CAHDI
Committee of Legal Advisers on Public International Law

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Strasbourg, 3 March 2016

CAHDI (2015) 23

COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

(CAHDI)

Meeting report

50th meeting
Strasbourg, 24-25 September 2015

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

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TABLE OF CONTENTS

I. INTRODUCTION 3

1. Opening of the meeting by the Chair, Mr Paul Rietjens 3
2. Adoption of the agenda 3
3. Adoption of the report of the 49th meeting 3
4. Information provided by the Secretariat of the CAHDI 3

II. ONGOING ACTIVITIES OF THE CAHDI 5

5. Committee of Ministers' decisions and activities of relevance to the CAHDI's activities, including requests for CAHDI's opinion 5
6. Immunities of States and international organisations 7
7. Organisation and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs 13
8. National implementation measures of UN sanctions and respect for human rights 13
9. Cases before the European Court of Human Rights involving issues of public international law 14
10. Peaceful settlement of disputes 17
11. Law and practice relating to reservations and interpretative declarations concerning international treaties: European Observatory of Reservations to International Treaties 17
12. Review of Council of Europe Conventions 19

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW 20

13. The work of the International Law Commission (ILC) and of the Sixth Committee 20
14. Consideration of current issues of international humanitarian law 24
15. Developments concerning the International Criminal Court (ICC) and other international tribunals 25
16. Topical issues of international law 28

IV. OTHER 29

17. Election of the Chair and Vice-Chair 29
18. Date and agenda of the 51st meeting of the CAHDI 29
19. Other business 29

APPENDICES 30

APPENDIX I – List of participants 31

APPENDIX II – Agenda 40

APPENDIX III – Opinion of the CAHDI on Recommendation 2069 (2015) of the Parliamentary Assembly of the Council of Europe – "Drones and targeted killings: the need to uphold human rights and international law" 42

APPENDIX IV – Statement of Mr Narinder Singh, Chairperson of the International Law Commission 49

I. INTRODUCTION

1. Opening of the meeting by the Chair, Mr Paul Rietjens

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 50th meeting in Strasbourg (France) on 24-25 September 2015 with Mr Paul Rietjens (Belgium) in the Chair. The list of participants is set out in **Appendix I** to this report. The Chair of the CAHDI underlined the commemorative character of this meeting and recalled the success of the Conference organised the previous day to mark the 50th anniversary of the CAHDI meetings. He also underlined the importance of the contributions made during the Conference for the future work of the CAHDI.

2. Adoption of the agenda

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

3. Adoption of the report of the 49th meeting

3. The CAHDI adopted the report of its 49th meeting (document CAHDI (2015) 8 prov 2) and instructed the Secretariat to publish it on the Committee's website.

4. Information provided by the Secretariat of the CAHDI

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

4. Mr Jörg Polakiewicz informed the CAHDI of the developments within the Council of Europe since the last meeting of the Committee.

5. He brought to the attention of the CAHDI that on 19 May 2015 the Secretary General of the Council of Europe presented his second report on *State of Democracy, Human Rights and the Rule of Law in Europe: A shared responsibility for democratic security in Europe*[1] to the Ministerial Session in Brussels. The report assesses the extent to which Council of Europe member States are able to make the five pillars of "democratic security" a reality: efficient and independent judiciary; freedom of expression; freedom of assembly and association; functioning of democratic institutions; inclusive society; and democratic citizenship. In the report each pillar is broken down into key parameters drawn from Council of Europe legal standards and norms and reflecting the findings and recommendations of relevant Council of Europe institutions and bodies. An important innovation compared to the first report is the development of parameters accompanied by detailed criteria to measure compliance.

6. The CAHDI was also informed that the Parliamentary Assembly of the Council of Europe re-elected on 23 June 2015 Ms Gabriella Battaini-Dragoni (Italy) as Deputy Secretary General of the Council of Europe (by an absolute majority of the votes cast) for a five-year term of office starting on 1 September 2015.

7. Furthermore the Director referred the CAHDI to the Turkish government decision, earlier this year, to support the Council of Europe's capacities and resources by offering to become a major contributor to the Organisation's budgets as from 1 January 2016. Therefore the number of seats of the Turkish delegation in the Parliamentary Assembly was increased from 12 to 18 through an amendment to Article 26 of the Statute of the Council of Europe. The amendment came into force on 16 June 2015 following the required approvals by the Committee of Ministers (CM/Res(2015)7) and the Parliamentary Assembly (Recommendation 2072 (2015)).

[1] The Report of the Secretary General is available at the following link.

8. In relation to the *European Convention on Human Rights* (ECHR) and its Protocols, the CAHDI took note of a series of decisions adopted by the Committee of Ministers during the Ministerial Session on 19 May 2015 in Brussels, in order to secure the long-term effectiveness of supervisory mechanism of the ECHR, in particular the endorsement by the Committee of Ministers of the so-called "Brussels Declaration" adopted on the occasion of the High-Level Conference on *"The implementation of the European Convention on Human Rights, our shared responsibility"* (Brussels, 26-27 March 2015).

9. With regard to the situation in Ukraine, the Director informed the CAHDI that:

- on 9 June 2015, Ukraine notified the Secretary General of the declaration made under Article 15 of the ECHR, according to which, given the public emergency threatening the life of the nation, the Ukrainian authorities took measures introducing special restrictions to the rights guaranteed by Articles 5 (right to liberty and security), 6 (right to a fair trial), 8 (right to respect for private and family life), and 13 (right to an effective remedy) of the ECHR and Article 2 (freedom of movement) of Protocol No.4 to the ECHR.

- on 31 March 2015, a report of the International Advisory Panel on Ukraine had been published, detailing the findings of the Panel's review of the investigations by the Ukrainian authorities into the violent incidents during the Maidan demonstrations. The Panel found that, in many respects, the investigations had failed to satisfy the requirements of the ECHR. The Panel's mandate had been extended to the events in Odessa. The Panel is expected to publish its report by the end of October 2015.

10. As regards news from the Treaty Office, the CAHDI took note that the new Treaty Office website would be launched in the course of autumn 2015. New functionalities would be added and the existing ones would be improved. Concerning the specific issue of the participation of non-member States in Council of Europe conventions, delegations were informed of the latest accessions[2] of non-member States to Council of Europe conventions.

11. The Director informed the CAHDI that on 15-16 September 2015, he participated in a specialised conference on Council of Europe legal standards and conventional framework in Minsk (Belarus), which was attended by more than 100 participants from various ministries, the Parliament, presidential administration as well as academia and civil society. The conference aimed at discussing a further increase of Belarus' participation in Council of Europe treaties.

12. The attention of the CAHDI was also drawn to a number of instruments adopted by the Committee of Ministers during the Ministerial Session on 19 May 2015 in Brussels regarding the Council of Europe action to combat terrorism, in particular the new *Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism* on the so-called "foreign terrorist fighters". It defines more precisely the offences set out in the *United Nations Security Council Resolution 2178 (2014) on "Threats to international peace and security caused by terrorist acts"* adopted by the Security Council on 24 September 2014 and commits parties to establish the required criminal offences under their domestic law. The Director highlighted the very speedy drafting of the Additional Protocol. The Protocol will be opened for signature in Riga (Latvia) on 22 October 2015. The EU Council adopted decisions authorising the EU to sign both the

[2] Since March 2015, the following non-member States have acceded to the following conventions:
- the *Convention on Mutual Administrative Assistance in Tax Matters* (CETS No. 127), as amended by the 2010 Protocol (CETS No. 208): Cameroon (ratified 30 June), El Salvador (signed 01 June), Kazakhstan (ratified 8 April), Mauritius (ratified 31 August), Nigeria (ratified 29 May) and Seychelles (ratified 25 June).
- the *Convention on Cybercrime* (ETS No. 185): Sri Lanka (ratified 29 May) and Canada (ratified 8 July).
- the *European Convention on the Legal Protection of Services based on, or consisting of, Conditional Access* (ETS No. 178): European Union (10 September).
- the *Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health* (CETS No. 211): Guinea (ratified 24 September).

Convention and the Protocol, which is a further sign of the growing impact of the EU on Council of Europe treaty-making and standard setting procedures and practices.

13. In this regard, the Director informed the CAHDI that, following a proposal from one delegation during the exchange of views with the CAHDI Chair on 1 July 2015 and supported by many other delegations, the Chair of the Committee of Ministers asked the Legal Adviser of the Council of Europe to carry out an analysis of legal issues raised by the accession of the European Union (EU) to Council of Europe conventions. The analysis will address issues such as voting rights, EU-related treaty clauses, and financial contribution, some of which had already been mentioned in the *Report by the Secretary General on the review of Council of Europe conventions*. Matters purely internal to the EU will be omitted, but certain other aspects of EU law will be included insofar as they directly and immediately affect Council of Europe procedures.

14. In relation to the current migrants and refugees situation in Europe, the delegations were informed that:

- the Secretary General issued a guidance to the Council of Europe's 47 member States regarding "The protection of migrants and asylum-seekers: States' main legal obligations under the Council of Europe Conventions".

- on 15 September 2015, the Committee of Ministers held a thematic debate on this issue. As a result, the Committee of Ministers adopted a series of decisions on 23 September 2015. Certain intergovernmental and cooperation activities addressing various aspects of this major challenge can be expected. Furthermore, a proposal had been put forward to consider complementing the United Nations (UN) *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime* with a new regional convention. A feasibility study would be carried out by the European Committee for Crime Problems (CDPC). In addition, the Council of Europe Development Bank (CEB) had already launched a new grant facility – "Migrant and Refugee Fund" (MRF) – to finance transit and reception centres in affected countries.

15. Finally the Director thanked the governments of the Netherlands and Germany for their voluntary contributions to the CAHDI databases, which enabled the Secretariat to progress the work on their development. The CAHDI databases will be launched beginning 2016 and the Secretariat will present them to the CAHDI in due time.

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

16. The Chair presented a compilation of Committee of Ministers' decisions of relevance to the CAHDI's activities (documents CAHDI (2015) 11 and CAHDI (2015) 11 Addendum). In particular, the CAHDI took note that the Committee of Ministers had examined the abridged report of its 49th meeting (Strasbourg, 19-20 March 2015) on 27 May 2015 and that, within the framework of the Belgian Chairmanship of the Committee of Ministers, a High-level Conference on *"Implementation of the European Convention, our shared responsibility"* took place in Brussels on 26-27 March 2015. The CAHDI also took note of the main priorities of the current Bosnian and Herzegovinian Chairmanship of the Committee of Ministers, which took over from the Belgian Chairmanship on 19 May 2015.

17. With regard to the aforementioned compilation of decisions, one delegation made extensive comments on the decisions adopted by the Ministers' Deputies on 15 April 2015 at their 1225th meeting on the situation in Ukraine in light of the reports presented by the Secretary General and the Commissioner for Human Rights, which underlined that "peace in Europe is based on the

respect of international law and the values and standards of the Council of Europe" (cf. item 7.a. of document CAHDI (2015) 11). Another delegation replied to those comments.

18. Furthermore, the CAHDI examined its draft terms of reference of the CAHDI for 2016-2017 (document CAHDI (2015) 9), which will be adopted by the Committee of Ministers at their 1241st meeting (Budget/Programme) on 24-26 November 2015.

19. In addition, on 12-13 May 2015, the Ministers' Deputies communicated to the CAHDI *Recommendation 2069 (2015) of the Parliamentary Assembly of the Council of Europe – "Drones and targeted killings: the need to uphold human rights and international law"*, for information and possible comments. A preliminary draft opinion had been prepared by the Chair, in cooperation with the Secretariat, and sent to delegations for comments/observations prior to the meeting.

20. The Chair presented the draft opinion of the CAHDI (document CAHDI (2015) 10 prov) together with the comments by delegations received on this preliminary draft (document CAHDI (2015) 10 Addendum). Following an exchange of views, the CAHDI adopted its opinion which appears in **Appendix III** to the present report.

21. In the opinion, the CAHDI agreed to use the term "unmanned aerial vehicles" (UAVs) to refer to the so called "drones". The CAHDI further noted that a distinction had to be made between armed and unarmed UAVs and their respective use during armed conflict and outside an armed conflict. The CAHDI then noted that there was a broad agreement that armed UAVs themselves were not illegal weapons and the CAHDI emphasised that relevant rules of international law regulating the use of force and the conduct of hostilities as well as of international human rights law applied to the use of UAVs. Nevertheless, the CAHDI pointed out that different views had been expressed in the international community concerning the interpretation or application of these rules. The CAHDI examined some of these views from the perspective of public international law. It concluded that many legal issues raised by the increasing use of armed UAVs needed to be addressed. The CAHDI considered that the subsequent examination of these issues within the Council of Europe should take into account the work of the United Nations as well as of the International Committee of the Red Cross (ICRC). The CAHDI pointed out that it was willing to examine these issues in greater depth and keep the issue on its agenda, but it considered that the drafting of guidelines would not be the best way forward.

22. The Chair of the CAHDI informed the Committee of his exchange of views with the Ministers' Deputies held on 1st July 2015. The Chair firstly informed the Ministers' Deputies of the CAHDI's upcoming 50th Conference on *"The CAHDI contribution to the development of public international law: achievements and future challenges"*. He further used the opportunity to highlight the CAHDI's contribution to the work of the Council of Europe by citing the following examples: the CAHDI's opinion on the Memorandum of Understanding between the Council of Europe and the EU, its activities as the *European Observatory of Reservations to International Treaties*, its activities concerning the settlement of disputes of a private character to which an international organisation is a party and the *Declaration on Jurisdictional Immunities of State Owned Cultural Property*. The full statement of the Chair of the CAHDI is contained in document CAHDI (2015) Inf 5. The CAHDI welcomed the support to its work by the Ministers' Deputies as reported by the Chair.

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

23. The Chair presented the topic "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 also 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 injury or death and property loss or damage 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)[3] and case-law of the European Court of Human Rights[4] involving international organisations where their immunity from the civil jurisdiction of domestic courts had been granted. The Dutch document also contained the following five questions addressed to 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?

24. The Chair welcomed the written comments submitted by Albania, Andorra, Armenia, the Czech Republic, Denmark, Germany, Greece, Israel, Mexico, Slovenia, Switzerland and the United Kingdom to the questions contained in document CAHDI (2015) 20 prov 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.

25. Delegations reiterated their support for this initiative and agreed that the issues raised in the document merited further attention as they had been neglected since the setting-up of the current international organisations system.

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[3] In October 2013, lawyers for Haiti Cholera victims filed a class action lawsuit in the Southern District of New York against the UN. The judgment of the Southern District Court of New York handed down on 9 January 2015 concluded that the UN was immune from the plaintiffs' suit. An appeal has been lodged on 12 February 2015 before the United States Court of Appeals for the Second Circuit.

[4] *Eur. Court HR, Beer and Regan v. Germany, Judgment* of 18 February 1999, Application No. 28934/95; *Eur. Court HR, Waite and Kennedy v. Germany, Judgment* of 18 February 1999, Application No. 26083/94; *Eur. Court HR, Chapman v. Belgium, Judgment* of 5 March 2013, Application No. 39619/06; *Eur. Court HR, Stichting Mothers of Srebrenica and others v. the Netherlands, Judgment* of 11 June 2013, Application No. 65542/12.

26. Delegations also expressed their support for the proposals contained in the document submitted by the delegation of the Netherlands 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. In particular, the establishment of an ombudsperson who could investigate complaints from individuals arising from the conduct/action of an international organisation was viewed favourably by most delegations and appeared to be a conceivable solution. It was however underlined that the establishment of such new measures needed to obtain a large consensus from the member States of the international organisations as well as by the States participating directly in peace-keeping operations.

27. The delegation of the United States provided information on the "Haiti Cholera case" to which reference was made in the document provided by the delegation of the Netherlands. It underlined that the case was currently on appeal to the United States Court of Appeals for the Second Circuit and that the Court was expected to hear the oral arguments during autumn/winter 2015.

28. The delegation of Norway informed the Committee of a case concerning an employee of NATO claiming compensation for damages as a consequence of alleged discrimination and whistleblowing retaliation. The District Court dismissed the claim on the grounds that NATO enjoyed immunity. The Court referred in this regard to:

- national legislation and notably the *Norwegian Immunity Act* (1947) according to which an international organisation may be granted privileges and immunities irrespective of national legislation;
- the *Memorandum of Agreement* of 21 June 2006 between Norway and NATO according to which labour disputes should be resolved in accordance with NATO's internal regulations. The Court noted in this regard that the plaintiff had already brought a claim before the NATO Appeals Board;
- the *European Convention on Human Rights* (Article 6). The Court considered in this regard substantive international precedents regarding the immunity of international organisations and proceeded with the test of proportionality between the right of the employee to bring a claim and the need to uphold NATO's immunity.

Furthermore, the Court considered that domestic lawsuits could endanger the independence of an international organisation and that they could lead to different interpretations and consequently be an obstacle to international cooperation.

29. The CAHDI agreed to keep this issue on the agenda of its 51st meeting. Furthermore, the Chair called on delegations to send their comments in writing before the next meeting in order to have sufficient replies for deciphering the main trends on this issue.

ii. Immunity of State owned cultural property on loan

30. The Chair recalled that the topic "Immunity of State owned cultural property on loan" had been included in the agenda of the 45th meeting of the CAHDI at the initiative of the Czech Republic and Austria and supported by the Netherlands. This initiative aimed at elaborating 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 question. 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.

31. Delegations were informed that to date, the Declaration had been signed by the Ministers of Foreign Affairs of 13 States (Albania, Armenia, Austria, Belarus, Belgium, the Czech Republic, Estonia, France, Georgia, Latvia, the Netherlands, Romania and Slovakia). Furthermore, they were

reminded that the Secretariat of the CAHDI performed the functions of "depository" of this Declaration and that the text of the Declaration was available in English and French on the website of the CAHDI[5].

32. The CAHDI encouraged its members and observers which had not yet done so to sign the Declaration. In this respect, the Chair recalled that the signature of this Declaration has been done so far by the Ministers of Foreign Affairs during events/conferences mainly in the Czech Republic or in Austria. He underlined that as from now on, there would also be the possibility to sign the Declaration in capitals and to send it to the Secretariat of the CAHDI through diplomatic courier to their Permanent Representations to the Council of Europe in Strasbourg. In this regard, a number of delegations informed the Committee of the intention of their State to sign the Declaration.

33. 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.

34. In this regard, the CAHDI welcomed the replies submitted by 18 delegations (Albania, Andorra, Austria, Armenia, Belarus, Belgium, Cyprus, Finland, France, Germany, Greece, Ireland, Latvia, Mexico, the Netherlands, Romania, the United Kingdom and the United States of America) to this questionnaire and encouraged the delegations which had not yet done so, to submit their replies at their earliest convenience.

iii. Immunities of special missions

35. Delegations were reminded that the topic "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.

36. The CAHDI welcomed the replies submitted by 23 delegations (Albania, Andorra, Armenia, Austria, Belarus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Ireland, Italy, Latvia, Mexico, the Netherlands, Norway, Romania, Serbia, Switzerland, the United Kingdom and the United States of America) to this questionnaire.

37. Considering the topicality and the importance of this issue, the CAHDI agreed to prepare an analysis outlining the main trends arising from these replies which could ultimately become a publication similar to the previous CAHDI publications.

iv. Service of process on a foreign State

38. The Chair reminded delegations that the topic "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 in the case *Wallishauser v. Austria*[6]. At its 46th meeting (Strasbourg, 16-17 September 2013), the CAHDI adopted a questionnaire in order to collect relevant information on this matter.

39. The Chair informed the Committee that 24 replies had been submitted to this questionnaire (Albania, Austria, Belgium, Cyprus, the Czech Republic, Germany, Greece, Finland, France, Ireland, Israel, Italy, Japan, Latvia, Mexico, the Netherlands, Norway, Portugal, Romania, Serbia,

[5] The dedicated webpage is available at the following link.
[6] *Eur. Court HR, Wallishauser v. Austria, Judgment* of 17 July 2012, Application No. 156/04.

Slovenia, Switzerland, United Kingdom and the United States of America) which were contained in document CAHDI (2015) 14 prov.

40. Considering the topicality and the importance of this issue, the CAHDI agreed to prepare an analysis outlining the main trends arising from these replies which could ultimately become a publication similar to the previous CAHDI publications.

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

41. The Chair informed the Committee that since the previous meeting of the CAHDI, Liechtenstein had acceded to the 2004 *UN Convention on Jurisdictional Immunities of States and of their Property* on 22 April 2015. He furthermore underlined that to date, 19 States had ratified the Convention and that in order for the Convention to enter into force, 30 ratifications were needed. The Chair therefore invited delegations to provide information with regard to possible future ratifications.

42. The delegation of Slovakia informed the Committee that the Parliament of Slovakia had approved the ratification of the Convention on 21 September 2015 and that the instrument of ratification would be submitted in the coming weeks.

43. The delegation of Armenia informed the Committee that due to the current preparations of a new Constitution, Armenia had suspended the internal procedures of ratification of the Convention.

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

44. The CAHDI welcomed the updated contribution to the CAHDI database on State practice regarding States Immunities from France. It noted that to date, 35 States (Andorra, Armenia, Austria, Belgium, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Mexico, the Netherlands, Norway, Poland, Portugal, Romania, the Russian Federation, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom) and one organisation (European Union) had submitted a contribution to this database. The Chair invited delegations, which had not yet done so, to submit or update their contributions to the relevant database at their earliest convenience.

45. The delegation of France provided information on the case of *Société Commissions import export (Commisimpex) v. République du Congo*[7] which was added to the updated contribution. The case concerned the waiver of immunities formulated by the Republic of Congo in the framework of contracts for public work.

In 1992, the Republic of Congo and the Congolese company, Commissions Import Export SA (Commisimpex), entered into a memorandum of understanding regarding the payment of the Republic of Congo's outstanding debts. In 1993, the Republic of Congo issued a letter of undertaking in which it waived its right to *"invoke, in the context of the settlement of a dispute relating to the undertakings which are the subject of this letter, any immunity of jurisdiction as well as any immunity of execution"*. However, these steps failed to settle the dispute between the parties and in 2000, an International Chamber of Commerce (arbitral tribunal) appointed under the memorandum of understanding issued an award in Commisimpex's favour. Commisimpex sought to enforce the award and in 2011, it obtained the attachment of a number of accounts held in the name of the Republic of Congo's diplomatic mission, and delegation to UNESCO, in Paris. However, in a judgment handed down on 15 November 2012, the Versailles Court of Appeal confirmed a lower decision ordering the discharge of the attachments on the ground that, under customary international law, diplomatic missions benefit from an autonomous form of immunity from execution, which can only be waived in an express and specific (*"expresse et spéciale"*)

[7] Cour de cassation (1ère chambre civile), *Société Commissions import export (Commisimpex) c. République du Congo*, n° du pourvoi 13-17.751, arrêt du 13 mai 2015.

manner. The Court of Appeal found that the letter of 1993 did not satisfy this test as the waiver was not specific.

In the present judgment of 13 May 2015, the Supreme Court (*Cour de cassation*) accepted Commisimpex's initial submission regarding the discharge of the attachment of the accounts, clarifying that customary international law requires nothing more than an "express" waiver of immunity from execution. As a result, in ruling that diplomatic missions enjoy an autonomous form of immunity from execution, which can only be waived in an "express and specific" manner, the Court of Appeal had misunderstood customary international law.

The delegation of France informed the Committee that, as a consequence of this judgment, the bank accounts of the embassy of another foreign country were seized pursuant to an arbitral award. It underlined that such action raised problems with regard to the obligations deriving from the *Vienna Convention on Diplomatic Relations* (1961) and that information from other States' practice was most welcome in this regard.

46. In reply to this request, the delegation of the United Kingdom referred to the case of *A Co. Ltd v. Republic of X*[8] of 21 December 1989. In this case, the High Court held that a contractual waiver of State immunity from jurisdiction and enforcement will not be sufficient to waive the inviolability and immunity of either the premises and/or property of a diplomatic mission, or the private residence and/or property of a diplomatic agent, enjoyed under, respectively, Article 22 and Article 30 of the *Vienna Convention on Diplomatic Relations* (1961).

47. The delegation of the United States provided information on two cases.

The case of *OBB Personenverkehr AG v. Carol P. Sachs*[9] concerned a Californian resident who brought a suit against OBB Personenverkehr AG, Austria's national railway and a foreign sovereign instrumentality under the Foreign Sovereign Immunity Act (FSIA), in a California federal court. The plaintiff had been seriously injured while attempting to board a train in Austria and asserted negligence, design defect, failure to warn, and breach of implied warranty claims. She claimed that the railway, by selling train tickets in the United States through an internet seller, was carrying on commercial activity in the United States. She relied on the "commercial activity exception" of the FSIA which allows a US court to hear suits involving a foreign State when the action is "based upon" the State's commercial activity in the United States. The District Court for the Northern District of California dismissed the complaint on the grounds that OBB Personenverkehr AG was entitled to sovereign immunity. However, the Court of Appeals for the Ninth Circuit reversed this decision. The delegation of the United States informed the Committee that the case had been submitted to the Supreme Court which will likely issue an opinion in the beginning of the year 2016.

The case of *RJR Nabisco v. European Community*[10] concerned a complaint brought in the early 2000s by the European Community and 26 of its member States against RJR Nabisco (RJR) under the *Racketeer Influenced and Corrupt Organizations* (RICO) Statute alleging that RJR had facilitated a worldwide money-laundering scheme in connection with organized crime groups, laundered money through New York financial institutions, and committed common law torts in violation of New York law. The United States District Court for the Eastern District of New York dismissed the complaint on the grounds that the RICO Statute has no extraterritorial application, and also dismissed the State law claims on the grounds that the European Community did not qualify as an organ of a foreign State under Title 28 of the US Code §§ 1322, 1603, which "deprived the court of jurisdiction over the State law claims." The Second Circuit disagreed and held that the Congress had clearly manifested an intent for RICO to apply extraterritorially in the type of circumstances alleged here. The Second Circuit further held that the European Community qualified as a "foreign State" under Title 28 of the US Code § 1332(a)(4), and "its suit against

[8] High Court, *A Co. Ltd v. Republic of X*, [1990] 2 Lloyds Rep. 520, 87 ILR 412
[9] Supreme Court of the United States, *OBB Personenverkehr AG v. Carol P. Sachs*, case no. 11-15458.
[10] Supreme Court of the United States, *RJR Nabisco v. European Community*, case no. 11-2475-cb.

'citizens of a State or of different States' comes within the diversity jurisdiction." The delegation of the United States informed the Committee that RJR had filed a request for Supreme Court review in August 2015.

48. The delegation of Belgium informed the Committee that a new law had been adopted on 23 August 2015 inserting a new Article 1412*quinquies* in the Belgian Code of Civil Proceedings[11]. This new Article provides that, as a general rule, property belonging to foreign States and located on the Belgian territory cannot be seized. Bank accounts used in the performance of the functions of diplomatic missions, consular posts and missions to international organisations are explicitly included in the assets covered by such immunity. Exceptionally, and based on a prior authorisation by the judge of seizures, foreign State property may be seized if the State has expressly and specifically consented to the seizure, if the State has allocated or earmarked property for the satisfaction of the claim, or if the creditor has established that the property is specifically used or intended for use for other than government purposes and that it has a connection with the defendant entity. The notion of “State” is used in a large sense and includes for instance federal entities, municipalities and other local entities. This immunity also applies to the property of international organisations.

49. The delegation of Andorra requested information from other delegations on their practice with regard to rental agreements containing a clause waiving the immunity of diplomats.

50. The representative of the OSCE informed the Committee that in June 2015 the Panel of Eminent Persons on European Security as a Common Project published its Interim Report on Lessons Learned from the OSCE Engagement in Ukraine. One of the five findings was the clear need for the OSCE to acquire a recognised legal personality. The Panel concluded that this is one of the most visible weaknesses of the OSCE. The Panel recommended that the OSCE owes it to all of its staff to resolve the question of legal personality and that the work of the Informal Working Group on Strengthening the Legal Framework of the OSCE offers a way forward. In the absence of consensus in the Informal Working Group for a multilateral solution over the past eight years, in July 2015 the OSCE Secretary General proposed, under his authority as Chief Administrative Officer, an interim solution in the form of a bilateral Standing Arrangement with each participating State, recognising the OSCE and its officials in the national jurisdiction. This is a separate track from the discussions in the Informal Working Group. The text of the Standing Arrangement is formulated to address the Secretary General's duty of care towards OSCE staff and his responsibility to protect OSCE assets. It is an interim solution, purely based on the serious operational need to protect OSCE officials and assets in States where no national measures in favour of the OSCE exist. The Standing Arrangement is consistent with the 1993 Rome Council Decision which aimed at gaining legal status, privileges and immunities for the OSCE across the OSCE region.

The representative of the OSCE informed all CAHDI participants that this new initiative had started in July 2015, and that the OSCE Secretary General would seek to conclude a Standing Agreement with each OSCE Participating State, establishing privileges and immunities and legal status for the OSCE across the OSCE region.

One delegation stated that there was no consensus on the legal personality of the OSCE and that this had to be discussed in the competent fora in Vienna (Austria).

51. 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 noted that to date, 29 delegations (Albania, Austria, Belgium, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Israel, Italy, Japan, Latvia, Luxembourg, Montenegro, the Netherlands, Norway, Portugal, Romania, the Russian Federation, Slovakia, Slovenia, Spain, Sweden and the United States of America) had

[11] The text of the new Article is available at the following link (*French only*).

replied to the questionnaire on this matter (document CAHDI (2015) 21). The CAHDI invited delegations which had not yet done so to submit or update their replies to the questionnaire.

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

52. The Chair reminded 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 47th meeting of the CAHDI and contained additional questions on gender equality in conformity with the Council of Europe Gender Equality Strategy for 2014-2017. He welcomed the replies submitted by 29 delegations (Albania, Andorra, Armenia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, Georgia, Germany, Greece, Israel, Italy, Latvia, Luxembourg, Mexico, Montenegro, Norway, Slovenia, Sweden, Switzerland, the United Kingdom, the United States of America and NATO) to this revised questionnaire as contained in document CAHDI (2014) 16 prov.

53. Considering the topicality and the importance of this issue, the CAHDI invited delegations to send to the Secretariat any further information in order to complete their replies (notably with regard to the scope of the competences of the Office of the Legal Adviser and the possible legal basis for acting as an agent before the International Court of Justice or other international courts or tribunals).

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

54. The Chair recalled 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.

55. The Chair also recalled that the *"High Level Review of United Nations Sanctions"* process, conducted from June to October 2014, had been finalised. In this regard, the CAHDI took note that a "*Compendium of the High Level Review of United Nations Sanctions*"[12] (document A/68/941-S/2015/432) was presented by a letter dated 12 June 2015 from the Permanent Representatives of Australia, Finland, Germany, Greece and Sweden to the UN addressed to the Secretary-General of the UN.

56. The Chair reminded the CAHDI that the report represented an amalgamation of views and recommendations made on the specific topics examined by the three Working Groups and related to the topic of strengthening the regime of implementation of UN sanctions. Of the 150 recommendations made in the report, the report highlighted in particular the need for an increased awareness of the sanctions regime, a better institutional coordination within the UN to integrate sanctions with other UN responses, improved procedures for administratively and substantively supporting experts and the Ombudsperson, enhanced interaction between UN policymakers and national level actors, and greater due process and human rights considerations in the sanctions procedures.

57. In this regard, the delegation of Switzerland reiterated that it remained committed to the aims of Group of Like-Minded States on Targeted Sanctions[13] and that, still before the end of 2015, it was planning to submit new proposals to the United Nations Security Council on the

[12] The Compendium is available at the following link.
[13] The Group of Like-Minded States comprises Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Sweden, Switzerland and Norway. The Group of Like-Minded States also advocates for improved information sharing between Member States and the Ombudsperson as well as between the Sanctions Committee and Member States, national and regional Courts, and other authorities, enhanced transparency, and timely provision of information and reasoned decisions about the listings.
[13] See the United Nations Security Council Resolution 2161 (2014), adopted by the Security Council at its 7198th meeting, on 17 June 2014, at the following link.

improvement of the various UN sanctions regimes. The representative of Switzerland further pointed out that after the referral of the case to the Grand Chamber of the European Court of Human Rights, the judgment in the case of *Al-Dulimi v. Switzerland,* was still pending.

58. The delegation of the European Union informed the CAHDI about the new Article 105 of the *Rules of Procedure of the General Court*.[14] Articles 103 to 105 contain mechanisms for dealing with information over which parties to litigation or the EU institutions assert confidentiality. The Article 105 refers specifically to situations where information or material refers to the security of the EU or its Member States or the conduct of their international relations. The Court has included these provisions in the Rules to address issues raised in its recent case law (for example *Kadi II*[15] and *ZZ*[16]). In *Kadi II*, the Court ruled that EU legal acts, even those that implement UN Security Council obligations, must conform to the EU's standards of lawfulness based on fundamental rights. In order to determine the lawfulness of a sanctions listing in the event of a challenge, the Court will take into account only the information substantiating the reasons for listing that is made available to the Court. The Court itself should determine whether there are valid grounds precluding disclosure of evidence to the individual on the basis of security or international relations considerations. If the Court does not accept that the grounds are well founded, it will only take into account the information that is disclosed to the Court and the other party in determining the lawfulness of a listing. Under the Court's current Rules of Procedure, no provision exists to allow Member States to rely on such information if they are not willing (for security or international relations reasons) to disclose it to the other party. Articles 103-105, and particularly Article 105, are intended to provide a mechanism by which the Court would be able to handle such cases.

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

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

60. The delegation of Italy drew CAHDI's attention to the case of *Khlaifia and Others v. Italy*[17] concerning the detention in a reception center on Lampedusa and subsequently on ships moored in Palermo harbour, as well as the repatriation to Tunisia, of clandestine migrants who had landed on the Italian coast in 2011 during the events linked to the "Arab Spring". Relying on Article 3 (prohibition of inhuman or degrading treatment) of the ECHR, the applicants complained of their conditions of detention in the reception center and on board the ships. They also alleged that their detention had been contrary to Article 5 paragraph 1 (right to liberty and security), Article 5 paragraph 2 (right to be promptly informed of the reasons for deprivation of liberty) and Article 5 paragraph 4 (right to examination of the lawfulness of detention). Relying on Article 13 (right to an effective remedy), they also submitted that they had had no effective domestic remedy to complain of the violation of their rights. Finally, the applicants submitted that they had been subjected to collective expulsion, prohibited under Article 4 of Protocol No. 4 (prohibition of collective expulsion of aliens) to the ECHR. The Court held that the applicants' detention had been unlawful. They had not been notified of the reasons for their detention, for which there was no statutory basis, and had been unable to challenge it. Concerning their conditions of detention in the reception center, the Court took account of the exceptional humanitarian crisis faced by Italy on the island of Lampedusa in 2011 in the wake of the Arab Spring (55,298 migrants had landed around the time the applicants had been present there). The Court nonetheless concluded that the applicants' conditions of detention had diminished their human dignity, although that had not been the case on board the ships moored in Palermo harbour. The Court further considered that the applicants had suffered a collective expulsion, as their refoulement decisions did not refer to their personal

[14] The Rules of Procedure are available at the following link.
[15] Court of Justice of the European Union, *Kadi II*, Judgment of 18 July 2013, Joined cases C-584/10 P, C-593/10 P and C-595/10 P.
[16] Court of Justice of the European Union, *ZZ v. Secretary of State for the Home Department*, Judgment of 4 June 2013, Case C-300/11.
[17] *Eur. Court HR, Khlaifia and Others v. Italy,* Judgment of 1 September 2015, Application No. 16483/12. [available only in French].

situation – the Court held in particular that an identification procedure was insufficient to disprove collective expulsion. Furthermore, the Court noted that at the time a large number of Tunisians had been expelled under such simplified procedures. Lastly, the Court considered that the applicants had not benefited from any effective remedy in order to lodge a complaint, because under Article 13, if a remedy was to be deemed effective in the case of a collective expulsion it had to have automatic suspensive effect – which in this case meant that it should have suspended the refoulement to Tunisia – and that had not been the case. Therefore the Court concluded on a violation of Article 5 paragraphs 1, 2 and 4, Article 3, Article 13 and Artilce 4 of the Protocol No. 4.

61. The delegation of Belgium drew the attention of the CAHDI to the case of *Ouabour v. Belgium*[18] concerning an order for the applicant's extradition to Morocco, issued after he had been sentenced in 2007 to six years' imprisonment for taking part in the activities of a terrorist organisation and for criminal conspiracy. Relying on Article 3 (prohibition of inhuman and degrading treatment) of the ECHR, the applicant alleged that if extradited to Morocco, he would face a real risk of being subjected to treatment in breach of that Article. Relying on Article 13 (right to an effective remedy) in conjunction with Article 3, he argued that his appeal to the *Conseil d'Etat* was ineffective. The Court first considered the issue of inhuman and degrading treatment in Morocco in the context of the policy against terrorism. According to the Court, from the information available it was established that the situation in Morocco in terms of respect for human rights in the fight against terrorism has not evolved favorably and that the use of practices contrary to Article 3 of the ECHR against persons prosecuted and arrested in this context was a lasting problem in Morocco. The Court noted that it was also established that the applicant himself belonged to the category of persons covered by such measures. The international arrest warrant issued by the prosecutor at Rabat Appeal Court indicated that the applicant was wanted for "constitution of a gang to prepare and commit terrorist acts". The Court further considered useful to observe that it did not appear from the observations submitted to it that the Belgian authorities had made any diplomatic demarche with the Moroccan authorities in order to obtain guarantees or assurances that the applicant would not face, after his extradition, inhuman and degrading treatment. The Court found that in the event of the applicant's extradition to Morocco, Belgium would be in violation of Article 3 of the ECHR. Following this decision, Mr Ouabour has not been extradited to Morocco.

62. The delegation of Switzerland mentioned the case of *A.S. v. Switzerland*[19] concerning removal from Switzerland to Italy of a Syrian national of Kurdish origin under the EU Dublin Regulation. The applicant lived with his sisters in Geneva, having entered Switzerland from Italy. He sought asylum in Switzerland in February 2013. The Swiss authorities rejected his request in May and June 2013 based on the fact that his fingerprints had already been registered in Greece and Italy before he had entered Switzerland. In addition, the Italian authorities had already accepted a request by the Swiss authorities under the EU Dublin Regulation. Relying on Article 3 (prohibition of inhuman or degrading treatment) of the ECHR, the applicant complained that, if returned to Italy, due to systemic deficiencies in the reception system for asylum seekers, he would not be provided with proper housing and adequate medical treatment. The Court observed in particular that the applicant was not critically ill and found that there was currently no indication that he would not receive appropriate psychological treatment if removed to Italy. While the Court had previously raised serious doubts as to the capacities of the reception system for asylum seekers in Italy, the reception arrangements there could not in itself justify barring all removals of asylum seekers to Italy. Thus the Court held that, if the applicant were removed to Italy, there would be no violation of Article 3 of the ECHR. This decision is noteworthy against the background of the judgment in the widely discussed case of *Tarakhel v. Switzerland*[20], in which an Afghan family successfully claimed before the Court that their removal to Italy under the Dublin system would violate Article 3 of the ECHR.

[18] *Eur. Court HR, Ouabour v. Belgium*, Judgment of 2 June, Application No. 26417/10 [available only in French].
[19] *Eur. Court HR, A.S. v. Switzerland*, Judgment of 30 June 2015, Application No. 39350/13.
[20] *Eur. Court HR, Grand Chamber, Tarakhel v. Switzerland*, Judgment of 4 November 2014, Application No. 29217/12.

63. The delegation of Estonia drew the attention of the CAHDI to the case of *Delfi v. Estonia*[21]. The case concerned the duties and responsibilities of the Internet news portal Delfi which provided, on a commercial basis, a platform for user-generated comments on previously published content. Some anonymous users engaged in unlawful hate speech which infringed the personality rights of others. The Estonian courts rejected the portal's argument that, under EU Directive 2000/31/EC on Electronic Commerce, its role as an information society service provider or storage host was merely technical, passive and neutral. This was the first case in which the Court had been called upon to examine a complaint about liability for user-generated comments on such an Internet news portal and therefore the Court emphasised that the Delfi case did not concern other fora on the Internet where third-party comments could be disseminated, for example Internet discussion forums, a bulletin boards or a social media platforms.

The Grand Chamber found that the Estonian courts' finding of liability against Delfi had been a justified and proportionate restriction on the portal's freedom of expression, particularly because the comments in question had been extreme and had been posted in reaction to an article published by Delfi on its professionally managed news portal run on a commercial basis. The Grand Chamber also found the steps taken by Delfi to remove the offensive comments without delay after their publication to have been insufficient and the 320 euros fine by no means excessive for Delfi, one of the largest Internet portals in Estonia.

Thus, the Court reiterated its previously established case-law that Article 10 (freedom of expression) and Article 8 (right to respect for private and family life) deserved equal protection and that the same applied in digital world. The Court took especially into account that on the internet, defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, could be disseminated like never before, worldwide, in a matter of seconds, sometimes remaining persistently available online. For this reason, a balance had to be struck which retained the essence of both rights. Therefore, liability for defamatory or other types of unlawful speech had to be retained and constituted an effective remedy for violations of personality rights.

64. The delegation of the United Kingdom informed the CAHDI about the *case Abdulla Ali v. the United Kingdom*[22]. The case concerned the applicant's complaint that, because of extensive adverse media coverage, the criminal proceedings against him for conspiring in a terrorist plot to cause explosions on aircraft on board transatlantic flights using liquid bombs had been unfair. Following a first trial in the applicant's case which had resulted in his conviction on a charge of conspiracy to murder, there had been extensive media coverage, including reporting on material which had never been put before the jury. A retrial was subsequently ordered in respect of the more specific charge of conspiracy to murder by way of detonation of explosive devices on aircraft mid-flight (on which the jury at the first trial had been unable to reach a verdict) and applicant argued that it was impossible for the retrial to be fair, given the impact of the adverse publicity. His argument was rejected by the retrial judge and he was convicted and sentenced to life imprisonment with a minimum term of 40 years. Relying on Article 6 paragraph 1 (right to a fair trial) of the ECHR, applicant complained that he had not received a fair trial by an impartial tribunal due to the extensive adverse media coverage between his first trial and his retrial. The Court found in particular that the applicable legal framework in the United Kingdom for ensuring a fair trial in the event of adverse publicity had provided appropriate guidance for the retrial judge. It further found that the steps taken by the judge were sufficient. He considered whether enough time had elapsed to allow the prejudicial reporting to fade into the past before the retrial commenced and recognised the need to give careful jury directions on the importance of impartiality and of deciding the case on the basis of evidence led in court only. He subsequently gave regular and clear directions, to which applicant did not object. The fact that the jury subsequently handed down differentiated verdicts in respect of the multiple defendants in the retrial proceedings supported the judge's conclusion that the jury could be trusted to be discerning and follow his instructions to decide the case fairly on the basis of the evidence led in court alone. The Court concluded that it had not been shown that the adverse publicity had influenced the jury to the point of prejudicing the outcome of the proceedings

[21] *Eur. Court HR,* Grand Chamber, *Delfi AS v, Estonia*, Judgment of 16 June 2015, Application No. 64569/09.
[22] *Eur. Court HR, Abdulla Ali v. the United Kingdom,* Judgment of 30 June 2015, Application no. 30971/12.

and rendering applicant's trial unfair. There had been no violation of Article 6 paragraph 1 in the present case.

65. The CAHDI took note of the information provided by several delegations concerning the applications lodged before the European Court of Human Rights involving issues of public international law. The Chair thanked the delegations and requested them to report to the CAHDI when the judgments related to these applications would be issued by the European Court of Human Rights.

10. Peaceful settlement of disputes

66. In the context of its consideration of the issues relating to the peaceful settlement of disputes, the Chair presented a document on the *Compulsory jurisdiction of the International Court of Justice* (document CAHDI (2015) 15) and informed the Committee that since its previous meeting Romania had recognised the compulsory jurisdiction of the International Court of Justice ("the ICJ").

67. The delegation of the Netherlands informed the Committee that on the occasion of the celebration of the 70th anniversary of the establishment of the ICJ, an event would be organised on 29 September 2015 at the United Nations Headquarters on "The International Court of Justice, a contemporary court". The event would be hosted by His Majesty King Willem-Alexander of the Netherlands and co-hosted by Ms Dalia Grybauskaite, President of Lithuania and Mr Thomas Boni Yayi, President of Benin. The objective of the event would be to raise awareness on the work of the Court, demonstrate how it has adapted over the years and as a contemporary court stands ready to promote the peaceful settlement of disputes in the world. The focus would be on the continued relevance of the Court for the future as demonstrated by the ability of the Court to adapt its work to contemporary problems and to the development of international law, as for instance demonstrated by recent decisions on land and maritime boundaries, the environment and the situation in the former Yugoslavia. The delegation of the Netherlands further informed that there would be more celebrations in The Hague in 2016 to commemorate the beginning of the work of the ICJ.

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

68. 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 (2015) 16 rev and CAHDI (2015) 16 Addendum prov) and opened the discussion. The Chair also drew the attention of the delegations to document CAHDI (2015) Inf 2 containing reactions to reservations and declarations to international treaties previously examined by the CAHDI and for which the deadline for objecting had already expired.

69. The Chair drew the attention of the CAHDI to the fact that the partial withdrawal of reservations was also contained in the above-mentioned list. In this respect, the Chair recalled that during the 41st meeting of the CAHDI, it had been stressed that in light of the practice in this matter, the objections registered against the original version of the reservations had been maintained to the extent that they concerned an aspect of the reservation which had not been covered by the withdrawal. On the other hand, any objections which had been registered for the first time at the time of the partial withdrawal would have no effect (see document CAHDI (2011) 5 paragraphs 50 to 52). The Chair pointed out that a reflection had to be carried out on the need to maintain or not, the withdrawal or partial withdrawal of reservations on the list within the framework of the CAHDI Observatory, as they are not subject to objection. In this respect, the CAHDI agreed

that a further reflection on this issue was needed and the Chair proposed to make a proposal during the next CAHDI meeting.

70. With regard to the **reservations from Tajikistan** on the Convention on the Privileges and Immunities of Specialized Agencies, a number of delegations indicated that they were considering objecting to this reservation. Few delegations voiced their concern with regard to the reference to national legislation and indicated that they wished to obtain clarifications from Tajikistan on the reasons behind this reservation.

71. With regard to the **declaration from South Africa** on the International Covenant on Economic, Social and Cultural Rights, one delegation pointed out that a reference to policy in declarations implied vagueness. In this respect another delegation expressed a view that although this declaration appeared to be vague, it did not amount to a reservation.

72. With regard to the **declaration from Panama** on the United Nations Convention on the Law of the Sea, several delegations agreed that it constituted an interpretative declaration and not a reservation.

73. With regard to the **declarations from Viet Nam** on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, delegations agreed that this declaration was not problematic as it was envisaged by the Convention itself.

74. With regard to the **withdrawal of reservations and controversial date of notification of the withdrawal from Oman** on the Convention on the Rights of the Child, several delegations pointed out that the situation regarding the controversial date of notification 'was quite odd'.

75. With regard to the **modification of reservation from Oman** on the Convention on the Rights of the Child, one delegation welcomed this partial withdrawal and confirmed their objection to the original reservations as far as they had not been withdrawn. Another delegation pointed out that now after the partial withdrawal of reservation the scope of the original reservation would appear to be more limited. A number of delegations voiced their opinion that the modification of reservation as worded would appear to be unlawful.

76. With regard to the **partial withdrawal of reservations from Brunei Darussalam** on the Convention on the Rights of the Child, one delegation was considering objecting as the wording of this partial withdrawal of reservations appeared vague and referred to the national Constitution.

77. With regard to the **declaration from Turkey** on the Optional Protocol to the Convention on the Rights of Persons with Disabilities, a number of delegations informed the CAHDI that they were considering objecting to this declaration.

78. With regard to the **declaration from Azerbaijan** on the Council of Europe Convention on Mutual Administrative Assistance in Tax Matters, a few delegations informed the Committee of their intention to object to this declaration. Several delegations expressed their opinion that this declaration amounted to a reservation not allowed by the treaty. One delegation pointed out that if one State did not have diplomatic relations with another State, it would be very difficult to fulfil the obligations under this Convention.

79. With regard to the **declarations from Poland** on the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, the delegation of Poland explained that the reference to the Polish Constitution was a result of politically sensitive debates in Poland. Consequently, it should be read as declaratory in nature. Nevertheless, a number of delegations expressed their concern about the reference to the national Constitution and indicated their wish to seek further information from Poland on these declarations.

12. Review of Council of Europe Conventions

80. Following the decision of the Ministers' Deputies 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 State Immunity* (ETS No. 74) and the *Additional Protocol to the European Convention on State Immunity* (ETS No. 74A), presented in document CAHDI (2015) 17. The Chair invited the delegations to hold an exchange of views on the practical importance of the Convention.

81. From the outset, the CAHDI noted that the *European Convention on State Immunity* (the "European Convention") entered into force on 11 June 1976. At present, the Convention has been ratified by eight States (Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom) and signed but not ratified by one State (Portugal). Regarding the *Additional Protocol to the European Convention on State Immunity* (the "Protocol"), the CAHDI noted that it entered into force on 22 May 1985 and that to date, it has been ratified by six States (Austria, Belgium, Cyprus, Germany, Luxembourg, and Switzerland) and signed but not ratified by two States (Germany and the Netherlands).

82. Several delegations underlined that the European Convention could be regarded as a source of customary international law. Reference was made in this regard to national judgments as well as judgments of the European Court of Human Rights and of the International Court of Justice recognising that the European Convention represented customary law.

83. However, many delegations informed the Committee that they did not intend to sign nor ratify the European Convention given the existence of the *United Nations Convention on Jurisdictional Immunities of States and their Property* (2004). Despite the fact that the UN Convention had not yet entered into force, a large majority of the delegations considered it as being more modern and complete. Nevertheless, they underlined the need to reflect on the relationship between the European Convention and the UN Convention once the latter enters into force for the States Parties to both Conventions. In this respect, as mentioned in paragraph 45 of document CAHDI (2015) 17, Article 33 of the European Convention and Article 26 of the UN Convention would govern the relationship between the two Conventions upon entry into force of the UN Convention as follows:

- between a State that is party to both Conventions and a State which is only Party to the European Convention: the European Convention will apply;

- between a State Party to both Conventions and a State which is only Party to the UN Convention: the UN Convention will prevail;

- between State Parties to both Conventions: the European Convention will apply. The UN Convention leaves untouched existing treaties on the subject of immunities of States in general, while the European Convention does not affect other international agreements – existing or future – if they address issues covered by the Convention "in specific matters". However, the scope of the UN Convention covers the complete area of States immunity and could therefore easily fall within the category of the most restrictive scope instruments such as covered by Article 33 of the European Convention.

Several delegations mentioned that the solution that the European Convention would apply between States Parties to both Conventions would not be the most appropriate one. They suggested that the UN Convention should apply as *lex posterior*. They pointed out that it should be up to the States Parties to both Conventions to decide which Convention should apply for instance through a declaration.

84. Some delegations underlined however that some States had serious doubts about the UN Convention and that they did not intend to ratify it. Therefore, they considered that the European Convention was still relevant and that it should not be terminated.

85. The CAHDI concluded, in relation to the *European Convention on State Immunity* (ETS No. 74) and the *Additional Protocol to the European Convention on State Immunity* (ETS No. 74A) that:

- the Convention could be regarded as a source of customary international law and was still relevant;
- however, considering the existence of the *United Nations Convention on Jurisdictional Immunities of States and their Property* (2004), many delegations had no intention to sign or ratify the Council of Europe Convention;
- a reflection should be engaged on the relationship between the Council of Europe Convention and the UN Convention once the latter enters into force.

86. Moreover, the CAHDI re-examined the *European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes* (ETS No. 82) included in the agenda of its previous meeting. The Chair drew the attention of the delegations to the written observations submitted by two delegations. The CAHDI observed that the views still differed and agreed therefore to conclude that:

- many delegations had no intention to sign or ratify the *European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes* because they considered that the *Rome Statute of the International Criminal Court* of 1 July 2002 had overtaken the Council of Europe convention;

- however, several delegations also underlined that given its purpose, namely to ensure that the punishment of crimes against humanity and the most serious violations of the laws and customs of war was not prevented by statutory limitation, the Convention had its own value and merits. It was therefore pointed out that it should not be terminated and that it could constitute evidence of an international custom.

87. The Chair of the CAHDI underlined that with the examination of these Conventions, the CAHDI had fulfilled its mandate to follow-up on the Conventions for which it had been given responsibility within the framework of the Ministers Deputies' decision on the *Review of Council of Europe Conventions*. Therefore the Chair proposed to prepare for the next meeting a document in cooperation with the Vice-Chair and the Secretariat, summarising the main findings of the CAHDI in relation to the five Conventions and one Protocol examined during these two years. In this respect, he underlined that as it was mentioned by several delegations, the "masters" of the Conventions were the Parties to them and therefore the CAHDI could only verify the practical implementation of the Conventions but would not advise on any termination, denunciation or withdrawal of these Conventions.

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

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

a. Presentation of the work of the International Law Commission (ILC) by Mr Narinder Singh, President of the ILC

88. The 67th Session of the ILC took place in Geneva from 4 May to 5 June 2015 and from 6 July to 7 August 2015. Mr Narinder Singh, President of the ILC, presented the recent activities of the ILC. The presentation of Mr Singh is reproduced in **Appendix IV** to the present report.

89. Before presenting the work of the ILC, Mr Singh informed the CAHDI that following the resignation of Mr Kirill Gevorgian, the ILC had elected Mr Roman A. Kolodkin (Russian Federation) to fill the casual vacancy occasioned by this resignation. Furthermore, he welcomed the exchange of views held between the ILC, the Chair of the CAHDI and the Secretary to the CAHDI on 10 July 2015 and highlighted the other exchanges the ILC had had with other bodies, i.e. the Asian-African Legal Consultative Organization (AALCO), the Inter-American Juridical Committee, the High Commissioner for Human Rights, the International Court of Justice, the African Union Commission on International Law and the United Nations Legal Counsel, Mr Miguel de Serpa Soares.

90. The topics discussed by the ILC during its 67th Session were the following: the most-favoured-nation clause, protection of the atmosphere, identification of customary international law, crimes against humanity, subsequent agreements and subsequent practice in relation to the interpretation of treaties, protection of the environment in relation to armed conflicts, immunity of State officials from foreign criminal jurisdiction and provisional application of treaties. Furthermore, the topic of *jus cogens* had been included in the programme of work of the ILC. The topic of "protection of persons in the event of disasters" was not considered during this session since the set of draft articles adopted on first reading in 2014 was being examined by governments, competent international organisations, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies.

91. The ILC concluded its work on the topic *"The most favoured-nation-clause"*. The Chairperson of the Study Group on the Most-Favoured-Nation clause, Mr Donald M. McRae, introduced the final report of the Study Group on the topic, which was considered together with appropriate recommendations by the ILC. The ILC further endorsed the summary conclusions of the Study Group and commended the final report to the attention of the United Nations General Assembly.

92. In connection with the topic *"Protection of the atmosphere"*, the ILC considered the second report of the Special Rapporteur, Mr Shinya Murase, on the topic. This report provided a further analysis of the draft guidelines submitted in the first report and consequently presented a set of revised draft guidelines relating to the use of terms, the scope of the draft guidelines, and the common concern of humankind, as well as draft guidelines on the general obligation of States to protect the atmosphere and on international cooperation. In view of the technical nature of the subject, the ILC also held a dialogue with scientists. The ILC provisionally adopted four preambular paragraphs, draft guideline 1 (use of terms), draft guideline 2 (scope) and draft guideline 5 (international cooperation) together with commentaries thereto.

93. With respect to the topic *"Identification of customary international law"*, the ILC considered the third report of the Special Rapporteur, Sir Michael Wood, on the topic. This report contained, *inter alia*, additional paragraphs to three of the draft conclusions proposed in the second report and five new draft conclusions relating respectively to the relationship between the two constituent elements of customary international law, the role of inaction, the role of treaties and resolutions, judicial decisions and writings, the relevance of international organisations, as well as particular custom and the persistent objector. Further to the presentation of the report to the Drafting Committee, the ILC took note of the 16 draft conclusions contained therein. It is foreseen that the ILC will, at its next session, consider the provisional adoption of the draft conclusions as well as the commentaries thereto.

94. With regard to the topic *"Crimes against humanity"*, the ILC considered the first report of the Special Rapporteur, Mr Sean D. Murphy, on the topic. This report contained, *inter alia*, two draft articles relating respectively to the prevention and punishment of crimes against humanity and to the definition of crimes against humanity. Upon consideration of the report of the Drafting Committee, the ILC provisionally adopted draft article 1 (scope), draft article 2 (general obligation), draft article 3 (definition of crimes against humanity) and draft article 4 (obligation of prevention) together with commentaries thereto.

95. In connection with the topic *"Subsequent agreements and subsequent practice in relation to the interpretation of treaties"*, the ILC considered the third report of the Special Rapporteur, Mr Georg Nolte, on the topic. This report offered, *inter alia*, an analysis of the role of subsequent agreements and subsequent practice in relation to treaties that are the constituent instruments of international organisations. In particular, it addressed questions related to the application of the rules of the *Vienna Convention on the Law of Treaties* (1969) on treaty interpretation to constituent instruments of international organisations. Further to the presentation of the report of the Drafting Committee, the ILC provisionally adopted draft conclusion 11 (constituent instruments of international organisations) together with a commentary thereto.

96. Regarding the topic *"Protection of the environment in relation to armed conflicts"*, the ILC considered the second report of the Special Rapporteur, Ms Marie G. Jacobsson, on the topic. This report identified and examined existing rules of armed conflict directly relevant to the protection of the environment in relation to armed conflict. The report contained five draft principles and three draft preambular paragraphs relating to the scope and purpose of the draft principles as well as use of terms. It is foreseen that the ILC will adopt the draft provisions and principles together with commentaries next year.

97. With respect to the topic *"Immunity of State officials from foreign criminal jurisdiction"*, the ILC considered the fourth report of the Special Rapporteur, Ms Concepción Escobar Hernández, on the topic which was devoted to the consideration of the remaining aspects of the material scope of immunity *ratione materiae*, namely what constituted an "act performed in an official capacity", and its temporal scope. Upon consideration of the report of the Drafting Committee, the ILC took note of draft article 2 subparagraph (f) (definition of "acts performed in an official capacity") and article 6 (scope of immunity *ratione materiae*). It is foreseen that the ILC will consider next year the question of limitations and exceptions.

98. With regard to the topic *"Provisional application of treaties"*, the ILC examined the third report of the Special Rapporteur, Mr Juan Manuel Gomez-Robledo, on the topic which considered the relationship of provisional application to other provisions of the *Vienna Convention on the Law of Treaties* (1969), and the question of provisional application with regard to international organisations. The ILC also had before it a memorandum prepared by the Secretariat, on provisional application under the *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations* (1986). The ILC received, for information only, an interim oral report of the Drafting Committee on draft guidelines 1 to 3, provisionally adopted by the Drafting Committee. It is foreseen that the Drafting Committee continues its consideration of the draft guidelines next year.

99. The ILC decided to include the topic *"jus cogens"* in its programme of work and to appoint Mr Dire Tladi as Special Rapporteur for the topic. In considering this topic, the ILC 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*.

100. Mr Singh further highlighted that the ILC had responded to the United Nations General Assembly's invitation to comment on its current role in promoting the rule of law and that it had discussed the possibility of convening a segment of future sessions in New York. Consequently, the first segment of its 70th Session (2018) could be convened at the United Nations Headquarters in New York.

101. Mr Singh concluded his presentation by underlining that the 51st Session of the International Law Seminar was held from 6 to 24 July 2015 in Geneva. He encouraged States to consider helping to finance scholarships granted to assist participants, notably from developing countries, to attend these sessions.

102. The Chair of the CAHDI thanked Mr Singh for his presentation and invited any delegations which so wished to take the floor.

103. In reply to a question on the procedure and criteria for the selection of topics by the ILC for its future work, Mr Singh informed the CAHDI that under its Statute, the ILC has to consider proposals for the progressive development of international law referred by the General Assembly or submitted by members of the United Nations, the principal organs of the United Nations other than the General Assembly, specialised agencies or official bodies established by intergovernmental agreements to encourage the progressive development and codification of international law. The selection of topics by the ILC for its future work is carried out in accordance with the procedure under which designated members of the Commission, or its Secretariat, write a short outline or explanatory summary on one of the topics included in a pre-selected list, indicating:

- the major issues raised by the topic;
- any applicable treaties, general principles or relevant national legislation or judicial decisions;
- existing doctrine; and
- the advantages and disadvantages of preparing a report, a study or a draft convention, if a decision is taken to proceed with the topic.

The Working Group on the Long-term Programme of Work then considers the outlines or summaries on the various topics prepared by members with a view to identifying topics for possible future consideration by the ILC. A report containing the list of topics is submitted to the ILC which adopts it and includes it in an annex to its annual report to the General Assembly. In the selection of topics, the ILC is guided by the following criteria:

- the topic should reflect the needs of States in respect of the progressive development and codification of international law;
- the topic should be at a sufficiently advanced stage in terms of State practice to permit progressive development and codification;
- the topic should be concrete and feasible for progressive development and codification; and
- the ILC should not restrict itself to traditional topics, but should also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.

104. With regard to the new topic *"jus cogens"*, Mr Singh informed delegations that, following several years of discussions on the inclusion or not of the topic on the long-term programme of work, the ILC considered that it had now sufficient material on the basis of which it could consider this matter and elaborate principles. Consequently, the first report of the Special Rapporteur would be presented in 2016.

105. In reply to a question on the most debated topics, Mr Singh indicated that many views had been expressed on the definition of the atmosphere in the framework of the examination of the topic of *"Protection of the atmosphere"*. Furthermore, on the topic of *"Identification of customary international law"*, the discussions had notably focused on the identification and the quality of a practice, and that concern had been expressed that information from more States was not available for consideration. With regard to the definition of *"Crimes against Humanity"*, Mr Singh stressed that the Special Rapporteur had proposed the definition to be based on the *Statute of the International Criminal Court* (ICC) to avoid any conflict and duplication of definitions. Finally, Mr Singh informed the delegations that, in connection with the topic of *"Immunity of State officials from foreign criminal jurisdiction"*, many members had highlighted that the draft articles should not encourage impunity for the most serious crimes. It was also noted that the draft articles would not affect the jurisdiction of international courts such as the ICC.

106. With regard to the topic of *"Identification of customary international law"* and more particularly to the role of international organisations' practice in the development of custom,

Mr Singh informed the CAHDI that the issue had been discussed in depth. Many members had considered that it was not the practice of the international organisation as such which created the customary law but rather the practice of the member States composing the international organisation.

107. Finally, concerning the difficulties faced by the ILC in obtaining information from States on the different topics, one delegation informed the CAHDI that an interactive dialogue was organised for a number of years with the members of the ILC during the International Law Week within the Sixth Committee of the United Nations General Assembly. This was an occasion for the Special Rapporteurs to have informal exchanges with member States.

108. The Chair thanked once again Mr Narinder Singh, President of the ILC, for having accepted the invitation of the CAHDI. The Chair underlined that it was an honour for the Council of Europe and the CAHDI to count with the presence of the President of the ILC.

b. Exchange of views between the ILC, the Chair of the CAHDI and the Secretary to the CAHDI, Geneva (Switzerland), 10 July 2015

109. The Chair informed the CAHDI on the exchange of views that took place on 10 July 2015 between the members of the ILC, the Chair of the CAHDI and the Secretary to the CAHDI (see documents CAHDI (2015) Inf 3 and CAHDI (2015) Inf 4).

110. During this exchange of views, the Chair of the CAHDI presented and informed the ILC of the CAHDI's recent work. With regard to the contribution of the CAHDI to the development of public international law, he drew the ILC's attention to the *Declaration on Jurisdictional Immunities of State Owned Cultural Property* elaborated within the framework of the CAHDI, the review of Council of Europe conventions undertaken by the CAHDI and the discussions on the so-called "foreign terrorist fighters". On the contribution of the CAHDI to the work of the ILC, the Chair referred to the annual exchange of views between the CAHDI and a member of the ILC, the issue of "immunities of States and international organisations" widely debated at each meeting as well as the forthcoming publication on "The judge and international custom". Finally, he underlined the key role of the CAHDI in exchanging and liaising between the Council of Europe and different international organisations.

111. The Secretary to the CAHDI presented the recent developments which took place within the Council of Europe and notably the election of the Deputy Secretary General of the Organisation and the priorities of the Chairmanships 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 amendment to Article 26 of the Statute of the Council of Europe, the derogation of Ukraine to the *European Convention on Human Rights* as well as the news from the Treaty Office (opening for signature and entry into forces, accession by non-member States to the Council of Europe conventions). She also referred to the action of the Council of Europe to combat terrorism as well as other topical issues related to public international law.

14. Consideration of current issues of international humanitarian law

112. The Chair invited the delegations to discuss current issues concerning international humanitarian law and present any relevant information, including on forthcoming events.

113. The representative of the International Committee of the Red Cross (ICRC) provided information on the *32nd International Conference of the Red Cross and Red Crescent* scheduled to take place in Geneva (Switzerland) on 8-10 December 2015. The Conference, which meets every four years to reflect and take decisions on pressing humanitarian issues, is a unique global forum to enhance and inspire humanitarian debates. It is where States, as parties to the Geneva Conventions and partners in humanitarian action, undertake joint commitments with the International Red Cross and Red Crescent Movement. This includes, among others, strengthening

international humanitarian law and furthering its implementation, addressing emerging risks threatening human life, strengthening legal frameworks for disasters, ensuring enabling environments for volunteering, and nurturing the auxiliary role of National Societies to their public authorities in the humanitarian field.

The representative of the ICRC recalled that two draft "0" resolutions were now available on the website devoted to the Conference[23], namely the *Resolution on Strengthening Compliance with International Humanitarian Law*[24] and the *Resolution on Strengthening International Humanitarian Law protecting persons deprived of their liberty*[25] and reminded delegations that the deadline for submitting comments on these resolutions was 5 October 2015. It finally underlined that another *Resolution on Sexual and gender-based violence: joint action on prevention and response*[26] was also available on the website and that the deadline for sending comments was 11 October 2015.

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

i. The International Criminal Court (ICC)

114. 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, the so called "Kampala amendments"[27], by Switzerland on 10 September 2015. The delegation of the United States underscored points it made at previous meetings of the CAHDI concerning the amendments on the crime of aggression, noted that there continued to be serious concerns at senior level of the United States Government regarding the amendments, and urged that we should be using the period between now and 2017 prudently to take a closer look at the issues raised by the amendments and address them in a serious manner.

115. The Chair informed the CAHDI about the election of a new judge to the ICC, namely Mr Raul Cano Pangalangan of the Philippines. Furthermore, the delegations took note that Ms Fatou Bensouda, Prosecutor of the ICC, issued on 8 July 2015 a draft strategic Plan[28] that will guide the work of the ICC Office of the Prosecutor for the period of 2016 to 2018.

116. The CAHDI was also informed that on 8 September 2015, the Government of Ukraine lodged a second declaration for an indefinite duration accepting the jurisdiction of the ICC for the purpose of identifying, prosecuting and judging the perpetrators and accomplices of acts committed in the territory of Ukraine since 20 February 2014. Further, the issue of the ratification of the Rome Statute had been included into the legislative package of the ongoing Constitutional reform in Ukraine, expected to be finalised in the near future.

117. The Committee also took note of recent developments concerning the activities of the ICC:

- on 7 May 2015, the Trial Chamber I scheduled the opening of the trial in the case *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*[29] for 10 November 2015, in order to hear the opening statements of the parties and participants. Laurent Gbagbo, former President of Côte d'Ivoire, and Charles Blé Goudé face each four charges of crimes against humanity allegedly committed in Côte d'Ivoire, between 16 December 2010 and on or around 12 April 2011.

[23] See the website of the Conference at the following link.
[24] See the text of the *Resolution on Strengthening Compliance with International Humanitarian Law* at the following link.
[25] See the text of the *Resolution on Strengthening International Humanitarian Law protecting persons deprived of their liberty* at the following link.
[26] See the text of the *Resolution on Sexual and gender-based violence: joint action on prevention and response* at the following link.
[27] On 15 October 2015, 25 States have ratified the Amendment to Article 8 of the Rome Statute of the ICC and 24 States have ratified the Amendment on the crime of aggression to the Rome Statute of the ICC.
[28] The draft strategic Plan is available at the following link.
[29] International Criminal Court, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé,* case No. ICC-02/11-01/15

- on 27 May 2015, in the case *The Prosecutor v. Simone Gbagbo*[30], the Appeals Chamber delivered its judgment by which it rejected the Republic of Côte d'Ivoire's appeal and confirmed the ICC Pre-Trial Chamber I's decision of 11 December 2014, which declared the case against Simone Gbagbo admissible before the ICC. She also faces four charges of crimes against humanity in Côte d'Ivoire.

- on 29 May 2015, in the case *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*[31]*:*

    - the Appeals Chamber reversed and remanded to Trial Chamber VII the decision of Pre-trial Chamber II, issued on 21 October 2014, in which the Pre-Trial Chamber ordered the interim release of four suspects (Musamba, Kabongo, Wandu and Arido). However, the Appeals Chamber found that, taking into account the length of time that has passed since their release, it would not be in the interests of justice for the suspects to be re-arrested.

    - in a separate judgment also rendered, the Appeals Chamber reversed and remanded to Trial Chamber VII the decision of Pre-Trial Chamber II, issued on 23 January 2015, ordering Bemba's interim release in the context of this case.

- on 19 August 2015, the Appeals Chamber reversed Trial Chamber V(B)'s decision regarding the Kenyan Government's alleged non-compliance with its obligations under the Rome Statute in the case *The Prosecutor v. Uhuru Muigai Kenyatta*[32]*,* due to errors in the Trial Chamber's assessment. Hence the Trial Chamber V(B) have to determine, in light of relevant factors, whether Kenya had failed to comply with a cooperation request that has prevented the ICC from exercising its functions and powers and, if so, to make an assessment of whether it is appropriate to refer Kenya's non-compliance to the Assembly of States Parties (ASP).

- on 2 September 2015, the trial in the case *The Prosecutor v. Bosco Ntaganda*[33] opened before Trial Chamber VI. Mr Ntaganda is accused of 13 counts of war crimes and five crimes against humanity allegedly committed in Ituri (Democratic Republic of the Congo), in 2002-2003.

- on 10 September 2015 in the case *The Prosecutor v. Joseph Kony, Vincent Otti and Okot Odhiambo*[34], Pre-trial Chamber II terminated proceedings against the alleged Deputy Army Commander of the Lord's Resistance Army (LRA) Okot Odhiambo following the forensic confirmation of his passing.

ii. *Other international criminal tribunals*

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

119. As regards the International Criminal Tribunal for the former Yugoslavia (ICTY), the CAHDI took note that in the case *Zdravko Tolimir*[35], the Appeals Chamber upheld his conviction for

[30] International Criminal Court, *The Prosecutor v. Simone Gbagbo*, case No. ICC-02/11-01/12.
[31] International Criminal Court, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, case No. ICC-01/05-01/13.
[32] International Criminal Court, *The Prosecutor v. Uhuru Muigai Kenyatta*, case No. ICC-01/09-02/11.
[33] International Criminal Court, *The Prosecutor v. Bosco Ntaganda*, case No. ICC-01/04-02/06.
[34] International Criminal Court, *The Prosecutor v. Joseph Kony, Vincent Otti and Okot Odhiambo*, case No. ICC-02/04-01/05.
[35] International Criminal Tribunal for the Former Yugoslavia, *The Prosecutor v. Radovan Karadžić*, Decision on Accused's Motion for Withdrawal of Charges, Decision of 13 October 2014, Case No. IT-95-5/18-T.

genocide and the life sentence. The Appeals Chamber confirmed the Trial Chamber's finding that Tolimir participated in two joint criminal enterprises (JCE): one to murder the able-bodied men of Srebrenica and the other to forcibly remove the Bosnian Muslim population from Srebrenica and Žepa. It confirmed his convictions for genocide, conspiracy to commit genocide, extermination, murder, persecutions, and inhumane acts (forcible transfer), on the basis of his participation in these two JCEs. It affirmed that Tolimir actively participated in and significantly contributed to these JCEs, which resulted in the mass executions of thousands of Bosnian Muslims in Srebrenica and the forcible displacement of thousands of civilians from these two enclaves. However, the Appeals Chamber partly reversed his convictions for genocide in Žepa and near Trnovo.

120. As regards the International Criminal Tribunal for Rwanda (ICTR), the CAHDI took note of the last case pending before the Appeals Chamber of the ICTR before it seizes its function, *Nyiramasuhuko et al.*[36]. It heard appeals lodged by Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, Kanyabashi, Ndayambaje, and the Prosecution against the Judgement pronounced by Trial Chamber II on 24 June 2011:

- the Trial Chamber found Nyiramasuhuko, Ntahobali, Nsabimana, Kanyabashi, and Ndayambaje guilty of genocide, crimes against humanity (extermination, persecution, and, for Nyiramasuhuko and Ntahobali only, rapes), and serious violations of Article 3 common to the Geneva Conventions and of Additional Protocol II (violence to life and, for Nyiramasuhuko and Ntahobali only, outrages upon personal dignity) for crimes committed in Butare Prefecture from April into June 1994. Nyiramasuhuko was also found guilty of conspiracy to commit genocide and Nteziryayo, Kanyabashi, and Ndayambaje were found guilty of direct and public incitement to commit genocide in relation to public addresses made in April, May, and June 1994 in Butare Prefecture. The Trial Chamber sentenced Nyiramasuhuko, Ntahobali, and Ndayambaje to life imprisonment, Nsabimana to 25 years of imprisonment, Nteziryayo to 30 years of imprisonment, and Kanyabashi to 35 years of imprisonment.

- Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, Kanyabashi, and Ndayambaje contended that the Trial Chamber committed a number of errors of law and fact and requested the Appeals Chamber to stay the proceedings, overturn their convictions, or reduce their sentences. The Prosecution submitted that the Trial Chamber erred in not finding Kanyabashi responsible in relation to the speech he gave at the swearing-in ceremony of Nsabimana as the new prefect of Butare held on 19 April 1994. It requested that Kanyabashi be convicted of genocide and direct and public incitement to commit genocide on this basis and that the Appeals Chamber imposed a life sentence or increased it.

121. With regard to the Extraordinary Chambers in the Courts of Cambodia (ECCC), the CAHDI took note that:

- in the case 004[37] on 27 March 2015, the International Co-Investigating Judge charged Ao An with premeditated homicide, as a violation of the 1956 Cambodian Penal Code, committed at Kok Pring execution site, Tuol Beng and Wat Au Trakuon security centres; and the Crimes against Humanity of murder, extermination, persecution on political/religious grounds, imprisonment, and other inhumane acts at Kok Pring execution site, Tuol Beng and Wat Au Trakuon security centres.

- in the Case 003[38] on 2 June 2015, the Co-Investigating Judges issued a decision dismissing the allegations against Sou Met, who was named as a suspect in the second introductory submission filed by the Acting International Co-Prosecutor on

[36] International Criminal Tribunal for Rwanda, *Nyiramasuhuko et al. (Butare) v. Prosecutor,* Judgment of 24 June 2011, Case No. ICTR-98-42.
[37] Extraordinary Chambers in the Courts of Cambodia, *Case 004*, no case file numer.
[38] Extraordinary Chambers in the Courts of Cambodia, *Case 003*, Case File No. 003/07-092009-ECCC.

7 September 2009. The Co-Investigating Judges concluded that the death of Sou Met extinguished the criminal allegations against him. Determination on the criminal responsibility for the crimes alleged in the introductory submission will be made at the time of the issuance of the closing order pursuant to Internal Rule 67.

- in the Case 002/01[39] on 2 July 2015 the Supreme Court Chamber commenced the first appeal hearings. Case 002/01 is the first of at least two trials against Khieu Samphân, former Head of State of Democratic Kampuchea and Nuon Chea, former Deputy Secretary of the Communist Party of Kampuchea. They appealed against their convictions for crimes against humanity committed between April 1975 and December 1977, resulting in sentences of life imprisonment. At the same time, starting from 7 September 2015, the Trial Chamber have for the first time heard evidence related to charges of genocide related to the treatment of the Cham group.

122. With regard to the Special Tribunal for Lebanon (STL), the CAHDI took note that on 18 September 2016, the in the Case STL-14-05[40] the Contempt Judge found:

- both defendants not guilty on Count 1: the Accused were charged with knowingly and willfully interfering with the administration of justice by broadcasting and/or publishing information on purported confidential witnesses in the *Ayyash et al.*[41] case, thereby undermining public confidence in the Tribunal's ability to protect the confidentiality of information about, or provided by, witnesses or potential witnesses.

- Ms Al Khayat guilty and Ms Al Jadeed not guilty on Count 2: the Accused were charged with knowingly and willfully interfering with the administration of justice by failing to remove from *Al Jadeed* TV's website and TV's YouTube channel information on purported confidential witnesses in the *Ayyash et al.* case, thereby violating the Order issued by the Pre-Trial Judge in the *Ayyash et al.* case on 10 August 2012.

16. Topical issues of international law

i. 2015 "International Law Week"

123. The delegation of Canada informed the CAHDI that an informal discussion on international law will take place on the occasion of the 26th Legal Advisers Meeting on 2-3 November 2015 in New York, hosted by the Government of Canada[42]. The representative of Canada recalled that for over 25 years, the Legal Advisers of the member States of the United Nations have gathered to discuss, in an informal setting, broad issues of international law that concern the international community. The discussions are held in the margin of the meetings of the Sixth Committee of the United Nations General Assembly, within the framework of the International Law Week.

He informed the CAHDI that the overarching theme to guide the discussions during these two-days meeting would be *"Globalization: international law and the global citizen"*. Indeed, he underlined that globalization poses challenges to practitioners of both private and public international law. An increasingly mobile global population is putting growing demands on the international legal system to respond to the needs of a world in which individuals expect to access justice abroad as much as they would at home. Additionally, the emergence of non-State actors in the geo-political arena is becoming increasingly significant to international law and diplomatic practice. The Legal Advisers of the Ministries of Foreign Affairs are often required to deal with increasingly complex issues including providing services and protections, handling State to State intercourse as well as creating

[39] Extraordinary Chambers in the Courts of Cambodia, *Case 002/01*,
[40] Special Tribunal for Lebanon, *Al Jadeed [CO.] S.A.L./NEW T.V. S.A.L. (N.T.V.) and Ms Karma Mohamed Tahsin Al Khayat* (STL-14-05).
[41] Special Tribunal for Lebanon, *Ayyash et al.*, (STL-11-01)
[42] Further information can be found at the following website.

redress mechanisms that are not dependent on national systems. Therefore, the issue would be considered through tow lenses, namely:

- "Modern challenges for the Vienna Convention on Consular Relations in an era of globalization"; and
- "International tribunals: criminal matters and investor State".

ii. National legislation on vulture funds

124. The delegation of Belgium informed the Committee that on 12 July 2015, a Belgian law was adopted against the activities of vulture funds. The legislation prevents vulture funds' from using Belgian courts to extract exorbitant and inequitable profits following a country's debt restructuring. Belgian tribunals will now be equipped with more effective tools to implement a more stringent regulation against such speculative behavior and will therefore ensure greater protection against vulture funds' exploitative practices that hinder economic growth and development."

IV. OTHER

17. Election of the Chair and Vice-Chair

125. In accordance with *Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods*, the CAHDI re-elected Mr Paul Rietjens (Belgium) and Ms Päivi Kaukoranta (Finland), respectively as Chair and Vice-Chair of the Committee, for a term of one year, as from 1 January 2016.

18. Date and agenda of the 51st meeting of the CAHDI

126. The CAHDI decided to hold its 51st meeting in Strasbourg on 3-4 March 2016. 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. Other business

- *Possible review and updating of 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*

127. The Chair reminded delegations that this Model Plan had been prepared at the initiative of the CAHDI. Indeed, with the aim of contributing to the Decade of International Law of the United Nations (1990 – 1999), the CAHDI instituted in 1992 a working group (DI-S-PR) with a mandate to consider ways of dealing with and exchanging information concerning State practice in the field of public international law. Following the work of the group, the CAHDI launched a pilot project in order to gather contributions of States. On the basis of these consultations, the CAHDI approved a model plan of classification. On 12 June 1997, the Committee of Ministers adopted *Recommendation No R(97)11 on the amended model plan for the classification of documents concerning State practice in the field of public international law*.

128. Following the proposal of the delegation of the United Kingdom, the CAHDI agreed to hold an exchange of views at its next meeting on 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.

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
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Treaties and International Law Department
Ministry of Foreign Affairs

ANDORRA / ANDORRE

Mme Patricia QUILLACQ
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AZERBAIJAN / AZERBAIDJAN

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APPENDIX II

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 49th 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. Cases before the European Court of Human Rights involving issues of public international law

10. Peaceful settlement of disputes

11. 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*

12. Review of Council of Europe Conventions

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

13. The work of the International Law Commission (ILC) and of the Sixth Committee eview of Council of Europe Conventions

14. Consideration of current issues of international humanitarian law

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

16. Topical issues of international law

IV. OTHER

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

18. Date and agenda of the 51st meeting of the CAHDI

19. Other business

APPENDIX III

OPINION OF THE CAHDI

ON RECOMMENDATION 2069 (2015) OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE – "DRONES AND TARGETED KILLINGS: THE NEED TO UPHOLD HUMAN RIGHTS AND INTERNATIONAL LAW"

1. On 12-13 May 2015, the Ministers' Deputies communicated Recommendation 2069 (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. The Ministers' Deputies also communicated this Recommendation to the Steering Committee for Human Rights (CDDH).

2. The CAHDI examined the abovementioned Recommendation at its 50th meeting (Strasbourg, 24-25 September 2015) and made the following comments which concern aspects of the recommendation which are of particular relevance to the terms of reference of the CAHDI.

3. From the outset, the CAHDI points out that it will use the terms "unmanned aerial vehicle" (UAV) within this Opinion to refer to the so-called "drones". Furthermore, the CAHDI notes that a distinction has to be made between armed and unarmed UAVs. While the use of unarmed UAVs for intelligence, surveillance, target identification and reconnaissance operations is not a new phenomenon, the use of armed UAVs is more recent and has greatly increased in the past years. Furthermore, the CAHDI notes that another distinction should be made between the use of UAVs during armed conflict and outside an armed conflict. The CAHDI points out that there is a broad agreement that armed UAVs themselves are not illegal weapons and notes that relevant rules of international law regulating the use of force and the conduct of hostilities as well as of international human rights law apply to the use of UAVs. Nevertheless, the CAHDI points out that different views have been expressed in the international community concerning the interpretation or application of these rules.

4. In view of addressing these issues raised by the increasing use of armed UAVs, the CAHDI refers to the efforts of the international community in this regard. It notes that wide academic literature has been developed and that armed UAVs have been debated in various forums of the United Nations, intergovernmental bodies and national Governments and courts.

5. In particular, the CAHDI notes that two reports have been submitted by Mr Ben Emmerson, *Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, respectively on 18 September 2013 to the United Nations General Assembly[1] and on 10 March 2014 to the Human Rights Council[2], in which Mr Emmerson examines the use of armed UAVs in extraterritorial lethal counter-terrorism operations, including in the context of asymmetrical armed conflicts, and allegations that the increasing use of armed UAVs has caused a disproportionate number of civilian casualties. The CAHDI also takes note of the report submitted by Mr Christof Heyns, *Special Rapporteur on extrajudicial, summary or arbitrary executions* on 13 September 2013 to the United Nations General Assembly[3], in which Mr Heyns focuses on the use of lethal force through armed UAVs from the perspective of protection of the right to life. In these three reports, the Special Rapporteurs examine the ways in which the constituent regimes of international law, including international human rights law, international

[1] The *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* submitted to the United Nations General Assembly is available at the following link (document A/68/389).
[2] The *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism* submitted to the Human Rights Council is available at the following link (document A/HRC/25/59).
[3] The *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions* submitted to the United Nations General Assembly is available at the following link (document A/68/382).

humanitarian law and the law on inter-State use of force are applicable to the use of armed UAVs. They make conclusions and recommendations, notably to the United Nations and in particular their Human Rights Council, to States using armed UAVs, States on whose territory armed UAVs are used as well as other actors.

6. Furthermore, the CAHDI notes that the Human Rights Council, in Resolution 25/22 of 24 March 2014 has urged States *"to ensure that any measures employed to counter terrorism, including the use of remotely piloted aircraft or armed drones, comply with their obligations under international law, including the Charter of the United Nations, international human rights law and international humanitarian law, in particular the principles of precaution, distinction and proportionality"*. Pursuant to this Resolution, the Human Rights Council decided to organise on 22 September 2014 an interactive panel discussion of experts in order to examine issues related to ensuring the use of armed UAVs in counterterrorism and military operation in accordance with international law, including international human rights and humanitarian law. In addition, in Resolution 28/3 of 19 March 2015, the Human Rights Council has decided to *"[invite] the United Nations High Commissioner for Human Rights and relevant special procedures of the Human Rights Council and the human rights treaty bodies to pay attention, within the framework of their mandates, to violations of international law as result of the use of remotely piloted aircraft or armed drones"* as well as to remain seized of the matter.

7. As it also appears in the abovementioned reports and resolutions, the CAHDI agrees that given the fact that the number of States with the capacity to use armed UAVs is likely to increase, a greater consensus on the terms of their use should be reached in order to ensure compliance with public international law. In this regard, the CAHDI underlines that for a particular armed UAV strike to be lawful under international law, it must satisfy the relevant and applicable requirements under the law on the use of inter-State force, international humanitarian law and international human rights law.

8. Concerning the law applicable for the use of inter-State force, the CAHDI recalls that under the United Nations Charter and customary international law, States are prohibited from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

9. With regard to the applicable legal regimes, the CAHDI underlines that even if there is a valid legal basis for the use of force, a UAV strike may, depending on the circumstances, still be deemed unlawful under international humanitarian law and/or international human rights law.

10. Concerning international humanitarian law applicable during armed conflict, the CAHDI recalls that all attacks on persons and/or objects are subject to the rules on conducting hostilities. In particular, in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects. More specifically, those who plan or decide upon an attack shall do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives. Furthermore, precautions should also be taken in the choice of means and methods of attack with a view to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects.

11. Concerning international human rights law, the CAHDI recalls the case-law of the European Court of Human Rights, according to which, consistently with the case-law of the International Court of Justice, *"even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law"*[4].

[4] *Eur. Court HR, Hassan v. the United Kingdom*, judgment of 16 September 2014, application no. 29750/09, para. 104.

12. In conclusion, the CAHDI finds that many legal issues raised by the increasing use of armed UAVs need to be addressed. The CAHDI considers that the subsequent examination of these issues within the Council of Europe should take into account the work of the United Nations as well as of the International Committee of the Red Cross (ICRC). The CAHDI is willing to examine these issues in greater depth and keep the issue on its agenda, but the CAHDI considers that the drafting of guidelines would not be the best way forward.

Appendix I to the opinion

Recommendation 2069 (2015) of the Parliamentary Assembly of the Council of Europe – "Drones and targeted killings: the need to uphold human rights and international law"[1] [2]

The Parliamentary Assembly, referring to Resolution 2051 (2015)[3] on drones and targeted killings: the need to uphold human rights and international law, invites the Committee of Ministers to undertake a thorough study of the lawfulness of the use of combat drones for targeted killings and, if need be, draft guidelines for member States on targeted killings, with special reference to those carried out by combat drones. These guidelines should reflect States' obligations under international humanitarian and human rights law, in particular the standards laid down in the European Convention on Human Rights (ETS No. 5), as interpreted by the European Court of Human Rights.

[1] Adopted by the Parliamentary Assembly of the Council of Europe on 23 April 2015 (Second part-session).
[2] The report of the Rapporteur of the Parliamentary Assembly of the Council of Europe, Mr Arcadio Díaz Tejera is available at the following link.
[3] Resolution 2051 (2015) appears as Appendix II to the present document.

Appendix II to the opinion

Resolution 2051 (2015) of the Parliamentary Assembly of the Council of Europe – "Drones and targeted killings: the need to uphold human rights and international law"[1]

1. The Parliamentary Assembly considers that the use of armed drones for targeted killings raises serious questions in terms of human rights and other branches of international law.

2. The Assembly notes that several member States and States enjoying observer status with the Council of Europe or the Parliamentary Assembly have used combat drones as weapons of war or for carrying out targeted killings of people suspected of belonging to terrorist groups in a number of countries, including Afghanistan, Pakistan, Somalia and Yemen.

3. Several Council of Europe member States have purchased combat drones or are considering doing so, or have shared intelligence with States using combat drones for targeted killings, thus assisting them in carrying out drone attacks. Furthermore, the United States of America is provided with transmission stations in the territories of Council of Europe member States that play an indispensable role in the execution of drone attacks.

4. Armed drones allow for the carrying out of attacks remotely, without placing the attacker's own personnel at risk of injury or capture. The ability of drones equipped with powerful sensors to loiter over a potential target for some time enables the decision on launching a strike to be based on particularly precise and up-to-date information. These advantages have contributed to lowering the threshold for intervention and increasing the number of drone strikes in recent years. At the same time, the increased precision of drone strikes provides the opportunity to improve compliance with international humanitarian and human rights law.

5. The Assembly is alarmed at the high number of lethal drone attacks, which have also caused considerable unintended collateral damage to non-combatants, in contrast with the "surgical" nature of such strikes claimed by those launching them. The constant fear of drone attacks engendered by strikes hitting schools, weddings and tribal assemblies has disrupted the life of traditional societies in the countries of operation.

6. Drone strikes raise serious legal issues, which differ depending on the circumstances in which the strikes are launched:

6.1. national sovereignty and the respect for territorial integrity under international law forbid military interventions of any kind on the territory of another State without valid authorisation by the legitimate representatives of the State concerned. Military or intelligence officials of the State concerned tolerating or even authorising such interventions without the approval or against the will of the State's representatives (in particular the national parliament) cannot legitimise an attack; exceptions from the duty to respect national sovereignty can arise from the principle of the "responsibility to protect" (for example in the fight against the terrorist group known as "IS"), in accordance with the principles of the Charter of the United Nations and international law;

6.2. under international humanitarian law, which applies in situations of armed conflict, only combatants are legitimate targets. In addition, the use of lethal force must be militarily necessary and proportionate and reasonable precautions must be taken to prevent mistakes and minimise harm to civilians;

6.3. under international human rights law, which generally applies in peacetime, but whose application has permeated also into situations of armed conflict, an intentional killing

[1] Adopted by the Parliamentary Assembly of the Council of Europe on 23 April 2015 (Second part-session).

by State agents is only legal if it is required to protect human life and there are no other means, such as capture or non-lethal incapacitation, of preventing that threat to human life;

6.4. in particular, under Article 2 – Right to life – of the European Convention on Human Rights (ETS No. 5), as interpreted by the European Court of Human Rights, the deprivation of the right to life can only be justified if absolutely necessary for the safeguarding of the lives of others or the protection of others from unlawful violence. Article 2 also requires timely, full and effective investigations to hold to account those responsible for any wrongdoing;

6.5. in order to justify a wider use of targeted killings, the concept of "non-international armed conflict" has been extended by some countries so as to include numerous regions across the world as "battlespaces" of the "global war on terror". This threatens to blur the line between armed conflict and law enforcement, to the detriment of the protection of human rights.

7. Despite some recent progress due to successful court challenges, in particular by the American media, attacks by combat drones are still largely shrouded in secrecy. This relates to both the actual outcome of individual attacks, including the extent of any collateral damage, and the decision-making process for targeting individuals and balancing potential harm to non-combatants.

8. The Assembly calls on all member and observer States, as well as States whose parliaments have observer status with the Assembly, to:

8.1. scrupulously respect the limits placed on targeted killings under international law and international humanitarian and human rights law, in particular with respect to the use of combat drones;

8.2. lay down clear procedures for authorising strikes, which must be subject to constant supervision by a high-level court and ex post evaluation by an independent body;

8.3. avoid broadening the concept of "non-international armed conflict" by continuing to respect established criteria, including the requisite degree of organisation of non-State groups and a certain degree of intensity and localisation of violence. Also, US drone strikes facilitated by transmission co-operation on the territory of member States must be investigated by the member States themselves, so as to ensure compliance with Article 2 of the European Convention on Human Rights;

8.4. fully and effectively investigate all deaths caused by armed drones in order to hold to account those responsible for any wrongdoing and to compensate any victims of wrongful attacks or their relatives;

8.5. publish the criteria and procedures used for targeting individuals and the results of the investigations carried out into deaths caused by the use of combat drones;

8.6. refrain from using, or providing intelligence information or other input for:

8.6.1. any automated (robotic) procedures for targeting individuals based on communication patterns or other data collected through mass surveillance techniques;

8.6.2. "signature strikes" not based on the precise identification of a targeted person, but on the target's pattern of behaviour (except in situations of armed conflict, provided the rules of international humanitarian law are respected);

8.6.3. “double-tap strikes”, involving a second strike targeting first responders (for example persons providing medical assistance to the victims of a first strike).

9. The Assembly urges the Secretary General of the Council of Europe to initiate a procedure under Article 52 – Inquiries by the Secretary General – of the European Convention on Human Rights to request information on the manner in which State Parties implement the provisions of the Convention concerning the right to life, with particular reference to their own drone weaponising programmes, and their co-operation with American programmes through the sharing of information, and the facilitation of targeted killings by drones.

APPENDIX IV

STATEMENT BY MR NARINDER SINGH, CHAIRPERSON OF THE INTERNATIONAL LAW COMMISSION,

TO THE 50TH MEETING OF THE COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI) OF THE COUNCIL OF EUROPE

(Strasbourg, 24 March 2015)

The work of the International Law Commission at its sixty-seventh session

Mr Chairman, distinguished Members of CAHDI and Observers, Madam 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 2015 session.

This summer, the President of CAHDI, Mr Paul Rietjens, 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.

Apart from the highly valued visit from the Chair of the CAHDI, Mr Paul Rietjens, 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 Ronnie Abraham, also made their annual visits and informed about recent developments in their respective institutions.

The United Nations High Commissioner for Human Rights also addressed the Commission. An informal exchange of views was held between members of the Commission and the International Committee of the Red Cross on topics of mutual interest. This included presentations on the preparations for the 32nd International Conference of the Red Cross and Red Crescent Movement, and the updating of the ICRC Commentaries on the Geneva Conventions and Additional Protocols. Presentations were also made on topics on the programme of work of the Commission, including the "Subsequent agreements and subsequent practice in relation to the interpretation of treaties" and "Crimes against humanity."

Introduction

The International Law Commission held the first part of its sixty-seventh session from 4 May to 5 June 2015 and the second part from 6 July to 7 August 2015 at its seat at the United Nations Office at Geneva. This session was the fourth session of the quinquennium.

The composition of the Commission changed further to the resignation of Mr Kirill Gevorgian after his election as Member of the International Court of Justice. The Commission elected Mr Roman A. Kolodkin (Russian Federation) to fill the casual vacancy occasioned by this resignation.

The Commission considered the nine topics on its agenda for this session. The topic "Protection of persons in the event of disasters" was not considered in 2015, since the set of draft articles adopted on first reading in 2014 is currently being examined by Governments, competent

international organizations, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies.

I will present the work done on the topics on the agenda of the Commission in turn, as well as the other decisions taken by the Commission.

The Most-Favoured-Nation clause

The Study Group on The Most-Favoured-Nation (MFN) clause, which commenced it work in 2009, has completed its work by submitting its final report at the present session. The Study Group was chaired by Mr Donald M. McRae. The final report is annexed to the report of the Commission.

The Commission has received and welcomed the report with appreciation. Further, it has endorsed the summary conclusions of the Study Group. In the main:

(a) MFN clauses remain unchanged in character from the time the 1978 draft articles were concluded. The core provisions of the 1978 draft articles continue to be the basis for the interpretation and application of MFN clauses today. However, these draft articles do not provide answers to all the interpretative issues that can arise with MFN clauses.

(b) The Vienna Convention of the Law of Treaties (VCLT) is important and relevant, as a point of departure, in the interpretation of investment treaties. The interpretation of MFN clauses is to be undertaken on the basis of the rules for the interpretation of treaties as set out in the VCLT.

(c) The central interpretative issue in respect of the MFN clauses relates to the scope of the clause and the application of the *ejusdem generis* principle. In other words, the scope and nature of the benefit that can be obtained under an MFN provision depends on the interpretation of the MFN provision itself.

(d) Even though the application of MFN clauses to dispute settlement provisions in investment treaty arbitration, rather than limiting them to substantive obligations, has brought a new dimension to thinking about MFN provisions and perhaps consequences that had not been foreseen by parties when they negotiated their investment agreements, the matter remains one of treaty interpretation.

(e) Whether MFN clauses are to encompass dispute settlement provisions is ultimately up to the States that negotiate such clauses. Explicit language can ensure that an MFN provision does or does not apply to dispute settlement provisions. Otherwise the matter will be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis.

The Commission also highlighted that the interpretative techniques reviewed in the report of the Study Group are designed to assist in the interpretation and application of MFN provisions.

The Commission has commended the final report to the attention of the General Assembly, and encouraged its widest possible dissemination.

The Commission has thus concluded its consideration of the topic.

Protection of the atmosphere

The Commission had before it the second report of the Special Rapporteur, Mr Shinya Murase, (A/CN.4/681 and Corr.1 (Chinese only)). The report provided a further analysis of the draft guidelines submitted in the first report, and consequently presented a set of revised draft guidelines relating to the (a) use of terms; (b) the scope of the draft guidelines; and (c) the common

concern of humankind. Further, additional draft guidelines were presented on (a) the general obligation of States to protect the atmosphere and (b) international cooperation.

The debate in the Commission led to the referral by the Commission to the Drafting Committee of draft guidelines 1, 2, 3 and 5, as contained in the Special Rapporteur's second report. This was on the understanding that draft guideline 3, on the common concern of humankind, would be considered in the context of a possible preamble. The Commission decided to defer the referral of draft guideline on the general obligation of States to protect the environment since the Special Rapporteur intimated that he intends to undertake a further analysis of the matter for next year in the light of the debate in plenary.

Upon consideration of the report of the Drafting Committee (A/CN.4/L.851), the Commission provisionally adopted four preambular paragraphs, draft guideline 1, on use of terms, draft guideline 2, on scope, and draft guideline 5, on international cooperation, together with commentaries thereto.

The Commission seeks, through the progressive development of international law and its codification, to provide guidelines that may assist the international community as it addresses critical questions relating to transboundary and global protection of the atmosphere. In doing so, the Commission does not desire to interfere with relevant political negotiations, including those on long-range transboundary air pollution, ozone depletion and climate change, seek to "fill" gaps in treaty regimes nor to impose on current treaty regimes legal rules or legal principles not already contained therein.

The Commission also recognised that this topic straddles law and science. Accordingly, a dialogue between scientists and the Commission was organized by the Special Rapporteur during which presentations were made regarding various aspects concerning the atmosphere and its interaction with the global environment.

Last year, the Commission requested States to provide relevant information on domestic legislation and the judicial decisions of the domestic courts. Any additional informational information would be appreciated.

Identification of customary international law

The Commission had before it the third report of the Special Rapporteur (A/CN.4/682), Sir Michael Wood, which contained, *inter alia*, additional paragraphs to three of the draft conclusions proposed in the second report and five new draft conclusions relating respectively to the relationship between the two constituent elements of customary international law, the role of inaction, the role of treaties and resolutions, judicial decisions and writings, the relevance of international organizations and non-State actors, as well as particular custom and the persistent objector. The report of the Commission for this year reflects the debate of the Commission on the third report.

The Commission referred the draft conclusions contained in the third report of the Special Rapporteur to the Drafting Committee. The Drafting Committee examined the two draft conclusions on acceptance as law (*opinio juris*) as contained in the second report by the Special Rapporteur (A/CN.4/672) and left pending from last year, as well as those presented in his third report this year. The Drafting Committee provisionally adopted, in total, 16 draft conclusions on the identification of customary international law structured in seven parts (A/CN.4/L869). The Introductory Part One contains one draft conclusion on scope. Part Two, with two draft conclusions, sets out the basic approach to the identification of customary international law, consisting of an inquiry into the two constituent elements, and the assessment of evidence in that respect. Parts Three, with five draft conclusions, and Four, containing two draft conclusions, address the basic approach by explaining further the two constituent elements, namely a general practice and accepted as law (*opinio juris*). Part Five then addresses, in four draft conclusions, the significance of certain materials for the identification of customary international law. Finally, Parts

Six and Seven, each containing one draft conclusion, address, respectively, the persistent objector and particular customary international law.

Further to the presentation of the report of the Drafting Committee (A/CN.4/L.869), the Commission took note of the 16 draft conclusions contained therein. It is anticipated that the Commission will, at its next session, consider the provisional adoption of the draft conclusions as well as the commentaries thereto.

In addition, the Commission recalled its request for information made in the previous report (A/69/10) and indicated that it would welcome any additional information.

Crimes against humanity

At its sixty-sixth session (2014), the Commission decided to include the topic in its programme of work and appointed Mr Sean D. Murphy as Special Rapporteur for the topic. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/680).

In his first report, the Special Rapporteur, after assessing the potential benefits of developing a convention on crimes against humanity (section II), provided a general background synopsis with respect to crimes against humanity (section III) and addressed some aspects of the existing multilateral conventions that promote prevention, criminalization and inter-State cooperation with respect to crimes (section IV). Furthermore, the Special Rapporteur examined the general obligation that existed in various treaty regimes for States to prevent and punish such crimes (section V) and the definition of “crimes against humanity” for the purpose of the topic (section VI). The report also contained information as to the future programme of work on the topic (section VII). The Special Rapporteur proposed two draft articles corresponding to the issues addressed in sections V and VI, respectively, which were referred to the Drafting Committee.

The Drafting Committee examined the two draft articles initially proposed by the Special Rapporteur in his first report (A/CN.4/680), together with a number of suggested reformulations that were presented by the Special Rapporteur to the Drafting Committee in order to respond to suggestions made, or concerns raised, during the debate in Plenary. The Drafting Committee provisionally adopted four draft articles as a result of the break-up of the provisions contained in one of the draft articles initially proposed by the Special Rapporteur, as well as the creation of a new draft article. Draft article 1 constitutes the traditional provision on the “scope” of the draft articles on crimes against humanity. Draft article 2, “General Obligation”, identifies as the title suggests, a general obligation of prevention and punishment of crimes against humanity that is applicable to the entire set of draft articles. Draft article 3, entitled “Definition of crimes against humanity”, provides a definition of crimes against humanity which reproduces essentially Article 7 of the Rome Statute. It contains also a “without prejudice” clause to any broader definition provided for in any international instrument or national law. Finally, draft article 4 “Obligation of prevention”, set out the various elements that collectively promote the prevention of crimes against humanity.

Upon consideration of the report of the Drafting Committee (A/CN.4/L.853), the Commission provisionally adopted draft articles 1, 2, 3 and 4, as well as commentaries thereto. These draft articles, together with commentaries, are reproduced in the report of the Commission.

Furthermore, the Commission recalled its request for information made in the previous report (A/69/10) and indicated that it would welcome any additional information.

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

At the present session, the Commission had before it the third report of the Special Rapporteur, Mr Georg Nolte (A/CN.4/683), which offered an analysis of the role of subsequent agreements and subsequent practice in relation to treaties that are the constituent instruments of international organizations and which proposed draft conclusion 11 on the issue. In particular, after addressing

Article 5 of the Vienna Convention on the Law of Treaties (Treaties constituting international organizations and treaties adopted within an international organization), the third report turned to questions related to the application of the rules of the Vienna Convention on treaty interpretation to constituent instruments of international organizations. It also dealt with several issues relating to subsequent agreements under article 31, paragraph 3 (a) and (b), as well as article 32, of the Vienna Convention on the Law of Treaties, as a means of interpretation of constituent instruments of international organizations.

The Commission decided to refer draft conclusion 11 to the Drafting Committee. The Drafting Committee examined this draft conclusion, together with a reformulation that was presented by the Special Rapporteur to the Drafting Committee in order to respond to suggestions made, or concerns raised, during the Plenary with respect to that draft conclusion.

Further to the presentation of the Report of the Drafting Committee (A/CN.4/L.854), the Commission provisionally adopted draft conclusion 11, as well as the commentary thereto, which are reproduced in the Report of the Commission.

In addition, the Commission requested States and international organizations to provide it with:

(a) any examples of decisions of national courts in which a subsequent agreement or subsequent practice has contributed to the interpretation of a treaty; and

(b) any examples where 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.

Protection of the environment in relation to armed conflicts

The Commission had before it the second report of the Special Rapporteur, Ms Marie Jacobsson (A/CN.4/685). It should be recalled that this topic is examined from the perspective of three temporal phases, before, during and after armed conflict. Last year's report was dedicated to the first phase, the phase dealing with the relevant rules and principles applicable to a potential armed conflict (peacetime obligations). This year's report dealt with the second phase (during armed conflict) and identified and examined existing rules of armed conflict directly relevant to the protection of the environment in relation to armed conflict.

The report contained five draft principles relating to these questions and three draft preambular paragraphs relating to the scope and purpose of the draft principles as well as use of terms.

Following the debate in Plenary, the Commission decided to refer the draft preambular paragraphs and the draft principles to the Drafting Committee, with the understanding that the provision on use of terms was referred for the purpose of facilitating discussions and was to be left pending by the Drafting Committee.

The Commission subsequently received the report of the Drafting Committee (A/CN.4/L.870), which structured the draft principles bearing in mind the temporal phases of the topic. The report contained two draft introductory provisions (previously entitled Preamble) on the scope and purpose of the topic and six draft principles, provisionally adopted by the Drafting Committee. Whereas one draft principle dealt with measures to be taken during peacetime, namely the designation of protected zones, the five remaining draft principles addressed principles applicable during armed conflict. These latter draft principles addressed matters relating to (i) the general protection of the environment during armed conflict, (ii) the application of the law of armed conflict to the environment, (iii) environmental considerations with respect to the application of the principle of proportionality and the rules on military necessity, (iv) prohibition of reprisals, and (v) protected zones. It emphasized that the draft principles had been prepared on the general understanding that they would normally apply to both international and non-international armed conflicts.

The report of the Commission for this year reflects the debate of the Commission on these draft principles and preambular paragraphs presented by the Special Rapporteur.

The Commission is expected to adopt these draft provisions and principles together with commentaries next year.

In addition, the Commission indicated that it would appreciate being provided by States with information on whether, in their practice, international or domestic environmental law has been interpreted as applicable in relation to international or non-international armed conflict. It also invited information from States as to whether they have any instruments aimed at protecting the environment in relation to armed conflict, for example, 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 Commission would, in particular, be interested in instruments related to preventive and remedial measures.

Immunity of State officials from foreign criminal jurisdiction

The Commission had before it the fourth report of the Special Rapporteur (A/CN.4/686), Ms Concepción Escobar Hernández. Since last year's report addressed the subjective scope of immunity *ratione materiae*, the report this year was devoted to the consideration of the remaining material scope namely what constituted an "act performed in an official capacity", and its temporal scope.

The report contained proposals for draft article 2, subparagraph (f), defining an "act performed in an official capacity" and draft article 6 on the scope of immunity *ratione materiae*.

The report of the Commission for this year reflects the debate of the Commission on these two draft articles presented by the Special Rapporteur.

Following the debate, the Commission decided to refer the two draft articles to the Drafting Committee.

The Commission subsequently received the report of the Drafting Committee (A/CN.4/L.865), and took note of draft articles 2, subparagraph (f), and 6, provisionally adopted by the Drafting Committee. The Commission is expected to adopt these articles together with commentaries next year.

Next year, the Commission will deal with the question of limitations and exception. It would appreciate being provided by States with information on their legislation and practice, in particular judicial practice, related to limits and exceptions to the immunity of State officials from foreign criminal jurisdiction. For that purpose, the Commission indicated that it would appreciate being provided by States with information on their legislation and practice, in particular judicial practice, related to limits and exceptions to the immunity of State officials from foreign criminal jurisdiction.

Provisional application of treaties

The Commission has been considering the topic since its inclusion in the programme of work in 2012. At this year's session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/687), Mr Juan Manuel Gómez-Robledo, which considered the relationship of provisional application to other provisions of the Vienna Convention on the Law of Treaties of 1969, and the question of provisional application with regard to international organizations. The Commission also had before it a memorandum (A/CN.4/676), prepared by the Secretariat, on provisional application under the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986. The Special Rapporteur further proposed six draft guidelines in his report.

The report of the Commission for this year reflects the debate of the Commission on the third report of the Special Rapporteur.

The Commission referred the six draft guidelines proposed by the Special Rapporteur to the Drafting Committee. The Commission subsequently received an interim oral report, presented by the Chairman of the Drafting Committee, on draft guidelines 1 to 3, provisionally adopted by the Drafting Committee, and which was presented to the Commission for information only. It is expected that the Drafting Committee will continue its consideration of the draft guidelines at the next session, in 2016.

In addition, the Commission indicated that it would appreciate being provided by States with 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.

Rule of Law

I would just like to highlight that since its sixtieth session in 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.

***Jus Cogens* - New topic**

The Commission decided to include the topic "*Jus cogens*" in its programme of work, and to appoint Mr Dire Tladi as Special Rapporteur for the topic. As noted in the proposal for the topic, the Commission could make a useful contribution to the progressive development and codification of international law by analysing the state of international law on *jus cogens* and providing an authoritative statement of the nature of *jus cogens*, the requirements for characterising a norm as jus cogens and the consequences or effects or *jus cogens*. The Commission could also provide an illustrative list of existing *jus cogens* norms. The consideration of the topic by the Commission could, therefore, focus on the following elements: (a) the nature of *jus cogens*; (b) requirements for the identification of a norm as *jus cogens*; (c) an illustrative list of norms which have achieved the status of *jus cogens*; (d) consequences or effects of *jus cogens*.

Other decisions and conclusions of the Commission

The Commission recommended that its sixty-eighth session be held in Geneva from 2 May to 10 June and 4 July to 12 August 2016.

The Commission also discussed the possibility of convening a segment of future sessions in New York and recommended that its sixty-eighth session be held in Geneva from 2 May to 10 June and 4 July to 12 August 2016. Based on the information made available, the Commission has recommended that preparatory work and estimates proceed on the basis that the first segment of its seventieth session (2018) would be convened at the United Nations Headquarters in New York.

International Law Seminar

This year the International Law seminar held its 51st session. Twenty-four participants of different nationalities, from all regional groups took part in the session. The participants attended plenary

meetings of the Commission, specially arranged lectures, and participated in working groups on specific topics.

The Commission attaches the highest importance to the Seminar, which is intended for young lawyers specializing in international law, young professors or government officials pursuing an academic or diplomatic career in posts in the civil service of their country, especially from developing countries, to familiarize themselves with the work of the International Law Commission and of the status of codification and progressive development of international law, as well as the work of the many International Organizations based in Geneva.

Since 1965, the year of the Seminar inception, 1163 participants, representing 171 nationalities, have taken part in the Seminar. 713 have received a fellowship. It is a matter of concern that against an average of about 22 fellowships a year over the last 50 years, this year only fourteen fellowships (nine for travel and living expenses, three for living expenses only and two for travel expenses only) could be granted.

Since 2013 the Governments of Argentina, Austria, China, Finland, India, Ireland, Mexico, Sweden, Switzerland, and of the United Kingdom had made voluntary contributions to the United Nations Trust Fund for the International Law Seminar. The Commission has recommended that the General Assembly should again appeal to States to make voluntary contributions in order to secure the organization of the Seminar in 2016 with as broad participation as possible.

I request the members of CAHDI to kindly persuade their governments to contribute to the Seminar Trust Fund. This would be a very cost effective contribution to the rule of law at the international level, and considering the modest amounts involved, should not be too difficult.

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