legal Advice and Public International Law as from 1 October 2013

   b. New website of the CAHDI

   c. Classification of working documents related to reservations

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 of 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

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

13. The work of the International Law Commission (ILC) and of the Sixth Committee

    - Presentation of the work of the International Law Commission (ILC) and of the Sixth Committee by Prof. Pavel Šturma, Member of the ILC

    - Exchange of views between the ILC, the Chair of the CAHDI and the Secretary to the CAHDI, Geneva, 10 July 2013

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

19. Date, venue and agenda of the 47th meeting of the CAHDI

20. Other business

APPENDIX III

INFORMATION ON THE RECENT ACTIVITIES OF THE COUNCIL OF EUROPE
(MARCH 2013 – SEPTEMBER 2013)

I. PRIORITIES OF THE COUNCIL OF EUROPE

A. Priorities of the Armenian Chairmanship of the Committee of Ministers of the Council of Europe

- On 16 May 2013, Armenia took over the Chairmanship of the Committee of Ministers of the Council of Europe (after Andorra).

- The **priorities and the objectives of the Armenian Chairmanship** are the following:

    - combating racism and xenophobia in Europe; promoting European values through intercultural dialogue;
    - strengthening European standards on human rights and on the rule of law;
    - fostering democratic societies;
    - reinforcing the role of the Council of Europe in the European architecture.

- In addition to these goals and as it has become the practice, the Armenian Chairmanship strives to uphold the logic of continuity applying to the priorities of the chairmanships of the Committee of Ministers. It will therefore also endeavour to move the reflection process forward and conduct concrete initiatives with regard to the **common priorities** of the Andorran and Austrian Chairmanships (previous and next Chairmanships), which are:

    - with regard to human rights, to:

        - seek to implement the follow-up to the Interlaken, Izmir and Brighton Conferences and to conclude the negotiations on the EU's accession to the ECHR;
        - take measures to translate various current projects relating to new media into practical initiatives.

    - with regard to democracy, to:

        - focus its efforts on education for democratic citizenship (promoting tolerance and non-discrimination);
        - promote local and regional democracy.

    - with regard to the rule of law, to focus its efforts on promoting democracy through law, ensuring the efficiency of justice and combating corruption and trafficking in human beings.

B. SECRETARY GENERAL'S PROPOSALS FOR PRIORITIES FOR 2014-2015

- In 2010, the Committee of Ministers agreed to the Secretary General's proposal to move to a biennial programme and budget as from 2012.

- Based on the Secretary General's priorities for the **biennium 2014-2015**, a draft Programme and Budget has been prepared and will be examined by the Rapporteur Group on Programme, Budget and Administration (GR-PBA) at its meeting on 19 September 2013. The draft Programme and Budget is structured around the three existing operational pillars and the support pillar covering *Governing Bodies, General Services and Other*.

- In addition to on-going priorities, notably the pivotal role of the European Convention of Human Rights system, the Secretary General proposes four focal areas – linked to current European challenges – for the priorities for the next biennium:

    - fight against corruption;
    - fight against intolerance and hate speech;
    - protection of minorities and vulnerable groups;
    - consolidation of Council of Europe legal space.

- The Programme and Budget for 2014-2015 will be adopted by the Ministers' Deputies at their 1185th meeting on 19-21 November 2013, together with the terms of reference of the intergovernmental committees of the Council of Europe.

- The intergovernmental structure for 2014-2015 will be priority driven, aimed at ensuring political relevance and high level attendance by participating States.

- In the frame of the review of the current intergovernmental structure, the Secretary General has underlined the importance of this structure, as an "essential asset of the Organisation". However, he has also noted that the terms of reference of intergovernmental committees will be limited to the biennial cycle, with no automatic renewal or prolongation, and clearly linked to the Programme for the upcoming biennium.

II. REVIEW OF COUNCIL OF EUROPE CONVENTIONS

- Another core priority of the Council of Europe is the review of Council of Europe conventions.

- On 10 April 2013, 11 months after the presentation of the Report of the Secretary General on this issue, the Committee of Ministers concluded this exercice by adopting a series of measures relating to:

    - the promotion of Council of Europe conventions;
    - the management of Council of Europe conventions;
    - the participation of non-member States in Council of Europe conventions;
    - reservations to Council of Europe conventions.

- Regarding the **management of Council of Europe conventions**, the CAHDI will discuss this issue under item 5 of its agenda.

- Regarding the **reservations to Council of Europe conventions**, the Committee of Ministers:

    - has agreed on the need, during the drafting process of each convention, to examine whether to include explicit provisions on reservations, which would determine on a case-by-case basis the regime applicable;
    - has invited the bodies responsible for monitoring conventions, if appropriate, to raise with the national authorities, particularly on the occasion of on-the-spot visits, the question of the need to maintain reservations already formulated, and the possibility of considering their withdrawal;

- Regarding the **participation of non-member States in Council of Europe conventions**, the Committee of Ministers has agreed, where there is a provision in a convention for accession by non-member States:

- to apply the usual informal consultation procedure of the member States and where necessary, to seek the opinion of the competent committees;
- to limit the validity of an invitation by the Committee of Ministers to accede to a convention to a period of five years;
- to provide, in cases where there is no convention-based body including all the Parties, for participation, with a right to vote, by non-member States in steering committee or ad hoc committee meetings pertaining to the conventions to which those States are Parties (this decision has been included in the terms of reference of the CAHDI for 2014-2015).

- The Committee of Ministers also agreed, <u>when participation in a convention by non-member States is envisaged during the drafting procedure</u>, on the need to insert a provision on financial contributions from those States.

- In this regard, it is important to note that on 10 April 2013, the Committee of Ministers also adopted Resolution *CM/Res(2013)7 concerning financial agreements for the participation of non-member States in Council of Europe conventions*, inviting any Contracting Party to a Council of Europe convention which is not member of the Council of Europe to make a financial contribution to the said convention when it participates as of right in the follow-up mechanism of the convention.

- Without being legally obliged to do so, non-member States which have become Parties to Council of Europe conventions prior to the adoption of this Resolution will be invited to consider contributing to the financing of these conventions according to the modalities set out in the resolution and to report back periodically on its implementation.

- Finally, **the Ministers' Deputies have agreed not to take any decisions on two issues raised by the Secretary General** in his report:

  - on the so-called "inactive" conventions;
  - on the issue of the European Union's accession to Council of Europe conventions in order not to interfere with the current negotiations on EU's accession to the ECHR.

- The Ministers' Deputies have agreed to evaluate the implementation of these decisions within three years.

III. <u>NEWS FROM THE TREATY OFFICE</u>

A. Protocols to the European Convention on Human Rights

i. Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 213)

- On 16 May 2013, the Committee of Ministers adopted Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 213).

- The Protocol was opened for signature on 24 June 2013 and counts today 1 ratification and 21 signatures.

- To maintain the effectiveness of the European Court of Human Rights, this Protocol makes the following changes to the Convention (ETS no. 005):

  - Adding a reference to the principle of subsidiarity and the doctrine of the margin of appreciation to the Preamble of the Convention;

- Shortening from six to four months the time limit within which an application must be made to the Court;
- Amending the 'significant disadvantage' admissibility criterion to remove the second safeguard preventing rejection of an application that has not been duly considered by a domestic tribunal;
- Removing the right of the parties to a case to object to relinquishment of jurisdiction over it by a Chamber in favour of the Grand Chamber;
- Replacing the upper age limit for judges by a requirement that candidates for the post of judge be less than 65 years of age at the date by which the list of candidates has been requested by the Parliamentary Assembly.

ii. Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms

- On 10 July 2013, the Committee of Ministers adopted Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

- The Protocol will be opened for signature in Strasbourg on 2 October 2013.

- It allows the highest courts and tribunals of a High Contracting Party, as specified by the latter, to request the European Court of Human Rights to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.

B. Draft Council of Europe Convention against Trafficking in Human Organs

- The Committee of Experts on Trafficking in Human Organs, Tissues and Cells (PC-TO) held, from December 2011 to October 2012, four meetings during which it finalised a draft convention aimed at:

    - preventing and combatting the trafficking in human organs by providing for the criminalisation of certain acts;
    - protecting the rights of the victim of the offences established under the Convention; and
    - facilitating co-operation at national and international levels on action against the trafficking in human organs.

- At its 63rd plenary session (4-7 December 2012), the European Committee on Crime Problems (CDPC) approved the draft Convention and agreed to transmit it to the Committee of Ministers for adoption together with the draft Explanatory Report.

- On 10 July 2013, the Committee of Ministers agreed to transmit the draft Convention and its Explanatory Report to the Parliamentary Assembly for its opinion.

- The Parliamentary Assembly will hold its discussions on this draft convention at its fourth part Session (30 September – 4 October 2013).

C. Modernisation of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108)

- In November 2012, the proposals for the modernisation of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data were adopted by the Consultative Committee of the Convention (T-PD).

- With this adoption, the technical phase of this process of modernisation was finalised.

- An *ad hoc* Committee on Data Protection (CAHDATA) has now been created and will be in charge of:

    - preparing and finalising a draft amending protocol to the Convention;
    - finalising a consolidated version of the Convention; and
    - updating the explanatory report to the Convention.

- The terms of reference of the CAHDATA foresee a widespread participation, extending to a large number of observer States having acceded to the Convention as well as intergovernmental and non-governmental organisations working with data protection policies.

- The first *ad hoc* meeting of the CAHDATA will be held in Strasbourg on 13-15 November 2013.

IV. EUROPEAN UNION'S ACCESSION TO THE ECHR

- On 5 April 2013, the *ad hoc* Group 47+1 concluded its negotiation round by finalising the text of the draft accession agreement, its explanatory report as well as related instruments.

- At its 78th meeting (25-28 June 2013), the Steering Committee for Human Rights (CDDH) noted with satisfaction the outcome of the negotiations and decided to send an interim report to the Committee of Ministers for information, based on the final report of the negotiation group. The Ministers' Deputies took note of this interim report on 11 September 2013.

- It is now up to the Court of Justice of the European Union to give its opinion on the draft texts, a consultation which could be quite lengthy (between 9 and 12 months).

V. PUBLICATION ON "THE JUDGE AND INTERNATIONAL CUSTOM"

- Following the Conference held in Paris in September 2012 on the topic "The Judge and International Custom", the Public International Law Division of the Council of Europe decided to publish the Proceedings of this Conference which were issued in March 2013.

- The great interest generated by this publication has conducted the Public International Law Division to contact other judges in order to collect contributions illustrating the practice of other legal systems, national and international, with regard to this topic.

- The Public International Law Division has already received 2 contributions from:

    - Eduardo Vio Grossi, Judge at the Inter-American Court of Human Rights;
    - Prof. Ernest Petrić, President of the Constitutional Court of the Republic of Slovenia.

- The Division intends to publish all contributions in an ISBN volume which will be issued in the course of 2014.

- The timeline of this project would make it possible to accommodate a few more additional contributions. Delegations which are interested to include the case-law of their national legal system in this forthcoming publication are therefore welcome to contact the Secretariat.

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 were concluded in the 47 + 1 format on the 5th of April this year, following the fifth round of negotiations in that format, building on the results of the eleven negotiation meetings of its predecessor format: the CDDH-UE. At that occasion, the negotiators were able to finalize the draft accession agreement of the EU to the ECHR.

The accession instrument contains provisions:

- on the scope of the accession;
- the adaptations required to the ECHR;
- on the participation of the EU in the Council of Europe bodies responsible for the ECHR system;
- and the creation of a co-respondent mechanism for cases involving both the EU and one or more of its member states.

You will find the most recent version of the text in document 47+1 (2013) 008rev2. The main elements of the accession instrument - the accession package - are now:

- a draft accession agreement (AA);
- a draft explanatory report to the accession agreement;
- a draft declaration by the EU;
- a draft model MOU between the EU and individual non-EU HCPs, and
- draft amendments to rule 18 of the rules of the Committee of Ministers of the Council of Europe.

As I reported to you at the last CAHDI meeting, the open issues as we headed into the last round of negotiations were related to three main provisions: Articles 1, 3 and 7.

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

One of the open issues related to technicalities and to the technique for bridging the Accession Agreement with the Convention. 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) was indeed strengthened, so that the modified text of 59 (2) (b) would read:

The Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms constitutes an integral part of this Convention.

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 solution appearing in the accession instrument, is a model Memorandum of Understanding that may be concluded between the EU and a non-EUMS in which the EU undertakes to consider requests by the other state that the EU should seek leave to make a third party intervention, when a situation has arisen that would have triggered the co-respondent mechanism, had the requesting state been an EUMS.

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, that were further elaborated on during the last session. This concerns in particular decisions related to referrals to the Court for interpretation of a judgment, infringement proceedings and the adoption of final resolutions.

The 47+1 body, having concluded its deliberations in April this year, reported on its progress in doc 47+1(2013)008rev2 to the CDDH. The CDDH in its turn, decided at its meeting in the end of June this year to send an interim report to the Committee of Ministers for information (CDDH(2013)R78 Addendum IV), while leaving the formal approval of the accession instrument to a point in the future, pending the internal procedures by negotiating parties, notably the EU, that is still working hard to draft and adopt a set of internal rules to match the post-accession situation it will face. The CM has taken note of this information, and awaits the next steps preceding formal adoption of the package text.

The main event ahead of us now is the opinion on the accession agreement that the EU Court of Justice was requested to deliver by the EU in July this year. Although the EUCJ has indicated its ambition to deal with this crucial matter swiftly, an opinion is nevertheless something that is deliberated and decided upon by all 28 judges on the bench. Next spring would be a realistic expectation. Until then EUMS and institutions will be given the opportunity to submit observations to the court, and it is perfectly feasible that the court calls a hearing before deciding on its opinion.

By the time CAHDI meets again, the time table for these subsequent steps should have become much clearer, which is what I hope to report to you.

APPENDIX V

STATEMENT BY PROFESSOR PAVEL ŠTURMA, MEMBER OF THE INTERNATIONAL LAW COMMISSION, ON THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS 65TH SESSION, 6 MAY-7 JUNE AND 8 JULY-9 AUGUST 2013

1. Introduction

It is a well-known fact that, according to Article 13, para. 1, of the Charter of the United Nations, "the General Assembly shall initiate studies and make recommendations for the purpose of: a. … encouraging the progressive development of international law and its codification." On 21 November 1947 the General Assembly adopted Resolution 174 (II), establishing the International Law Commission and approving its Statute. Article 1, para. 1, of the Statute of the ILC provides that the "Commission shall have for its object the promotion of the progressive development of international law and its codification".[1]

Article 15 of the Statute then specifies that the expression "codification of international law" is used for the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedents and doctrine. Conversely, "progressive development of international law" is used as meaning the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States.[2]

The ILC consists of 34 members who shall be persons of recognized competence in international law. They are elected by the General Assembly from the list of candidates nominated by the Governments of States Members of the United Nations. No two members of the Commission shall be nationals of the same State. They are elected for five years and eligible for re-election. The Commission meets for its sessions at the European Office of the United Nations at Geneva. The sessions, usually being 10 weeks in length, are split in two parts, one in May, the other in summer (July till the beginning of August). This organization allows sufficient time for the preparation of the commentaries on the texts (in particular draft articles) adopted during the first part of the session.[3]

2. The organization of the sixty-fifth session of the ILC (2013)

As usual, the session of the Commission took part in Geneva and was split in two parts. The first part of the session (from 6 May till 7 June) was followed by a month break. Then the Commission resumed its session on 8 July; the second part lasted until 9 August 2013.

At its first meeting on 6 May 2013 the Commission elected Mr. Bernd H. Niehaus (of Costa Rica) as Chairman of the ILC and other officers of the Bureau of the sixty-fifth session.[4]

On some occasions they also meet in the Enlarged Bureau, including in particular the Special Rapporteurs and chairmen of Study Groups. The Commission set up a Planning Group under the chairmanship of P. Šturma. The ILC also established a Drafting Committee, which met this year for only three topics on which some draft articles or conclusions were sent to it: (a) Subsequent agreements and subsequent practice in relation to the interpretation of treaties; (b) Immunity of State officials from foreign criminal jurisdiction; and (c) Protection of persons in the event of disasters.
On 6 May 2013 the Commission also elected Mr. Marcelo Vázquez-Bermúdez (Ecuador) to fill the casual vacancy occasioned by the resignation of Mr. S. C. Vasciannie (Jamaica).

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[1] See The Work of the International Law Commission. Vol. I. Sixth ed., New York: United Nations, 2004, p. 245.
[2] *ibid.*, p. 247.
[3] *cf*. Report of the International Law Commission. Sixty-third session, GAOR Sixty-sixth session, Supplement No. 10 (A/66/10), p. 294.
[4] First Vice-Chairman: Mr. Pavel Šturma (Czech Republic), Second Vice-Chairman: Mr. Narinder Singh (India), Chairman of the Drafting Committee: Mr. Dire D. Tladi (South Africa), Rapporteur: Mr. Mathias Forteau (France).

During the first part of the session the Commission also reconstituted one Openended Working Group on the obligation to extradite or prosecute (*aut dedere aut judicare*), under the chairmanship of Mr. K. Kittichaisaree, and one Study Group on the Most-Favoured-Nation clause (Chairman: Mr. D. M. McRae, during his absence chaired by Mr. M. Forteau). At its meeting on 7 May 2013 the Planning Group decided to reconstitute the Working Group on the Long-term Programme of Work. The Working Group recommended the inclusion of the topic "Crimes against humanity" in the Long-term Programme of Work of the ILC on the basis of the proposal prepared by Mr. Sean D. Murphy (USA). The Working Group also discussed, on the basis of three working papers, new proposals of possible subjects for the Long-term Programme, namely the Rights of individuals arising from international responsibility, the Succession of States with respect to State responsibility and the *Jus Cogens* in international law.

The Commission decided, on 28 May and 9 August respectively, to include in its current programme of work the topic "Protection of the environment in relation to armed conflicts" and the "Protection of the Atmosphere" and to appoint Ms. Marie Jacobsson (Sweden) and Mr. Shinya Murase (Japan) as the Special Rapporteurs respectively for the first and the second topic.

3. The topics on the Agenda of the ILC

This year the Commission had more topics on its agenda than in 2012, which was the first year of the new quinquennium. T e ILC was able to discuss the following topics: "Subsequent agreements and subsequent practice in relation to the interpretation of treaties", "Immunity of State officials from foreign criminal jurisdiction", "Protection of persons in the event of disasters", "Customary International Law", "Provisional application of treaties" and, on a preliminary basis, "Protection of the environment in relation to armed conflict". In addition, two other topics were considered by the Working Group and the Study Group.

3.1 Subsequent agreements and subsequent practice in relation to the interpretation of treaties

The Commission had before it the first report of the Special Rapporteur G. Nolte,[5] who developed earlier work he had done over the past years in the framework of the Study Group on Treaties over time. The report, very well elaborated and documented, with numerous references to case-law and literature, contained four draft conclusions relating to the general rule and means of interpretation; subsequent agreements and subsequent practice as means of interpretation; the definition of subsequent agreements and subsequent practice; and attribution of a treaty related practice to a State. Upon consideration of the report of the Drafting Committee, the Commission provisionally adopted five draft conclusions together with commentaries thereto.

Those draft conclusions deal with general issues, such as the definitions of subsequent agreements and subsequent practice and their role in the process of treaty interpretation. Draft Conclusion 1 confirms that Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth, respectively, the general rule of interpretation and the rule on supplementary means of interpretation. These rules also apply as customary international law. It also points out that the interpretation of a treaty consists of a single combined operation, which places appropriate emphasis on the various means of interpretation.[6]

Draft Conclusion 2 characterizes subsequent agreements and subsequent practice under Article 31, para. 3 (a) and (b) "as authentic means of interpretation".[7] The Commission thereby follows its 1966 Commentary on the Draft Articles on the Law of Treaties, which described subsequent agreements and subsequent practice as "authentic means of interpretation". This Commentary

[5] See doc. A/CN.4/660 (2013).
[6] See doc. A/CN.4/L.819/Add.1, p. 3.
[7] See doc. A/CN.4/L.819/Add.1, p. 10.

stresses the importance of such subsequent practice, for it constitutes "objective evidence of the understanding of the parties as to the meaning of the treaty".[8]

Draft Conclusion 3 addresses the role which subsequent agreements and subsequent practice may play in an evolutive interpretation of a treaty. Subsequent agreements and subsequent practice may assist in determining whether or not the presumed intention of the parties was to give a term used a meaning which is capable of evolving over time.[9] This draft conclusion should not be read as taking position regarding the appropriateness of a more contemporaneous or a more evolutive approach to treaty interpretation in general. It rather emphasizes that subsequent agreements and subsequent practice can support both a contemporaneous and an evolutive (or evolutionary) interpretation, where appropriate.[10]

Draft Conclusion 4 provides definitions of the three different "subsequent" means of treaty interpretation which are mentioned in Draft Conclusion 1, *i.e.* (1) "subsequent agreement" under Article 31, par. 3 (a), "subsequent practice" under Article 31, par. 3 (b), and other "subsequent practice" under Article 32 of the Vienna Convention. The first two are authentic means of interpretation, while the third one, which consists of conduct by one or more parties in the application of the treaty, is just a subsidiary means of interpretation.[11]

Finally, Draft Conclusion 5 (Attribution of subsequent practice) deals with the question of possible authors of subsequent practice under Articles 31 and 32 of the Vienna Convention. Paragraph 1 of this conclusion makes it clear that subsequent practice may consist of "any conduct in the application of a treaty which is attributable to a party to the treaty under international law". This phrase, which borrows language from Article 2 (a) of the Articles on State responsibility,[12] suggests that "any conduct" is not limited to the conduct of States organs but also covers conduct which is otherwise attributable, under international law, to a party to a treaty.[13]

One of the most debated issues refers to other conduct, including that by non-State actors. This conduct "does not constitute subsequent practice under Articles 31 and 32. Such conduct may, however, be relevant when assessing the subsequent practice of parties to a treaty." (para. 2). Such other conduct may include practice and pronouncements by treaty monitoring bodies[14], international organizations[15], the International Committee of the Red Cross[16] or NGOs[17]. Of special interest seem to be the issues of "social practice", "social acceptance" or "social changes", the concepts occasionally referred to by the European Court of Human Rights[18], but rather difficult for acceptance in other parts of the world. To conclude, the adopted draft conclusions have the merit of a balanced approach, as such practice alone is not sufficient to constitute relevant subsequent practice but may be recognized as contributing to State practice[19].

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[8] *cf.* YILC, 1966, Vol. II, p. 221, § 15.
[9] This was illustrated, *e.g.*, in the judgment of the ICJ in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua), ICJ Reports 2009*, p. 242, § 64.
[10] See doc. A/CN.4/L.819/Add.1, pp. 14-15.
[11] See doc. A/CN.4/L.819/Add.2, p. 2.
[12] Articles on the Responsibility of States for internationally wrongful acts, Report of the ILC to the General Assembly on the work of its Fifty-third session, YILC, 2001, Vol. II (Part Two), p. 35, § 4.
[13] See doc. A/CN.4/L.819/Add.3, p. 2.
[14] *cf.* ILA, Committee on International Human Rights Law and Practice, „Final Report on the Impact of the Findings of United Nations Human Rights Treaty Monitoring Bodies", ILA Reports of Conferences (2004), p. 621, § 21 f.
[15] See *e.g.* UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1.
[16] See *e.g.* ICRC, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (2009), www.icrc.org/eng/assets/fi les/other/icrc-002-0990.pdf.
[17] See *e.g.* "The Monitor", a joint initiative of the "International Campaign to Ban Landmines" and the "Cluster Munitions Coalition" acting as a "de facto monitoring regime" for the 1997 Ottawa Convention and the 2008 Dublin Convention.
[18] *cf. e.g. Dudgeon v. the UK*, Judgment (Merits), 22 October 1981, Application No. 7525/76, Series A, No. 45, § 60; *Christine Goodwin v. the UK* [GC], Judgment (Merits and Just Satisfaction), 11 July 2002, Application No. 28957/95, ECHR/VI, §§ 85, 90.
[19] See doc. A/CN.4/L.819/Add.3, p. 8.

3.2 Immunity of State officials from foreign criminal jurisdiction

While the 2012 session of the ILC brought a restart of the topic with the preliminary report of the new Special Rapporteur, Ms. Concepción Escobar-Hernández, this year the Commission engaged in regular work. The ILC had before it the second report of the Special Rapporteur, in which six draft articles were presented[20]. The report provided an analysis of the scope of the topic; the concepts of immunity and jurisdiction; the difference between immunity *ratione personae* and immunity *ratione materiae*; and identified the basic norms comprising the regime of immunity *ratione personae*. Following the debate in plenary, the Commission decided to refer all six draft articles to the Drafting Committee, which conducted a thorough debate. Upon consideration of the report of the Drafting Committee, the ILC provisionally adopted three draft articles, together with commentaries thereto. At the same time it was decided to postpone Draft Article 2 on definitions to a later stage of work.

Draft Article 1 deals with the scope of the draft articles, which is the immunity of State officials from the criminal jurisdiction of another State. According to paragraph 2, "the present draft articles are without prejudice to the immunity from criminal jurisdiction enjoyed under special rules of international law, in particular by persons connected with diplomatic missions, consular posts, special missions, international organizations and military forces of a State."[21]

Draft Article 3 lists the State officials who enjoy immunity *ratione personae* from foreign criminal jurisdiction, namely the Head of State, Head of Government and Minister for Foreign Affairs[22]. The selection of these officials is based on the fact that, under the rules of international law, these persons represent the State in international relations by virtue of the office they hold, with no need for specific powers to be granted by the State. They must be able to discharge their functions unhindered[23]. This draft article gave rise to a large debate. Some members of the Commission were in favour of limitation of the list of State officials to only the Heads of State. Other members supported the view that other high-ranking officials should be included in Draft Article 3. In the end the Commission decided that under the current draft articles other high-ranking officials than the so-called troika should not enjoy immunity *ratione personae* but that this was without prejudice to the rules pertaining to immunity *ratione materiae*[24].

The most complex provision seems to be in Draft Article 4, which deals with the scope of immunity *ratione personae* from both the temporal and material standpoint. Paragraph 1 addresses the temporal aspect: "Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office." According to paragraph 2 such immunity *ratione personae* covers all the acts performed, whether in a private or official capacity, by Heads of State, Heads of Government and Ministers for Foreign Affairs during or prior to their term of office. Although it may appear so, there is no contradiction between these two rules. The first rule sets the period of time when the above officials enjoy immunity. The second rule deals with the material scope of immunity, which extends to all acts (both official and private) performed during or prior to their term of office. It implies that acts committed after the end of office are not covered by this immunity. However, as pointed out in para. 3, the cessation of immunity *ratione personae* is without prejudice to the application of the rules of international law concerning immunity *ratione materiae*[25].

3.3 Protection of persons in the event of disasters

This topic belongs to the old ones on the agenda of the ILC. The Commission had before it the sixth report of the Special Rapporteur E. Valencia-Ospina, dealing with aspects of prevention in the

[20] See doc. A/CN.4/661 (2013).
[21] See doc. A/CN.4/L.820/Add.2, p. 2.
[22] See doc. A/CN.4/L.820/Add.3, p. 2.
[23] See the *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, ICJ Reports 2002*, § 53-54.
[24] See doc. A/CN.4/L.820/Add.3, pp. 7-10, § 8, 10-12.
[25] See doc. A/CN.4/L.820/Add.1, p. 2.

context of the protection of persons in the event of disasters[26]. The Commission decided to refer two draft articles, as proposed by the Special Rapporteur, to the Drafting Committee. At this session, the ILC provisionally adopted seven draft articles with commentaries, namely Draft Articles 5 *bis* and 12 to 15, which it had taken note of at its sixty-fourth session (2012), dealing with forms of cooperation, offers of assistance, conditions on the provision of external assistance, facilitation of external assistance. It also adopted new draft articles, 5 *ter* and 16[27]. According to Draft Article 5 *ter*, cooperation shall extend to the taking of measures intended to reduce the risk of disasters. While Draft Article 5 *bis* deals with the response to a disaster, Draft Article 5 *ter* also covers the pre-disaster phase and addresses the reduction of disaster risk[28]. In a sense, this provision has just completed Draft Article 5 and its final placement will be decided later.

The new Draft Article 16 deals with the duty to reduce the risk of disasters. Paragraph 1 establishes the basic obligation to reduce the risk of disasters by taking the necessary and appropriate measures to prevent, mitigate, and prepare for disasters. Paragraph 2 provides an indicative list of such measures, namely the conduct of risk assessments, the collection and dissemination of risk and past loss information, and the installation and operation of early warning systems[29]. This rule draws inspiration, *inter alia*, from the 2005 Hyogo Framework for Action 2005-2015, as well as from judgments of the European Court of Human Rights in *Öneryildiz v. Turkey*[30] and *Budayeva v. Russia*[31].

As promised by the Special Rapporteur, the Commission should be able to complete the first reading of the draft articles on the Protection of persons in the event of disasters at its next session in 2014.

3.4 Formation and evidence of customary international law

In relation to the topic adopted on the agenda in 2012, the Commission had before it the first report of the Special Rapporteur M. Wood[32]. It presented an overview of the previous work of the ILC relevant to the topic, views expressed by delegates made in the Sixth Committee of the General Assembly, the scope of the topic, the range of materials to be consulted and issues related to custom as a source of international law. The Commission also had a memorandum by the Secretariat addressing elements in the previous work of the Commission that could be particularly relevant to the topic[33].

The first report does not include any draft conclusions or guidelines. The debate in the plenary addressed, *inter alia*, the scope and methodology of the topic, the range of materials (*e.g.* State practice, case-law of international and national courts and tribunals, *etc.*) and the future plan of work. One of the reasons for the topic is to shed a light on the process of formation and identification of customary international law which would serve State practice, in particular national courts, addressing, now more frequently, customary law. It was also a subject of the conference of legal advisors of the members of the Council of Europe (CAHDI) in November 2012[34].

The Special Rapporteur also held informal consultations on the title of the topic, the consideration of *jus cogens* within the scope of the topic and the need for additional information on State practice. The prevailing view was that *jus cogens* would not be specifically dealt with in this topic. The Commission also decided to change the title of the topic to “Identification of customary

[26] See doc. A/CN.4/661 (2013).
[27] See doc. A/CN.4/L.821, p. 3.
[28] See doc. A/CN.4/L.821/Add.2, p. 2.
[29] See doc. A/CN.4/L.821/Add.2, p. 3.
[30] ECHR, *Öneryildiz v. Turkey* [GC], Judgment, 30 November 2004, Application No. 48939.
[31] ECHR, *Budayeva and Others v. Russia*, Judgment, 20 March 2008, Applications No. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02.
[32] See doc. A/CN.4/663 (2013).
[33] See doc. A/CN.4/659 (2013).
[34] *cf.* Th e judge and international custom. Le juge et la coutume internationale, Strasbourg: Council of Europe, 2013, 116 pp.; and the book review in this volume, p. 313.

international law". However, the substance of the topic should include both formation and evidence of customary international law.

3.5 Provisional application of treaties

In relation to this topic, also introduced in 2012, the Commission had before it the first report of the Special Rapporteur J. M. Gómez-Robledo[35]. This report, preliminary by nature, sought to establish, in general terms, the principal legal issues that arose in the context of the provisional application of treaties by considering doctrinal approaches to the topic and briefly reviewing the existing State practice. The ILC also had before it a very useful memorandum by the Secretariat which traced the negotiating history of the provision both in the Commission and at the Vienna Conference on the Law of Treaties[36]. The rich debate revolved around the purpose and nature of the provisional application of treaties, relations between international and constitutional law approaches to it, as well as the elaboration of specific issues to be considered in the future reports of the Special Rapporteur.

3.6 Protection of the environment in relation to armed conflict

During the 2013 session the Commission decided to include this new topic in its programme of work. The Special Rapporteur Ms. Marie Jacobsson presented the Commission with a series of informal working papers with a view to initiating a dialogue with members of the Commission on a number of issues that could be relevant for the topic. Issues addressed in the informal consultations included scope and methodology, the possible outcome of the ILC's work, as well as a number of substantive issues. With respect to the questions of scope and methodology, the Special Rapporteur proposed that the topic could be addressed through a temporal perspective, rather than from the perspective of various areas of international law. The temporal phases would address legal measures taken to protect the environment before (Phase I), during (Phase II) and after an armed conflict (Phase III)[37].

3.7 The obligation to extradite or prosecute (aut dedere aut judicare)

In connection with the topic *Aut dedere aut judicare*, carried over from the previous quinquennium, the Commission re-constituted the Working Group on the topic under the chairmanship of Mr. K. Kittichaisaree. The Working Group continued the evaluation of work on the topic, particularly in the light of the judgment of the International Court of Justice in the *Belgium v. Senegal* case[38]. The WG adopted and the Commission took note of the report, which will appear as Annex to the 2013 Report of the ILC[39]. This report summarizes the work of the Commission on the topic. Whether it will be a final report or a progress report may depend on the Sixth Committee of the GA. Up to now it seems to me very problematic to deal with the obligation to extradite or prosecute as a stand-alone rule, unless the GA decides to extend the mandate of the Commission to also encompass the issue of universal jurisdiction.

3.8 The Most-Favoured-Nation clause

Concerning the topic MFN clause, the Commission re-constituted the Study Group on the topic, which continued to examine the various factors that seemed to influence investment tribunals in interpreting MFN clauses. The Study Group had before it several informal working papers. It discussed the topic on the basis, *inter alia*, of contemporary practice and jurisprudence of international investment tribunals[40]. It is possible that the Study Group will adopt its final report in

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[35] See doc. A/CN.4/664 (2013).
[36] See doc. A/CN.4/658 (2013).
[37] See doc. A/CN.4/L.824, p. 2.
[38] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment of 20 July 2012*, ICJ Reports 2012.
[39] See doc. A/CN.4/L.825, p. 2.
[40] In particular, see *Daimler Financial Services AG v. Argentine Republic*, ICSID Case No. ARB/05/1, 22 August 2012; *Kiliç İnşaat İhracat Sanayive Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, 2 July 2013

2014. What remains an open question, however, is the issue of other possible outcomes, such as model MFN clauses.

4. Conclusion

While the session of the ILC in 2012 could be called transitory, as having almost one third new members changed the composition of the Commission, the 2013 session brought a return to its usual work. However, a significant number of new topics or new Special Rapporteurs had as a result the fact that the Commission and its Drafting Committee worked on draft articles or conclusions in only three topics. Other reports were rather preliminary in nature. The number of Study or Working Groups decreased and the number of Special Rapporteurs increased, which may also be considered a return to usual business.

The next session (2014) is expected to have a heavy workload, as the Commission should start and hopefully complete the adoption of draft articles on Expulsion of aliens in the second reading and adopt draft articles on Protection of persons in the event of disasters in the first reading. At the same time, the Commission should also have reports of other Special Rapporteurs on other topics, including two newly included topics, namely Protection of the environment in relation to armed conflict and Protection of the atmosphere.

Moreover, the Commission decided to include the topic Crimes against humanity in its long-term programme of work. At least three other possible topics, proposed by new members (those who started their first term in 2012) were discussed in the WG on the Long-term Programme of Work, and this discussion should continue in 2014.

To conclude, in the light of the above developments, some voices that the ILC is outdated and faces marginalization seem to be largely exaggerated.