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Committee of Legal Advisers on Public International Law

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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

(CAHDI)

Meeting report

48th meeting
18-19 September 2014
The Hague (the Netherlands)

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

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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 48th meeting in The Hague (Netherlands) on 18 and 19 September 2014 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 47th meeting

3. The CAHDI adopted the report of its 47th meeting (document CAHDI (2014) 11 prov) and instructed the Secretariat to publish it on the Committee's website.

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

- Statement by Mr Jörg Polakiewicz, Director of Legal Advice and Public International Law

4. Mr Jörg Polakiewicz, Director of Legal Advice and Public International Law (DLAPIL), warmly thanked, on behalf of the CAHDI Secretariat, Ms Linzaad as well as her colleagues from the Ministry of Foreign Affairs of the Netherlands, Mr René Lefeber and Mr Jeroen Gutter, for the two fruitful years of cooperation during the Dutch chairmanship of the CAHDI.

5. He informed the CAHDI that on 24 June 2014 during the Third part of the 2014 Session of the Parliamentary Assembly of the Council of Europe (hereinafter "PACE"), the PACE re-elected Mr Thorbjørn Jagland to the post of Secretary General of the Organisation for another period of five years. On 17 September 2014, Mr Jagland presented the agenda for his second mandate to the Ministers' Deputies containing seven imperatives for increased relevance and efficiency of the Council of Europe, namely: 1) continue to strengthen the European Court of Human Rights and the principle of shared responsibility; 2) continue to strengthen and expand co-operation with member States; 3) reinforce the role of the Organisation when it comes to upholding democratic principles; 4) uphold the assistance to neighbouring countries; 5) make the role of the Social Charter stronger; 6) strengthen the cohesion of the Organisation; and 7) increase the operational capacity.

6. Regarding the latest news from the Treaty Office, delegations were informed that on 1 August 2014, one of the Organisation's key conventions entered into force, namely the *Council of Europe Convention on preventing and combating violence against women and domestic violence* (CETS No. 210). This Convention opens the path for creating a legal framework at pan-European level to protect women against all forms of violence and prevent, prosecute and eliminate violence against women and domestic violence. It further establishes a specific monitoring mechanism – the "GREVIO" – in order to ensure effective implementation of the Convention's provisions by the Parties. Mention was also made to two other conventions which were finalised on 9 July 2014 with their adoption by the Ministers' Deputies, i.e.:

- the *Council of Europe Convention against Trafficking in Human Organs*; and
- the *Council of Europe Convention on the Manipulation of Sports Competitions* (CETS No. 215), which was opened for signature on 18 September 2014 in Magglingen/Macolin (Switzerland) at the 13th Council of Europe Conference of Ministers responsible for Sport[1].

[1] As of 10 October 2014, 16 member States of the Council of Europe have signed the Convention (Armenia, Azerbaijan, Bulgaria, Denmark, Finland, France, Georgia, Germany, Greece, Lithuania, Montenegro, Netherlands, Norway, Russian Federation, Serbia and Switzerland).

Mr Polakiewicz underlined that the three mentioned conventions had in common that they were intended from the outset not to be limited to Council of Europe member States. He recalled that accession by non-member States to Council of Europe conventions had increased considerably over the last 20 years and that more than 80% of the 216 treaties of the Organisation were opened for accession by non-member States[2]. In this regard, he thanked the Israeli authorities for having organised on 7-8 July 2014 a successful information seminar on the Council of Europe's conventions at the Ministry of Foreign Affairs in Jerusalem.

7. The Director also drew the attention of the CAHDI to the increasing impact of European Union law on the adoption and implementation of the Council of Europe conventions. This impact is notably due to the extension – on the one hand – of the European Union's competences and – on the other hand – of the number of European Union ("EU") member States. Mention was made to three examples illustrating this tendency:

- Firstly, the request for opinion submitted by one EU member State pursuant to Article 218 paragraph 11 of the *Treaty on the Functioning of the European Union* asking whether the *Council of Europe Convention on the Manipulation of Sports Competitions* was compatible with the EU Treaties[3]. Mr Polakiewicz noted that it was the first time that a request for opinion procedure was used by a member State acting individually regarding a Council of Europe convention.

- Secondly, the judgment of the Court of Justice of the EU (Grand Chamber) of 22 October 2013 in the case C-137/12 *"European Commission v. Council of the European Union"*[4]. In this case, the Court annulled the Council Decision 2011/853/EU of 29 November 2011 on the signing, on behalf of the Union, of the *European Convention on the Legal Protection of Services based on, or consisting of, Conditional Access* (ETS No. 178). Mr Polakiewicz indicated that nullity at the level of EU law did not necessarily mean nullity at the level of international law. He informed the CAHDI that the Council of Europe had considered that the signature remained valid given notably that the Court of Justice of the EU had underlined that the EU's competence to sign the convention had never been questioned.

- Finally, the judgment of the Court of Justice of the EU (Grand Chamber) of 4 September 2014 in the case C-114/12 *"European Commission v. Council of the European Union"*[5]. In this case, the Court annulled the decision of the Council regarding the participation of the EU and its member States to the negotiations of a convention of the Council of Europe on the protection of the rights of broadcasting organisations of 19 December 2011. Mr Polakiewicz noted that the content of this convention had not been delimited (only some preparatory work had taken place) but that the Court of Justice of the EU had nevertheless considered that the matters which would presumably be covered by the convention were largely addressed by the common EU rules. Therefore, the negotiations within the Council of Europe could affect these common rules or at least alter their scope and consequently, the Court considered that the negotiations fell under the exclusive competence of the EU.

Finally, Mr Polakiewicz underlined that the scope of the EU's competences and their impact on the negotiations within the Council of Europe raised complex legal questions. He welcomed in this regard the Conference of Legal Experts *"Working together for Europe"* organised during the Austrian chairmanship of the Committee of Ministers of the Council of Europe (14 November 2013

[2] By way of comparison ("request": request by a non-member State to be invited to accede to a convention / "invitation": following the request, final invitation by the Committee of Ministers to accede to the convention in question): in 2008, 4 requests and 4 invitations; in 2013, 18 requests and 13 invitations.
[3] For more information on this request, please refer to the website on the Case-law of the Court of Justice (InfoCuria).
[4] Court of Justice of the European Union, *European Commission v. Council of the European Union*, Case no. C-137/12, judgment delivered on 22 October 2013.
[5] Court of Justice of the European Union, *European Commission v. Council of the European Union*, Case no. C-114/12, judgment delivered on 4 September 2014.

– 14 May 2014) on 15 November 2013 and indicated that the reports of this Conference would soon be published in the *"Zeitschrift für ausländisches öffentliches Recht und Völkerrecht"*. He finally pointed out that these issues merit further consideration.

8. The CAHDI took note of the ongoing discussions within different entities of the Organisation on the situation in Ukraine. In particular, Mr Polakiewicz mentioned:

- the decision by the PACE on 10 April 2014[6] (Second part of the 2014 Session) to suspend the voting rights of the Russian delegation to the PACE, as well as its right to be represented in the Assembly's leading bodies, and its right to participate in election observation missions, effective until the end of the 2014 Session (26 January 2015). In this decision, the PACE also reserved the right to annul the credentials of the Russian delegation if the Russian Federation did not "deescalate the situation and revers the annexation of Crimea".

- the visit of the Secretary General to Kiev and Moscow on 2-4 September 2014, during which he met respectively the Ukrainian President Mr Petro Poroshenko and Foreign Minister Mr Pavlo Klimkin as well as the Russian Foreign Minister Mr Sergei Lavrov and the President of the State Duma Mr Sergei Naryshkin.

- the decisions adopted by the Committee of Ministers on 3 April 2014[7], 16 April 2014[8], 29-30 April 2014[9] and notably on 17 September 2014[10].

- the creation in April 2014 of the International Advisory Panel (IAP)[11] to oversee that the investigations into the violent incidents which took place in Ukraine from 30 November 2013 onwards, and in the first place the "Maidan demonstration" as well as the events in Odessa, meet all the requirements of the *European Convention on Human Rights* and the case-law of the European Court of Human Rights. Mr Polakiewicz informed the CAHDI that the investigations would be conducted by the relevant Ukrainian authorities in accordance with the Ukrainian law. This Panel is composed of:

    - Sir Nicolas Bratza, IAP Chairman, former President of the European Court of Human Rights;
    - Mr Volodymyr Butkevych, former Judge of the European Court of Human Rights;
    - Mr Oleg Anpilogov, member of the Kharkiv Regional Council.

- the "Guiding Principles for Council of Europe activities in Crimea" issued by the Secretary General on the basis of the decision of the Committee of Ministers of 2-3 April 2014 in order to ensure a coherent approach of the Organisation with regard to its activities in this region.

9. Delegations were finally informed that on 11 June 2014, the Committee of Ministers agreed to the request by Kosovo[12] to join the *Enlarged Agreement establishing the European Commission for Democracy through Law* (Venice Commission). Mr Polakiewicz underlined that this request had raised several questions notably with regard to the possible implied recognition of Kosovo[12] as a State. In this regard, he recalled that recognition is a prerogative of sovereign States and that it is

[6] See Resolution 1990 (2014) of the PACE of 10 April 2014.
[7] See the decision of the Committee of Ministers of 3 April 2014 at the following link.
[8] See the decision of the Committee of Ministers of 16 April 2014 at the following link.
[9] See the decision of the Committee of Ministers of 29-30 April 2014 at the following link.
[10] See the decision of the Committee of Ministers of 17 September 2014 at the following link.
[11] See the mandate of the International Advisory Panel.
[12] All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

not for international organisations such as the Council of Europe to recognise entities as States. Moreover, admission to membership in the Venice Commission is a collective act within the legal framework of the Council of Europe which does not in principle affect the position of individual member States. However, in order to dispel any doubts about the legal consequences of the decision of the Committee of Ministers for the individual position of member States, the decision noted that *"Kosovo[12]'s membership in the Venice Commission is without prejudice to the positions of individual Council of Europe member States on the status of Kosovo[12]"* and contained the footnote referring to UN Security Council Resolution 1244. In light of the preamble of the Statute of the Commission, Kosovo[12] participates on an "equal footing" and is entitled to appoint one expert member and one substitute.

II. ONGOING ACTIVITIES OF THE CAHDI

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

10. The Chair presented a compilation of Committee of Ministers' decisions of relevance to the CAHDI's activities (documents CAHDI (2014) 12 and CAHDI (2014) 12 Addendum).

11. The CAHDI took note that the Committee of Ministers had examined the abridged report of its 47th meeting held on 20-21 March 2014 in Strasbourg. It further took note that the Committee of Ministers adopted the reply of the Committee of Ministers to *Recommendation 2037 (2014) of the Parliamentary Assembly of the Council of Europe – "Accountability of international organisations for human rights violations"* on 2-3 July 2014 on the basis of the opinion adopted by the CAHDI on 21 March 2014 at its 47th meeting.

12. The delegation of Belgium drew the attention of the CAHDI to the organisation of some conferences/symposiums during the future Belgian Chairmanship of the Committee of Ministers (13 November 2014 – 19 May 2015), in particular:

- the Conference on the *Best interest of the child* organised within the framework of the 25th anniversary of the *United Nations Convention on the Rights of the Child* (9-10 December 2014, Brussels);
- the Symposium on *Social rights and right to social protection* (12-13 February 2015, place to be determined);
- a Conference on the *Council of Europe Convention on preventing and combating violence against women and domestic violence* (date and place to be determined);
- a High-level Conference on the implementation of the *European Convention on Human Rights* (26-28 March 2015, place to be determined).

6. Immunities of States and international organisations

a. Topical issues related to immunities of States and international organisations

i. Settlement of disputes of a private character to which an international organisation is a party

13. The Chair presented the topic of the "Settlement of disputes of a private character to which an international organisation is a party" which had been included in the agenda of the 47th meeting of the CAHDI at the request of the delegation of the Netherlands, which had provided a document in this regard (document CAHDI (2014) 5). This document aimed in particular at facilitating a discussion on the topical questions related to the settlement of third-party claims for personal

injuries or death and property loss or damages allegedly caused by an international organisation and the effective remedies available for claimants in these situations. The immunity of international organisations in many cases prevents individuals who have suffered harm from conduct of an international organisation from bringing a successful claim before a domestic court. This immunity has been increasingly challenged on an alleged incompatibility of upholding immunity with the right of access to court. A relevant element is the existence of an alternative remedy provided to the claimant by the international organisation. Mention was made – for illustrative purposes – to recent events mainly in relation to some peace keeping operations of the United Nations (UN)[13] and case-law of the European Court of Human Rights[14] involving international organisations and where their immunity from the civil jurisdiction of domestic courts had been granted. The Dutch document also contained the following five questions addressed the members of the CAHDI:

- Do you share our analysis concerning the current state of the settlement of disputes of a private character to which an international organisation is a party?
- What is your experience with the settlement of disputes of a private character to which an international organisation is a party in your legal system?
- In particular, are there examples in your legal system of perceived shortcomings in the settlement of disputes of a private character to which an international organisation is a party leading claimants to turn to the member States?
- Do you consider that the strengthening of the settlement of disputes of a private character to which an international organisation is a party merits attention?
- Specifically in respect of settlement of private claims in UN peace operations, how do you see the merits of the possible measures described above?

14. The Chair welcomed the written comments submitted by Slovenia and invited delegations to orally present their views on the current state of this issue from their own national experience and on the possible measures to be adopted.

15. A large majority of the delegations welcomed this initiative and thanked the Dutch delegation for addressing these topical questions. It was however underlined on several occasions that it was a rather sensitive issue and that it had to be considered with great caution as it touched upon the question of the immunity generally enjoyed by international organisations from the jurisdiction of domestic courts as well as on the link between the liability of an international organisation on the one hand and the liability of the individual member States of these organisations on the other hand.

16. While it was underlined that the privileges and immunities enjoyed by international organisations were crucial for their proper functioning, independence and efficiency, the important question remained the balance to be struck between this need and the need for accountability i.e. the need to protect victims. Several delegations pointed out that the concerns relating to the issue of immunity of international organisations on the one hand and accountability of international organisations on the other hand went beyond the United Nations and specifically its peacekeeping operations. In this respect, it was mentioned that other international organisations were also concerned by the possibility of being confronted with an important number of lawsuits before national courts for the implementation of the activities and programmes agreed and mandated by their member States. The need to find a consistent approach was therefore highly recommended even though it was pointed out that finding a single solution to these problems was difficult given the diversity of international organisations and the subject matters.

[13] In October 2013, lawyers for Haiti Cholera victims filed a class action lawsuit in the Southern District of New York against the UN.

[14] European Court of Human Rights, *Beer and Regan v. Germany*, application No. 28934/95, judgment delivered on 19 February 1999; European Court of Human Rights, *Waite and Kennedy v. Germany*, application No. 26083/94, judgment delivered on 18 February 1999; European Court of Human Rights, *Chapman v. Belgium*, application No. 39619/06, judgment delivered on 5 March 2013; European Court of Human Rights, *Stichting Mothers of Srebrenica and others v. the Netherlands*, application No. 65542/12, judgment delivered on 11 June 2013.

17. Several delegations pointed out however that their national case-law was relatively sparse on this issue. They had also noted that, in some cases, national judges had disregarded the immunity of the international organisation and that civil society increasingly had difficulties in accepting this immunity.

18. Regarding the specific suggested measures to strengthen the mechanism of settlement of disputes of a private character to which an international organisation is a party, several delegations supported the proposal contained in the document submitted by the delegation of the Netherlands to establish an ombudsperson who could investigate complaints from individuals arising from the conduct/action of an international organisation. Other possible measures were also voiced such as a) the establishment of a standing claims commission as envisaged in the UN Model Status-of-Forces Agreement for Peace-keeping Operations normally concluded between the United Nations and the host State of the operation or b) the waiver of immunity of international organisations in selected cases.

19. Most of the delegations however agreed that strengthening these mechanisms would necessarily entail additional costs for the organisations and lead to an increase of the budget, financed mainly by the member States.

20. The CAHDI agreed to keep the issue on the agenda of its 49th meeting. The Chair invited the members of the CAHDI to submit their comments on the questions raised in the document, in writing, before the next meeting.

ii. Immunity of State owned cultural property on loan

21. Delegations were reminded that the topic of "Immunity of State owned cultural property on loan" had been included in the agenda following the initiative of the Czech Republic, supported by Austria and the Netherlands presented at the 45th meeting of the CAHDI to elaborate a draft declaration in support of the recognition of the customary nature of the pertinent provisions of the 2004 *United Nations Convention on Jurisdictional Immunities of States and Their Property* (the UN Convention) related to this issue. This Declaration was presented at the 46th meeting of the CAHDI as a non-legally binding document expressing a common understanding of *opinio juris* on the basic rule that certain kind of State property (cultural property on exhibition) enjoyed jurisdictional immunity. Furthermore, it was recalled that the Secretariat and the Chair had drafted a questionnaire on this issue in order to have an overview of the specific national legislations and practices. Delegations had been invited to submit their replies.

22. The CAHDI welcomed the signature of the Declaration by:

- the Minister of Foreign Affairs of the Czech Republic on 18 November 2013;
- the Federal Minister for European and International Affairs of Austria on 18 November 2013;
- the Minister of Foreign Affairs of Latvia on 8 January 2014;
- the Minister of Foreign and European Affairs of Slovakia on 28 February 2014;
- the Minister of Foreign Affairs of Georgia on 4 June 2014; and
- the Minister of Foreign Affairs of Romania on 28 August 2014.

23. The Secretariat informed the CAHDI that it would perform the functions of "depository" of the Declaration. In this regard, a specific page of the CAHDI website was dedicated to this issue and contained a text of the Declaration as well as the list of signatures received to date[15]. A link to this page was furthermore included in the website of the Council of Europe Treaty Office. The Secretariat also informed the delegations that it would provide an official French translation of the Declaration and publish it on the website. It finally reminded delegations that this Declaration was also open for signature by non-member States and observers to the Council of Europe.

[15] The dedicated webpage is available at the following link.

24. The CAHDI encouraged its members and observers which had not yet done so to sign the Declaration, most of which endorsed the objectives of this text. In this regard, a number of delegations informed the Committee of the intention of their State to sign the Declaration.

25. Regarding the questionnaire drafted by the Secretariat and the Chair, the CAHDI welcomed the replies submitted by 12 States (Andorra, Austria, Belgium, Cyprus, Finland, Germany, Greece, Ireland, Latvia, Mexico, United Kingdom and the United States of America) and encouraged the delegations which had not yet done so, to submit their replies at their earliest convenience.

iii. Immunities of special missions

26. The Chair recalled that the topic of "Immunities of special missions" had been included in the agenda of the 46th meeting of the CAHDI at the request of the delegation of the United Kingdom, which had provided a document in this regard (document CAHDI (2013) 15). Following this meeting, the Secretariat and the Chair had drafted a questionnaire aimed at establishing an overview of legislations and specific national practices in this field.

27. The CAHDI welcomed the replies submitted by 16 States to this questionnaire (Albania, Andorra, Austria, Belarus, Estonia, Finland, Georgia, Germany, Ireland, Italy, Latvia, Mexico, Serbia, Switzerland, United Kingdom and the United States of America) and invited delegations which had not yet done so, to submit their replies at their earliest convenience. It was recalled in this regard that even though a State had decided not to sign or ratify the *United Nations Convention on special missions* (1969), its view on this decision remained interesting and could provide useful background information for other States considering the possibility to sign or ratify this Convention. It was finally pointed out that the work of the International Law Commission on the "Immunity of State officials from foreign criminal jurisdiction" would also assist a broader understanding of the legal standards in this field.

iv. Service of process on a foreign State

28. Delegations were reminded that the topic of "Service of process on a foreign State" had been included in the agenda of the 44th meeting of the CAHDI (Paris, 19-20 September 2012), during which the Portuguese delegation referred to the difficulties faced in identifying the manner in which to serve documents instituting proceedings against a foreign State. On this occasion, the Austrian delegation had also provided information on this matter regarding the judgment of the European Court of Human Rights on the *Wallishauser v. Austria* case[16]. At its 46th meeting (Strasbourg, 16-17 September 2013), the CAHDI adopted a questionnaire in order to collect relevant information on this matter.

29. The Chair informed the Committee that 17 replies had been submitted to this questionnaire (Albania, Austria, Belgium, Cyprus, Germany, Greece, Ireland, Israel, Italy, Japan, Latvia, Norway, Portugal, Slovenia, Switzerland, United Kingdom and the United States of America) which were contained in document CAHDI (2014) 15 Addendum. She drew the Committee's attention to document CAHDI (2014) 15 containing an analysis and a summary of these replies aiming at highlighting the main practices and procedures among States regarding this issue and invited the delegations to give further attention to this document.

30. The analysis highlighted that a majority of the States which replied to the questionnaire considered the provisions on service of process of the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (2004) as a codification of customary international law. Regarding the procedure applicable to the service of process on a foreign State:

- As the State of forum: a large majority of the States indicated that they acted through diplomatic channels, transmitting the documents to the Ministry of Foreign Affairs via

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

the diplomatic mission of the State of the forum accredited in the defendant State, under cover of a *note verbale*;

- As the defendant State: a large majority of the States indicated that they accepted service of documents to their Ministry of Foreign Affairs via the diplomatic mission accredited in the State of the forum.

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

31. The Chair informed the Committee that since the previous meeting of the CAHDI, Finland had deposited its instrument of acceptance of the 2004 *UN Convention on Jurisdictional Immunities of States and of their Property* on 23 April 2014.

c. State practice, case-law and updates of the website entries

32. The CAHDI took note of the updated contributions to the CAHDI database on State practice regarding States Immunities from Slovenia and the United Kingdom. The Chair invited delegations, which had not yet done so, to submit or update their contributions to the relevant database at their earliest convenience.

33. 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, the CAHDI took note of the update of the contribution of Finland to the questionnaire related on this issue (document CAHDI (2014) 22). It noted that so far, 27 delegations had replies to this questionnaire (Albania, Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Latvia, Luxembourg, Montenegro, Norway, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Canada, Japan, United States of America).

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

34. The Chair reminded the delegations that a *Revised questionnaire on the organisation and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs* had been presented at the previous meeting of the CAHDI and contained additional questions on gender equality in conformity with the *Council of Europe Gender Equality Strategy for 2014-2017*. She welcomed the 20 replies submitted to this revised questionnaire by Albania, Andorra, Armenia, Austria, Belarus, Bosnia and Herzegovina, Cyprus, Czech Republic, Estonia, Georgia, Germany, Greece, Latvia, Luxembourg, Mexico, Montenegro, Slovenia, United Kingdom, the United States of America and the North Atlantic Treaty Organization (NATO) as contained in document CAHDI (2014) 16.

35. She further informed the Committee that the United Kingdom had submitted the "Foreign and Commonwealth Office Legal Directorate's Annual Report for 2014" to the database on this issue.

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

36. The Chair introduced document CAHDI (2014) 21 on the *Cases that have been submitted to national tribunals by persons or entities included in or removed from the lists established by the United Nations Security Council Sanctions Committees* and invited all delegations to submit information in this respect. The Chair noted that Switzerland had submitted a new contribution to this document.

37. The CAHDI took note of the information provided on a new initiative, named "High Level Review of United Nations Sanctions", supported by the governments of Australia, Finland, Germany, Greece and Sweden, in partnership with the Watson Institute of Brown University and

Compliance and Capacity International. In this respect, it was underlined that, given that the focus of UN sanctions had narrowed to target specific goods or services, as well as specific individuals and entities, new issues had arisen, such as the need to ensure that UN sanctions were reconciled with the rule of law, in particular respect for due process and human rights. Furthermore, it was underlined that the greater reliance on the private sector for complying with sanctions measures required new modes of partnerships and strategies to assure effectiveness. Therefore, the aim of this High Level Review was to examine ways to enhance the effectiveness of UN sanctions. It was underlined that the review was a continuing process conducted from June to October 2014 by three working groups:

- Working Group 1 chaired by Australia on *UN integration and coordination on the implementation of UN sanctions*;
- Working Group 2 chaired by Sweden on *UN sanctions and external institutions and instruments*;
- Working Group 3 chaired by Greece on *UN sanctions, regional organizations, and emerging challenges*.

38. In this regard, the delegation of Greece, chairing Working Group 3, provided information on the forthcoming meeting of this Group, which will take place in Athens on 13-14 October 2014 and will focus on the following topics:

- Minimizing humanitarian consequences of sanctions;
- Enhancing collaboration and information-sharing among sanctions and humanitarian actors;
- Coordination of UN sanctions with regional organizations;
- Emerging sanctions.

39. The delegation of Sweden, chairing Working Group 2, informed the CAHDI that there had been no decision yet on the form that the outcome of the work of this Working Group would take. The representative of Sweden informed the CAHDI that this Working Group would address the intersections between UN sanctions implementation and the following 3 key endeavours of the international community: international arms control, international financial and economic regulatory agencies as well as international criminal justice. This Working Group would also explore issues of coordination and information exchange as well as possibilities of increasing awareness among those concerned in the understanding of the different but complementary roles of the UN Security Council and judicial bodies in conflict resolution.

40. The Secretariat informed the CAHDI that the Council of Europe participated in the first meeting of Working Group 3 in order to present the work that the Organisation had carried out in this field. It was underlined that, taking into account that one of the main aims of the Council of Europe is to promote and protect human rights in the framework of the rule of law, the organisation had been conducting extensive work in this field. In the context of the Council of Europe, the subject of UN Sanctions is examined through:

- the CAHDI since 2004. A specific database – to which 37 member and non-member States of the Council of Europe and one organisation (the European Union) have contributed – is devoted to this subject; and
- the case law of the European Court of Human Rights, notably with two important judgments recently delivered in the *Nada*[17] and *Al-Dulimi and Montana Management Inc.*[18] cases.

[17] European Court of Human Rights [Grand Chamber], *Nada v. Switzerland*, application No. 10593/08, judgment delivered on 12 September 2012.
[18] European Court of Human Rights, *Al-Dulimi and Montana Management Inc. v. Switzerland*, application No. 5809/08, judgment delivered on 26 November 2013.

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

41. The CAHDI addressed the issue of the accession of the European Union to the European Convention on Human Rights (ECHR) and took note of the public hearing of the Court of Justice of the European Union of 5-6 May. At this hearing, all EU institutions and intervening EU member States argued that the draft accession agreement was compatible with EU law.

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

42. The Chair introduced the topic of the cases before the European Court of Human Rights ("the Court") involving issues of public international law.

43. The delegation of Serbia drew the attention of the CAHDI to the case of *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and "The former Yugoslav Republic of Macedonia"*[19], involving issues of public international law related to State succession. The case concerned the applicants' inability to recover "old" foreign-currency savings[20] – deposited with two banks in what is now Bosnia and Herzegovina – following the dissolution of the former Socialist Federal Republic of Yugoslavia (SFRY). After the savings remained frozen for various periods of time after the disintegration of the SFRY, the successor States agreed to repay some of them. However, the applicants' savings remained frozen. The Court confirmed that Slovenia and Serbia had been responsible for the debts owed to the applicants by the two banks, Ljubljanska banka Sarajevo and the Tuzla branch of the Investbanka, and held that there had been no good reason for the applicants to have been kept waiting for so many years for repayment of their savings. It pointed out that this was a special case, as it was not a standard case of rehabilitation of an insolvent private bank, the banks in question having always been either State- or socially-owned. The Court further held by a majority that Serbia and Slovenia had to make all necessary arrangements, including legislative amendments, within one year and under the supervision of the Committee of Ministers, in order to allow the applicants (nationals of Bosnia and Herzegovina), as well as all others in their position, to recover their "old" foreign-currency savings under the same conditions as Serbian and Slovenian citizens who had such savings in domestic branches of Serbian and Slovenian banks. The Court unanimously decided to adjourn, for one year, examination of all similar cases against Serbia and Slovenia.

44. The delegation of Cyprus referred to the case of *Cyprus v. Turkey*[21] in which the Court ruled on the question of the application of Article 41 of the *European Convention on Human Rights* (the "Convention") regarding just satisfaction. The case concerned the situation in northern Cyprus since Turkey carried out military operations there in July and August 1974, and the continuing division of the territory of Cyprus since that time. On 10 May 2001, the Court delivered a Grand Chamber judgment[22] where it found numerous violations of the Convention by Turkey. However, regarding the issue of just satisfaction, the Court held unanimously that it was not ready for decision and adjourned its consideration[23]. The judgment of May 2014 therefore concerned the application of Article 41 and raised in this regard several questions:

- *regarding the admissibility of the Cypriot Government's claims:* the Court reiterated that the Convention was an international treaty to be interpreted in accordance with the relevant norms and principles of public international law and, in particular, in light of the *Vienna*

[19] European Court of Human Rights [Grand Chamber], *Ališić and Others v. Bosnia and Herzegovina, Croatia, Serbia, Slovenia and the former Yugoslav Republic of Macedonia*, application No. 60642/08, judgment delivered on 16 July 2014.
[20] After the disintegration of the SFRY in 1991/92, foreign currency deposited beforehand was customarily referred to as "old" or "frozen" foreign-currency savings in the successor States.
[21] European Court of Human Rights [Grand Chamber], *Cyprus v. Turkey*, application No. 25781/94, judgment delivered on 12 May 2014.
[22] European Court of Human Rights [Grand Chamber], *Cyprus v. Turkey*, application No. 25781/94, judgment delivered on 10 May 2001.
[23] The procedure for execution of the principal judgment is currently pending before the Committee of Ministers.

Convention on the law of treaties (1969). It acknowledged that general international law, in principle, recognised the obligation of the applicant Government in an inter-State dispute to act without undue delay in order to uphold legal certainty and not to cause disproportionate harm to the legitimate interests of the respondent State, as stated by the International Court of Justice[24]. Referring to its Grand Chamber judgment of 10 May 2001 in which the Court had not fixed time-limits for the parties to submit their just satisfaction claims, the Court considered accordingly that the fact that the Cypriot Government had not submitted their claims for just satisfaction until 11 March 2010 did not render the claims inadmissible and saw therefore no reason to reject them as being out of time.

- *regarding the applicability of Article 41 in inter-State cases:* the Court observed that the logic of the just satisfaction rule derived from the principles of public international law relating to State liability and notably to the principle that the breach of an engagement involved an obligation to make reparation in an adequate form. Bearing in mind the specific nature of Article 41 in relation to the general rules and principles of international law, the Court could not interpret that provision in such a narrow and restrictive way as to exclude inter-State applications for its scope. The overall logic of Article 41 was not substantially different from the logic of reparations in public international law and accordingly, the Court considered that Article 41 did, as such, apply to inter-State cases. However, the Court underlined that according to the very nature of the Convention, it was the individual and not the State who was directly or indirectly harmed and primarily "injured" by a violation of one or several Convention rights. Therefore, if just satisfaction was afforded in an inter-State case, it always had to be done for the benefit of individual victims.

The Court therefore held, by a majority, that Turkey was to pay Cyprus 30,000,000 Euros in respect of the non-pecuniary damage suffered by the relatives of the missing persons and 60,000,000 Euros in respect of the non-pecuniary damage suffered by the enclaved Greek-Cypriot residents of the Karpas peninsula. It further held that these amounts were to be distributed by the Cypriot Government to the individual victims under the supervision of the Committee of Ministers.

45. The delegation of Belgium provided information on a recent case, *Trabelsi v. Belgium*[25]. The case concerned the extradition, which had been effected despite the indication of an interim measure by the Court (Rule 39 of the Rules of the Court), of a Tunisian national from Belgium to the United States of America, where he was being prosecuted on charges of terrorist offences and was liable to life imprisonment. The Court held that there had been a violation of Article 3 and Article 34 of the Convention:

- *Article 3 (with regard to the applicant's extradition to the United States of America):* the Court firstly reiterated that the imposition of a sentence of life imprisonment on an adult offender was not in itself prohibited by any Article of the Convention, provided that it was not disproportionate. On the other hand, if it was to be compatible with Article 3, such a sentence should not be irreducible *de jure* and *de facto*. The Court considered that in view of the gravity of the terrorist offences with which the applicant stood charged and the fact that a sentence could only be imposed after the trial court had taken into consideration all relevant mitigating and aggravating factors, a life sentence would not be grossly disproportionate[26]. However, the Court held that the US authorities had at no point provided any concrete assurance that the applicant would be spared an irreducible life sentence and that the US legislation did not lay down any procedure amounting to a mechanism for reviewing such sentences for the purpose of Article 3. Therefore, the Court considered that the life imprisonment to which the applicant might be sentenced could not be described as

[24] *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment*, I.C.J. Reports 1992, p. 240.
[25] European Court of Human Rights, *Trabelsi v. Belgium*, application No. 140/10, judgment delivered on 4 September 2014.
[26] The Court referred in this regard to its following judgment: European Court of Human Rights [Grand Chamber], *Vinter and Others v. the United Kingdom*, applications Nos. 66069/09, 130/10 and 3896/10, judgment delivered on 9 July 2013.

reducible, which meant that his extradition to the United States of America had amounted to a violation of Article 3.

- *Article 34 (with regard to the obligation of the High Contracting Parties not to hinder the right of individual application):* the Court noted that by acting in breach of the interim measures indicated by the Court, Belgium had deliberately and irreversibly lowered the level of protection of the rights set out in Article 3 which the applicant had endeavoured to uphold by lodging his application with the Court. The extradition had, at the very least, rendered any finding of a violation of the Convention otiose, as the applicant had been removed to a country which was not a Party to that instrument. The Court therefore considered that the actions of the Belgian Government had made it more difficult for the applicant, who was being held in solitary confinement with limited contact with the outside world, to exercise his right of petition and held thus that there had been a violation of Article 34.

46. The delegation of the United Kingdom drew the attention of the Committee to the case of *Hassan v. the United Kingdom*[27] regarding the acts of British armed forces in Iraq, extra-territorial jurisdiction and the application of the Convention in the context of an international armed conflict. The case concerned the capture of an Iraqi national, Mr Tarek Hassan, by the British armed forces and his detention at Camp Bucca during the hostilities in 2003. His brother (the applicant) claimed that Mr Tarek Hassan was under the control of British forces and had been tortured and executed. The Court noted from the outset that it was the first case in which a Contracting State had requested the Court to disapply its obligations under Article 5 (right to liberty and security) or in some other way to interpret them in the light of powers of detention available to it under international humanitarian law. Two main questions were examined by the Court:

- *Was Mr Tarek Hassan within the jurisdiction of the United Kingdom?* The Court first of all was not persuaded by the Government's argument that jurisdiction should not apply in the active hostilities phase of an international armed conflict. It noted that such conclusion would have been inconsistent with its previous case-law[28] and with the case-law of the International Court of Justice[29]. Furthermore, having regard to the arrangements operating at Camp Bucca, the Court was of the view that the United Kingdom had retained authority and control over all aspects of the applicant's complaint under Article 5. It therefore concluded that Mr Tarek Hassan had been within the jurisdiction of the United Kingdom.

- *Was Mr Tarek Hassan's capture and subsequent detention arbitrary?* The Court decided that international humanitarian law and the Convention both provided safeguards from arbitrary detention in time of armed conflict and that the grounds of permitted deprivation of liberty set out in Article 5 of the Convention should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the *Third and Fourth Geneva Conventions*. In the present case, it found that there had been legitimate grounds under international law for capturing and detaining Mr Tarek Hassan, who had been found by British troops, armed and on the roof of his brother's house, where other weapons and documents of a military intelligence value had been retrieved. Moreover, following his admission to Camp Bucca, he had been subjected to a screening process, which established that he was a civilian who did not pose a threat to security and led to his being cleared for release. Mr Tarek Hassan's capture and detention had not therefore been arbitrary.

[27] European Court of Human Rights [Grand Chamber], *Hassan v. the United Kingdom*, application No. 29750/09, judgment delivered on 16 September 2014.
[28] European Court of Human Rights [Grand Chamber], *Al-Skeini and others v. the Uniked Kingdom*, application No. 55721/07, judgment delivered on 7 July 2011.
[29] See for example *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo (DRC) v. Uganda), Judgment*, I.C.J. Reports 2005, p. 168.

In the light of these considerations, the Court held that there had been no violation of Article 5 paragraphs 1, 2, 3 or 4 (right to liberty and security) in the circumstances of the present case. The complaints under Article 2 (right to life) and Article 3 (prohibition of inhuman or degrading treatment) concerning the alleged ill-treatment and death of the applicant's brother were declared inadmissible for lack of evidence.

47. The Chair and the Secretariat also mentioned the cases of *Husayn (Abu Zubaydah) v. Poland*[30] and *Al Nashiri v. Poland*[31] concerning allegations of torture, ill-treatment and secret detention of two men suspected of terrorist acts. The applicants, in these cases, alleged that they were held at a CIA "black site" in Poland, from where they were subsequently transferred to other sites before eventually being moved back to Guantanamo Bay. Two main questions were examined by the Court:

- *the responsibility of Poland for the treatment and detention of the applicants by foreign officials on its territory:* the Court reiterated that, in accordance with its settled case law, the respondent State must be regarded as responsible for acts performed by foreign officials on its territory with the acquiescence or connivance of its authorities.

- *the responsibility of Poland for the removal of the applicants from its territory:* the Court found, according to settled case law, that removal of an applicant from the territory of a respondent State may engage the responsibility of that State under the Convention if this action has as a direct consequence the exposure of an individual to a foreseeable violation of his Convention rights in the country of his destination. Furthermore, the Court considered that the existence of the alleged risk must be assessed primarily with reference to those facts which were known or ought to have been known to the Contracting State at the time of the removal.

Having regard to the evidence before it, the Court came to the conclusion that the applicants' allegations that they had been detained in Poland were sufficiently convincing. The Court found that Poland had cooperated in the preparation and execution of the CIA rendition, secret detention and interrogation operations on its territory and it ought to have known that by enabling the CIA to detain the applicants on its territory, it was exposing them to a serious risk of treatment contrary to the Convention. Therefore, the Court considered that there had been, in both cases, a violation of Article 3 (prohibition of torture and inhuman or degrading treatment), of Article 5 (right to liberty and security), of Article 8 (right to respect for private and family life), of Article 13 (right to an effective remedy) and of Article 6 paragraph 1 (right to a fair trial). The Court also decided that Poland, in order to comply with its obligations under Articles 2 and 3 of the Convention and Article 1 of Protocol No. 6 to the Convention, was required to seek to remove, as soon as possible, the risk that Mr Al Nashiri could be subjected to the death penalty by seeking assurances from the US authorities that such penalty would not be imposed on him.

48. The Chair invited delegations to keep the Committee informed of any judgment, decisions or pending cases before the European Court of Human Rights.

11. Peaceful settlement of disputes

49. In the context of its consideration of issues relating to the peaceful settlement of disputes, the Chair presented the document on the *Compulsory jurisdiction of the International Court of Justice* (document CAHDI (2013) 11) and invited the delegations to submit to the Secretariat any relevant information in order to update it.

[30] European Court of Human Rights, *Husayn (Abu Zubaydah) v. Poland*, application No. 7511/13, judgment delivered on 24 July 2014.
[31] European Court of Human Rights, *Al Nashiri v. Poland*, application No. 28761/11, judgment delivered on 24 July 2014.

50. The delegation of Romania informed the CAHDI that, in June 2014, the government adopted a draft law containing the declaration of acceptance of the compulsory jurisdiction of the Court, which was currently being debated at the Parliament.

51. The delegation of Italy informed the Committee that the resolution to recognise the compulsory jurisdiction of the Court was adopted on 2 September 2014 by the Committee for Foreign Affairs of the Italian Parliament. Therefore, Italy will recognise the compulsory jurisdiction of the ICJ in the near future.

52. The Chair noted that the workload of the ICJ was increasing and that it was a positive indicator that States made recourse to it for settling their disputes.

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

53. 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 containing these reservations and declarations (documents CAHDI (2014) 17 and CAHDI (2014) 17 Addendum prov) and opened the discussion.

54. With regard to the **declaration from Belgium** to the Convention on the Reduction of Statelessness, the Belgian delegation informed the Committee on the scope and content of its declaration explaining that it aimed to clarify the meaning of “foundlings” and listed the cases of loss of nationality, which were in compliance with the Convention.

55. With regard to the **declaration from Georgia** to the Convention on the Reduction of Statelessness, the Georgian delegation informed the Committee on the scope and content of its declaration. One delegation informed the Committee that it was still reviewing the scope of the declaration in order to assess whether it could amount to a reservation.

56. With regard to the **partial withdrawal of declaration from Tunisia** on the Convention on the Elimination of All Forms of Discrimination Against Women, a number of delegations voiced concerns with respect to the remaining declaration, in particular with regard to the reference to the national legislation. Several delegations were considering objecting.

57. With regard to the **reservation from El Salvador** on the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the Abolition of the Death Penalty, concerns were voiced with respect to the crimes that were encompassed by the reservation and whether El Salvador only referred to the most serious crimes, in compliance with the Protocol. Many delegations stated that they were considering objecting.

58. With regard to the **declaration from Viet Nam** to the International Convention for the Suppression of Terrorist Bombings, some delegations expressed their concerns with respect to the first part of the declaration and in particular the reference therein to the principle of reciprocity. It was noted that this declaration was similar to the declaration of Viet Nam to the *International Convention Against the Taking of Hostages* and that it could amount to a reservation.

59. With regard to the **reservations from Switzerland** to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, the Swiss delegation informed the Committee on the scope and content of its reservations, which were both considered to be fully consistent with the object and purpose of the Convention.

60. With regard to the **declaration from Finland** to the United Nations Convention on Jurisdictional Immunities of States and Their Property, the Finnish delegation provided information on the scope and content of its declaration and recalled that the interpretation contained in the declaration had already been given by the Chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property in the Sixth Committee at the 59th Session of the United Nations General Assembly.

61. The attention of the Committee was also drawn to two reservations which were not included in the abovementioned documents: the interpretative **declaration from the Democratic Republic of the Congo** to the United Nations Convention on the Law of the Sea and the **late reservation from Honduras** to the United Nations Convention Against Corruption. Since the deadline for objection will not have expired before, respectively, 30 April and 10 May 2015, the CAHDI decided to examine these reservations at its next meeting.

13. Review of Council of Europe Conventions

62. Following the Ministers' Deputies' decision of 10 April 2013 on the review of Council of Europe conventions in the light of the Secretary General's report, the CAHDI drew up a work plan at its 46th meeting for the follow-up of the conventions for which it had been given responsibility. In pursuance of this work plan, the Committee examined the *European Convention on Consular Functions* (ETS No. 61) as well as on the *European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers* (ETS No. 63), presented respectively in document CAHDI (2014) 18 and CAHDI (2014) 19. The Chair invited the delegations to hold an exchange of views on the practical importance of these conventions.

i. The European Convention on Consular Functions (ETS No. 61)

63. From the outset, the CAHDI noted that the *European Convention on Consular Functions* entered into force on 9 June 2011, i.e. 43 years after its adoption. At present, the Convention has been ratified by 5 States (Georgia, Greece, Norway, Portugal and Spain) and signed by 4 other States (Austria, Germany, Iceland and Italy). It furthermore noted that its scope had been limited to the subject of consular functions, as "consular privileges, immunities and relations" were already covered by the widely ratified *Vienna Convention on Consular Relations* (1963). Consequently, the CAHDI considered that the practical relevance of this Convention was difficult to determine but that it seemed that it was rather limited.

64. Furthermore, a large majority of the delegations was of the view that a specific article of this Convention was problematic, namely Article 6. According to this Article, when a national of the sending State is deprived of his/her liberty, the competent authorities of the receiving State shall inform the consular officer of the sending State without delay of this deprivation of liberty. The *Vienna Convention on Consular Relations* on the contrary – to which reference was made by most of the delegations – only obliges in its Article 36 the receiving State to allow the arrested contact with a consular representation "if requested" by the detainee, being thus in conformity with most of personal data protection legislations. Delegations therefore considered that the *European Convention on Consular Functions* was outdated with regard to the question of data protection, and often in contradiction with domestic legislation in this field.

65. The CAHDI concluded, in relation to the *European Convention on Consular Functions* (ETS No. 61), that:

- the Convention was of limited practical relevance;
- Article 6 could infringe national legislation on data protection;
- States preferred to have recourse either to the *Vienna Convention on Consular Relations* (1963) which suited better for solving problems or eventually to bilateral agreements.

66. Consequently, most of the delegations informed the Committee that they had no intention of ratifying this Convention.

ii. The European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers (ETS No.63)

67. The vast majority of the delegations agreed that the *European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers* was very useful in practice. At present, the Convention has been ratified by 22 States (Austria, Cyprus, Czech Republic, Estonia, France, Germany, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Moldova, Netherlands, Norway, Poland, Portugal, Romania, Spain, Sweden, Switzerland, Turkey and the United Kingdom) and signed by one State (Malta).

68. The Convention eliminates all authentification requirements for documents within its scope and thus makes it possible to use foreign documents in the same manner as documents emanating from national authorities. The CAHDI agreed that it therefore facilitated inter-European relations and strengthened the ties between States. Mention was made, for illustrative purposes, to Article 2 defining the scope of application of the Convention and which notably does not exhaustively list the documents to which the Convention applies.

69. The CAHDI concluded, in relation to the *European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers* (ETS No. 63) that:

- the Convention was of great practical relevance and facilitated inter-States relations;
- considering its wide scope of application (*ratione personae* and *ratione materiae*), States often had recourse to this Convention which fills gaps contained in *The Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents* (1961) which excludes from its scope of application documents executed by diplomatic or consular agents and does not eliminate all authentification requirements but replaces legalisation with a simplified procedure;
- States which had not yet done so were therefore encouraged to become party to the Convention reminding in this regard that the Convention was also open to non-member States[32];
- it invited the Council of Europe to ensure its promotion notably outside the boundaries of the Organisation.

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

14. 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, 16 July 2014

70. With reference to documents CAHDI (2014) Inf 8 and CAHDI (2014) Inf 9, the CAHDI was informed of the exchange of views that took place on 16 July 2014 between the members of the ILC, the Chair of the CAHDI and the Secretary to the CAHDI.

71. During this exchange of views, the Chair of the CAHDI, Ms Liesbeth Lijnzaad, presented the CAHDI and informed the ILC of its recent work. She drew the ILC's attention to the opinions that the CAHDI had adopted in 2013 and 2014, the topical issues of international law that it had discussed as well as the review of the Council of Europe conventions that it had undertaken. She

[32] According to Article 7 paragraph 1 of the Convention, non-member States of the Council of Europe may be invited by the Committee of Ministers to accede to the Convention.

also underlined the key role of the CAHDI in exchanging and liaising between the Council of Europe and different international organisations.

72. The Secretary of the CAHDI, Ms Marta Requena, presented the recent news of the Council of Europe and notably the election of the Secretary General of the Organisation and the priorities of the Chairmanship of the Committee of Ministers. She drew the ILC's attention to the work of the Organisation with regard to treaty law and in particular the issues of the reform of the European Court of Human Rights, the accession of the European Union to the *European Convention on Human Rights* as well as the news from the Treaty Office (entry into forces, draft conventions being finalised, accession by non-member States to the Council of Europe conventions). She also mentioned the neighbouring policy of the Council of Europe, the accession by Kosovo[33] to the Venice Commission and the cooperation with the United Nations.

b. Presentation of the work of the ILC and of the Sixth Committee by Ms Marie Jacobsson, Member of the ILC

73. The 66th Session of the ILC had taken place in Geneva from 5 May to 6 June and from 7 July to 8 August 2014. Ms Marie Jacobsson, member of the ILC and Special Rapporteur on "Protection of the environment in relation to armed conflict", presented the recent activities of the ILC. Ms Marie Jacobsson's presentation is reproduced in **Appendix III** to this report.

74. The topics discussed by the ILC during its 66th Session had been: expulsion of aliens, protection of persons in the event of disasters, the obligation to extradite or prosecute (*aut dedere aut judicare*), subsequent agreement and subsequent practice in relation to the interpretation of treaties, protection of the atmosphere, immunity of State officials from foreign criminal jurisdiction, identification of customary international law, protection of the environment in relation to armed conflict and provisional application of treaties. In addition, the topic of the most-favoured nation clause had been considered by a study group. Finally, the topic of crimes against humanity has been included in the programme of work of the ILC.

75. The ILC had concluded its work on the topic of the *"Expulsion of aliens"* by adopting thirty-one draft articles, together with commentaries thereto. In accordance with Article 23 of its Statute, the ILC recommended to the General Assembly of the United Nations to take note of the draft articles in a resolution, to annex the articles in the resolution, to encourage their widest possible dissemination and to consider, at a later stage, the elaboration of a convention on the basis of the draft articles.

76. In connection with the topic of the *"Protection of persons in the event of disasters"*, the Special Rapporteur, Mr Eduardo Valencia-Ospina had presented his seventh report to the ILC. This report dealt with the protection of relief personnel and their equipment and goods, as well as the relationship of the draft articles with other rules. The Commission subsequently adopted, on first reading, a set of twenty-one articles, together with commentaries thereto, which had been transmitted to Governments and relevant international organisations for comments and observations. Ms Jacobsson informed the Committee that the Special Rapporteur intended to submit an eighth report for the ILC's consideration in 2016 to enable it to adopt, on second reading, its final set of draft articles.

77. The ILC had also concluded its work on the topic of the *"Obligation to extradite or prosecute (aut dedere aut judicare)"* by adopting the final report on this topic on the basis of the work of the Working Group chaired by Mr Kriangsak Kittichaisaree. The conclusions in the final report should enable States to better understand the various treaty obligations to extradite or prosecute alleged offenders and uphold the rule of law. Furthermore, the ILC had observed that there were important gaps in the present conventional regime governing the obligation to extradite or prosecute that had

[33] All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

to be closed, notably with regard to most crimes against humanity, warcrimes other than grave breaches, and war crimes in non-international armed conflict.

78. With respect to the topic of *"Subsequent agreements and subsequent practice in relation to the interpretation of treaties"*, the Special Rapporteur, Mr Georg Nolte had presented his second report to the ILC, containing five Draft Conclusions, which were referred to the drafting committee and provisionally adopted, with commentaries, by the ILC on the basis of the report of the drafting committee. In these Draft Conclusions, the following aspects of the topic were considered: the identification of subsequent agreements and subsequent practice, possible effects of subsequent agreements and subsequent practice in the interpretation of treaties, the form and value of subsequent practice, the conditions for an "agreement" of the parties regarding the interpretation of a treaty, decisions adopted within the framework of Conferences of States Parties, and the possible scope for interpretation by subsequent agreements and subsequent practice. It was recalled that these conclusions were aimed to clarify the rules on treaty interpretation and were based on the practice of States and international organisations.

79. Concerning the topic of the *"Protection of the atmosphere"*, the Special Rapporteur, Mr Shinya Murase had presented his first report to the ILC, which addressed the general objective of the project by, in particular, delineating its general scope, identifying the relevant basic concepts and offering perspectives and approaches to be taken with respect to the topic. The second and third reports would focus on elaborating basic principles on the protection of the atmosphere.

80. The ILC had continued its examination of the topic of *"Immunity of State officials from foreign criminal jurisdiction"* on the basis of the third report of the Special Rapporteur, Ms Concepcion Escobar Hernandez, in which two draft articles were presented: draft Article 2 (e) on the definition of State official, and draft Article 5 on the beneficiaries of immunity *ratione materiae*. Ms Jacobsson underlined that these draft Articles were later discussed in the Drafting Committee which adopted two articles in this regard. She noted that they were the first draft articles adopted on immunity *ratione materiae* and informed the Committee that it was envisaged that the material and temporal scope of immunity *ratione materiae* would be the subject of consideration in the Special Rapporteur's next report.

81. In relation to the topic of the *"Identification of customary international"*, the Special Rapporteur, Sir Michael Wood, had presented his second report to the ILC. This report contained, *inter alia*, eleven draft conclusions, which addressed the scope and outcome of the topic, the basic approach of the subject and the two constituent elements of rules of customary international law, namely "a general practice" and "accepted as law". They were referred to the drafting committee, which provisionally adopted conclusions 1 to 8.

82. In connection with the topic of the *"Protection of the environment in relation to armed conflict"*, the Special Rapporteur, Ms Marie Jacobsson, had presented her preliminary report to the ILC. This report contained, *inter alia*, an overview of the practice of States and international organisations and addressed the scope and methodology of the topic, the use of terms, environmental principles and issues relating to human and indigenous rights. It also contained two tentative draft definitions of the terms "armed conflict" and "environment". Ms Jacobsson informed the Committee that her next report would focus on the law applicable during both international and non-international armed conflicts and would contain an analysis of existing rules of armed conflict relevant to the topic as well as their relationship to peacetime obligations.

83. Regarding the topic of the *"Provisional applications of treaties"*, the Special Rapporteur, Mr Juan Manuel Gomez-Robledo, had presented his second report to the ILC, which provided a substantive analysis of the legal effects of the provisional application of treaties. The next report will most likely contain draft guidelines or conclusions for the consideration of the Commission.

84. In relation to the topic of the *"Most-favoured nation clause"*, the study group had begun its consideration of the draft final report and envisaged a revised draft final report to be presented for

consideration of the ILC at its sixty-seventh Session in 2015. The aim is to present a report that would be of practical use for practitioners and policy-makers and offer some guidance on the possible interpretations of the most-favoured nation clause.

85. The ILC had decided to place the topic of *"Crimes against humanity"* on its programme of work and appointed Mr Sean Murphy as Special Rapporteur. The proposal of this topic had been made on the basis that a global convention on crimes against humanity was a key-missing piece in the current framework of international law and with the aim to help to harmonise national legislations in order to build a network of cooperation between States on the investigation, prosecution and extradition for such crimes.

86. Finally, the ILC had decided to place the topic of *jus cogens* on its long-term programme of work. In considering this topic, the Commission could focus on the following elements: the nature of *jus cogens*, requirements for the identification of a norm as *jus cogens*, an illustrative list of norms which have achieved the status of *jus cogens* and the consequences or effects of *jus cogens*.

87. Ms Jacobsson concluded her presentation by underlining that the 50th Session of the International Law Seminar was held from 7 to 25 July 2014 in Geneva, on the theme of "International law as a profession". She encouraged States to consider helping to finance scholarships granted to assist participants, notably from developing countries, to attend these sessions.

88. The Chair of the CAHDI thanked Ms Jacobsson for her presentation and invited any delegations which so wished to take the floor.

89. In reply to questions raised by one delegation with regard to the topic of the identification of customary international law, Ms Jacobsson explained that the ILC had adopted draft conclusions but had lacked time to adopt the commentaries thereto. However, she pointed out that the report of the drafting committee was available on the website of the ILC.

90. Several delegations underlined that a definition of "Crimes against humanity" already existed under the *Statute of the International Criminal Court* and stressed that this concept should not be redefined. Ms Jacobsson pointed out that this topic was in its very early stages and that the intention of the ILC was to build on the already existing definition in order to strengthen cooperation between States with regard to crimes against humanity. Some delegations mentioned the *Mutual Legal Assistance Initiative* launched by the Netherlands, Slovenia and Belgium aimed at improving the international framework for mutual legal assistance and extradition on investigating and prosecuting the most serious crimes. They expressed the hope that the ILC would take it into consideration while examining the topic of crimes against humanity.

91. As regards the topic of the *"Protection of the environment in relation to armed conflict"*, a number of delegations concerning the inclusion of "cultural heritage" in the notion of "environment" recalled that a specific legal regime already existed. They underlined that a definition of the environment could be useful in this respect. Ms Jacobsson, as Special Rapporteur on this topic, explained that international humanitarian law defined the "natural environment" and that the ILC had previously worked on issues relating to the protection of the environment without defining it. Ms Jacobsson further explained that the members of the ILC had considered the inclusion of cultural heritage after noticing the gaps in the existing applicable legal framework with respect to natural sites containing cultural property. Ms Jacobsson also stated that she would take into account the comment of another delegation, which underlined that the notion of "armed conflict" was defined by international humanitarian law and should not be redefined by the Commission with respect to its consideration of this specific topic.

92. Several delegations stressed the importance of the dialogue between the CAHDI and the ILC, which was considered very useful for the purpose of the preparation of the statements before

the Sixth Committee of the General Assembly of the United Nations. In this regard, one delegation underlined the impact of the work of the ILC at the national level, in particular in the domestic courts and, in this respect, encouraged other delegations to comment and participate to the work of the ILC. Another delegation also underlined the importance of the ILC having access to national legislations and practices but pointed out the difficulty faced by a number of States in replying to the numerous questions raised by the Commission and in contributing efficiently to its work. In this regard, Ms Jacobsson emphasised the usefulness of the interventions of delegations during the debate on the report of the ILC before the Sixth Committee. She underlined that States could focus on the issues of most importance to them, without commenting on each topic.

93. Finally, another delegation underlined the importance of the International Law Seminar, particularly its practical value and encouraged States to help financing scholarships.

15. Consideration of current issues of international humanitarian law

94. The representative of the International Committee of the Red Cross (ICRC) provided an update to the CAHDI members on the project of the ICRC entitled "Strengthening Legal Protection for Victims of Armed Conflict". He recalled the two tracks of this project, namely: strengthening international humanitarian law (IHL) compliance mechanisms on the one hand and strengthening the norms protecting persons deprived of liberty in non-international armed conflict (NIAC) on the other hand.

95. Regarding the first track, he informed the Committee that since the 47th meeting of the CAHDI, two main consultations had taken place: one *Preparatory Discussion* (3-4 April 2014) which was held in view of the *Third Meeting of States on Strengthening Compliance with International Humanitarian Law* (30 June – 1 July 2014). He noted that following these consultations, it appeared that the outlines of a future IHL compliance system were discernable. This system would comprise a Regular Meeting of States with a periodic reporting system as well as thematic discussions on IHL issues. He underlined that States had expressed different opinions regarding a possible fact-finding function but agreed that if such a function was to be created, it should not be legally binding. He informed the Committee that a *Preparatory Discussion* would take place on 1-2 December 2014 during which the questions relating notably to the establishment and the institutional structure of a Meeting of States would be examined. This discussion would be followed by the *Fourth Meeting of States* scheduled for late spring 2015 and constituting the last round of consultations within this process. A concluding report on the consultation process with a range of options and recommendations would then be submitted by the ICRC to the *32nd International Conference of the Red Cross and Red Crescent* scheduled to take place in Geneva in late 2015.

96. Regarding the second track of the project, the representative of the ICRC informed the Committee that following the four regional consultations held by the ICRC in 2012 and 2013, the ICRC had decided to hold two centralised thematic discussions. These discussions focused on assessing the modalities to strengthen the law to address the four main substantive areas identified as priorities, namely: 1) conditions of detention, 2) particularly vulnerable groups of detainees, 3) grounds and procedures for internment and 4) transfer of detainees. He informed the Committee that the first two priorities were addressed during the first thematic consultation (29-30 January 2014) and that the two others would be discussed during the second thematic consultation (20-22 October 2014). He underlined that on this occasion, an assessment would be made on the possible application of IHL rules applicable in international armed conflicts, human rights law and internationally recognised detention standards to NIAC. He finally informed the delegations that, following the second thematic consultation, a final consultation meeting would take place in spring 2015, during which States would be asked to evaluate concrete options to strengthen the law in relation to detention in NIAC.

97. The representative of the ICRC finally informed the delegations that on the occasion of the *32nd International Conference of the Red Cross and Red Crescent*, the follow-up on Resolution 1[34] of the *31st International Conference* in 2011 would be addressed. States would also be invited to update by mid-2015 the ICRC on the actions they had taken to implement the four-year action plan for the implementation of IHL, adopted in Resolution 2 of the *31st International Conference*.

98. Regarding the first track on *"Strengthening IHL compliance mechanisms"*, a large majority of the delegations welcomed this initiative and expressed their full support to the future IHL compliance system and notably to the proposals on intergovernmental meetings, periodic reporting and thematic discussions. Some delegations admitted that their States were hesitant at the beginning of the discussion process but welcomed the realistic and down-to-earth approach of the outcome of the consultations. They agreed on the need to have an efficient and depoliticised compliance system possibly based on soft law, with a positive approach driven by mutual assistance and exchange of experience and best practices. Mention was however made to a question that had to be discussed, namely the tendency for human rights bodies to deal with IHL. Many delegations were of the view that creating this dedicated forum for discussing greater compliance with IHL was the best solution to avoid blurring the distinction between these two sets of international law rules and thus underline that human rights law and IHL were different.

99. Regarding the second track on *"Strengthening legal protection for persons deprived of liberty in relation to a NIAC"*, a large majority of the delegations welcomed this initiative but underlined however their attachment not to have a legally binding document. They stressed the need not to transpose:

- the rules applying to international armed conflicts to NIAC on the one hand; and
- the existing rules of international human rights law to NIAC on the other hand.

100. Many delegations underlined that such transpositions would require amendments to the Geneva conventions. It would thus endanger the whole project and lead to the opposite of the expected outcome. They also mentioned the difficulties it could entail for the practitioners to have two distinct sets of rules applying to one situation.

101. In conclusion, it was underlined that the project of the ICRC constituted a process that was bound to evolve and should therefore be open for progressive development. Delegations agreed that focus should now be made on implementation rather than on creating new instruments.

102. The delegation of the Netherlands informed the Committee that the *Advisory Committee on Issues of Public International Law* (CAVV)[35] had issued an advice on humanitarian assistance in armed conflicts at the end of August 2014 at the request of the Ministry of Foreign Affairs of the Netherlands. This advice focused particularly on the international law aspects of access to and facilitation of humanitarian assistance in armed conflicts situations. The delegation underlined that the Dutch government would issue an official response to this advice in due time which would be translated into English and made available on the website of the Advisory Committee.

103. The Secretariat of the CAHDI updated the Committee on the current work carried out by the Parliamentary Assembly of the Council of Europe (PACE) in relation to the issue of drones. It informed the CAHDI that the Committee on Legal Affairs and Human Rights of the PACE will hold a hearing on 30 September 2014 on "*Drones and targeted killings: the need to uphold human rights*" with the participation of:

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[34] Resolution 1 invited the ICRC *"to pursue further research, consultation and discussion (...) to identify and propose a range of options and its recommendations to: i) ensure that international humanitarian law remains practical and relevant in providing legal protection to all persons deprived of their liberty in relation to armed conflict; and ii) enhance and ensure the effectiveness of mechanisms of compliance with international humanitarian law".*

[35] The Advisory Committee on Issues of Public International Law (CAVV) is an independent body that advises the government, the House of Representatives and the Senate of the Netherlands on international law issues.

- Mr Ben Emmerson, UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (London);
- Ms Irmina Pacho, Head of Strategic Litigation Programme, Polish Helsinki Foundation for Human Rights (Warsaw); and
- Mr Markus Wagner, Associate Professor at the School of Law of the University of Miami, Florida (USA).

Following this hearing, the PACE Rapporteur for this subject, Mr Arcadio Diaz Tejera, would prepare a report including a draft preliminary resolution. This report would be submitted for approval to the Committee during its forthcoming meeting, most probably before the end of 2014. The report and the draft resolution would then be submitted to the plenary of the PACE possibly during the first semester of 2015. The Secretariat informed the CAHDI that at this stage, no public documents were available yet. The Secretariat will continue to keep the CAHDI informed on any developments concerning this issue.

16. Developments concerning the International Criminal Court (ICC) and other international criminal tribunals

i. The International Criminal Court (ICC)

104. The delegation of Slovenia updated the Committee on the progress of the initiative launched in 2011 by the Netherlands, Slovenia and Belgium – the so-called "Mutual Legal Assistance (MLA) Initiative" – aimed at improving the international framework for mutual legal assistance and extradition on investigating and prosecuting the most serious international crimes: genocide, crimes against humanity and war crimes. The representative of Slovenia highlighted that this initiative intended to strengthen the principle of complementarity that governs the exercise of the ICC's jurisdiction in order to ensure, *in fine*, the effectiveness and efficiency of the ICC as the principle prompts the States Parties to the Rome Statute and other States to carry out consistent and rigorous national proceedings obviating thus the need for trials before the ICC. He also underlined that a new declaration had been drafted and opened for signature to all States and specified that the aim of this initiative was to draft a new international legal instrument in order to fill existing gaps in the international legal order. The representative of Slovenia informed the Committee of a side event on this issue, which would be held in the margins of the 13th Session of the Assembly of State Parties (ASP) of the ICC (New York, 8-17 December 2014), with Mr Adama Dieng, Special Adviser of the Secretary-General of the United Nations on the Prevention of Genocide, as a keynote speaker. The representative of Slovenia also informed the CAHDI of a retreat, organised by Switzerland and held in Glion (Switzerland) on 3-5 September 2014, on strengthening the proceedings at the ICC. This retreat gathered around 60 senior policy makers and practitioners, including representatives of the ICC, States Parties, and non-governmental organisations as well as independent experts and enabled intense and informal discussions on how to further enhance the effectiveness at the ICC.

105. One delegation pointed out that a discussion on the challenges faced by the ICC for its future and on the means to make the ICC more efficient should be engaged prior to the 13th session of the ASP. It was underlined that the workload of the ICC was increasing and that its budget was limited. In this regard, it was recalled that the ICC had requested an increase of 25% of its budget. Another delegation considered that the ICC had established its reputation since its creation but that it must now maintain it, in particular through both its judges and its courtroom activity. It was underlined in this regard that a reflection on the measures that could be taken by the State Parties to support the ICC should be conducted.

106. At the request of one delegation, the CAHDI held an exchange of views on the issue of the current judicial vacancy at the ICC resulting from the resignation of Judge Santiago during her term. The Bureau of the ASP had decided in this regard not to open an election aiming at filling the vacancy at the 13th Session of the ASP as it was not possible to set the date of the election for this Session in a way that would allow the election to take place within the existing legal framework.

One delegation regretted this decision and recalled that in order for the ICC to be fully operational, such a judicial vacancy had to be filled without undue delay. It also noted that this decision of the Bureau would result in postponing the election to the 14th session of the ASP and expressed therefore its full support to the organisation of an election during the forthcoming session of the ASP. In this regard, several delegations underlined that the Bureau had carefully considered the legal aspects of this situation and taken into account the provisions with respect to the elections of judges and judicial vacancies (Articles 36 and 37 of the *Statute of the ICC*). They highlighted the complexity of the situation faced by the ASP, having to fill a judicial vacancy while conducting regular elections at its next session and recalled that the decision of the Bureau was the result of a negotiation involving many States Parties and had been reached by consensus. Another delegation reminded the participants that such a judicial vacancy was an unprecedented event at the ICC. Even if it had to be filled without undue delay, the election should not, however, be hastily organised. It was underlined in this regard that Article 112 paragraph 6 of the *Statute of the ICC* could provide a suitable solution to this issue by allowing the Bureau or one third of the State Parties to convene a special session of the ASP, which could therefore be held in early 2015.

107. The CAHDI took note of the ratification of the two amendments to the Rome Statute adopted at the Review Conference of the Rome Statute held in Kampala (Uganda) on 31 May – 11 June 2010, also known as the "Kampala amendments", by Slovakia and Austria, respectively on 28 April 2014 and 18 July 2014. The delegation of the United States underscored that it continues to have concerns about important issues implicated by the "aggression amendments". In the opinion of the United States, it was wise for the States Parties in Kampala to subject the Court's exercise of jurisdiction to a decision to be taken after 1 January 2017. The delegation pointed out that the international community should be using the time to take a look at these important issues and address them in a serious way.

108. The delegation of the United States updated the Committee on the "Rewards for Justice Programme" under which the United States government may offer rewards for information that leads to the arrest of certain fugitives who are under an arrest warrant of the ICC.

109. The Committee also took note of recent developments concerning the activity of the ICC:

- On 21 May 2014, the Appeals Chamber delivered its judgment[36] in which it confirmed the admissibility before the ICC of the case against Mr Saif Al-Islam Gaddafi.

- On 23 May 2014, Trial Chamber II, ruling in the majority, sentenced Mr Germain Katanga[37] to a total of 12 years' imprisonment.

- On 9 June 2014, Pre-Trial Chamber II confirmed charges consisting in 18 counts of war crimes and crimes against humanity against Bosco Ntaganda[38] and committed him for trial before a Trial Chamber on the charges as confirmed.

- On 12 June 2014, Pre-Trial Chamber I confirmed by majority four charges of crimes against humanity against Laurent Gbagbo[39] and committed him for trial before a Trial Chamber.

- On 11 July 2014, the Appeals Chamber delivered its judgments in which it dismissed, by majority, the appeals of Aimé Kilolo Musamba, Fidèle Babala Wandu and Jean-Jacques Mangenda Kabongo against the decisions of Pre-Trial Chamber II of 14 and 17 March 2014 rejecting their requests for interim release, having found no clear errors materially affecting the Pre-Trial Chamber's decisions.

[36] International Criminal Court, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, case No. ICC-01/11-01/11.
[37] International Criminal Court, *The Prosecutor v. Germain Katanga*, case No. ICC-01/04-01/07.
[38] International Criminal Court, *The Prosecutor v. Bosco Ntaganda*, case No. ICC-01/04-02/06.
[39] International Criminal Court, *The Prosecutor v. Laurent Gbagbo*, case No.ICC-02/11-01/11.

- On 24 July 2014, the Appeals Chamber unanimously confirmed Pre-Trial Chamber I's decision which declared the case against Abdullah Al-Senussi[40] inadmissible before the ICC.

- On 11 September 2014, Trial Chamber IV issued, by majority, an arrest warrant against Abdallah Banda Abakaer Nourain.

ii. Other international criminal tribunals

110. The CAHDI took note of recent developments concerning the functioning of other international criminal tribunals.

111. As regards the International Criminal Tribunal for the former Yugoslavia (ICTY), the CAHDI took note that:

- The Chamber denied the accused's motion to hold a separate sentencing judgment in the event that a conviction is handed down in the *Radovan Karadžić* case[41], on the grounds that it found no reason to depart from the Tribunal's usual practice of determining the sentence together with a conviction, if any.
- In the case of *Vojislav Šešelj*[42], Trial Chamber III decided to terminate the process initiated *proprio motu* with a view to a possible provisional release of the accused.
- In the case of *Ratko Mladić*[43], the Appeals Chamber dismissed the interlocutory appeal filed confidentially by the Defence appealing the decision of the Trial Chamber on Rule 98 *bis* on counts 1 and 2 of the indictment, dealing with genocide.

112. As regards the International Criminal Tribunal for Rwanda (ICTR), the CAHDI took note that the Appeals Chamber delivered its judgment in the *Bizimungu* case[44]. The Chamber affirmed, in part, Bizimungu's convictions for genocide, extermination, murder, and rape as crimes against humanity, and murder and rape as serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.

113. With regards to the Extraordinary Chambers in the Courts of Cambodia (ECCC), the CAHDI took note that in the case 002/01[45], the Trial Chamber found Nuon Chea and Khieu Samphan guilty of crimes against humanity committed between 17 April 1975 and December 1977 and sentenced them to life imprisonment.

[40] International Criminal Court, *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, case No. ICC-01/11-01/11.
[41] International Criminal Tribunal for the Former Yugoslavia, *The Prosecutor v. Radovan Karadžić*, Decision on Accused's Motion for Bifurcated Judgement, Decision of 22 May 2014, Case No. IT-95-5/18-T.
[42] International Criminal Tribunal for the Former Yugoslavia, *The Prosecutor v. Vojislav Šešelj*, Order terminating the process for provisional release of the Accused *proprio motu*, Order of 22 May 2014, Case No. IT-03-67-T.
[43] International Criminal Tribunal for the Former Yugoslavia, *The Prosecutor v. Ratko Mladić*, Public redacted version of decision on Defence interlocutory appeal from the Trial Chamber Rule 98 bis decision, Decision of 24 July 2014, Case No. IT-09-92-AR73.4.
[44] International Criminal Tribunal for Rwanda, *Augustin Bizimungu v. the Prosecutor*, Judgment of 30 June 2014, Case No. ICTR-*00-56B-A*.
[45] Extraordinary Chambers in the Courts of Cambodia, *Case 002/01 Judgment*, Judgment of 7 August 2014, Case File No. 002/19-09-2007/ECCC/TC.

17. Topical issues of international law

i. "Foreign fighters"[46]

114. The CAHDI held an exchange of views on the possibility to withdraw citizenship from persons who have departed for foreign countries in order to join groups involved in armed conflicts in these countries, the so-called "foreign fighters". It was recalled that the 1961 *United Nations Convention on the Reduction of Statelessness* (the "UN Convention"), which counts 60 Parties, and the 1997 *European Convention of Nationality* (the "European Convention"), to which 20 States are Parties, contain provisions regarding the loss of nationality. Under Article 8 of the UN Convention, a Contracting State shall not deprive a person of its nationality if such deprivation would render him stateless. Article 7 of the European Convention provides that a State Party may not provide in its internal law for the loss of its nationality if the person concerned would thereby become stateless, unless the nationality was acquired fraudulently. Furthermore, under Article 7.1.c. of the same convention, a State Party may provide in its internal law for the loss of its nationality when a person voluntary enters service in a foreign military force. It was recalled that the main aim of these conventions is to reduce and avoid, as far as possible, cases of statelessness. It was also underlined that the provisions of the conventions did not cover, in principle, the situation of "foreign fighters". One delegation underlined that its country had made a declaration to the UN Convention and a reservation to the European Convention declaring that it retains the right to deprive a national of its nationality if such person voluntarily enters the military service of a foreign state. This delegation considered that while the withdrawal of nationality from dual nationals seemed be in conformity with international law, including obligations under the UN Convention and the European Convention, there were certain questions concerning the withdrawal of the citizenship from persons that would become stateless. The delegation mentioned two possibilities for, in its view, legally depriving the "foreign fighters" of their nationality. The first possibility would be to denounce the two conventions, change the national legislation and accede to the conventions with a new declaration and a new reservation. The second possibility would be to explain through an interpretative declaration that the object and purpose of the reservations made to the abovementioned conventions was to sanction citizens taking part in military activities abroad, therefore covering the current issue of "foreign fighters" joining groups involved in non-international armed conflicts.

115. All delegations that took the floor welcomed the debate on this complex and sensitive issue that is of major concern to all countries.

116. A large number of delegations objected to the possibility of denouncing and reacceding to the abovementioned conventions with a new reservation or declaration. They underlined that they had previously firmly opposed similar practices by other States as contrary to treaty law.

117. Many delegations also expressed concerns with regard to the second possibility. It was pointed out that both the UN Convention and the European Convention aim at reducing and avoiding statelessness. These delegations considered that a new interpretative declaration of the current reservation would expand the scope of both the UN Convention and the European Convention to include "foreign fighters" and would be contrary to the object and purpose of both conventions if it would result in statelessness for the individuals concerned. Furthermore, some delegations indicated that such a new interpretative declaration enlarging the grounds on which an individual can be deprived of his or her nationality could also be regarded as contrary to Article 8 paragraph 3 of the UN Convention which allows such deprivation of nationality only if those grounds exist in national law at the time the State becomes party to the UN Convention. Moreover, as a reservation should directly relate to a provision of a convention, some delegations expressed concerns about the legality of an interpretative declaration of an existing reservation. One delegation mentioned the *International Law Commission Guide to Practice on Reservations to*

[46] Note of the Secretariat: on 24 September 2014, the UN Security Council unanimously adopted Resolution S/RES/2178 (2014) condemning violent extremism, underscoring need to prevent travel, support for foreign terrorist fighters.

Treaties and, in particular, guideline 2.3.4 relating to *"Widening the scope of a reservation"*[47]. It was underlined that the commentary refers to the established practice within the Council of Europe to prohibit changes that widen the scope of reservations. In this regard, delegations were informed that the Council of Europe as depositary of the European Convention would be concerned about such a declaration that widened the scope of the original reservation in a manner that could be contrary to the object and purpose of the Convention.

118. Some delegations provided information on deprivation of nationality under their national legislation. Many of them highlighted that there was no possibility under their domestic legislation of withdrawing the nationality of an individual if that would render the person concerned stateless.

119. One delegation mentioned the *Rottmann* case[48] in which the applicant, an Austrian national, had been naturalised German, which had had the effect of causing him to lose his Austrian nationality. The Court of Justice of the European Union recalled that States have the power to lay down the conditions for the acquisition and loss of nationality and recalled the general principle of international law that no one is arbitrarily to be deprived of his/her nationality.

120. Furthermore, a number of delegations underlined that States depriving the "foreign fighters" of their nationality would lose jurisdiction over them, which would be counterproductive, and that a better option would be to criminalise the actions under national law.

121. In this regard, some delegations mentioned the measures that had already been taken in their countries in order to prevent "foreign fighters" to leave the territory, among which travel restrictions, withdrawal of passport or cooperation at the borders with other countries and with international organisations such as Interpol.

122. One delegation informed the CAHDI of the applicable legal framework in its country. The representative of this delegation specified that there were four cases of deprivation of nationality under domestic law, among which engaging in acts that are incompatible with the status of citizen of this State and acts against its interests or, for the benefit of a foreign State. This delegation mentioned, in particular, a national legislation on combatting terrorism that is currently being drafted. This legislation will create the offence of "individual terrorist undertaking" with the aim of criminalizing individual acts of terrorism and adopting measures of prohibition on leaving the territory for nationals for which there are serious reasons to believe that they leave the territory to carry out terrorist activity, crimes of war or crimes against humanity.

123. Another delegation noted, with regard to the criminalisation of the actions of "foreign fighters", that a problem might arise of proving the status of foreign fighters before the courts. It was recalled that the main focus should be placed on preventing "foreign fighters" from leaving the national territory rather than depriving them of their nationality.

ii. Other issues

124. The delegation of Mexico informed the CAHDI that an informal discussion on international law will take place on the occasion of the 25th Legal Advisers Meeting on 27-28 October 2014 in New York, hosted by the Mexican Government. The representative of Mexico recalled that for over 25 years, the Legal Advisers of the member States of the United Nations have gathered to discuss, in a dynamic, informal and enriching fashion, the most relevant issues of international law that concern the international community. The discussions are held in the margins of the meetings of the Sixth Committee of the United Nations General Assembly, within the framework of the International Law Week. He recalled that this year, on the occasion of the 25th anniversary of this meeting, the current (Mr Miguel de Serpa Soares) and former Legal Advisers of the United Nations (Mr Hans Corell, Ms Patricia O'Brien and Mr Nicolas Michel) will be participating in the opening of

[47] *"The modification of an existing reservation for the purpose of widening its scope is subject to the rules applicable to the late formulation of a reservation. If such a modification is opposed, the initial reservation remains unchanged".*
[48] CJEU, 2 March 2010, *Janko Rottmann v. Freistaat Bayern*, C-135/08.

the meeting. He also informed the Committee that the following main subjects will be discussed during these two-days meeting:

- "Taking stakeholder's interests into account: the admission of *amicus curiae* in international Courts and Tribunals";
- "Delineation and delimitation of the continental shelf beyond 200M";
- "UN Security Council's targeted sanctions and individual rights";
- "Extraterritorial access to information: rights and duties of States".

The representative of Mexico also informed the CAHDI on several connected events which will take place prior to the meeting (e.g. the breakfast informal discussion featuring Judge Peter Tomka's "Personal Reflections as President of the ICJ" on 28 October) and during lunch time (e.g. the discussion on "Establishing a compliance system for International humanitarian Law: how will it improve respect for the law of war?" on 28 October). The programme of this 25th Legal Advisers Meeting was distributed to all participants[49].

125. The delegation of Belgium informed the CAHDI that the *International Conference on Genocide Prevention*, organised by the Belgian Government in cooperation with the European Union, the African Union and the United Nations, was held on 31 March and 1 April 2014 in Brussels. The Conference gathered representatives of 125 States and of relevant regional and universal international organisations, as well as academics, legal experts, representatives of civil society and Parliamentarians. The participants discussed ways and means to rid mankind of the scourge of mass atrocities and genocides and reached understanding on an impressive number of elements. The Conference focused on four aspects of this issue:

- the status of academic research on genocide;
- an integrated international human rights law – international criminal law perspective;
- the role of civil society;
- parliaments and institutional responses.

The representative of Belgium also informed the Committee that a side event entitled "Towards inclusive societies: empowerment and education as a strategy to prevent genocide" will take place on 24 September 2014 in the framework of the 69th Session of the General Assembly of the United Nations. The aim of this side event is to explore how to tackle the root causes of hate speech, in particular via targeted awareness raising and educational initiatives and programmes for online communication. An important question in this regard is how and to what extent new communication and information technologies can serve as an educational instrument to foster an inclusive society and combat hate speech and violence.

126. One delegation informed the CAHDI that the meeting of the General Assembly of the International Commission on Civil Status ("*la Commission internationale de l'état civil* (CIEC)" in French) will take place next week. This organisation was founded in 1948 with the aim "to facilitate international cooperation in civil status matters and to further the exchange of information between civil registrars". It was underlined that, at present, the CIEC comprises 14 member States and 9 observer States. In this respect, it was pointed out that three States have recently withdrawn from the CIEC as they considered that this international intergovernmental organisation has fulfilled its mission. It was therefore proposed to launch a reflection on the future of this organisation.

[49] Further information can be found at the following website : http://www.un.org/law/counsel/meetings2014.html

IV. OTHER

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

127. In accordance with *Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods*, the CAHDI elected Mr Paul Rietjens (Belgium) and Ms Päivi Kaukoranta (Finland), respectively as Chair and Vice-Chair of the Committee for one year, as from 1 January 2015.

19. Date and agenda of the 49th meeting of the CAHDI

128. The CAHDI decided to hold its 49th meeting in Strasbourg on 19-20 March 2015. 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

129. The CAHDI concluded its 48th meeting by adopting its abridged report.

APPENDICES

APPENDIX I

LIST OF PARTICIPANTS

MEMBER STATES OF THE COUNCIL OF EUROPE / ETATS MEMBRES DU CONSEIL DE L'EUROPE

ALBANIA / ALBANIE

Mr Armand SKAPI
Director
Treaties and International Law Department
Ministry of Foreign Affairs

ANDORRA / ANDORRE

Mme Carmen PERNA GARCÍA
Legal Adviser
Government of Andorra

Ms Patricia QUILLACQ [Apologised / Excusée]
Legal Adviser
Department of General and Legal Affairs
Ministry of Foreign Affairs

ARMENIA / ARMENIE

Mr Vahagn PILIPOSYAN
Head of International Treaties and Deposit Division
Legal Department
Ministry of Foreign Affairs

AUSTRIA / AUTRICHE

Mr Helmut TICHY
Legal Adviser
Austrian Federal Ministry for Europe

AZERBAIJAN / AZERBAIDJAN

Mr Sadi JAFAROV
Second Secretary
International Law and Treaties Department
Ministry of Foreign Affairs

BELGIUM / BELGIQUE

M. Paul RIETJENS
Vice-Chair / *Vice-Président*
Directeur général des Affaires juridiques
Service Public Fédéral des Affaires étrangères,
Commerce extérieur et Coopération au
Développement

Mme Sabrina HEYVAERT
Conseiller
Service Public Fédéral des Affaires étrangères
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Direction Droit International Public

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Mme Đanela ZEĆO
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BULGARIA / BULGARIE

Mr Danail CHAKAROV
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Ministry of Foreign Affairs

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Ms Marina KALJURAND
Undersecretary for Legal and Consular Affairs
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FINLAND / FINLANDE

Ms Päivi KAUKORANTA
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Legal Service
Ministry for Foreign Affairs

Ms Liisa VALJENTO
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Directeur des affaires juridiques
Ministère des affaires étrangères et du développement international

M. Ludovic LEGRAND
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Deputy Director
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Mr Martin NEY
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Director General of Legal Affairs
Department of Legal Affairs
Federal Foreign Office

Mr Oliver FIXSON
Head of Division
Federal Foreign Office

GREECE / GRECE

Ms Maria TELALIAN
Head of the Legal Department
Ministry of Foreign Affairs

HUNGARY / HONGRIE

Mr Ferenc DANCS
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Mr Kristjan Andri STEFANSSON
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Mr Paolo EPIFANI
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LATVIA / LETTONIE

Ms Sanita PEKALE
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LIECHTENSTEIN

[Apologised / *Excusé*]

LITHUANIA / LITUANIE

Ms Sigute JAKSTONYTE
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LUXEMBOURG

M. Carlo KRIEGER
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Ministère des Affaires étrangères et européennes

M. David HEINEN
Conseiller juridique
Direction des Affaires juridique et culturelles
Ministère des Affaires étrangères et européennes

MALTA / MALTE

[Apologised / *Excusé*]

REPUBLIC OF MOLDOVA / REPUBLIQUE DE MOLDOVA

Mr Dumitru SOCOLAN
Director
General Directorate of International Law
Ministry of Foreign Affairs and European Integration

MONACO

[Apologised / *Excusé*]

MONTENEGRO

Ms Bozidarka KRUNIC
Head of International Law Department
Ministry of Foreign Affairs and European Integration

NETHERLANDS / PAYS-BAS

Ms Liesbeth LIJNZAAD
Chair / *Présidente*
Legal Adviser
Head of the International Law Division
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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 47th meeting

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

   - Statement by Mr Jörg Polakiewicz, Director of Legal Advice and Public International Law

II. ONGOING ACTIVITIES OF THE CAHDI

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

6. Immunities of States and international organisations

   a. Topical issues related to immunities of States and international organisations

   - Settlement of disputes of a private character to which an international organisation is a party
   - Immunity of State owned cultural property on loan
   - Immunities of special missions
   - Service of process on a foreign State

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

   c. State practice, case-law and updates of the website entries

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)

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

11. Peaceful settlement of disputes

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

    - List of outstanding reservations and declarations to international treaties

13. Review of Council of Europe Conventions

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

14. 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 Ms Marie Jacobsson, Member of the ILC

    - Exchange of views between the ILC, the Chair of the CAHDI and the Secretary to the CAHDI, Geneva, 16 July 2014

15. Consideration of current issues of international humanitarian law

16. Developments concerning the International Criminal Court (ICC) and other international criminal tribunals

17. Topical issues of international law

IV. OTHER

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

19. Date and agenda of the 49th meeting of the CAHDI

20. Other business

APPENDIX III

PRESENTATION BY MS MARIE JACOBSSON MEMBER OF THE INTERNATIONAL LAW COMMISSION (ILC) ON THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS 66TH SESSION (5 May – 6 June and 7 July – 8 August 2014)

Madam Chair, distinguished Members of CAHDI and Observers, Mr Director,

It is a great pleasure to be here and to present to the Committee of Legal Advisers on Public International Law, CAHDI, the work of the International Law Commission's 2014 session. This summer, the President of CAHDI, Ms Liesbeth Lijnzaad, and Ms. Marta Requena made the annual visit of CAHDI to the Commission to talk about the work of the CAHDI and of the Council of Europe as it relates to public international law. The members of the Commission appreciated this visit very much.

Like other Members before me, I should make it clear that I am not here to represent the Commission. Instead, I intend to give my own personal impressions as an individual member of the Commission. My aim is to describe the Commission's latest session in a way that will be helpful for you when preparing for the Sixth Committee debate in October, and preparing written comments on certain matters.

To achieve this goal, I have given every Special Rapporteur and every Chair of each Working Group a chance to contribute their views on issues relating to their topics. The rationale behind this is that the Special Rapporteurs and Chairs of the working groups possess a specific and detailed understanding of their respective topics. ILC colleagues have indeed seized the opportunity and contributed. In using this method, I hope to present a balanced account of the work.

I. GENERAL REMARKS

I will begin with a few general remarks and then proceed to address the substantive issues.

It seems fair to say that the Commission had a very fruitful and efficient session under the excellent chairmanship of Mr Kyrill Gevorgian. The general level of presence and participation was high and all Members contributed in a constructive manner. The highlights of the Commission's work this year were its adoption, on second reading, of the articles on the expulsion of aliens, and its adoption, on first reading, of the articles on the protection of persons in the event of disasters. In addition, the Commission concluded the work on the obligation to extradite or prosecute *(aut dedere aut judicare)*. Furthermore, the Commission included crimes against humanity as a topic in its current work programme, and *Jus cogens* in its long-term work programme.

I will return to these topics later when I address the substantive issues dealt with by the Commission.

Apart from the highly valued visit from the Chair of the CAHDI, Ms Liesbeth Lijnzaad, and the Secretary of the CAHDI, Ms Marta Requena, both of whom addressed the Commission, the Commission also received visits from the Asian-African Legal Consultative Organization (AALCO), the Inter-American Juridical Committee, and the African Union Commission on International Law.

The United Nations Legal Counsel, Mr Miguel de Serpa Soares, and the President of the International Court of Justice, Judge Peter Tomka, made their annual visits and informed about recent developments in their respective institutions.

II. SUBSTANTIVE ISSUES

I will now turn to the substantive issues and begin by summarising the work and principal outcomes of the session. I would like to recall two things: first, that Chapter II of the Commission's report contains a brief and useful summary of the Commission's work and, second, that Chapter III contains a list of the specific issues that the Commission would be interested to receive comments on.

I would like to underline that your interventions during the ILC debate in the Sixth Committee and your written responses to requests by the Commission are very much appreciated by the Commission. We have access to every single statement and they are read and used by the Special Rapporteurs, by Members of the Commission during the debates, and in the work of the Drafting Committee.

I would also like to mention here that the Commission sometimes encounters considerable problems with translations. This year this was the case with "Immunity of State Officials" and, to a lesser extent, with "Expulsion of Aliens". It is therefore recommended that the reports of the Special Rapporteurs be read in the language in which they are written, if possible.

I will now proceed to the topics in the order they appear in the Commission's report.

1. Expulsion of aliens – Special Rapporteur Maurice Kamto – Chapter IV

This year the Commission finished its work on the topic "Expulsion of aliens". It did so by adopting, on second reading, a set of 31 draft articles, together with commentaries thereto. In accordance with Article 23 of its Statute, the Commission recommended to the General Assembly to take note of the draft articles in a resolution, to annex the articles to the resolution, and to encourage their widest possible dissemination; and to consider, at a later stage, the elaboration of a convention on the basis of the draft articles. The fate of the suggested draft articles is now in the hands of the Member States of the United Nations.

The articles cover a wide range of issues under four major headings: Part I: General provisions (such as: scope, use of terms, right of and grounds for expulsion, requirement for conformity with law), Part II: cases of prohibited expulsion, Part III: protection of the rights of aliens subject to expulsion and Part IV: procedural rules.

The Commission devoted a substantive amount of work to the topic. The Special Rapporteur had presented his last and ninth report to the Commission containing his proposals for reformulating the draft articles adopted on first reading in 2012. Governments based the reformulations on the comments and observations. Members of the Commission then made suggestions and comments during the plenary debate, but the bulk of the hard work of going through the entire set of articles was done by the Drafting Committee. I would like to recall that the report of the Drafting Committee is available on the Commission's website. *[How to find? See last page of this Statement!]*

The Special Rapporteur wishes to point out that this is the first comprehensive work done in this area that brings out the applicable law with a careful balance between the right of the expelling State and the rights of the individuals subject to expulsion, and that this be recognised by the States.

In accordance with the decision by the Commission, the Special Rapporteur would also like to express his wish that the General Assembly adopt a resolution which takes note of the Articles and declares that the United Nations will consider convening a diplomatic conference for the adoption of a Convention on this topic on the basis of the Commission's work.

2. Protection of persons in the event of disasters – Special Rapporteur Eduardo Valencia Ospina – Chapter V

The work on this topic has proceeded steadily. This year the Special Rapporteur presented his seventh report, which dealt with the protection of relief personnel and their equipment and goods, as well as the relationship of the draft articles with other rules, and included a proposal for the use of terms. This concluded the first cycle of work on this topic.

The Commission subsequently adopted, on first reading, a set of 21 draft articles, together with commentaries thereto. The whole Draft is being transmitted to Governments and relevant international organisations for their observations, orally in the Sixth Committee at the forthcoming session of the General Assembly and in writing by 1 January 2016.

The Special Rapporteur intends to prepare and submit an eighth report for the ILC's consideration in 2016 (i.e. the last year of the Commission's present membership) to enable it to adopt, on second reading, its final set of draft articles on the "Protection of Persons in the Event of Disasters", together with its recommendation as to the form of the future instrument that is to embody them.

3. The obligation to extradite or prosecute (aut dedere aut judicare) – Chair of the open-ended Working Group Mr Kriangsak Kittichaisaree – Chapter VI

"The obligation to extradite or prosecute (*aut dedere aut judicare*)" was included in the Commission's work programme in 2005 and Mr Galicki was appointed Special Rapporteur. He has submitted four reports.

The Commission decided to reorient its work in 2009, and it has continued in an open-ended Working Group chaired by Mr Kittichaisaree since 2012.

This year the Working Group evaluated the work on the topic, particularly in the light of comments made in the Sixth Committee last year. On the basis of the work of the Working Group, the Commission adopted the final report on the topic, and decided to conclude its consideration of the topic.

According to the Chair of the Working Group the conclusions in the final report should enable States to understand better the various treaty obligations to extradite or prosecute alleged offenders and uphold the rule of law. The Commission observes that there are important gaps in the present conventional regime governing the obligation to extradite or prosecute which need to be closed, most notably most crimes against humanity.

It would be greatly appreciated if States would express their endorsement of the final report and pledge to use the conclusions in the report to fight impunity of perpetrators of crimes of international concern.

4. Subsequent agreements and subsequent practice in relation to the interpretation of treaties – Special Rapporteur Georg Nolte – Chapter VII

Concerning the topic "Subsequent agreements and subsequent practice in relation to treaty interpretation", the Commission adopted five Draft Conclusions with commentaries. These Draft Conclusions address core aspects of the topic.

Of particular interest are:
Draft Conclusion 7, para. 3 (on the possible effects of subsequent agreements and subsequent practice), which proposes a presumption that "the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it",

Draft Conclusion 9 on under which circumstances it is possible to speak of a relevant "agreement" between the parties regarding the interpretation of a treaty, and, finally, Draft Conclusion 10 on the relevance of decisions by Conferences of States Parties as possibly embodying, explicitly or implicitly, a subsequent agreement or subsequent practice under Articles 31, paragraph 3, or Article 32 in the Vienna Convention on the Law of Treaties

Since all Draft Conclusions are meant to clarify the rules on treaty interpretation, as they are contained in the Vienna Convention and under customary international law, they are based on the practice of States and international courts and tribunals, as explained in the commentaries. The Draft Conclusions should therefore be read in light of the commentaries.

The report from the Drafting Committee is available on the Commission's website.

This year the Commission requests States and international organisations to provide it with any examples where:

(a) the practice of an international organisation has contributed to the interpretation of a treaty; and
(b) pronouncements or other action by a treaty body consisting of independent experts have been considered as giving rise to subsequent agreements or subsequent practice relevant for the interpretation of a treaty.

5. Protection of the Atmosphere – Special Rapporteur Shinya Murase – Chapter VIII

The Commission considered the first report of the Special Rapporteur. The report addressed the general objective of the project, including providing the rationale for work on the topic, delineating its general scope, identifying the relevant basic concepts and offering perspectives and approaches to be taken with respect to the subject. It presented three draft guidelines concerning (a) the definition of the term 'atmosphere'; (b) the scope of the draft guidelines; and (c) the legal status of the atmosphere. Following the debate in plenary, the referral of the draft guidelines to the Drafting Committee was deferred, at the request of the Special Rapporteur, until next year.

The Commission requests States to provide relevant information on domestic legislation and the judicial decisions of the domestic courts.

According to the Special Rapporteur, the aim of his first report was to stimulate discussion within the Commission. In addition to the information that the Commission has requested, the Special Rapporteur would welcome anything that States consider important on the topic discussed in the first report, including the basic approach to the topic and the notion of "common concern of humankind" for the protection of the atmosphere.

The focus of the second and third reports will be to elaborate "basic principles" on the protection of the atmosphere.

6. Immunity of state officials from foreign criminal jurisdiction – Special Rapporteur Concepcion Escobar Hernandez – Chapter IX

The Commission considered the third report of the Special Rapporteur, in which, two draft articles were presented: draft Article 2 (e), on the definition of State official, and draft Article 5, on the beneficiaries of immunity *ratione materiae*.

The two draft articles were discussed in the Drafting Committee which later adopted two articles: an article containing a definition of "State official" and an article on "Persons enjoying immunity *ratione materiae*". The latter is intended to define the subjective scope of this category

of immunity from foreign criminal jurisdiction. It is worth noting that these are the first draft articles of several articles to come on immunity *ratione materiae*.

Both articles are accompanied by commentaries and I would once again underline that the report of the Drafting Committee provides a useful background also in this context.

The Special Rapporteur would like to highlight four particular elements of importance to her topic.

(i) Most of the members of the Commission considered it useful to have a general definition of "State Official". A great emphasis was put on the idea that the topic only takes into account immunities enjoyed by an individual, not by a legal person.

(ii) The Commission was of the view that the general concept of State Official must reflect the existence of a link between the State and the individual.

(iii) The definition of "State Official" must be distinguished from the concept of an act performed by the official. The subjective element (individual enjoying immunity) and substantive element (act covered by immunity) must be dealt with separately.

However, some members of the ILC were of the view that, for the purpose of immunity *ratione materiae*, the "act performed" constitutes the only element to be considered.

(iv) There was general agreement in the Commission that with regard to immunity *ratione materiae* it is not possible to identify the individuals enjoying immunity *eo nomine,* but rather by enumerating some criteria. The functional nature of immunity *ratione materiae* is reflected by the use of the phrase "State officials acting as such". The Commission considers that this reference is broad enough to determine case by case the capacity of an individual as a "State official". It is also suitable for including a former Head of State, a former Head of Government and a former foreign minister when they have acted in the capacity of State officials.

The Special Rapporteur envisages that the material and temporal approach of immunity *ratione materiae* will be the subject of her next report.

It is of considerable importance to read the work of the Commission on this topic against the framework of work outlined by the Special Rapporteur. The Special Rapporteur is convinced that the only practical way forward is to address clearly defined issues, one at the time. As a result, the Commission has now provisionally adopted a total of five draft articles. (Last year (2013) it adopted the articles on scope and immunity *ratione personae*).

The Commission requests States to provide information, on their domestic law and their practice, in particular judicial practice, with reference to:

(a) the meaning given to the phrases "official acts" and "acts performed in an official capacity" in the context of the immunity of State officials from foreign criminal jurisdiction; and
(b) any exceptions to immunity of State officials from foreign criminal jurisdiction.

The Special Rapporteur would like to underline the value of such information since it will facilitate her work on the next report.

Finally, through me, the Special Rapporteur wishes to express her deep gratitude to the CADHI and the Secretariat of the Council of Europe for organising the seminar on Immunity of State officials last March. It was an important and valuable seminar.

7. Identification of customary international law – Special Rapporteur Sir Michael Wood – Chapter X

The second report of the Special Rapporteur contained, *inter alia*, eleven draft conclusions, following an analysis of: the scope and outcome of the topic, the basic approach, as well as the two constituent elements of rules of customary international law, namely "a general practice" and "accepted as law". The eleven draft conclusions were referred to the Drafting Committee, which adopted eight draft conclusions provisionally. There was no time to prepare draft commentaries. The plenary will only act on the draft conclusions in 2015 when the commentaries are available, together with such further conclusions and amendments as may be adopted by the Drafting Committee. It is hoped that a complete 'first reading' set of draft conclusions will be ready in 2015.

For a full overview of the discussions in the Drafting Committee, a close reading of report of the Drafting Committee is recommended. This contains and explains and the eight draft conclusions provisionally adopted by the Drafting Committee. The report is available on the Commission website.

The Special Rapporteur would welcome comments on the general approach to the topic, as well as on the draft conclusions annexed to the report of the Drafting Committee. The Commission has also repeated its request for information from States on their practice in identifying rules of customary international law, and included a new request for information on their digests of state practice.

8. Protection of the environment in relation to armed conflict – Special Rapporteur Marie Jacobsson – Chapter XI

Although it is very tempting to speak at length on this topic, I will refrain from doing so and give it as much - or as little – space as any other topic has been given.

This year I presented a preliminary report which, among other things, contained an overview of views expressed by delegates in the Sixth Committee. I would like to mention that more than 30 States spoke on my topic. My work benefited greatly from those interventions. The purpose of the report was to seek the views of colleagues in the ILC on peacetime obligations, particularly environmental and human rights law obligations before proceeding to the second report and the development of guidelines, conclusions or recommendations. The report contained information on practice of States and international organisations. Furthermore it addressed scope and methodology, use of terms, environmental principles, and issues relating to human and indigenous rights. The debate in the plenary addressed all these aspects.

My report contained two tentative draft definitions of the terms "armed conflict" and "environment". I proposed them to facilitate discussion, but did not want them to be referred to the Drafting Committee at the present session. This is because I am not entirely convinced that these two terms need to be defined in this context. However, it was necessary to present a proposal as a basis for our discussion. I would very much welcome States' views on the value of including definitions of these two terms.

The Commission decided to repeat its requests to state concerning relevant legislation whether, in their practice, international or domestic environmental law has been interpreted as applicable in relation to international or non-international armed conflict. The Commission would also like information from States as to whether they have any instruments aimed at protecting the environment in relation to armed conflict. Examples of such instruments include but are not limited to: national legislation and regulations; military manuals, standard operating procedures, Rules of Engagement or Status of Forces Agreements applicable during international operations; and environmental management policies related to defence-related activities. The reason is that, as a Special Rapporteur, I have found that there is considerable practice in this

respect – not necessarily “State practice” in the proper sense of the word, but rather “best practices”.

The next report will focus on the law applicable during both international and non-international armed conflicts and will contain an analysis of existing rules of armed conflict relevant to the topic, as well as their relationship to peacetime obligations. The report will also include proposals for guidelines, conclusions or recommendations on general principles, preventive measures and examples of rules of international law that are candidates for continued application during armed conflict.

9. Provisional application of treaties – Special Rapporteur Juan Manuel Gómez-Robledo – Chapter XII

The Special Rapporteur presented his second report in which he sought to provide a substantive analysis of the legal effects of the provisional application of treaties. The debate revealed broad agreement that the basic premise underlying the topic was that, subject to the specificities of the treaty in question, the rights and obligations of a State which had decided to provisionally apply the treaty, or parts thereof, were the same as if the treaty were in force for that State.

The Special Rapporteur will most likely propose draft guidelines or conclusions for the consideration of the Commission next year.

The Commission reiterates its request to States to provide information on their practice concerning the provisional application of treaties, including domestic legislation pertaining thereto, with examples, in particular in relation to:
(a) the decision to provisionally apply a treaty;
(b) the termination of such provisional application; and
(c) the legal effects of provisional application.

10. The Most-Favoured Nation clause (Study Group) – Chapter XIII

The work on the MFN takes place in a Study Group and you will therefore find limited information on its work on the website. This year, the Study Group began it consideration of the draft final report. The Study Group envisaged a revised draft final report to be presented for consideration at the sixty-seventh session of the Commission in 2015, taking into account comments made and amendments proposed by individual members of the Study Group during the present session.

The aim is to present a report that would be of practical use for practitioners and policy-makers, and offer some guidance on the possible interpretations of the MFN Clause, in particular by investment tribunals, depending on the exact wording of the clauses.

11. Crime against humanity – Special Rapporteur Sean Murphy

This year the Commission decided to place the topic of “crimes against humanity” on its work programme and to appoint Mr Sean Murphy as Special Rapporteur.

This autumn in the Sixth Committee, Governments may wish to indicate whether they support this topic and, if so, whether there are particular aspects that they believe the ILC should pursue, given that the project is at a very early stage. As noted in the original proposal for the topic (annexed to the Commission’s Report last year), there exist global treaties for serious war crimes and genocide that require States to prevent and punish such conduct, and to cooperate among themselves toward those ends. Yet we have no such treaty for crimes against humanity, even though these crimes appear to be far more prevalent. Moreover, treaties focused on

prevention, punishment, and inter-State cooperation exist for many far less egregious offenses, such as corruption, bribery, or organised crime.

As such, the Commission believes that a global convention on crimes against humanity is a key-missing piece in the current framework of international law. Such a convention could help to stigmatise such egregious conduct, could draw further attention to the need for its prevention and punishment, and could help to harmonise national laws relating to such conduct, thereby opening the door to more meaningful inter-State cooperation on the investigation, prosecution and extradition for such crimes. In building a network of cooperation, as has been done with respect to other offences, sanctuary would be denied to offenders, and thereby – it is hoped – help to deter such conduct *ab initio*. I wish to stress that the Special Rapporteur and the Commission as a whole are committed to avoiding any possible conflict with the Rome Statute, and instead view this project as a means of promoting the system of complementarity upon which the ICC is built.

The Special Rapporteur intends to present his first report at our next session (2015).

12. Possible new topics

The Commission decided to include a new topic in its long-term programme of work, namely *Jus cogens*. The syllabus of that topic is written by Mr Dire Tladi and is found in the Annex to the Commission's Report.

III. SOME OTHER REMARKS

Rule of Law - Chapter XIV

I will not prolong my intervention, but would just like to highlight that since 2008 the Commission has responded annually to the General Assembly's invitation to comment, in its report to the General Assembly, on its current role in **promoting the rule of law.** The Commission recalls that the rule of law constitutes the essence of the Commission and that the Commission has in mind the Rule of Law in all its work. The Commission's response is found in the last chapter of its annual report.

International Law Seminar

This year the International Law seminar held its 50th session and the Commission therefore held a special meeting to commemorate this anniversary. The theme was "International law as a profession".

It is worth noting that since 1965, the year of the Seminar inception, 1139 participants representing 171 nationalities have taken part in the Seminar, and 699 participants have received fellowships.

The Commission attaches great importance to the Seminar. As you know, the Seminar takes place on an annual basis and aims to enable postgraduate students or young university teachers, as well as young lawyers working in the international law field, including those in government service, to widen their knowledge of both the work of the International Law Commission and of the status of codification and progressive development of international law. It also provides an opportunity for lawyers from different legal systems and cultures to exchange views regarding items on the Commission's agenda and on other international law matters.

As Members of the Commission have said before me: worldwide participation depends on the active efforts by you, the Legal Advisers, to persuade your Ministries to find the very modest sums needed for a scholarship. That would be a very cost-effective contribution to the rule of

law at international level. For this year's Seminar, contributions were made by Argentina, Austria, the Czech Republic, Finland, India, Ireland, Mexico, Sweden, Switzerland and the United Kingdom. The contributions assisted participants from developing countries to attend the Seminar.

This concludes my presentation, and I would like *to thank you for your attention.*

Additional information on how to find the Statements of the Chairman of the Drafting Committee on the ILC website:

1. Go to the website: http://www.un.org/law/ilc/
2. Click on "Sessions" (found under the heading).
3. Select Session "2014".
4. Click on "DAILY BULLETIN" (right column).
5. Scroll down until you find documents under the heading "Statement of the Chairman of the Drafting Committee". (The first document is found on 30 May 2014.)