

Strasbourg, 20 March 2015

CAHDI (2015) 7

COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

List of items discussed and decisions taken Abridged report

49th meeting
Strasbourg, 19-20 March 2015

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

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

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

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

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 49th meeting in Strasbourg (France) on 19-20 March 2015 with Mr Paul Rietjens (Belgium) in the Chair.
2. The CAHDI adopted its agenda as set out in **Appendix I** to the present report.
3. The CAHDI adopted the report of its 48th meeting (The Hague, Netherlands, 18-19 September 2014) and authorised the Secretariat to publish it on the CAHDI's website.
4. The CAHDI took note of the developments within the Council of Europe since the last meeting of the Committee. In particular, the CAHDI took note of the *"Immediate Action by the Council of Europe to combat extremism and radicalisation leading to terrorism"* (document SG/Inf(2015)4 rev) presented by the Secretary General of the Council of Europe and endorsed by the Committee of Ministers. The CAHDI furthermore took note of the preparation of a *Declaration of the Committee of Ministers on the Threat of Terrorism and Radicalisation in Europe* and the preparation of an additional Protocol to the *Council of Europe Convention on the Prevention of Terrorism* (CETS No. 196) on the so-called "foreign terrorist fighters". In addition, the CAHDI took note of the latest developments with regard to the situation in Ukraine and in particular the launching of the Action Plan for Ukraine 2015-2017. It finally took note of the latest accessions of non-member States to Council of Europe conventions, the adoption of *Resolution CM/Res(2015)1 concerning financial arrangements for the participation of non-member States in Council of Europe conventions* as well as the signature of an Arrangement with the Central Commission for the Navigation of the Rhine allowing the Administrative Tribunal of the Council of Europe to examine the related disputes between this organisation and its staff members.
5. The CAHDI took note of the **decisions of the Committee of Ministers relevant to its work** and in particular the decision of 11-12 February 2015 communicating to the CAHDI *Recommendation 2060 (2015) of the Parliamentary Assembly of the Council of Europe – "The implementation of the Memorandum of Understanding between the Council of Europe and the European Union"* for information and possible comments by 23 March 2015.

In reply to this decision, the CAHDI adopted its opinion on the abovementioned recommendation as set out in **Appendix II** to the present report. In this opinion, the CAHDI stressed from the outset that the *Memorandum of Understanding* concluded in 2007 between the Council of Europe and the European Union (hereinafter the "EU") remained the relevant applicable framework for cooperation between both organisations. With regard to the accession of the EU to Council of Europe conventions, the CAHDI noted that the EU was already party to ten Council of Europe conventions and that it had signed but not yet ratified four other conventions. Furthermore, the EU could become party to twenty three more conventions and could be invited to accede to twelve other conventions after their entry into force. To facilitate further accessions, the CAHDI reiterated that it stood ready to assist the Committee of Ministers with respect to the examination of legal issues raised by the participation of the EU in Council of Europe conventions such as those identified in the *Report of the Secretary General on the review of Council of Europe conventions* (adaptation of final and interpretation clauses, modalities of EU participation in follow-up mechanisms, financial participation). With regard more specifically to the accession of the EU to the European Convention on Human Rights, the CAHDI encouraged that the negotiations between member States and EU institutions continue following the Opinion 2/13 of the European Union Court of Justice.

6. a. With regard to the topic of “**Immunities of States and international organisations**”, the CAHDI held an exchange of views on the issue of the “Settlement of disputes of a private character to which an international organisation is a party”, and in particular on the questions contained in the document presented by the delegation of the Netherlands at the 47th meeting of the CAHDI (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 CAHDI took note of the written comments submitted by Andorra, Armenia, Denmark, Germany, Mexico, Slovenia, Switzerland and United Kingdom to the questions contained in the document and invited other delegations to also reply to these questions in written.

b. The CAHDI furthermore addressed the issue of the “Immunity of State owned cultural property on loan” and examined in this regard the replies submitted by 13 delegations (Andorra, Austria, Armenia, Belgium, Cyprus, Finland, Germany, Greece, Ireland, Latvia, Mexico, the United Kingdom and the United States of America) to the questionnaire prepared on this topic.

On this issue, the CAHDI furthermore encouraged delegations which have not yet done so to consider signing the *Declaration on Jurisdictional Immunities of States Owned Cultural Property* which to date (20 March 2015) had been signed by 6 States (Austria, Czech Republic, Georgia, Latvia, Romania and Slovakia). This declaration, presented by the delegations of the Czech Republic and Austria and supported by the delegation of the Netherlands, had been drafted 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* in order to guarantee the immunity of State cultural property on loan. It had been elaborated 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. The CAHDI noted that the Secretariat of the CAHDI performed the functions of “depository” of this Declaration and that the text of this Declaration was available on the website of the CAHDI.

c. The CAHDI furthermore addressed the issue of the “Immunities of special missions” and examined in this regard the replies submitted by 20 delegations (Albania, Andorra, Armenia, Austria, Belarus, Czech Republic, Denmark, Estonia, Finland, Georgia, Germany, Ireland, Italy, Latvia, Mexico, Norway, Serbia, Switzerland, the United Kingdom and the United States of America) to the questionnaire prepared on this topic. The CAHDI agreed to prepare an analysis containing the main trends of these replies.

d. The CAHDI also addressed the issue of “Service of process on a foreign State” and examined in this regard the replies submitted by 18 delegations (Albania, Austria, Belgium, Cyprus, Germany, Greece, Finland, Ireland, Israel, Italy, Japan, Latvia, Norway, Portugal, Slovenia, Switzerland, United Kingdom and the United States of America) to the questionnaire prepared on this topic. Taking into account the importance of this issue, the CAHDI agreed to keep it on its agenda and to prepare an analysis of these replies which will be complemented by further information.

e. The CAHDI took stock of the state of ratifications of the *United Nations Convention on Jurisdictional Immunities of States and Their Property* by the States represented within the CAHDI. It welcomed the ratification of the Convention by the Czech Republic on 12 March 2015.

f. With regard to its *Database on “State practice regarding State Immunities”*, the CAHDI noted that to date (20 March 2015) 35 States (Andorra, Armenia, Austria, Belgium, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Mexico, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom) and one organisation (European Union) had submitted a contribution to this database. It also welcomed the updated contribution of the United Kingdom to this database.

The CAHDI furthermore considered national practices and case-law regarding immunities of States and international organisations on the basis of information provided by the delegations and invited delegations to submit or update their contributions to the relevant CAHDI database.

g. The CAHDI pursued its exchange of views on the *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 noted that to date (20 March 2015), 27 delegations (Albania, Austria, Belgium, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Japan, Latvia, Luxembourg, Montenegro, Norway, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, United States of America) had replied to the questionnaire on this matter (document CAHDI (2014) 22). The CAHDI invited delegations which had not yet done so to submit or update their replies to the questionnaire.

7. At its 47th meeting (Strasbourg, 20-21 March 2014), the CAHDI adopted a revised questionnaire on the “**Organisation and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs**” containing additional questions on gender equality following the recommendations contained in the Council of Europe Gender Equality Strategy 2014-2017.

The CAHDI examined the replies submitted by 24 delegations (Albania, Andorra, Armenia, Austria, Belarus, Bosnia and Herzegovina, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, Georgia, Germany, Greece, Latvia, Luxembourg, Mexico, Montenegro, Slovenia, Switzerland, the United Kingdom, the United States of America and NATO) to this revised questionnaire. The CAHDI invited delegations to send to the Secretariat any further information in order to complete their replies.

8. With regard to the issue of “**National implementation measures of UN sanctions and respect for human rights**”, the CAHDI took note of the information regarding cases that have been submitted to national tribunals by persons or entities included in or removed from the lists established by the UN Security Council Sanctions Committee (document CAHDI (2014) 21).

It also took note that the *High Level Review of United Nations Sanctions* process, 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*” conducted from June to October 2014 had finalised. It further took note of the final reports prepared by the three working groups, namely 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” and Working Group 3 chaired by Greece on “UN sanctions, regional organizations, and emerging challenges”.

9. 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 Opinion 2/13 issued by the Court of Justice of the European Union on 18 December 2014 on the following question: “Is the draft agreement providing for the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms compatible with the Treaties of the European Union?”.

10. The CAHDI considered **cases brought before the European Court of Human Rights involving issues of public international law** and invited delegations to keep the CAHDI informed of any judgments or decisions, pending cases or relevant forthcoming events.

11. In the context of its consideration of issues relating to the **peaceful settlement of disputes**, the CAHDI considered the latest version of the document containing information on the International Court of Justice’s (ICJ) compulsory jurisdiction. It noted that since its previous

meeting, Italy had recognised the compulsory jurisdiction of the ICJ and that Greece and the United Kingdom had amended their declarations.

12. In the framework of its activity as the **European Observatory of Reservations to International Treaties**, the CAHDI considered a list of 19 outstanding reservations and declarations to international treaties.

In addition, the CAHDI took note of the reactions to reservations and declarations to international treaties previously examined by the CAHDI and for which the deadline for objection had already expired. It invited delegations to submit to the Secretariat any relevant information for the update of the summary table as set out in document CAHDI (2015) 4 Addendum prov.

13. Following the decision of the Ministers' Deputies of 10 April 2013 on the **review of Council of Europe conventions** adopted in the light of the Secretary General's report and in pursuance of the CAHDI work plan for the review of conventions for which it has been given responsibility, the CAHDI held an exchange of views on the *European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes* (ETS No. 82).

14. The CAHDI welcomed the presentation of the **special guest** Ms Kimberly Prost, Ombudsperson of the United Nations Security Council's Al-Qaida Sanctions Committee and held an exchange of views with Ms Prost on the successes, the setbacks and the challenges of the Ombudsperson four years after her appointment.

15. With regard to **consideration of current issues of international humanitarian law**, the CAHDI took note of information provided by several delegations.

16. The CAHDI took note of the recent **developments concerning the International Criminal Court (ICC) and other international criminal tribunals**.

17. With regard to the examination of **topical issues of international law**, the CAHDI took note of the Report of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe on "Drones and Targeted Killings: the need to uphold human rights and international law".

18. The CAHDI decided to hold its **50th meeting** in Strasbourg on 24-25 September 2015. The CAHDI instructed the Secretariat, in liaison with the Chair of the CAHDI, to prepare in due course the provisional agenda of this meeting.

19. Following the proposal of one delegation, the CAHDI discussed the possibility to revise and update the "Amended Model Plan for the Classification of Documents concerning State Practice in the Field of Public International Law" adopted by the Committee of Ministers in Recommendation No. R (97) 11 of 12 June 1997. The CAHDI agreed to examine this proposal at its next meeting on the basis of a working document outlining the reasons for such revision and the advantages of an updated "Model Plan".

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

1. Opening of the meeting by the Chair, Mr Paul Rietjens
2. Adoption of the agenda
3. Adoption of the report of the 48th 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. Exchange of views with Ms Kimberly Prost, Ombudsperson of the United Nations Security Council's Al-Qaida Sanctions Committee
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. Date and agenda of the 50th meeting of the CAHDI
19. Other business

APPENDIX II

OPINION OF THE CAHDI

ON RECOMMENDATION 2060 (2015) OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE – “THE IMPLEMENTATION OF THE MEMORANDUM OF UNDERSTANDING BETWEEN THE COUNCIL OF EUROPE AND THE EUROPEAN UNION”

1. On 11-12 February 2015, the Ministers' Deputies communicated Recommendation 2060 (2015) of the Parliamentary Assembly of the Council of Europe (see Appendix I) to the Committee of Legal Advisers on Public International Law (CAHDI) for information and possible comments by 23 March 2015. The Ministers' Deputies also communicated this Recommendation to the Steering Committee for Human Rights (CDDH).

2. The CAHDI examined the abovementioned recommendation at its 49th meeting (Strasbourg, 19-20 March 2015) and made the following comments which concerned aspects of the recommendation which were of particular relevance to the terms of reference of the CAHDI.

3. From the outset, the CAHDI recalled its opinion on *Recommendation 2027 (2013) of the Parliamentary Assembly of the Council of Europe – “European Union and Council of Europe human rights agendas: synergies not duplication!”* (see Appendix II) adopted in November 2013 through a written consultation. This opinion of 2013 contained comments which were of relevance for the present Recommendation.

4. The CAHDI reiterated that the Memorandum of Understanding concluded in 2007 between the Council of Europe and the European Union (hereinafter the “EU”) remained the relevant applicable framework for the cooperation between both organisations and notably with regard to the protection and promotion of human rights. It recalled that the EU recognised in this Memorandum the role of the Council of Europe as the Europe-wide reference source of human rights, both with respect to the relevant norms developed by the Council of Europe as to the decisions and conclusions of its monitoring structures which the EU undertook to take into account where relevant.

5. Pursuant to this Memorandum, the Council of Europe and the EU had agreed that “*legal cooperation should be further developed [...] with a view to ensuring coherence between Community and European Union law and the standards of Council of Europe conventions*”¹. To this end, the CAHDI noted that regular, institutionalised dialogue with the EU institutions was already well-established in the practice of the Council of Europe and aimed at avoiding unnecessary duplication of norms in the area of shared values: human rights, democracy and the rule of law. This cooperation took the form of both high-level political contacts and joint activities. The CAHDI welcomed notably the long cooperation experience between both organisations in the area of criminal matters through the regular meetings between the EU's Troika of the Article 36 Committee (CATS) and the Council of Europe. The CAHDI further noted that cooperation was subject to regular review by the Committee of Ministers, in particular on the occasion of the annual Ministerial Sessions. The latest Session held in Vienna on 5-6 May 2014² highlighted that “*since the signing of the Memorandum of Understanding, there has been an unprecedented qualitative change in mutual relations, which have been transformed into a true, strategic partnership in the areas of political dialogue, legal cooperation and concrete cooperation activities, as illustrated by the continuous high-level consultations with EU representatives*”³. Mention was made in particular for illustrative purposes to the adoption by the Foreign Affairs Council of the EU of the *EU Priorities for cooperation with the Council of Europe* which included “political dialogue” as a main feature of the cooperation, together with its legal and assistance dimensions.

¹ Paragraph 24 of the Memorandum of Understanding.

² 124th Session of the Committee of Ministers (Vienna, 5-6 May 2014).

³ *Summary Report on the Cooperation with the European Union*, document CM(2014)38 of 30 April 2014.

6. Regarding more specifically the active cooperation with the EU in the implementation of the new “Framework to strengthen the rule of law” in EU member States, the CAHDI recalled that according to the Statute of the Council of Europe, the principle of the rule of law formed the basis of all genuine democracy and had therefore been one of the three pillars of the Council of Europe since its creation. This organisation therefore had a long established experience in dealing with rule of law issues and could consequently provide valuable input to the EU in implementing this new framework. The CAHDI recommended that any initiative pertaining to the area of cooperation between the Council of Europe and the EU took into account the principles for cooperation under the Memorandum of Understanding of 2007, in particular the concern to avoid duplication and promote complementarity in view of ensuring their added value.

7. With regard to the accession of the EU to Council of Europe conventions, the CAHDI noted that the EU was already party to ten Council of Europe conventions⁴, that it had signed but not yet ratified four other conventions, that it could become party to twenty three more conventions and that it could be invited to accede to twelve other conventions after their entry into force. The CAHDI therefore welcomed the existing active participation of the EU to Council of Europe conventions and noted with satisfaction the encouraging prospects for future participation. To facilitate these future accessions, the CAHDI agreed however with the analysis of the Secretary General in his *Report on the review of Council of Europe conventions*⁵ according to which “*this accession, alongside with or instead of its member States, may, in fact, have a number of implications on the functioning of the conventions concerned [...] and the co-ordination of the action by the EU and its member States when taking positions and/or expressing a vote*”⁶. In this regard, the CAHDI therefore reiterated that it stood ready to assist the Committee of Ministers with respect to the examination of legal issues raised by the participation of the EU in Council of Europe conventions such as those identified in paragraph 77 of the Secretary General’s abovementioned report (adaptation of final and interpretation clauses, modalities of EU participation in follow-up mechanisms, financial participation).

8. To the extent that the accession of the EU to the European Convention on Human Rights (hereinafter the “ECHR”) became a legal obligation under the Treaty of Lisbon which entered into force on 1 December 2009, the CAHDI could only reaffirm the importance of this accession and encourage, following the Opinion 2/13 of the European Union Court of Justice, the finalisation of the process at the earliest opportunity. It recalled that it had closely followed the negotiations aimed at this accession through the participation of an observer of the CAHDI to the meetings of the CDDH and the informal working group 47+1 in charge of finalising the draft agreement on the accession of the EU to the ECHR as well as its draft explanatory report. The CAHDI also underlined that the Memorandum of Understanding, signed by both organisations, stipulated that “*early accession of the [EU] to the [ECHR] would contribute greatly to coherence in the field of human rights in Europe*”⁷ and stood therefore ready to provide its expertise in the perspective of creating a unique European legal area concerning the protection of fundamental rights.

⁴ European Agreement on the Exchange of Therapeutic Substances of Human Origin (ETS No. 026) as completed by its Additional Protocol (ETS No. 109), Agreement on the Temporary Importation, Free of Duty, of Medical, Surgical and Laboratory Equipment for Use on Free Loan in Hospitals and other Medical Institutions for Purposes of Diagnosis or Treatment (ETS No. 033) as completed by its Additional Protocol (ETS No. 110), European Agreement on the Exchange of Blood-grouping Reagents (ETS No. 039) as completed by its Additional Protocol (ETS No. 111), Convention on the Elaboration of a European Pharmacopoeia (ETS No. 050) as amended by its Protocol (ETS No. 134), European Agreement on the Exchange of Tissue-typing Reagents (ETS No. 84) as completed by its Additional Protocol (ETS No. 89), European Convention for the Protection of Animals kept for Farming Purposes (ETS No. 087), Convention on the Conservation of European Wildlife and Natural Habitats (ETS No. 104), European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes (ETS No. 123), Protocol to ETS 123 on the Protection of Animals used for Experimental and Scientific Purposes (ETS No. 170), Convention on information and legal co-operation concerning « information Society Services » (ETS No. 180).

⁵ *Report by the Secretary General on the review of Council of Europe conventions*, 16 May 2012, document SG/Inf(2012)12.

⁶ Paragraph 74 of *Report by the Secretary General on the review of Council of Europe conventions*

⁷ Paragraph 20 of the Memorandum of Understanding.

9. Regarding the Council of Europe monitoring mechanisms and bodies, the CAHDI noted that over almost sixty five years, the Council of Europe had developed a considerable *acquis* encompassing not only standards on human rights, rule of law and democracy but also active European monitoring of these standards. These mechanisms are either treaty-based monitoring mechanisms (independent monitoring mechanisms or conventional committees) or monitoring mechanisms carried out directly by Council of Europe bodies such as the Committee of Ministers. In this regard, the CAHDI welcomed the continuous efforts of the Committee of Ministers to guarantee the long term efficiency of the European Convention on Human Rights system notably through its periodic supervision of the execution of judgments, which had become more effective and transparent since the “Interlaken – Izmir – Brighton process”. The CAHDI furthermore indicated that it looked forward to the High-level Conference on the “Implementation of the European Convention on Human Rights, our shared responsibility” (Brussels, 26-27 March 2015). The CAHDI also took note of the recent report of the Secretary General of the Council of Europe on the “State of democracy, human rights and the rule of law in Europe” issued in 2014 which highlighted a number of challenges identified by the Council of Europe monitoring mechanisms. It underlined in particular the essential function of these mechanisms aimed at helping member States to identify and remedy shortcomings in their compliance with Council of Europe standards and proposed solutions to improve and enhance them.

10. Regarding more specifically the participation of the EU in these monitoring mechanisms, the CAHDI noted that pending completion of the accession process of the EU to the ECHR, contacts had intensified with a view to furthering synergies between the EU and Council of Europe monitoring and advisory bodies, and between Council of Europe standards and EU legislation. As highlighted by the Committee of Ministers at its 124th Session in May 2014, synergies between both organisations had notably been established in the framework of the negotiations for the modernisation of the *Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (ETS No. 108). The EU participated in a bid to ensure a high level of data protection and consistency between EU data protection rules and the rules of the Council of Europe amended instrument, with a view to acceding to such a modernised instrument. Furthermore, the CAHDI also welcomed the good cooperation with regard to the collection and analysis of data on the functioning of judicial systems in the EU carried out by the Secretariat of the European Commission for the Efficiency of Justice (CEPEJ) as well as the ongoing discussions on the possible accession of the EU to the *European Social Charter* (revised) and the full participation in the Group of States against corruption (GRECO).