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(CAHDI)

Meeting report

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Brussels (Belgium), 15-16 September 2016

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

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I. INTRODUCTION

1. Opening of the meeting

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 52nd meeting in Brussels (Belgium) on 15-16 September 2016 with Mr **Paul Rietjens (Belgium)** in the Chair. The list of participants is set out in **Appendix I** to this report.

2. The meeting was opened with a message from Mr **Didier Reynders**, Deputy Prime Minister and Minister of Foreign Affairs and European Affairs of Belgium which appears in **Appendix IV** to this report. The message was delivered by Ambassador **Rudy Huygelen***,* Chief of Cabinet of the Minister of Foreign Affairs and European Affairs of Belgium.

2. Adoption of the agenda

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

3. Adoption of the report of the 51st meeting

4. The CAHDI adopted the report of its 51st meeting (document CAHDI (2016) 16 prov 1) and instructed the Secretariat to publish it on the Committee's website.

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

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

5. Mr Jörg Polakiewicz informed the CAHDI of the latest developments within the Council of Europe since the Committee's last meeting on 3-4 March 2016 in Strasbourg.

6. Concerning the *European Convention on Human Rights* (ECHR), the Director informed the CAHDI of the latest derogations made under Article 15 of the ECHR since the last CAHDI meeting. In this regard, the CAHDI noted that France had prolonged its state of emergency for two months on 25 May 2016 and again for a further six months on 21 July 2016. The CAHDI also took note of the declaration of the state of emergency for ninety days in Turkey from 21 July 2016 and its derogation under Article 15 of this Convention. The CAHDI further noted that Ukraine had transmitted to the Secretary General of the Council of Europe on 29 June 2016 a revised list of localities in Donetsk and Luhansk oblasts which were under control/partially controlled by the Government as of 14 June 2016. On the annual report of the Secretary General of the Council of Europe on the state of democracy, the Director informed the CAHDI of the Secretary General's third report issued in May 2016 on *State of Democracy, Human Rights and the Rule of Law: a security imperative for Europe*. With regard to the Secretary General of the Council of Europe's powers under Article 52 of the ECHR, the Director reminded the CAHDI of the Secretary General of the Council of Europe's decision earlier this year to use his powers with regard to the execution of the judgment of the European Court of Human Rights on the detention of the applicant, Mr Ilgar Mammadov, in the case of *Ilgar Mammadov v. Azerbaijan*[1]. The CAHDI then took note of the latest developments in this regard, noting that the Committee of Ministers had adopted, under Article 46 of the ECHR, a third Interim Resolution and had decided to examine the applicant's situation at each of its regular and DH meetings until such time as the applicant was released.[2] On the topic of the case law of the European Court of Human Rights, the Director mentioned the case of *Al-Dulimi*

[1] ECHR, *Ilgar Mammadov v. Azerbaijan*, no. 15172/13, Chamber judgment of 22 May 2014.

[2] See Interim Resolution CM/ResDH(2016)144, adopted by the Committee of Ministers on 8 June 2016 at the 1259th meeting of the Ministers' Deputies.

and Montana Management Inc. v. Switzerland[3], the Grand Chamber judgment which had been delivered on 21 June 2016.

7. With regard to the unprecedented migration crisis in Europe, the CAHDI was informed that the Council of Europe's efforts to ensure safety and proper treatment of asylum-seekers and refugees were still underway. In this respect, the Director informed the CAHDI of the fact-finding mission to hotspots in Greece, "the former Yugoslav Republic of Macedonia", Turkey and France (Calais) led by the Secretary General's Special Representative Ambassador Boček (Czech Republic). Finally, and concerning the latest activities of the Venice Commission, the Director mentioned its Opinion of 11 March 2016 on various amendments to the Act on the Constitutional Tribunal of Poland, as well as its upcoming Opinion on the new Act of the Constitutional Tribunal of Poland to be adopted on 14-15 October 2017. The CAHDI was also informed of the Venice Commission's opinion on the Amendments to the Federal Constitutional Law on the Constitutional Court of Russia.

b. Presentation of the new CAHDI databases

8. The Secretariat of the CAHDI presented the three new CAHDI databases on "Immunities of States and international organisations", the "Organisation and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs" and "National implementation measures of UN sanctions and respect for human rights". The CAHDI thanked the delegations of Germany and the Netherlands for their voluntary contributions to this project which allowed for the setting up of these databases. The Secretariat informed the CAHDI that the aims of this project were:

- to facilitate the contribution process to the databases; and
- to facilitate the access of the CAHDI members and the public at large to the information, in a more intuitive way thus allowing, *in fine*, a broader dissemination of the work of the Committee.

To illustrate this, the Secretariat made a live presentation of the contribution and search processes, accessible through a personal space. In this regard, delegations were informed that their accounts created and used notably for accessing the restricted parts of the CAHDI website could also be used to access their personal space. The Secretariat would activate them after the meeting and would inform the delegations.

The Secretariat finally informed the CAHDI that it would contact particular delegations in order to finalise the entry of their existing contributions which needed further information.

9. A number of delegations welcomed the new databases, noting that these user-friendly tools would allow States to interact more intensively.

II. <u>ONGOING ACTIVITIES OF THE CAHDI</u>

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

10. The Chair presented a compilation of Committee of Ministers' decisions of relevance to the CAHDI's activities (documents CAHDI (2016) 17 and CAHDI (2016) 17 Addendum). In particular, the CAHDI noted that the Committee of Ministers had on 27 April 2016 examined the abridged report of its 51st meeting (Strasbourg, 3-4 March 2016). The CAHDI also took note of the main priorities of the current Estonian Chairmanship of the Committee of Ministers, which took over from the Bulgarian Chairmanship on 18 May 2016.

[3] ECHR, *Al-Dulimi and Montana Management Inc. v. Switzerland*, no. 5809/08, Grand Chamber judgment of 21 June 2016.

11. The CAHDI recalled that on 6 July 2016 at their 1262nd meeting, the Ministers' Deputies had adopted their reply to the Parliamentary Assembly *Recommendation 2083 (2016) on "Introduction of sanctions against parliamentarians"*. The CAHDI further recalled that on 6 July 2016 at the same meeting, the Ministers' Deputies had communicated *Recommendation 2095 (2016) on "Parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly"* to the CAHDI for information and possible comments by mid-September 2016. A preliminary draft opinion was prepared by the Chair, in cooperation with the Secretariat, and sent to delegations on 1 September 2016 for comments and observations before 8 September 2016 prior to the meeting. The Secretariat did not receive any comment by delegations.

12. The Chair presented the draft opinion of the CAHDI (document CAHDI (2016) 20 prov). Following an examination of the draft opinion, the CAHDI adopted the opinion which appears in **Appendix III** to the present report.

13. In its opinion, the CAHDI first of all recalled its earlier Opinion on *Recommendation 2083 (2016) of the Parliamentary Assembly of the Council of Europe (PACE) on "Introduction of sanctions against parliamentarians"* adopted on 4 March 2016 during its 51st meeting and underlined that its comments made therein on the main legal arguments concerning the scope of the privileges and immunities enjoyed by members of the PACE were equally relevant to the present *Recommendation 2095 (2016)*. In this vein, the CAHDI reiterated that the legal situation of members of the PACE seeking to attend an official meeting in a member State was governed by the *Statute of the Council of Europe* (ETS. No. 001) and the *General Agreement on Privileges and Immunities of the Council of Europe* (ETS. No. 002) as well as its *Protocol* (ETS No. 10). With reference to replies to PACE recommendations and written questions by PACE members, the CAHDI further reiterated that the Committee of Ministers of the Council of Europe had on several occasions invited governments of member States to fully implement the above mentioned privileges and immunities. It also considered that the responsibility for imposing restrictions on foreign nationals from entering their territory under international law rested with the States. In closing, the CAHDI considered that many political and legal issues were raised by the privileges and immunities of parliamentarians and their corresponding rights and obligations, which were governed by the applicable Council of Europe treaties. It further considered that the decision to further call "member States to act in strict compliance with their obligations" under the above-mentioned rules as requested by the PACE rested with the Committee of Ministers.

14. The Chair informed the CAHDI of his exchange of views with the Committee of Ministers at the 1260th meeting of the Ministers' Deputies on 15 June 2016 (the statement of the Chair of the CAHDI is contained in document CAHDI (2016) Inf 7). The Chair gave a brief overview of his statement to the CAHDI experts, underlying in particular that he had presented to the Committee of Ministers the contribution of the CAHDI to the activities of the Council of Europe; the contribution of the CAHDI beyond the Council of Europe and as a liaison body with other international intergovernmental organisations as well as the futures challenges. In relation to the latter issue, the Chair of the CAHDI pointed out that he had mentioned to the Committee of Ministers the need for the CAHDI to be served by a permanent and specialised Secretariat with staff covered by the Ordinary Budget of the Organisation (which was the case until 2011) and therefore not subject to the uncertainties of voluntary contributions.

6. Immunities of States and international organisations

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

15. The Chair introduced this item and underlined that the CAHDI replies to the three questionnaires on this topical issue of immunities of States and International Organisations constituted a valuable working tool not only for but also beyond the CAHDI members (e.g. academia, other international organisations, officials of ministries of foreign affairs of non- member States represented within the CAHDI, etc.). Therefore, he indicated that the increased number of

requests for the disclosure of such replies which had been received by him and the Secretariat had been expected. In this respect, the Chair requested the views of the CAHDI experts on this issue.

16. Consequently, the CAHDI held an exchange of views on the possibilities to disclose the replies to the questionnaires set out under this item, namely the questionnaires on:

- "Immunity of State owned cultural property on loan";
- "Immunities of special missions"; and
- "Service of process on a foreign State".

17. While all the delegations favoured more openness and transparency in order to promote the work of the CAHDI in particular, and of the Council of Europe in general, they also underlined that they needed more time to reflect on this issue and possibly revise their replies. Indeed, many delegations highlighted that the current replies had been submitted bearing their confidential nature in mind and suggested therefore that before proceeding to disclose them, they needed to carefully examine their content and wording. Some delegations suggested offering flexibility to the States, i.e. to leave them the option to have their replies public or confidential. In relation to the latter dual option, the Secretariat pointed out that its implementation might be more complicated due to IT reasons.

18. The CAHDI agreed to further examine this issue at its next meeting in March 2017. The Chair indicated that in order for the CAHDI to make an informed decision, it would be advisable to define the modalities for such a disclosure. Therefore, the Chair invited delegations to submit to the Secretariat their written proposals before the next CAHDI meeting.

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

19. 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 peacekeeping operations of the United Nations (UN)[4] and case-law of the European Court of Human Rights[5] 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?

[4] 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 was lodged on 12 February 2015 before the United States Court of Appeals for the Second Circuit. The oral arguments were heard on 1 March 2016. In its judgment of 18 August 2016, the United States Court of Appeals for the Second Circuit upheld the immunity of the United Nations.

[5] ECHR*, Beer and Regan v. Germany*, no. 28934/95, Grand Chamber judgment of 18 February 1999; ECHR*, Waite and Kennedy v. Germany,* no. 26083/94, Grand Chamber judgment of 18 February 1999; ECHR*, Chapman v. Belgium,* no. 39619/06, decision of 5 March 2013; ECHR, *Stichting Mothers of Srebrenica and others v. the Netherlands,* no. 65542/12, decision of 11 June 2013.

- 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?

20. The Chair welcomed the written comments submitted by Albania, Andorra, Armenia, Austria, Canada, the Czech Republic, Denmark, Germany, Greece, Hungary, Israel, Mexico, Slovenia, Switzerland and the United Kingdom to the questions contained in document CAHDI (2016) 9 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.

21. The delegation of the Netherlands presented the preliminary findings from the replies received so far. It noted that a large majority of the delegations welcomed 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. Furthermore, many delegations had underlined that while the privileges and immunities enjoyed by international organisations were crucial for their proper functioning, independence and efficiency, the important question remained the balance to be struck between this need and the need for accountability i.e. the need to protect victims. In this regard, some delegations had pointed out that a distinction had to be made between the activities of international organisations having a direct contact and impact on individuals (such as peace-keeping operations) and those which had only an indirect impact (such as policy guidelines on specific areas, legal activities etc.). Many delegations had underlined that indeed the diversity of international organisations and the subject matters made it necessary to envisage a tailor-made approach for each and every international organisation. Moreover, the question of the differences between the acts of *jure imperii* of international organisations and those of *jure gestionis* also had to be taken into account when examining this issue. Furthermore, the delegation of the Netherlands noted that many delegations had reiterated 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.

22. The delegation of the Netherlands informed the Committee that it would envisage drafting another document on the subject as soon as it had more replies available.

23. The delegation of the Netherlands also informed the Committee that the Advisory Report on the "Responsibilities of international organisations" issued by the Dutch *Advisory Committee on Issues of Public International Law* (CAVV) [6] in December 2015 at the request of the Dutch Ministry of Foreign Affairs, was now available in its English translation[7]. It also underlined that the Ministry of Foreign Affairs was under a legal obligation to respond to this Advice.

24. The delegation of the Russian Federation provided some comments since it had not had the occasion to do so earlier. It pointed out that the fact that international organisations are *sui generis* subjects under international law should be taken into account within this debate. As such, they do not possess their own territory and rely heavily on their special status, which is provided for as a rule in their founding treaties. As a result, without their special status they would not be able to

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

effectively perform their functions vested in them by member States. The delegation of the Russian Federation further referred to the analysis provided by the Netherlands in its paper on the settlement of disputes of a private character to which an international organisation is a party and concurred that the privileges and immunities of international organisations served a legitimate purpose of protecting their independence. Acknowledging also that their increasing involvement in conducting operations gave rise to liabilities, the delegation of the Russian Federation stated that the conflict between privileges and immunities on the one hand, and access to justice on the other hand, acquired a new dimension in the context of international organisations. It further stated that international organisations were not subject to any jurisdiction on national or international level, leaving those who had sustained damage no more than dependency on the rules of international organisations or the rules of diplomatic protection. In assessing the adequacy of the former, the delegation of the Russian Federation observed that it varied from case to case. It further referred to the judgment of the ICJ in the case of *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening[8]) of 3 February 2012: "*The Court can find no basis in the State practice from which customary international law is derived that international law makes the entitlement of a State to immunity dependent upon the existence of effective alternative means of securing redress (*para. 101)." The delegation of the Russian Federation, in its view, stated that the only viable solution would be for member States to work on the improvement of rules applicable to the settlement of liability arising from international organisations. Furthermore, it underlined the high risk of international organisation transferring their liabilities to host countries through host country agreements. The delegation of the Russian Federation stressed once more that it would be difficult to find a general universal solution and observed that it would be more efficient to consider this issue in the appropriate forums of relevant organisations. Finally, the delegation of the Russian Federation did not deem it appropriate for the ILC to further examine this issue.

25. Several delegations mentioned the proposal of Sir Michael Wood, member of the International Law Commission (hereinafter the "ILC"), to include the topic of "The settlement of international disputes to which international organizations are parties" in the future work of the ILC. As it has been presented by Sir Michael Wood in the Annexes to the Report on the work of the sixty-eighth session of the ILC[9], the proposed topic would for now include disputes between international organisations and States (both member and non-member States) and disputes between international organisations. It would not cover disputes to which international organisations are not parties, but are involved in some other way nor disputes in which an international organisation merely has an interest. However, Sir Michael Wood leaves open the question whether certain disputes of a private law character, such as those arising under a contract or out of a tortious act by or against an international organisation, might also be covered. In this regard, several delegations welcomed the proposal to include disputes of a private law character in the examination of the topic but also agreed that it was not for the CAHDI to give "recommendations or instructions" to the ILC in this regard.

26. The delegation of the United States provided an update on the case of "Georges v. United Nations", the so-called "Haiti Cholera case" to which reference was made in the document provided by the delegation of the Netherlands. It informed the CAHDI that in its judgment of 18 August 2016, the United States Court of Appeals for the Second Circuit upheld the immunity of the United Nations on the grounds that this immunity, under the 1946 *Convention on the Privileges and Immunities of the United Nations*, was absolute. This decision was in conformity with the brief articulated by the attorney of the United States. The Court also rejected a due process claim by US citizens.

27. The CAHDI agreed to keep this issue on the agenda of its 53rd 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. He underlined that delegations

[8] International Court of Justice, *Jurisdictional Immunities of the State* (Germany v. Italy: Greece intervening), Judgement of 3 February 2012.
[9] See the text at the following link.

were not obliged to limit their replies to the questions contained in the document, but that they could also submit relevant case-law.

ii. Immunity of State owned cultural property on loan

28. 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.

29. Delegations were informed that to date, the Declaration had been signed by the Ministers of Foreign Affairs of 18 States (Albania, Armenia, Austria, Belarus, Belgium, the Czech Republic, Estonia, Finland, France, Georgia, Hungary, Ireland, Latvia, Luxembourg, the Netherlands, Romania, the Russian Federation and Slovakia).

30. The Chair reminded CAHDI delegations that the Secretariat of the CAHDI – which is also the Secretariat of the Council of Europe Treaty Office - performed the functions of "depositary" of this Declaration. In this respect, the Chair informed delegations that on the occasion of this 52nd meeting in Brussels, Ms Päivi Kaukoranta, Director General of the Legal Service of the Finnish Ministry of Foreign Affairs, handed to the Secretariat the *Declaration on Jurisdictional Immunities of State Owned Cultural Property* signed by **Mr Timo Soini**, Minister for Foreign Affairs of Finland, on 14 September 2016.

31. The CAHDI encouraged its members and observers which had not yet done so to sign the Declaration. In this respect, the Chair reminded delegations that the text of the Declaration was available in English and French on the website of the CAHDI[10] and that the Declaration could be signed, not only during events/conferences, but also in capitals and be sent to the Secretariat of the CAHDI by diplomatic courier through their Permanent Representations to the Council of Europe in Strasbourg or directly from the capitals if they do not have a representation in Strasbourg. This was recently the case with Hungary that sent to its Permanent Representation in Strasbourg the Declaration signed by the Minister of Foreign Affairs and Trade of Hungary, **Mr Péter Szijjártó,** on 18 August 2016.

32. Some delegations suggested that the approach of this initiative could be broadened in order to invite those non-member States of the Council of Europe which are not represented within the CAHDI, to sign the Declaration. For instance, this could be achieved by promoting the Declaration within other organisations such as the United Nations Educational, Scientific and Cultural Organization (UNESCO) or the Asian-African Legal Consultative Organization (AALCO). Despite welcoming more publicity of the Declaration, notably through its presentation at the International Law Week in the framework of the Sixth Committee of the General Assembly of the United Nations, other delegations considered that it was first and foremost important to have more signatories amongst the Council of Europe member and observer States to the Council of Europe and to the CAHDI. The Secretariat recalled that already a non-member State of the Council of Europe, Belarus, had signed the Declaration. Furthermore, it was pointed out that there is no legal or procedural problem with having other signatories of the Declaration beyond the Council of Europe member States and/or observers to the Council of Europe and to the CAHDI (e.g. many non-member States had acceded to the Council of Europe's conventions during the last decade).

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

33. With regard to the issue of the relationship between the signature of this Declaration and the ratification of the *UN Convention on Jurisdictional Immunities of States and their Property* (hereinafter the “UN Convention”), some delegations considered that the priority remained the ratification of the UN Convention so that it could enter into force. Other delegations were of the view that the Declaration was complementary and not in contradiction with the ratification of the UN Convention and that the existence of this Declaration probably enhanced the publicity of the UN Convention. It was reminded in this regard that the Declaration had been elaborated as a non-legally binding document and that its signature was therefore more a political signal.

34. The representative of the Czech Republic informed the CAHDI that their authorities were considering organising a specific event on this Declaration during the forthcoming Czech Chairmanship of the Committee of Ministers of the Council of Europe from 19 May to November 2017.

35. 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.

36. In this regard, the CAHDI welcomed the replies submitted by 24 delegations (Albania, Andorra, Austria, Armenia, Belarus, Belgium, Canada, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Mexico, the Netherlands, Norway, Romania, Switzerland, the United Kingdom and the United States of America) to this questionnaire contained in document CAHDI (2016) 2 prov and encouraged the delegations which had not yet done so, to submit their replies at their earliest convenience.

iii. Immunities of special missions

37. 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.

38. The CAHDI welcomed the replies submitted by 24 delegations (Albania, Andorra, Armenia, Austria, Belarus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Ireland, Italy, Latvia, Mexico, the Netherlands, Norway, Romania, Serbia, Sweden, Switzerland, the United Kingdom and the United States of America) to this questionnaire, contained in document CAHDI (2016) 10 prov.

39. The delegation of the United Kingdom welcomed the replies submitted by the delegations and invited States which had no experience in this area to also submit their replies as such answers were equally important in its view.

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

iv. Service of process on a foreign State

41. 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*[11]. At its 46th meeting (Strasbourg, 16-17 September 2013), the CAHDI adopted a questionnaire in order to collect relevant information on this matter.

42. The Chair informed the Committee that 27 replies had been submitted to this questionnaire (Albania, Austria, Belarus, Belgium, Canada, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Latvia, Mexico, the Netherlands, Norway, Portugal, Romania, Serbia, Slovenia, Switzerland, the United Kingdom and the United States of America) which were contained in document CAHDI (2016) 12 prov.

43. The delegation of Belarus informed the Committee that after having submitted its reply to the questionnaire, a case connected to service of process and immunities of special missions had arisen. The case concerned a delegation of employees of a diplomatic mission who was transiting through Belarus and who had violated custom rules. As a result, it was fined by the custom authorities and some property was confiscated. The delegation of Belarus informed the Committee that the Ministry of Foreign Affairs of Belarus intervened and that the property was consequently returned to the diplomatic mission. The decision on the fine, however, was found legitimate.

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

44. The Chair informed the Committee that since the previous meeting of the CAHDI, no State represented within the CAHDI had signed, ratified, accepted, approved or acceded to the 2004 *UN Convention on Jurisdictional Immunities of States and of their Property* (hereinafter the "UN Convention"). He furthermore underlined that to date, 21 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.

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

45. The CAHDI noted that to date, 35 States (Andorra, Armenia, Austria, Belgium, Canada, Croatia, Cyprus, the 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 and 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.

46. With regard to the new databases, the Chair informed the Committee that the Secretariat would contact the delegations after the meeting in order to finalise the entry of all the existing contributions in the new system.

47. The delegation of the Netherlands informed the Committee of the judgment rendered in April 2015 by the Court of Appeals of The Hague in the case of *SUEPO and others against the European Patent Office*. The Court of Appeals waived the immunity of jurisdiction of the European Patent Office (hereinafter the "EPO") against the right to access of justice of SUEPO, the Staff Union of the EPO, and other labour unions and held that SUEPO and others did not have any means at their disposal to protect their rights under the *European Convention on Human Rights* because there were no internal means nor could they appeal to the Administrative Tribunal of the International Labour Organisation with respect to trade unions rights. The Court of Appeals ordered the EPO to grant SUEPO and others unlimited access to the email servers of the EPO and to refrain from disciplinary measures against employees using their personal patent office email address for trade union related subjects. However, the Ministry of Justice prohibited the bailiff from executing the judgment on the grounds that the *Protocol on Privileges and Immunities of the European Patent Organisation* stipulates that the premises of the EPO enjoy absolute inviolability

[11] ECHR, *Wallishauser v. Austria*, no. 156/04, Chamber judgment of 17 July 2012.

and that the Organisation enjoys immunity from execution. The delegation of the Netherlands informed the Committee that the EPO had appealed to the Supreme Court of the Netherlands and that the decision should be rendered in the first half of 2017.

48. 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, the 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 replied to the questionnaire on this matter (document CAHDI (2016) 13). 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

49. 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 35 delegations (Albania, Andorra, Armenia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Israel, Italy, Latvia, Lithuania, Luxembourg, Malta, Mexico, Montenegro, Norway, Serbia, Slovenia, Sweden, Switzerland, United Kingdom, United States of America and NATO) to this revised questionnaire as contained in document CAHDI (2016) 11 prov.

50. 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

51. The Chair introduced document CAHDI (2016) 14 prov 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.

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

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

53. The delegation of Latvia informed the CAHDI on the case of *Avotinš v. Latvia*[12], concerning the enforcement of a Cypriot court judgment in Latvia. The applicant, a Latvian national living in Riga and an investment consultant, had in May 1999 signed an acknowledgment of debt deed with F.H. Ltd, a commercial company incorporated under Cypriot law, under the terms of which the applicant had declared that he had borrowed money from F.H. Ltd. and that he would repay it by end of June 1999. The deed was governed by Cypriot law and the Cypriot courts had non-exclusive jurisdiction to hear the dispute. In 2003, F.H. Ltd instituted proceedings against the applicant in Cyprus, alleging that he had not repaid the debt, and sought application from the

[12] ECHR, *Avotinš v. Latvia*, no. 17502/07, Grand Chamber judgment of 23 May 2016.

Cypriot court to enable a summons to be served to the applicant at his home address in Riga (Latvia) but the applicant claimed to have never received the summons. Consequently, the Cypriot courts ruled in the applicant's absence in May 2004 and in February 2005 F.H. Ltd. requested to enforce the judgment in Riga, which was granted in February 2006. The applicant, after allegedly only learning of the Cypriot judgment in June 2006, lodged an appeal against the enforcement order of February 2006 and appealed arguing that the recognition and enforcement of the Cypriot judgment in Latvia breached Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters ("Brussels I Regulation") and Latvian Civil Procedure Law. After a quashing of the order by the Riga Regional Court on 2 October 2006 and a reversal of that decision by the Senate of the Supreme court in 2007, the applicant, relying on Article 6(1) (right to a fair trial) of the ECHR, complained that the declaration of enforceability of the Cypriot judgment of May 2004 was defective and breached his Convention rights. The Grand Chamber of the Court in its judgment firstly noted the unprecedented nature of these hearings, having never previously been called upon to examine observance of the guarantees of a fair hearing within the context of mutual recognition in civil and commercial matters based on European Union law. It then also emphasised that it was not competent to rule on compliance with domestic law, international treaties or European Union law, as this task fell to the Court of Justice of the European Union and to domestic courts. However, the Court also emphasised that States Parties remained bound by their obligations under the ECHR, even when applying European Union law. On this point, the Court referred to the principles established in the *Bosphorus*[13] judgment and espoused in the *Michaud*[14] judgment. In *Bosphorus*, the Court had essentially held that the protection of fundamental rights afforded by the legal system of the European Union was in principle equivalent to that which the Convention provided. In *Michaud* the Court had highlighted that this principle had the status of general principles of European Union law. This application of the presumption of equivalent protection in the legal system of the European Union was subject to two conditions according to the Court: the first being the absence of a margin of appreciation on the part of the domestic authorities and the second being the deployment of the supervisory mechanism provided for by European Union law. With regard to the first condition, the Court noted that the Latvian Supreme Court had not enjoyed any margin of manoeuvre in this case. With regard to the second condition, the Court observed that the supervisory mechanism put in place within the European Union afforded a level of protection equivalent to that for which the Convention mechanism provided, concluding then that the presumption of equivalent protection was applicable in the present case. Additionally, the Court held that the applicant's inaction had contributed to the preventable situation which he was complaining before the Court about. In particular, the applicant should have enquired as to his available remedies as soon as he had become aware of the judgment given in Cyprus and he should have familiarised himself with the method of proceedings envisaged in the deed of debt. Thus in conclusion, the Court did not consider the protection of fundamental rights to have been manifestly deficient and therefore ruled that there had been no violation of Article 6(1) of the ECHR.

54. The delegation of Sweden drew the attention of the CAHDI to the case of *Arlewin v. Sweden*[15] concerning the decision of the Swedish courts, in accordance with Directive 2010/13/EU, to decline jurisdiction in defamation proceedings which arose out of the content of a cross-border television programme service. In October 2006, the applicant, a Swedish national and self-employed businessman, attempted to bring proceedings and a claim for damages for gross defamation against X, the anchor-man of the show, following the live broadcast in Sweden of a Swedish produced and backed programme in which the applicant was accused *inter alia* of organised crime. In May 2008, the Stockholm District Court declined jurisdiction in this case, since in its view the programme hat not originated in Sweden but rather been sent from Sweden by satellite to Viasat Broadcasting UK Ltd, a London-based company, which was responsible for the content of the programme and had transmitted it to the Swedish viewers. The Court of Appeal

[13] ECHR, *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland*, no. 45036/98, Grand Chamber judgment of 30 June 2005.
[14] ECHR, *Michaud v. France*, no. 12323/11, Chamber judgment of 6 December 2012.
[15] ECHR, *Arlewin v. Sweden*, no. 22302/10, Chamber judgment of 1 March 2016.

upheld this decision, indicating that proceedings before a court in the United Kingdom would be a possibility for the applicant. The applicant appealed this decision, arguing that the position adopted by the Swedish courts ran contrary to European Union law and the “Brussels I Regulation” which, according to the applicant, entitled him to bring an action in the place where the harm had occurred. In September 2009, the Supreme Court of Sweden rejected the applicant’s appeal. Relying on Article 6 (1) (right to a fair trial), Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy) of the ECHR, the applicant argued against his denial of access to a court in Sweden. The Third Section Court in its judgment analysed both the relevant EU Audiovisual Media Services Directive (Directive 2010/13/EU) as well as the “Brussels I Regulation” and noted that the Directive did not, contrary to the assertions of the Government, determine the country of jurisdiction in case of a defamation claim. Rather, the Court noted that the jurisdiction was mainly to be regulated by the “Brussels I Regulation”, according to which the United Kingdom and Sweden had jurisdiction. The Court then observed that the content, production and broadcasting of the programme had strong ties to Sweden, to the extent that Sweden had an obligation under Article 6 of the ECHR to provide access to court to the applicant. Thus the Court concluded that there had been a violation of Article 6(1) of the ECHR.

55. The delegation of Switzerland informed the CAHDI of the Grand Chamber Judgment of 21 June 2016 on the case of *Al-Dulimi and Montana Management Inc. v. Switzerland*[16], which had been referred to the Grand Chamber on appeal from the Second Section on 14 April 2014. The application was lodged with the European Court of Human Rights on 1 February 2008. In its Chamber judgment of 26 November 2013 the Court found, by four votes to three, that there had been a violation of Article 6 (1). On 25 February 2014 the Government of Switzerland requested that the case be referred to the Grand Chamber under Article 43 and on 14 April 2014 the panel of the Grand Chamber accepted that request. The applicants and the Government filed further written observations. Comments were also received from the French and United Kingdom Governments, which had been given leave by the President to intervene in the proceedings. A hearing was held on 10 December 2014. This case concerned the freezing of Mr Al-Dulimi’s assets in Switzerland pursuant to UN Security Council Resolution 1482 (2003) which imposed sanctions against the former Iraqi regime. Mr Al-Dulimi, the applicant, an Iraqi national and the managing director of Montana Management Inc., had been designated by the UN Security Council as the finance manager for the Iraqi secret services of the Saddam Hussein regime. Following two UNSC Resolutions calling upon States to impose a general embargo on Iraq, on 22 May 2003 the UNSC adopted Resolution 1483 (2003) imposing on States an obligation to “freeze without delay” the funds, financial assets or economic resources acquired by senior officials of the former Iraqi regime and entities belonging to them. A year later, and on 26 April 2004, the established UNSC Sanctions Committee had also added the Applicant and Montana Management Inc. to the list of names subject to such measures. In May of the same year, the applicants’ names were also added to the list of individuals and legal entities annexed to the Swiss Iraq Ordinance which had been adopted in Switzerland by the Swiss Federal Council on 7 August 1990 in order to implement the necessary economic measures pursuant to the UNSC Resolutions. As a consequence, the applicant’s assets were frozen and confiscated. After several unsuccessfully lodged complaints at the Federal Court of Switzerland, on 13 June 2008 the applicants unsuccessfully lodged a delisting application in accordance with the procedure that had been introduced by UNSC Resolution 1730 (2006). Relying on Article 6 (1) (right to a fair trial) of the ECHR, the applicants complained that the confiscation of their assets had been ordered in the absence of any procedure compatible with the Convention. The Grand Chamber of the Court in its judgment of 21 June 2016 began by emphasising that the right to a fair trial had to be construed against the background of the rule of law, requiring every litigant to have an effective judicial remedy to assert their civil rights. Having said that, the Court also noted that the right of access to a court was not absolute and that it may be subject to limitations. In view of the Court’s earlier judgment in 2008 where the Swiss Federal Court had set out very detailed reasons why it considered itself to be bound only to verify whether the applicants’ names appeared on the sanctions lists or not, the Court observed that in such circumstances the applicants’ right of access to a court had been clearly restricted, although it

[16] ECHR, *Al-Dulimi and Montana Management Inc. v. Switzerland*, no. 5809/08, Grand Chamber Judgment of 21 June 2016.

remained to be examined whether the restriction was justified. In doing so, the ECHR had to be interpreted in accordance with the relevant norms and principles of public international law, one of the basic elements of which being Article 103 of the UN Charter which, in the event of conflict, asserts primacy over any other obligation arising from an international agreement. However, even where Switzerland had no room for manoeuvre in the implementation of the UNSC Resolution, the Court would always presume the measures to be compatible with the ECHR, in the absence of any clear wording in the UNSC Resolution excluding or limiting respect for human rights in the context of implementation of sanctions at national level. With this in mind, the Court further noted that none of the provisions of the UNSC Resolution in question had prohibited the Swiss courts from ensuring that the measures taken at national level to implement UNSC Resolution would ensure respect for human rights. The Court stressed that it was up to the States Parties of the ECHR to ensure a level of scrutiny which preserved the foundations of public order, one of which was the principle of the rule of law. Thus in the event of a dispute over a decision to add a person to the list or to refuse delisting, the domestic courts, in the Court's view, had to be able to obtain sufficiently precise information in order to exercise the requisite scrutiny. Consequently the Court did not find that Switzerland had been faced with a conflict of obligations so as to engage the primacy rule of the UN Charter. The applicants in this case should have been afforded some opportunity to submit evidence to a Court to show that their inclusion had been arbitrary. Thus the applicants' right of access to a court had been impaired. The Court also noted the continuing restrictions in place on the applicants, and highlighted that the UN sanctions system, and in particular the procedure for the listing of individuals and legal entities, had in the past received serious criticism. Considering that listing procedure could not realistically replace the appropriate judicial scrutiny at the level of States, the Court concluded that there had been a violation of Article 6 (1).

56. The CAHDI held an exchange of views on the questions and challenges posed by the case of *Al-Dulimi and Montana Management Inc. v. Switzerland*. Taking into account that all member States of the Council of Europe, which are Parties to the ECHR, are also member States of the United Nations they were faced with the dilemma to implement the legal obligations incumbent to them as a result of their membership of the United Nations and the compulsory nature of the Security Council resolutions and their obligations under the ECHR. Therefore, the challenge was to harmonise international obligations that could appear contradictory and to balance their obligations under the United Nations Charter and the ECHR. Some delegations pointed out that they were disappointed with the judgment which neither addressed the issue of hierarchy of norms between the UN Charter and the ECHR nor gave sufficiently clear guidance to national courts. One delegation quoted the Dissenting Opinion of Judge Nussberger "*The UN Resolution does not only describe the measures of freezing and transferring funds in a very concrete way and explain that they have to be applied to specific "listed" persons, but also demands that these measures be taken "immediately" and "without delay". I agree with my colleague Helen Keller that this wording does not leave any discretion or choice of interpretation for implementation. To hold otherwise turns a "harmonious interpretation" into a "fake harmonious interpretation" that is not in line with basic methodological requirements of international treaty interpretation. In my view it is impossible to deny that the treaty obligations Switzerland has been confronted with in the present case are not only conflicting, but also mutually exclusive* (page 141)". Other delegations mentioned the binding force of European Court of Human Rights' judgments (Article 46 of the ECHR) and argued that a reflection should be engaged in order to find solutions to such dilemmas which go beyond a regional level. In this context, a possible strengthening of the existing ombudsperson and a broadening of its mandate was mentioned. Other delegations disagreed with this approach.

57. The Secretariat presented to the CAHDI the document on the "*Case law of the European Court of Human Rights related to Public International Law*" (document PIL (2016) Case Law prov) containing those judgments related to public international law for which official press releases and legal summaries were available. The CAHDI welcomed this document and thanked the Secretariat. The Secretariat communicated to the CAHDI that a French version of this document would be prepared and distributed at its next meeting.

10. Peaceful settlement of disputes

58. On the topic of peaceful settlement of disputes, the Chair presented a document on the *Compulsory jurisdiction of the International Court of Justice* (CAHDI (2016) 3) and informed the CAHDI that since its last meeting, no new State had accepted the compulsory jurisdiction of the International Court of Justice ("the ICJ"). In this respect, the Czech delegation informed the CAHDI that his country would start the ratification process soon.

59. Some delegations suggested that the CAHDI should not focus solely on the acceptance of a State of the compulsory jurisdiction of the ICJ, since there were other legal means whereby the ICJ's jurisdiction could be seized. In this respect, another delegation supported this suggestion and drew the CAHDI's attention to other clauses of attribution of jurisdiction such as *forum prorogatum*, meaning that if a State has not recognised the jurisdiction of the ICJ at the time when an application instituting proceedings is filed against it, that State has the possibility of subsequently accepting such jurisdiction to enable the ICJ to entertain the case. Therefore in such cases the Court has jurisdiction as of the date of acceptance in virtue of the rule of *forum prorogatum.* See Article 36 (5) of the ICJ Statute: "*Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.*"

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 subject to objection***

60. 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 (2016) 18 and CAHDI (2016) 18 Addendum prov) and opened the discussion. The Chair also drew the attention of the delegations to document CAHDI (2016) Inf 4 containing reactions to reservations and declarations to international treaties previously examined by the CAHDI and for which the deadline for objecting had already expired.

61. With regard to the **reservation of Kyrgyzstan** to the Convention on the Privileges and Immunities of the Specialized Agencies, one delegation indicated that such a reservation was unacceptable and that it would seek information from Kyrgyzstan on the reasons behind such reservation.

62. With regard to the **reservations and declarations of Singapore** to the International Convention on the Elimination of All Forms of Racial Discrimination, several delegations expressed their doubts with regard to the formulation of paragraph 1 of the notification which could be interpreted positively or negatively depending if the country "policy" is in conformity with the Convention. Consequently, they underlined that such formulation could be an attempt to hide a restriction.

63. With regard to the **modification of reservations of Bahrain** to the Convention on the Elimination of All Forms of Discrimination against Women, several delegations informed the CAHDI that they had already objected to the original reservation. Consequently, the question remained whether or not they should make a new objection, a declaration or if their existing objection was enough to react to this modification. Two delegations indicated however that they would object, notably because this modification could be considered as a late reservation.

64. With regard to the **reservations of Fiji** to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, many delegations informed the CAHDI that they were considering objecting to these reservations on the notion of “torture” and its subjection to internal law as they could be considered incompatible with the object and purpose of the Convention.

65. With regard to the **reservations of Somalia** to the Convention on the Rights of the Child, many delegations informed the CAHDI that they had already objected to these reservations which subject the application of the obligations deriving from the Convention to the general principle of Islamic Sharia and which therefore can be considered contrary to the object and purpose of the Convention. Many other delegations informed the CAHDI that its State would object to these reservations.

66. With regard to the **reservation of the United Arab Emirates** to the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, one delegation informed the CAHDI that it would seek explanations from the United Arab Emirates on the reasons behind such a reservation which was very vague.

67. With regard to the **reservations of the Democratic People’s Republic of Korea** to the United Nations Convention against Transnational Organized Crime, some delegations considered these reservations unacceptable as the establishment of criminal liability of legal persons was an obligation imposed by the Convention. Other delegations considered on the other hand that the Convention did not impose such an obligation and therefore, did not consider these reservations to be problematic.

68. With regard to the **declaration and reservation of Singapore** to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, one delegation expressed doubts with regard to the declaration, which could be considered as a reservation.

69. With regard to the **reservation of Brunei Darussalam** to the Convention on the Rights of Persons with Disabilities, many delegations informed the CAHDI that they were considering objecting to this reservation which subject the application of the obligations deriving from the Convention to the Constitution of Brunei Darussalam and to the beliefs and principles of Islam and which therefore can be considered contrary to the object and purpose of the Convention.

70. With regard to the **declaration of Turkey** to the Additional Protocol to the European Convention on Extradition (ETS No. 086), two delegations informed the CAHDI that they would object to the declaration which could amount to a reservation contrary to the object and purpose of the Protocol. One delegation informed the CAHDI that in previous similar cases, its State had circulated an “opposition” to such declaration because of the use of the term “defunct ‘Republic of Cyprus’” considered as unacceptable and that it was consequently envisaging doing the same for this declaration.

71. With regard to the **declarations of Turkey** to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), one delegation informed the CAHDI that it had already objected to these declarations on July 2016. Another delegation indicated that it would object to these declarations which could amount to a reservation contrary to the object and purpose of the Convention.

72. With regard to the **declaration of Turkey** to the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding Supervisory Authorities and Transborder Data Flows (ETS No. 181), two delegations informed the CAHDI that they would object to the declaration which could amount to a reservation contrary to the object and purpose of the Protocol.

73. With regard to the **reservations and declarations by Turkey** to the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 182), two delegations informed the CAHDI that they would object to these declarations which could amount to a reservation contrary to the object and purpose of the Protocol.

74. With regard to the **declaration of Turkey** to the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197), one delegation informed the CAHDI that it had already objected to this declaration in July 2016. Another delegation indicated that it would object to this declaration which could amount to a reservation contrary to the object and purpose of the Convention.

75. One delegation pointed out that there are two other declarations made by Turkey respectively to the *Third Additional Protocol to the European Convention on Extradition* (CETS No. 209) and to the *Fourth Additional Protocol to the European Convention on Extradition* (CETS No. 212) which were not contained in document CAHDI (2016) 18 and which have a similar content of the above-mentioned declarations. The Secretariat informed the delegations that these two declarations would be included in the list of outstanding reservations and declarations to international treaties for the next meeting of the CAHDI in March 2017 as the deadline for objecting would be 12 July 2017.

76. With regard to the **reservation and declaration made upon signature of Latvia** to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210), the delegation of Latvia informed the Committee that the reference to the Latvian Constitution was a result of politically sensitive debates in Latvia and the possible adoption of a law in its Parliament during autumn 2017.

77. With regard to the **partial withdrawal of reservation of Kuwait** to the International Covenant on Civil and Political Rights, some delegations welcomed this partial withdrawal and informed the Committee that the reservations which remained were still covered by earlier objections. Some questions arose however as to whether it could be necessary to reiterate that earlier objections had been made. Another delegation informed the Committee that it would seek information from Kuwait on the reasons behind such partial withdrawal as the remaining part still seemed discriminatory.

- ***Exchange of views on Recommendation No. R (99) 13 of the Committee of Ministers to member States on responses to inadmissible reservations to international treaties***

78. The Chair presented *Recommendation No. R (99) 13 of the Committee of Ministers to member States on responses to inadmissible reservations to international treaties* which had been elaborated in the framework of the CAHDI in 1999 and further adopted by the Committee of Ministers. This Recommendation had been elaborated bearing in mind that when the *Vienna Convention on the Law of Treaties* was adopted in 1969, subsequent developments were not envisaged, in particular the formulation of reservations of a general character and the increasing role of the monitoring bodies provided for by certain treaties. The Chair informed the Committee that the text therefore recommended that, when confronted with reservations to international treaties which give rise to doubts as to their admissibility, the governments of member States take into consideration in their law and practice the model responses clauses appended to the Recommendation. The Recommendation presents two model responses:

- one to non-specific reservations;
- another to specific reservations.

The Chair opened the floor for comments on the different ways to further use this Recommendation in the framework of the European Observatory of Reservations to International Treaties of the CAHDI.

79. Some delegations highlighted that these model responses clauses to reservations could be very useful as a model for reacting to reservations within and outside the CAHDI. Furthermore, they considered that these clauses illustrated that there were many other ways to react to problematic reservations than objections. Concerning this issue, one delegation indicated that it would be very useful to read the Article on "*The CAHDI European Observatory of Reservations to International Treaties: Law and Practice relating to Reservations and Interpretative Declarations concerning International Treaties*" prepared by Mr Rolf Einar Fife for the CAHDI Conference to commemorate its 50th meeting[17] in 2015. Another delegation underlined that it was not necessary to revise or amend theses model response clauses to reservations given the existence of the *Guide to Practice on Reservations to Treaties*[18] adopted in 2011 by the International Law Commission and the well-established practice of the CAHDI to exchange on problematic reservations during the CAHDI meetings. In this respect, the Chair and the Secretariat underlined that this Recommendation had been included in the agenda of the CAHDI only for information and to bring it to the attention of new representatives and CAHDI experts in general as a valuable tool which could be used in the framework of the CAHDI Observatory and outside it. Therefore, it was not suggested any revision or modification of it as the model clauses contained in *Recommendation No. R (99) 13* were still relevant.

80. Consequently, the CAHDI agreed to make further use, wherever appropriate, of these model responses clauses to reservations contained in *Recommendation No. R (99) 13 of the Committee of Ministers to member States on responses to inadmissible reservations to international treaties,* within the context of the *European Observatory of Reservations to International Treaties* of the CAHDI.

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

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

- **Presentation of the work of the International Law Commission (ILC) by Mr Pedro Comissário Afonso, Chairperson of the ILC**

81. The Chair welcomed and thanked Ambassador Pedro Comissário Afonso, Chairperson of the ILC, for having accepted the invitation of the CAHDI. The Chair underlined that it was a privilege for the Council of Europe and the CAHDI to count with his presence.

82. Mr Pedro Comissário Afonso, provided the CAHDI with an overview of the recent activities of the ILC, in particular during its 68th Session which took place in Geneva from 2 May to 10 June 2016 and from 4 July to 12 August 2016. The presentation of Mr Comissário Afonso is reproduced in **Appendix V** to the present report.

83. Before presenting the work of the ILC, Mr Comissário Afonso welcomed the exchange of views held between the ILC, the Chair of the CAHDI and the Secretary to the CAHDI on 7 July 2016. He expressed his and the ILC's appreciation for these annual exchanges of views and underlined the importance that both entities attached to them as well as to the close links developed between both entities in the field of public international law. Furthermore, he informed the CAHDI that the ILC had also had exchanges of views with other bodies such as the Inter-American Juridical Committee, the International Court of Justice, the International Committee of the Red Cross as well as with the United Nations Legal Counsel, Mr Miguel de Serpa Soares.

84. Mr Comissário Afonso also informed the Committee that the 68th Session was the end of the quinquennium and that the entire membership of the ILC would therefore be renewed for the next five years during the 71st Session of the United Nations General Assembly in November 2016.

[17] Council of Europe, *The CAHDI Contribution to the Development of International Law: Achievements and Future Challenges* (Brill Nijhoff 2016), pp.91-97.
[18] See the text at the following link.

85. The topics discussed by the ILC during its 68th Session were the following: protection of persons in the event of disasters, identification of customary international law, subsequent agreements and subsequent practice in relation to the interpretation of treaties, crimes against humanity, protection of the atmosphere, *jus cogens*, protection of the environment in relation to armed conflicts, immunity of State officials from foreign criminal jurisdiction and provisional application of treaties.

86. In connection with the topic *"Protection of persons in the event of disasters"*, the ILC commenced the second reading of the draft articles on the basis of the eighth report of the Special Rapporteur, Mr Eduardo Valencia Ospina, as well as the report of the Secretary-General reproducing the comments and observations submitted by States, international organisations and entities. The ILC decided to refer the draft preamble and draft articles, as recommended by the Special Rapporteur, to the Drafting Committee. The ILC subsequently adopted, on second reading, a draft preamble and 18 draft articles, together with commentaries thereto and in accordance with article 23 of its Statute recommended to the General Assembly the elaboration of a convention on the basis of the draft articles on the protection of persons in the event of disasters.

87. With respect to the topic *"Identification of customary international law"*, the ILC had before it the fourth report of the Special Rapporteur, Sir Michael Wood, and an addendum to that report providing a bibliography on the topic. The fourth report contained, in particular, suggestions for the amendments of several draft conclusions in light of the comments thereof by Governments and others. It also addressed ways and means to make the evidence of customary international law more readily available. In addition, the ILC had before it the memorandum by the Secretariat concerning the role of decisions of national courts in the case-law of international courts and tribunals of an universal character for the purpose of the determination of customary international law. On 24 May 2016, the ILC also requested the Secretariat to prepare a memorandum on ways and means for making the evidence of customary international law more readily available, which would survey the present state of the evidence of customary international law and make suggestions for its improvement. The ILC also decided to establish an open-ended working group, under the Chairmanship of Mr. Marcelo Vázquez-Bermúdez, to assist the Special Rapporteur in the preparation of the draft commentaries to the draft conclusions to be adopted by the ILC. The working group held five meetings between 3 and 11 May 2016. As a result of its consideration of the topic at the present session, the ILC adopted on first reading a set of 16 draft conclusions, together with commentaries thereto. The ILC decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft conclusions, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2018.

88. With regard to the topic *"Subsequent agreements and subsequent practice in relation to the interpretation of treaties"*, the ILC had before it the fourth report of the Special Rapporteur, Mr Georg Nolte, which addressed the legal significance, for the purpose of interpretation and as forms of practice under a treaty, of pronouncements of expert bodies and of decisions of domestic courts and which proposed, respectively, draft conclusions 12 and 13 on those issues. It also discussed the structure and scope of the draft conclusions, proposing the inclusion of a new draft conclusion 1a, and suggested a revision to draft conclusion 4. Following the debate in Plenary, the ILC decided to refer draft conclusions 1a and 12 to the Drafting Committee. The ILC adopted on first reading a set of 13 draft conclusions, together with commentaries thereto. It decided, in accordance with articles 16 to 21 of its Statute, to transmit the draft conclusions, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2018.

89. Regarding the topic *"Crimes against humanity"*, the ILC had before it the second report of the Special Rapporteur, Mr Sean D. Murphy, on the topic, as well as the memorandum by the Secretariat providing information on existing treaty-based monitoring mechanisms which may be of relevance to the future work of the ILC. The second report addressed, *inter alia*, criminalization under national law, establishment of national jurisdiction, general investigation and cooperation for

identifying alleged offenders, exercise of national jurisdiction when an alleged offender is present, *aut dedere aut judicare* and fair treatment of an alleged offender. The report contained corresponding proposals for draft articles 5, 6, 7, 8, 9 and 10. The ILC provisionally adopted draft articles 5 to 10, together with commentaries thereto and decided to refer to the Drafting Committee the question of the liability of legal persons. Following its consideration of a further report of the Drafting Committee, the ILC provisionally adopted paragraph 7 of draft article 5, together with the commentary thereto.

90. In connection with the topic *"Protection of the atmosphere"*, the ILC had before it the third report of the Special Rapporteur, Mr Shinya Murase, which, building upon the previous two reports, analysed several key issues relevant to the topic, namely, the obligations of States to prevent atmospheric pollution and mitigate atmospheric degradation and the requirement of due diligence and environmental impact assessment. The report also explored questions concerning sustainable and equitable utilization of the atmosphere, as well as the legal limits on certain activities aimed at intentional modification of the atmosphere. The ILC considered and provisionally adopted draft guidelines 3, 4, 5, 6 and 7 and a preambular paragraph, together with commentaries thereto.

91. Concerning the topic *"Jus cogens"*, the ILC had before it the first report of the Special Rapporteur, Mr Dire Tladi, which addressed conceptual issues relating to peremptory norms (*jus cogens*), including their nature and definition, and traced the historical evolution of peremptory norms and, prior to that, the acceptance in international law of the elements central to the concept of peremptory norms of global international law. The report further raised a number of methodological issues on which the ILC was invited to comment, and reviewed the debates held in the Sixth Committee in 2014 and 2015. The ILC subsequently took note of the interim report of the Chairperson of the Drafting Committee on draft conclusions 1 and 2 provisionally adopted by the Committee, which was submitted to the ILC for information.

92. With respect to the topic *"Protection of the environment in relation to armed conflicts"*, the ILC had before it the third report of the Special Rapporteur, Ms Marie Jacobsson, which focused on identifying rules applicable in post-conflict situations, while also addressing some preventive issues to be undertaken in the pre-conflict phase. The report contained three draft principles on preventive measures, five draft principles concerning primarily the post-conflict phase and one draft principle on the rights of indigenous peoples. The ILC subsequently took note of draft principles 4, 6, 7, 8, 14, 15, 16, 17 and 18, provisionally adopted by the Drafting Committee. Furthermore, it provisionally adopted the draft principles it had taken note of during its sixty-seventh session, which had been renumbered and revised for technical reasons by the Drafting Committee at the present session, together with commentaries thereto.

93. Regarding the topic *"Immunity of State officials from foreign criminal jurisdiction"*, the ILC had before it the fifth report of the Special Rapporteur, Ms Concepción Escobar Hernández, which analysed the question of limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction. Since at the time of its consideration the report was only available to the ILC in two of the six official languages of the United Nations, the debate in the ILC was commenced and would be continued at the 69th Session of the ILC in 2017. The ILC provisionally adopted draft articles 2 (f) and 6, together with commentaries thereto.

94. In connection with the topic *"Provisional application of treaties"*, the ILC had before it the fourth report of the Special Rapporteur, Mr Juan Manuel Gómez-Robledo, which continued the analysis of the relationship of provisional application to other provisions of the 1969 Vienna Convention and of the practice of international organisations with regard to provisional application. The report included a proposal for a draft guideline 10 on internal law and the observation of provisional application of all or part of a treaty. The addendum to the report contained examples of recent European Union practice on provisional application of agreements with third States. The ILC subsequently took note of draft guidelines 1 to 4 and 6 to 9.

95. The ILC decided to include in its long-term programme of work two new topics, namely (a) Settlement of international disputes to which international organizations are parties; and (b) Succession of States in respect of State responsibility. It also recommended holding the first part of the 70th Session of the ILC (2018) in New York during which the first part of a seventieth anniversary commemorative event would be organised. The second part would be held in Geneva.
96. The Chair of the CAHDI thanked Mr Comissário Afonso for his presentation and invited any delegations which so wished to take the floor.

97. In reply to a question on the relationship and the cooperation between the ILC and the Sixth Committee, Mr Comissário Afonso welcomed the positive evolution through the last years of this collaboration. He informed the CAHDI that the well-established practice of annually considering the ILC's reports in the Sixth Committee had facilitated the development of the existing relationship between the General Assembly and the ILC and noted that the ILC had made changes with respect to the preparation and content of its reports to facilitate a more structured and focused debate in the Sixth Committee. Mr Comissário Afonso also welcomed the improvement of the Sixth Committee's method of consideration of the ILC's report in order to provide effective guidance for the ILC regarding its work.

98. With regard to the topic *"Protection of persons in the event of disasters"*, several delegations underlined that the consideration of this issue had led to the adoption, by the ILC, of a very good text, namely the *Draft articles on the protection of persons in the event of disasters*[19]. They expressed the hope that the General Assembly, to which the ILC, according to Article 23 of its Statute, had recommended the elaboration of a convention on the basis of these draft articles, would keep the quality of this text when drafting the convention. Mr Comissário Afonso expressed his confidence in this regard, noting that these draft articles were already the result of a very good collaboration between the ILC and the member States of the General Assembly.

99. Concerning the topic *"Subsequent agreements and subsequent practice in relation to the interpretation of treaties"*, and in particular on the issue of the legal value of pronouncement of expert treaty bodies on which the Council of Europe has a rich practice, Mr Comissário Afonso underlined that it was important that the Council of Europe continued to draw the attention of the ILC to what the Council of Europe thought was important.

100. In reply to a comment on the slow progress of the examination of the topic *"Immunity of State officials from foreign criminal jurisdiction"* of particular interest to the CAHDI, Mr Comissário Afonso highlighted the complexity of this issue and the need to examine it thoroughly and prudently. He welcomed the adoption by the ILC of six complete draft articles but underlined also the recurrent problem faced by the ILC, namely the difficulty to obtain enough information on State practice and precedents by the International Court of Justice.

101. Several delegations welcomed the inclusion in the long-term programme of work of the ILC of the issue *"Settlement of international disputes to which international organizations are parties"* and expressed their wish that this topic also covered certain disputes of a private law character.

102. In reply to a question on the need to include in the long-term programme of work of the ILC the issue of "Succession of States in respect of State responsibility", Mr Comissário Afonso recalled that in the selection of new topics, the ILC was 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

[19] See the Draft articles at the following link.

- 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.

Acknowledging that some topics were more attractive than others, Mr Comissário Afonso highlighted that the main criteria in this selection process remained the possibility of filling gaps in the realm of international law.

103. The Chair thanked Ambassador Comissário Afonso once again for having accepted the invitation of the CAHDI and for having taken the time to address the CAHDI the recent activities of the ILC.

- Exchange of views between the ILC, the Chair of the CAHDI and the Secretary to the CAHDI, Geneva (Switzerland), 7 July 2016

104. The Chair informed the CAHDI on the exchange of views that took place on 7 July 2016 between the members of the ILC, the Chair of the CAHDI and the Secretary to the CAHDI (see documents CAHDI (2016) Inf 5 and CAHDI (2016) Inf 6).

105. During this exchange of views, the Chair of the CAHDI presented and informed the ILC of the CAHDI's recent work and notably of its Conference organised on the occasion of the 50th meeting of the CAHDI on *"The CAHDI contribution to the development of public international law: achievements and future challenges"*. He also 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 *model final clauses for conventions, additional protocols and amending protocols* concluded within the Council of Europe currently under examination by the CAHDI. 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 work of the CAHDI as *European Observatory of Reservations to International Treaties* as well as the issue of "immunities of States and international organisations" widely debated at each meeting. Finally, he underlined the key role of the CAHDI in exchanging and liaising between the Council of Europe and different international organisations.

106. The Secretary to the CAHDI presented the recent developments which took place within the Council of Europe and notably 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 derogations to the *European Convention on Human Rights*, the third report of the Secretary General on *State of Democracy in Europe, Human Rights and the Rule of Law in Europe: a security imperative for Europe* issued in May 2016, the recent case-law of the *European Court of Human Rights* as well as the news from the Treaty Office (opening for signature and entry into force, accession by non-member States to the Council of Europe conventions). She also recalled the latest opinions of the Venice Commission as well as the issue of the migration crisis in Europe.

13. Exchange of views with Mr Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel

107. The Chair welcomed and thanked Mr Miguel de Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, for having accepted the invitation of the CAHDI. The Chair underlined that it was a special privilege for the CAHDI to have such an influential presence and former CAHDI member within its midst.

108. Under-Secretary-General Serpa Soares provided the CAHDI with an overview of selected issues currently being dealt with by the United Nations Office of Legal Affairs. In his presentation, he focused on accountability in South Sudan, the issue of sexual exploitation and abuse in the context of peacekeeping operations, and in particular the mission in the Central African Republic,

and recent questions relating to the topical issue of immunities enjoyed by the United Nations, in particular against the backdrop of the outbreak of cholera in Haiti.

109. Regarding the situation in South Sudan, Under-Secretary-General Serpa Soares recalled that the CAHDI had had a longstanding involvement and interest in matters of international criminal justice, which is a central element of the work of the Office of the Legal Counsel. Accountability for serious crimes of international concern remains high on the international agenda. Under-Secretary-General Serpa Soares noted that the parties to the Agreement on the Resolution of the Conflict in South Sudan – signed on 17 August 2015 – agreed that a hybrid court for South Sudan should be established to assist in ensuring accountability. The Agreement stipulates that it shall be "an independent hybrid judicial court" and that it "shall be established by the African Union Commission to investigate and prosecute individuals bearing the responsibility for violations of international law and/or applicable South Sudanese law, committed from 15 December 2013 through the end of the Transitional Period." The United Nations Security Council requested the Secretary-General, in its resolution 2241 (S/RES/2241 (2015)) adopted on 9 October 2015, to make available technical assistance to the African Union Commission and to the Transitional Government of National Unity for the implementation of Chapter V of the Agreement. The Security Council reiterated this request in its resolution 2252 (S/RES/2252 (2015)) adopted on 15 December 2015. Under-Secretary-General Serpa Soares said that this was the first time that the Secretary-General had been tasked with providing technical assistance to a regional organisation in the establishment of a hybrid tribunal. In accordance with the mandate conferred on it by the Security Council, the UN Office of Legal Affairs has been providing technical assistance to the African Union and has been working with our counterparts to identify the concrete needs of the African Union Commission with regard to the process for the establishment of a hybrid court. Grave atrocities – serious international crimes – have reportedly been, and continue to be, committed in South Sudan. As the Security Council had noted, these threaten the peace, security and stability of South Sudan. There is an urgent need to end impunity in South Sudan and to bring to justice the perpetrators of such crimes. Without accountability, it is not possible to achieve reconciliation and healing and, ultimately, sustainable peace. Under-Secretary-General Serpa Soares concluded that ensuring accountability would require States cooperation, in particular in terms of financial contributions and the full support of the entire international community.

110. With respect to recent allegations of sexual exploitation and abuse (SEA) in peacekeeping operations, Under-Secretary-General Serpa Soares indicated that it was one of the major challenges for the UN. Not only did the nature of the allegations, with all the attendant media attention, undermine the credibility and image of the Organisation, but addressing the problem in the international context of UN operations was difficult to do. Last year, the issue came to the fore amid criticism of the UN's handling of allegations of SEA involving children in refugee camps in the Central African Republic (CAR). While the allegations in that case concerned non-UN personnel, but not under UN command and control, it was the UN's inadequate response to the issue that was highly criticised. In an attempt to address these issues, the UN Secretary-General appointed an independent panel to review the UN's response to sexual exploitation and abuse allegations of the peacekeeping forces in the Central African Republic in the spring of 2014. The *Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic*, which was published on 17 December 2015, made several recommendations including notably treating SEA as a "human rights" issue, - with the victim placed at the centre of the UN's actions. This is a shift for the Organisation, which to date, has largely addressed SEA as a conduct and discipline issue, and even then, has struggled to ensure accountability, whether via its own disciplinary mechanisms or by requesting member States to investigate and prosecute criminal acts by their nationals. Currently, the UN is undertaking major efforts to address SEA, the efforts being steered by a Special Coordinator to improve the UN's response. Another significant recent development is the adoption of Security Council resolution 2272 (S/RES/2272 (2016)) - the Council's first resolution specifically addressing SEA. Resolution 2272, adopted on 11 March 2016, highlighted the role to be played by member States (i.e. the Troop Contributing Countries and Police Contributing Countries) to ensure effective discipline of

their personnel and accountability in cases of misconduct. The resolution also provides important tools to the Secretary-General to take effective measures to address SEA.

111. Turning to the topical issue of immunities, Under-Secretary-General Serpa Soares stated that this topic was of great concern to the Office of Legal Affairs of the United Nations. Over the years, the Office of Legal Affairs had been confronted with several judgments arising out of labour disputes which had ordered the UN to pay large sums of compensation. To this end, he reminded the CAHDI of the absolute immunity principle applicable to the UN and shared with the CAHDI his insights on the "Haiti cholera" claims. In this connection, the United Nations asserted its immunity with respect to the claims that had been filed in the United States courts and also took the position that they were not of a private law character such that settlement proceedings would be required. The United States Appeals Court has recently upheld the immunity of the United Nations in one of the cases before it. This should guide the decision in the other cases pending in the United States courts. He pointed out that the legal position taken by Office of Legal Affairs had never precluded appropriate measures from being taken to address the cause and impact of cholera in Haiti. In closing, and on the issue of whether the general human rights principle of securing access to a court conflicted with the law of immunities, Under-Secretary-General Serpa Soares reiterated to the CAHDI that the absolute immunity of the UN was in his view essential to the proper and efficient functioning of the Organisation.

112. The Chair of the CAHDI thanked Under-Secretary-General Serpa Soares for his presentation and invited any delegations which so wished to take the floor.

113. In reply to questions on the methods of accountability for troop contributing countries in the peacekeeping context, notably with regard to the UN's sexual exploitation and abuse violations in the Central African Republic, Under-Secretary-General Serpa Soares highlighted to the CAHDI the importance of UN peacekeeping operations, but also emphasised that even one case of sexual exploitation and abuse was one too many and had to be addressed in an appropriate manner. In this regard, he informed the CAHDI of various mechanisms undertaken within the UN to ensure accountability for such offences and referred back to the *Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic*. On possible solutions, he referred to the recommendations made in the report, specifically Recommendations 8 and 9. Recommendation 8 suggested that the UN negotiated with troop contributing countries provisions which would ensure mechanisms and grant host countries the means to prosecute sexual violence offences committed by peacekeepers. On this point, he noted that many States might have difficulties accepting that their own military personnel, acting as peacekeeping troops, could be subjected to a foreign State's jurisdiction. On the larger issue of transparency and lack of information sharing with the UN, he referred to Recommendation 9 of the report, which suggested the inclusion of agreements with troop contributing countries which would provide for and ensure transparency and cooperation in the accountability processes. With regard to another possible solution to accountability problems in relation to sexual exploitation and abuse cases, he referred to the possibility of naming those States which did not comply with their obligations of accountability.

114. Furthermore on the issue of accountability, but with regard to non-military personnel in peacekeeping forces, Under-Secretary-General Serpa Soares informed the CAHDI of the two ways of ensuring accountability. On the one hand, jurisdiction could be granted to the host State to prosecute these crimes, and on the other hand jurisdiction could be granted to the States of nationality. He further explained that there could be gaps in this accountability regime for several reasons including, but not limited to, a dysfunctional system of justice in the host state and a lack of international legislation in many States to prosecute crimes committed abroad. With regard to the often unused availability for arbitration of disputes arising out of labour contracts, he observed that a potential solution could be to grant member States access to the United Nations Dispute Tribunal. Although the issue of labour contracts had been referred to the ILC for its consideration, he underlined that ultimately it was up to the States to propose and implement a solution.

115. In response to a potential hybrid court for South Sudan, Under-Secretary-General Serpa Soares emphasised the importance of ensuring African ownership of the accountability processes and expressed his satisfaction with the African Union's readiness in the past to take ownership of its institutions. In emphasising the need to support such an initiative, he appealed to the delegations represented in the CAHDI to secure means of permanently financing such a hybrid court which would not rely on voluntary contributions.

116. In response to the increasing ambivalence with regard to immunities, Under-Secretary-General Serpa Soares spoke to the negative reputation of the law of immunities but shared with the CAHDI that they were essential for the proper and effective functioning of the United Nations. The matter of immunities had to be followed carefully, especially by the legal advisers, in order to ensure a correct application of immunities in the dealings of States both externally and internally in national courts.

117. In closing, Under-Secretary-General Serpa Soares appealed to the delegations represented in the CAHDI to find appropriate solutions to the questions raised and reminded them that the solutions to the issues discussed rested with the legislators in each State.

118. The Chair thanked Under-Secretary-General Serpa Soares once again for having accepted the invitation of the CAHDI and for having taken the time to address the CAHDI on the very important issues facing the international community and the UN.

14. Consideration of current issues of international humanitarian law

119. The Chair invited the delegations to take the floor on current issues concerning international humanitarian law (hereinafter "IHL") and to present any relevant information on this topic, including forthcoming events.

120. The representative of the International Committee of the Red Cross (ICRC) took the floor to inform the CAHDI of the outcome of the 32nd International Conference of the Red Cross and Red Crescent[20] held on 8-10 December 2015 in Geneva (Switzerland) and more specifically on the measures taken by the ICRC and Switzerland to implement Resolutions 1 and 2 adopted during this Conference.

121. With regard to Resolution 1 on *"Strengthening international humanitarian law protecting persons deprived of their liberty"*, the representative of the ICRC reminded delegations that this resolution asked States and the ICRC to collaborate in determining, by consensus, the modalities of further work and that this collaboration should be led in a non-politicized and collaborative manner. A series of bilateral meetings and meetings with regional groups were organised in September 2016 in order to discuss the modalities and the possible future steps of the process. Many views were expressed:

- some States proposed that the process could be led by one State, by one State and the ICRC as co-facilitator or by two States with or without the ICRC as co-facilitator;
- other States proposed that the process could be led by a group of States;
- some States proposed that the process could be led by the ICRC only.

In this regard, Australia expressed its readiness to play an active role in this process.

122. Regarding Resolution 2 on *"Strengthening compliance with international humanitarian law"*, the representative of the ICRC reminded delegations that this Resolution recommended the continuation of an inclusive State-driven intergovernmental process to find agreement on features and functions of a potential forum of States as well as ways to enhance the implementation of international humanitarian law using the potential of the International Conference and IHL regional

[20] The website of the Conference is available at the following link.

forums. The representative of the ICRC informed the Committee that a first preliminary exchange of views took place on 3 June 2016 in Geneva among the permanent missions. The ICRC and Switzerland consequently invited States to submit their opinions on the organisational and procedural questions that arose at this stage. A second preliminary exchange of views would take place on 12 October 2016 in Geneva.

123. Finally, the representative of the ICRC informed the Committee that the *Fourth Universal Meeting of National Committees for the Implementation of IHL* would be held in Geneva from 30 November to 2 December 2016 and that the ICRC published on 22 March 2016 the updated Commentary on the *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. The new edition of the Commentary on *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* should be published in fall 2017.

124. The delegation of Australia informed the Committee that Australia was looking forward to be actively engaged in the process related to the implementation of Resolution 1.

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

125. The Chair presented the document on the Developments concerning the International Criminal Court and other international criminal tribunals (document CAHDI (2016) 21). With regard to the ICC, the Chair especially drew the attention of the CAHDI to the conviction of Jean-Pierre Bemba Gombo to a prison sentence of 18 years in the case of *The Prosecutor v. Jean-Pierre Bemba Gomba*[21], for war crimes and crimes against humanity committed in the Central African Republic from 2002 to 2003. He also drew the attention of the CAHDI to the unprecedented decision of the ICC approving the prosecution of Germain Katanga by the Democratic Republic of the Congo (DRC) following a request of the DRC to prosecute the defendant for offences allegedly committed in the DRC between 2002 and 2006 and unrelated to those for which Mr Katanga had been prosecuted at the ICC. The CAHDI also took note that on 11 July 2016, Pre-Trial Chamber II had decided that the Republics of Uganda and Djibouti had failed to comply with the request for arrest and surrender to the ICC of Mr Omar Al Bashir while he was present on their territories and referred the matter to the Assembly of States Parties to the Rome Statute and the United Nations Security Council.

126. With regard to the other international criminal tribunals, the Chair informed the CAHDI that on 24 March 2016, Trial Chamber III of the International Criminal Tribunal for Yugoslavia (ICTY) had convicted Mr Radovan Karadžić, the former President of Republika Srprska and Supreme commander of its armed forces, of genocide, crimes against humanity and violations of the laws or customs of war committed by Serb forces during the armed conflict in Bosnia and Herzegovina from 1991 to 1995. The Chair further indicated to the CAHDI that on 30 June 2016, the Appeals Chamber of the ICTY had confirmed the convictions of the defendants Mr. Mićo Stanišić (former Minister of the Interior of Republika Srpska (Bosnia and Herzegovina)) and Mr Stojan Župljanin (former Chief of the Regional Security Services Centre of Banja Luka (Bosnia and Herzegovina)) and had affirmed that the defendants were criminally responsible for war crimes and crimes against humanity committed in Bosnia and Herzegovina in 1992.

127. With regard to the so-called "Kampala amendments" on the crime of aggression, one delegation stressed the need to clarify some ambiguities regarding the ICC's future jurisdiction to prosecute nationals under this crime.

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[21] International Criminal Court, *The Prosecutor v. Jean-Pierre Bemba Gomba*, case no. ICC-01/05-01/08.

16. Topical issues of international law

128. The Chair invited delegations to take the floor concerning any topical issues of international law.

129. The delegation of Belgium informed the CAHDI of the latest developments concerning the initiative for a *Multilateral Treaty for Mutual Legal Assistance and Extradition for Domestic Prosecution of the Most Serious International Crimes*. In this respect, the CAHDI took note of the fact that Belgium had organised an event to promote the Mutual Legal Assistance Initiative (MLA) in Brussels on 17 June 2016. All member States, associated States and observer States of the *Organisation Internationale de la Francophonie* (OIF) were invited and 44 out of 80 invited delegations attended the event. Within the framework of the event, Mr Adama Dieng, United Nations Special Adviser on the Prevention of Genocide, delivered a strong statement in support of the initiative. The States promoting the initiative were represented at ambassadorial level and the Belgian Minister of Justice delivered a speech. Since this event, three States expressed their official support to the MLA initiative, bringing the list of supporting States to 52. On this point, the CAHDI was reminded that the permanent Declaration is opened to all States, Parties or not, to the Rome Statute of the ICC.

130. The delegation of Canada further informed the CAHDI of the recent decision of 29 April 2016 by the Supreme Court of Canada in the case of *World Bank Group v. Wallace*[22] overturning an earlier decision by the Ontario Superior Court of Justice. The earlier decision of the Ontario Superior Court of Justice had held that the immunities of the World Bank Group (composed of five separate organisations, including the International Bank for Reconstruction and Development ("IBRD)") and the International Development Association ("IDA")) were to be construed narrowly under Canadian law. The decision had therefore compelled the World Bank to produce certain internal documents of the Integrity Vice Presidency, an independent unit within the World Bank Group responsible for investigation allegations of fraud, in support of the Royal Canadian Mounted Police's investigation into allegations of corruption and bribery involving a World Bank Group financed contract for a construction project in Bangladesh. In its decision, the Supreme Court of Canada addressed whether the World Bank could be subject to a production order issued by a Canadian court given the immunities accorded to it. In response to this question, the Court firstly examined Section 3 Articles VII and VIII of the Articles of Agreement of the IBRD and the IDA which confirms that the IBRD and IDA could be subject of a lawsuit in a court of competent jurisdiction but rejected the Ontario Superior Court of Justice's interpretation since in the appeal before it, the Court was dealing with a request directed at personnel of the INT for the production of documents in the context of criminal charges and not in the context envisaged by section 3. The Court further examined the immunities outlined in sections 5 and 8 of Articles VII and VIII respectively and concluded that there was no added condition of functional necessity which implied that the immunities only applied where it had been demonstrated that their application was necessary for the Organisation to carry out its operations and responsibilities. With regard to the Organisation's inviolability contained in section 5, the Court reasoned that the trial judge in the lower court had erred in narrowly construing this immunity, since the immunity outlined in section 5 shielded all the documents of IBRD and IDA from both seizure and search. Consequently, the Court held that the trial judge had erred in law and the immunities of the World Bank Group were to be upheld.

IV. OTHER

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

131. In accordance with *Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and their working methods*, the CAHDI elected Ms

[22] *World Bank Group v. Wallace*, 2016 SCC 15 (Can.).

Päivi KAUKORANTA (Finland) and Mr Petr VÁLEK (Czech Republic) respectively as **Chair and Vice-Chair of the Committee**, for a term of one year, as from 1 January 2017.

18. Place, date and agenda of the 53rd meeting of the CAHDI: Strasbourg, 23-24 March 2017

132. The CAHDI decided to hold its 53rd meeting in Strasbourg (France) on 23-24 March 2017. The CAHDI instructed the Secretariat, in consultation with the Chair and the Vice-Chair of the CAHDI, to prepare and communicate the agenda of this meeting.

19. Other business

a. *Possible review and updating of the "Amended Model Plan for the Classification of Documents concerning State practice in the Field on Public International Law" adopted by the Committee of Ministers of the Council of Europe in Recommendation No. R (97) 11 of 12 June 1997*

133. The Chair drew the attention of the CAHDI to *Recommendation No. R (97) 11* of the Committee of Ministers on the *"Amended Model Plan for the Classification of Documents concerning State Practice in the Field of Public International Law"* adopted on 12 June 1997 and document CAHDI (2015) 19 on the *"Advantages of an updated Model Plan for the Classification of Documents concerning State Practice in the Field of Public International Law"*, prepared by the delegation of the United Kingdom. To this end, the Chair invited the delegation of the United Kingdom to provide further comments on the results of its exchange of views on the overall utility of the Model Plan and whether there was a need for updating it.

134. The delegation of the United Kingdom underlined that the Model Plan had been very useful in his country and that the need of updating it was proposed by some British scholars who considered that it was missing additional areas which could benefit from being included in the Model Plan. However, the delegation pointed out that following the exchanges of views held during the 50th and 51st meetings of the CAHDI on the basis of the document CAHDI (2015)19 prepared by the United Kingdom as well as the assessment of the views on the overall need and usefulness to update the Model Plan, he recommended not to proceed, at this stage, with such an update.

135. Following the comments of the delegation of the United Kingdom, the CAHDI decided that an update of this Model Plan was not necessary.

b. *Exchange of views on the "Draft model final clauses for conventions, additional protocols and amending protocols concluded within the Council of Europe", prepared by the Treaty Office of the Council of Europe*

136. The Chair drew the attention of the CAHDI to document CAHDI (2016) 8 on the "*Draft model final clauses for conventions, additional protocols and amending protocols concluded within the Council of Europe*" prepared by the Treaty Office of the Council of Europe. The Chair recalled that during the last CAHDI meeting, the Head of the Public International Law Division and Treaty Office of the Council of Europe, Ms Marta Requena, presented the above-mentioned document and informed the CAHDI on the main reasons for updating the *"Model Final Clauses for Conventions and Agreements concluded within the Council of Europe"* adopted by the Committee of Ministers at its 315th meeting in February 1980 (see document CM/Del/DEC(80)315/9E). She further informed the Committee that the CAHDI held an exchange of views on these 1980 Model

Final Clauses before submitting them to the Committee of Ministers for adoption (see document CAHDI (2016)16 paragraphs 136-139).

137. The Chair also recalled that the CAHDI had held at its last meeting an exchange of views on this document and had agreed that, in order to allow delegations to further examine these final clauses, the document would be re-examined during this meeting.
138. The Chair informed the Committee that to this day (16 September 2016) 6 delegations had submitted comments to this document. The written comments of 5 delegations were set out in document CAHDI (2016) 8 Addendum prov and the written comments of one delegation received during this meeting were contained in document CAHDI (2016) 8 Misc. The Secretariat will prepare a revised document consolidating in a single document all written comments received by delegations.

139. The Secretariat of the Treaty Office of the Council of Europe prepared a document containing its observations on the comments made by 5 delegations received prior to the meeting. These observations of the Secretariat of the Treaty Office to the comments by delegations were set out in document CAHDI (2016) 8 Addendum II prov.

140. The CAHDI held an exchange of views on the document prepared by the Treaty Office of the Council of Europe concerning the *"Draft model final clauses for conventions, additional protocols and amending protocols concluded within the Council of Europe"* in light of the comments submitted by six delegations to this document, as well as written observations to these comments by the Treaty Office of the Council of Europe.

141. Following a short exchange of views due to a lack of time, the CAHDI entrusted the Secretariat to prepare a revised version of these draft model final clauses and to include in the revised version the alternative wordings suggested by some delegations. This revised version of the draft model clauses would be sent to all CAHDI experts for further consideration at its next meeting in March 2017.

APPENDICES

APPENDIX I

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APPENDIX II

AGENDA

I. INTRODUCTION

1. Opening of the meeting

2. Adoption of the agenda

3. Adoption of the report of the 51st 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

   - Presentation of the new CAHDI databases

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 reservations and declarations to international treaties subject to objection

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

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

    - Presentation of the work of the International Law Commission (ILC) by Mr Pedro Comissário Afonso, Chairperson of the ILC

    - Exchange of views between the ILC, the Chair of the CAHDI and the Secretary of the CAHDI, Geneva (Switzerland), 7 July 2016

13. Exchange of views with Mr Miguel Serpa Soares, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel

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. Place, date and agenda of the 53rd meeting of the CAHDI: Strasbourg, 23-24 March 2017

19. Other business

    a. *Possible review and updating of the "Amended Model Plan for the Classification of Documents concerning State practice in the Field on Public International Law" adopted by the Committee of Ministers of the Council of Europe in Recommendation No. R (97) 11 of 12 June 1997*

    b. *Exchange of views on the "Draft model final clauses for conventions, additional protocols and amending protocols concluded within the Council of Europe", prepared by the Treaty Office of the Council of Europe*

APPENDIX III

OPINION OF THE CAHDI

ON RECOMMENDATION 2095 (2016) OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE – "PARLIAMENTARY IMMUNITY: CHALLENGES TO THE SCOPE OF PRIVILEGES AND IMMUNITIES ENJOYED BY MEMBERS OF THE PARLIAMENTARY ASSEMBLY"

1. On 6 July 2016, the Ministers' Deputies at their 1262nd meeting agreed to communicate *Recommendation 2095 (2016) of the Parliamentary Assembly of the Council of Europe (PACE) on "Parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly"* to the Committee of Legal Advisers on Public International Law (CAHDI), for information and possible comments by mid-September 2016[1].

2. The CAHDI examined the above-mentioned Recommendation at its 52nd meeting (Brussels, Belgium, 15-16 September 2016) and made the following comments concerning those aspects of Recommendation 2095 (2016) which are of particular relevance to the Terms of Reference of the CAHDI.

3. From the outset, the CAHDI recalls its Opinion on *Recommendation 2083 (2016) of the Parliamentary Assembly of the Council of Europe (PACE) on "Introduction of sanctions against parliamentarians"* adopted on 4 March 2016 during its 51st meeting. The CAHDI underlines that the comments on the main legal arguments concerning the scope of the privileges and immunities enjoyed by members of the PACE made in its Opinion on Recommendation 2083 are equally relevant for the present Recommendation 2095. Furthermore, the CAHDI recalls the Reply to Parliamentary Assembly *Recommendation 2083 (2016) on "Introduction of sanctions against parliamentarians"* adopted by the Committee of Ministers on 6 July 2016 at its 1262nd meeting[2].

4. As the PACE underlined in paragraphs 1 and 2 of its Recommendation 2095, the CAHDI notes that the scope of privileges and immunities enjoyed by the members of the PACE is governed by Article 40[3] of the *Statute of the Council of Europe*, as further elaborated in the *General Agreement on Privileges and Immunities of the Council of Europe* (GAPI) and its *Protocol.* Furthermore, the CAHDI reiterates that the rights of members of the PACE when seeking to attend an official meeting in a member State, in particular in relation to the freedom of movement, are defined in Article 13[4] of the GAPI. The immunities enjoyed by PACE members are defined in

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[1] The Ministers' Deputies specifically indicated in their decision that they "agreed to communicate it [Recommendation 2095 (2016)] to the Committee of Legal Advisers on Public International Law (CAHDI), for information and possible comments by 15 September 2016. However, taking into account that the 52nd meeting of the CAHDI will take place on 15 and 16 September, it was agreed to send the CAHDI opinion to the Secretariat of the Committee of Ministers on 19 September 2016.

[2] See the text at the following link.

[3] **Article 40 (ETS No.1)**: "*The Council of Europe, representatives of members and the Secretariat shall enjoy in the territories of its members such privileges and immunities as are reasonably necessary for the fulfilment of their functions. These immunities shall include immunity for all representatives to the Consultative Assembly from arrest and all legal proceedings in the territories of all members, in respect of words spoken and votes cast in the debates of the Assembly or its committees or commissions."*

[4] **Article 13 (ETS No.2)**: *"No administrative or other restriction shall be imposed on the free movement to and from the place of meeting of Representatives to the Consultative Assembly and their substitutes.*
Representatives and their substitutes shall, in the matter of customs and exchange control, be accorded:
a. by their own government, the same facilities as those accorded to senior officials travelling abroad on temporary official duty;
b. by the governments of other members, the same facilities as those accorded to representatives of foreign governments on temporary official duty."

particular in Articles 14[5] and 15[6] of the GAPI. Moreover, Article 3[7] of the *Protocol* to the GAPI extends the immunities defined in Article 15 of the GAPI to the representatives of the PACE and their substitutes attending or travelling to or from meetings of the PACE committees or sub-committees.

5. The CAHDI reiterates also that the Committee of Ministers of the Council of Europe has invited on several occasions the governments of member States to adopt specific measures in order to fully implement the above mentioned privileges and immunities enjoyed by the PACE members. For instance, in its Reply to PACE *Recommendation 1373 (1998) on freedom of movement and the issue of visas to members of the Parliamentary Assembly of the Council of Europe* adopted on 20 October 1998 at the 645th meeting, the Committee of Ministers invited the governments of member States to consider taking a series of measures, in conformity with their national legislation, to ensure that members of the Parliamentary Assembly on official journeys benefit from full entry facilities on the territory of member States[8]. These measures were recalled by the Chair of the Committee of Ministers in his reply to the written Question No. 501 by Lord Russell-Johnston: "Visa requirements for members of the Assembly attending Assembly committee meetings". The CAHDI further notes that since then the Committee of Ministers has replied to the PACE on different occasions on this issue (see for instance the Reply adopted at the 869th meeting of the Committee of Ministers on 21 January 2004[9] and at its 911th meeting on 12 January 2005[10] in relation to the PACE Recommendation 1602 (2003) on "Immunities of members of the Parliamentary Assembly). The most recent reply has been the *Reply of the Committee of Ministers to the Parliamentary Assembly Recommendation 2083 (2016) on "Introduction of sanctions against parliamentarians"* adopted on 6 July 2016[11].

6. The CAHDI also reiterates that international law grants States full sovereignty over their territory. This implies that States can also freely decide, in conformity with their obligations under international law, on the entry of foreign nationals into their territory.

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[5] **Article 14 (ETS No.2)**: "*Representatives to the Consultative Assembly and their substitutes shall be immune from all official interrogation and from arrest and all legal proceedings in respect of words spoken or votes cast by them in the exercise of their functions*".

[6] **Article 15 (ETS No.2)**: "*During the sessions of the Consultative Assembly, the Representatives to the Assembly and their substitutes, whether they be members of Parliament or not, shall enjoy:*

a. on their national territory, the immunities accorded in those countries to members of Parliament;
b. on the territory of all other member States, exemption from arrest and prosecution.

This immunity also applies when they are travelling to and from the place of meeting of the Consultative Assembly. It does not, however, apply when Representatives and their substitutes are found committing, attempting to commit, or just having committed an offence, nor in cases where the Assembly has waived the immunity."

[7] **Article 3 (ETS No.10)**: "*The provisions of Article 15 of the Agreement shall apply to Representatives to the Assembly, and their Substitutes, at any time when they are attending or travelling to and from, meetings of committees and sub-committees of the Consultative Assembly, whether or not the Assembly is itself in session at such time".*

[8] In its reply to PACE Recommendation 1373 (1998) on freedom of movement and the issue of visas to members of the Parliamentary Assembly of the Council of Europe, the Committee of Ministers "*[…] invited the governments of member States to consider taking one or more of the following measures, in conformity with their national legislation, to ensure that members of the Parliamentary Assembly on official journeys benefit by full entry facilities on the territory of member States:*

i. according priority to or at least speedy treatment of requests for visas from members of the Parliamentary Assembly in connection with their officials duties, in particular when supported by a Council of Europe card;
ii. granting long-term multiple entry visas whenever possible;
iii. when the granting of long-term multiple visas is not possible, according priority to the speedy processing of requests for single-entry visas;
iv. authorising authorities at ports of entry, in cases of urgency when it has not been possible for the member of the Parliamentary Assembly to obtain a visa prior to departing on an official journey, and when notified of such impossibility by the appropriate domestic authorities, to grant the appropriate visas exceptionally at the port of entry;
v. granting visas free of charge whenever possible […]."

Reply adopted by the Committee of Ministers on 20 October 1998 at the 645th meeting of the Ministers' Deputies: See the full text at the following link.

[9] See the text at the following link.

[10] See the text at the following link.

[11] See the text at the following link.

7. The CAHDI considers that many political and legal issues are raised by the privileges and immunities of parliamentarians and their corresponding rights and obligations, which are governed by the applicable Council of Europe treaties. In relation to paragraph 4 of Recommendation 2095, the CAHDI reiterates its consideration that an efficient implementation of the rules currently into force would solve most of the issues highlighted by the PACE. In this respect, the CAHDI recalls that the Committee of Ministers in its recent *Reply to the Parliamentary Assembly Recommendation 2083 (2016) on "Introduction of sanctions against parliamentarians"* adopted on 6 July 2016 "reiterates its invitation to member States to honour their commitments" (see in particular paragraph 3 of the Reply[12]). The decision to further call "member States to act in strict compliance with their obligations" under the above-mentioned rules as requested by the PACE rests with the Committee of Ministers.

[12] "The Committee of Ministers recalls that it has on several occasions invited the governments of member States to adopt specific measures in order to fully implement the above-mentioned privileges and immunities. For instance, in its reply to Parliamentary Assembly Recommendation 1373 (1998) on "Freedom of movement and the issue of visas to members of the Parliamentary Assembly of the Council of Europe", it invited the governments of member States to consider taking a series of measures, in conformity with their national legislation, to ensure that members of the Parliamentary Assembly on official journeys benefit from full entry facilities on the territory of member States. The Committee reiterates its invitation to member States to honour their commitments".

APPENDIX IV

MESSAGE FROM MR DIDIER REYNDERS DEPUTY PRIME MINISTER AND MINISTER OF FOREIGN AFFAIRS AND EUROPEAN AFFAIRS OF BELGIUM

delivered by
Ambassador Rudy Huygelen, Chief of Cabinet of the Minister of Foreign Affairs and European Affairs

French only

Mesdames et Messieurs,

C'est avec beaucoup de plaisir que je m'adresse à vous aujourd'hui dans le cadre de cette 52ème réunion du Comité des conseillers juridiques sur le droit international public du Conseil de l'Europe, organisée ici à Bruxelles. Ne pouvant malheureusement être présent ce matin, j'ai tenu à vous adresser ces quelques mots de bienvenue par l'entremise de mon Directeur de Cabinet.

M'adresser à vous aujourd'hui m'est d'autant plus agréable que je suis moi-même juriste, ce qui me rend particulièrement sensible et attentif à l'importance du droit dans les relations que les Etats entretiennent entre eux, que ce soit sur le mode bilatérale ou multilatérale. La Belgique accorde ainsi une grande attention au suivi de l'activité du Conseil de l'Europe et se trouve pleinement engagée aux côtés des Etats membres que vous représentez. La promotion et la défense des droits de l'homme ainsi que l'attachement aux valeurs fondamentales de la démocratie et de l'état de droit, constituent le fil rouge de la politique étrangère belge.

L'engagement de la Belgique au sein du Conseil de l'Europe s'est traduit ces dernières années en particulier par la Présidence belge du Comité des Ministres de cette organisation, que j'ai assumée de novembre 2014 à mai 2015 et durant laquelle notre pays a mis notamment l'accent sur la nécessité d'une mise en œuvre effective de la Convention européenne des droits de l'homme et sur les défis posés dans nos pays par une lutte efficace, mais respectueuse du droit, contre le terrorisme et plus particulièrement contre le phénomène des combattants étrangers.

L'actualité offre de trop nombreux exemples de zones de conflits avec leurs cortèges de victimes et de personnes déplacées, de personnes innocentes dont la vie est fauchée par la violence aveugle du terrorisme ou encore de régions du monde dans lesquelles l'instabilité politique interne menace. Ces événements nous rappellent avec urgence l'importance d'un ordre international et d'ordres nationaux fondés sur le droit. La primauté du droit est, au niveau international, le garant de la paix et de la sécurité ; sur le plan interne, cette primauté est la condition indispensable pour l'émergence et la consolidation de sociétés libres et justes.

A cet égard, la contribution du Conseil de l'Europe a été et reste toujours incontournable. La mise en place du système de la Convention européenne des droits de l'homme, dont la spécificité est bien l'existence d'un mécanisme juridictionnel dont les décisions obligent les 47 États membres, permet de rappeler à l'ordre ces derniers s'ils ne se comportent pas selon les standards de protection auxquels ils ont souscrits.

Mais le Conseil de l'Europe ne se réduit toutefois pas à cette dimension juridictionnelle. Il est un lieu de rencontres et de négociations entre États membres. Il est également un lieu de réflexion et d'élaboration du droit international qui est, de par sa nature même, en constant développement.

Dans ce travail, la contribution de votre comité, le CAHDI, au développement du droit international ne saurait être sous-estimée. Vous formez en effet – que vous soyez membres ou observateurs – une communauté, voire un « club » de conseillers juridiques de 56 États et plusieurs organisations internationales. Le CAHDI est cette enceinte qui vous permet de vous rencontrer et de vous

connaître pour mieux coopérer. Forum de discussion, d'échange et de partage d'expérience, il vous permet de discuter de manière franche de certaines questions pointues. Il facilite la confrontation d'idées et de systèmes juridiques très variés, ce qui favorise l'approfondissement de la réflexion juridique et une meilleure compréhension du droit, ainsi que le rapprochement entre visions ou interprétations différentes. Le CAHDI a ainsi contribué tout au long de son quart de siècle d'existence, pour ne citer que quelques exemples, à l'élaboration de la Charte des droits fondamentaux de l'Union européenne, à la création de la Cour pénale internationale, à l'évolution de la pratique des états dans le domaine de leurs immunités et celles de leurs biens, notamment en ce qui concerne la saisie des comptes bancaires d'une ambassade ou la protection des patrimoines culturels des États étrangers, aux débats entourant la problématique des combattants terroristes étrangers ou encore ceux relatifs à la protection des droits de l'homme en cas d'état d'urgence.

Le travail du CAHDI et du Conseil de l'Europe rayonne au-delà de l'espace géographique des 47 États membres. La présence ce jour de conseillers juridiques d'États observateurs et d'organisations et organismes internationaux en atteste. En outre, le CAHDI est lui-même en contact étroit avec d'autres organisations internationales, telles que l'Union européenne et les Nations-Unies. A cet égard, je me félicite de la participation à vos travaux en tant qu'invités de marque au cours de ces deux journées, de Monsieur Pedro Comissário Afonso, actuel Président de la Commission de Droit international, et de Monsieur Miguel de Serpa Soares, Secrétaire général adjoint aux Affaires juridiques et Conseiller juridique des Nations Unies. Ce lien étroit qui rapproche le CAHDI de ces organisations provient du fait que les conseillers juridiques des états membres et observateurs se retrouvent aussi dans ces autres fora. Ceci permet d'avoir une cohérence juridique sur certaines questions mais également de favoriser les échanges juridiques au sein de ces différentes organisations. Dans ces échanges, le CAHDI joue un rôle très important dans la mesure où il constitue un laboratoire d'idées primordiales pour le développement du droit international.

Cette contribution du Conseil de l'Europe en général et du CAHDI en particulier aux travaux d'autres organisations internationales telles que les Nations Unies est pour la Belgique essentielle. La promotion et la protection des droits de l'homme par les États, y compris la lutte contre l'impunité, constituent en effet un facteur incontournable de la paix et de la sécurité internationales. Les droits de l'homme, tout comme le concept juridique d'état de droit, sont étroitement liés à l'idée d'un ordre international fondé sur le droit, dont la primauté doit être respectée. Ou pour citer Paul-Henri Spaak, ancien Ministre des Affaires étrangères belge et Premier Président de l'Assemblée générale des Nations Unies : « L'organisation internationale ne pourra fonctionner que le jour où les Nations, petites, moyennes et grandes, auront reconnu, en pleine conscience, qu'au-dessus de leurs volontés personnelles, il y a la loi internationale. » La Belgique, qui est par ailleurs candidate pour un siège non-permanent au Conseil de Sécurité des Nations-Unies pour la période 2018-2020, s'efforce constamment de mettre en œuvre et promouvoir cette primauté du droit international. Tel est son engagement, à l'intérieur de ses frontières, au sein de l'Europe et au-delà, au sein des Nations Unies.

Mesdames, Messieurs,

Il ne me reste plus qu'à vous souhaiter deux jours de travaux fructueux, productifs et de nature à contribuer au développement du droit international et au renforcement de sa primauté, pour l'édification d'un monde meilleur et de sociétés justes, libres et inclusives, à la hauteur des engagements souscrits de manière conjointe par nos divers États.

APPENDIX V

STATEMENT BY MR PEDRO COMISSÁRIO AFONSO

CHAIR OF THE UNITED NATIONS INTERNATIONAL LAW COMMISSION (ILC)

Mr Chairman,

Excellencies,

Distinguished Legal Advisors,

Dear Colleagues, Ladies and Gentlemen,

I am deeply honoured to stand today before you, in my capacity as Chairman of the International Law Commission, in order to present a summary of its work at its 68th session which was held at the United Nations Office at Geneva, its seat, from 2 May to 10 June and from 4 July to 12 August 2016.

Let me start by expressing my profound gratitude to Chairman Paul Rietjens of CAHDI for the kind invitation and warm and generous hospitality. I thank Ms Marta Requena and her so efficient team at the CAHDI Secretariat for the excellent conditions created for my stay at Brussels. I want to assure you that the ILC highly values its excellent and fruitful relationship with CAHDI which was further strengthened with your importance presence and statements before the Commission, in July this year.

Mr. Chairman, I wish to report that the International Law Commission had an extremely heavy and exacting session. This year´s session was also the end of the quinquennium; a quinquennium that was very productive and one that the members can be very proud of. From the current session, the Commission is submitting a rich report to the General Assembly that includes the draft articles on *Protection of persons in the event of disasters*, which have been completed on second reading. We very much hope that those draft articles will be taken up by the General Assembly as the basis for the elaboration of a convention. We are also submitting two sets of draft conclusions which are complete on first reading. These are draft conclusions on *Subsequent agreements and subsequent practice in relation to the interpretation of treaties*, and draft conclusions on *Identification of customary international law*.

I wish to recall that, earlier in the quinquennium, the Commission had completed its work on 3 important topics, namely, *Expulsion of aliens*, *The Obligation to extradite or prosecute* (*Aut dedere aut judicare),* and the *Most-Favored-Nation clause*.

Being this the end of the quinquennium, it follows that the entire membership of the Commission will be renewed for the next five years during this session of the General Assembly, in November.

Mr Chairman,

Allow me that I offer a wider overview of the work of our Commission. This year, we had nine main topics on the agenda of the Commission.

1. Protection of persons in the event of disasters

As I mentioned, at this session, the Commission concluded its work on the topic “Protection of persons in the event of disasters” which had been on the programme of work of the Commission since 2007.

The Commission had before it the eighth report of the Special Rapporteur (A/CN.4/697), Mr Eduardo Valencia Ospina, in which he surveyed the comments made by States and international organizations, and other entities, on the draft articles on the protection of persons in the event of disasters adopted on first reading at the sixty-sixth session (2014). He also made recommendations for consideration by the Commission during the second reading. The Commission also had before it the comments and observations received from Governments and international organizations (A/CN.4/696 and Add.1) on the draft articles adopted on first reading.

The Commission subsequently adopted, on second reading, a draft preamble and 18 draft articles, together with commentaries thereto, on the topic. In accordance with article 23 of its statute, the Commission recommended to the General Assembly the elaboration of a convention on the basis of these draft articles.

The preamble aims at providing a conceptual framework for the draft articles, setting out the essential rationale for the text and the general context in which the topic of the protection of persons in the event of disasters has been elaborated.

The three first draft articles are general in nature. Draft article 1 establishes the scope of the draft articles, while draft article 2 elaborates on draft article 1 by providing further guidance on the purpose of the draft articles, which is to facilitate the adequate and effective response to disasters and reduction of the risk of disasters, so as to meet the essential needs of the persons concerned, with full respect for their rights. Draft article 3 defines a number of terms for the purpose of the draft articles.

Draft articles 4, 5 and 6 emphasize the prominent role of human rights and humanitarian principles in the context of the topic. While draft article 4 addresses the principle of human dignity both in the context of disaster response and in the context of disaster risk reduction, draft article 5 reflects the broad entitlement to human rights protection held by those affected by disasters. Draft article 6 establishes the key humanitarian principles relevant to the protection of persons in the event of disasters.

Draft articles 7 and 8 relate to cooperation. Draft article 7, in particular, establishes the duty to cooperate, a well-known concept in the work of the Commission. It indicates that, in the application of the draft articles, States shall, as appropriate, cooperate among themselves, with the United Nations, with the components of the Red Cross and Red Crescent Movement, and with other assisting actors. Draft article 8 seeks to clarify the various forms which cooperation between affected States, assisting States and other assisting actors may take in the context of response to disasters.

The subsequent articles address the role of States in the event of disasters. Draft article 9 deals with the duty to reduce the risk of disasters. Draft article 10 concerns the primary role of the affected State in the context of the protection of persons in the event of a disaster upon its territory, or in territory under its jurisdiction or control. Under draft article 11, an affected State has the duty to seek assistance from, as appropriate, other States, the United Nations, and other potential assisting actors in situation in which a disaster manifestly exceeds a State's national response capacity.

The subsequent draft articles relate to external assistance. Draft article 12 acknowledges the interest of the international community in the protection of persons in the event of disasters, which is to be viewed as complementary to the primary role of the affected State. Draft article 13 addresses the consent of an affected State to the provision of external assistance and creates a qualified consent regime for affected States in the field of disaster relief operations. The conditions on the provision of external assistance are set out in draft article 14, while draft article 15 deals with the facilitation of such assistance. Draft article 16 establishes the obligation for the affected State to take the measures that would be appropriate in the circumstances to ensure the protection of relief personnel, equipment and goods involved in the provision of external assistance. Draft article 17

deals with the question of termination of external assistance. Finally, draft article 18 addresses the relationship between the draft articles and other rules of international law.

2. Identification of customary international law

The Commission concluded its first reading of the draft conclusions on identification of customary international law. The topic has been in the programme of work of the Commission since 2012. It was successfully concluded in a single quinquennium. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/695), Sir Michael Wood, and an addendum to that report (A/CN.4/695/Add.1) providing a bibliography on the topic. The fourth report addressed the suggestions made by States on the draft conclusions provisionally adopted and contained suggestions for the amendment of several draft conclusions in light of the comments received. It also addressed ways and means to make the evidence of customary international law more readily available, recalling the background of the prior work of the Commission on that matter as a basis for further consideration by the Commission in the context of the topic. In addition, the Commission had before it a memorandum by the Secretariat concerning the role of decisions of national courts in the case-law of international courts and tribunals of a universal character for the purpose of the determination of customary international law (A/CN.4/691).

The Commission considered the fourth report of the Special Rapporteur, as well as the memorandum by the Secretariat. It referred to the Drafting Committee the proposed amendments to the draft conclusions contained in the report. It also decided to establish an open-ended working group, under the Chairmanship of Mr Marcelo Vásquez-Bermúdez, to assist the Special Rapporteur in the preparation of the draft commentaries to the draft conclusions to be adopted by the Commission.

As a result of its consideration of the topic at the present session, the Commission adopted on first reading a set of 16 draft conclusions on the identification of customary international law, together with commentaries thereto. The Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft conclusions, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2018.

The 16 draft conclusions are divided into seven parts. Part One defines the scope of the draft conclusions, outlining their function and purpose. Part Two sets out the basic approach to the identification of customary international law. It is the “two element” approach. It specifies that determining a rule of customary international law requires establishing the existence of the two constituent elements: a general practice and acceptance of that practice as law (*opinio juris*). Parts Three and Four provide further guidance on the two constituent elements of customary international law, which also serve as the criteria for its identification. Part Five addresses certain categories of materials that are frequently invoked in the identification of rules of customary international law (e.g., treaties, resolutions of international organizations and intergovernmental conferences, decisions of courts and tribunal, teachings). Parts Six and Seven deal with two exceptional cases. The first is *the persistent objector rule*. It says that a state that has persistently objected to an emerging rule of customary international law and maintains its objection after the rule has crystallised, is not bound by it. It is suggested that the principle is the logical consequence of the consensual nature of the formation of international law. The second is that of *particular customary international law*, that is, rules of customary international law that apply only among a limited number of States of a certain geographical area or those comprising a community of interest.

Still on this topic, the Commission decided to request the United Nations Secretariat to prepare a memorandum on ways and means for making the evidence of customary international law more readily available. The study would survey the present state of the evidence of customary international law and make suggestions for its improvement.

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

At the present session, the Commission also concluded its first reading of this topic with the provisional adoption of the draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties.

This topic has been on the programme of work of the Commission since 2008. At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/694), Mr. Georg Nolte, which addressed the legal significance, for the purpose of interpretation and as forms of practice under a treaty, of pronouncements of expert bodies and of decisions of domestic courts. The report also discussed the structure and scope of the draft conclusions.

The Commission decided to refer two proposed draft conclusions to the Drafting Committee and subsequently adopted these two draft conclusions on the basis of the report of the Committee.

As a result of its consideration of the topic at the present session, the Commission adopted on first reading a set of 13 draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, together with commentaries thereto. The Commission decided, in accordance with articles 16 to 21 of its statute, to transmit the draft conclusions, through the Secretary-General, to Governments for comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 1 January 2018.

The draft conclusions are divided into four parts. Part One is an introduction to the draft conclusions, which aims to explain the role that subsequent agreements and subsequent practice play in the interpretation of treaties. They are based on the Vienna Convention on the Law of Treaties of 1969. Part Two sets out the basic rules and definition. Part Three deals with the general aspects of the topic, while Part Four addresses its specific aspects.

4. Crimes against humanity

This topic has been on the programme of work of the Commission since 2014. The Special Rapporteur for the topic, Mr Sean Murphy, has suggested that the Commission prepare a draft convention on the prevention and punishment of crimes against humanity.

Last year the Commission provisionally adopted four draft articles. At the present session, it had before it the second report of the Special Rapporteur (A/CN.4/690), as well as a memorandum by the Secretariat providing information on existing treaty-based monitoring mechanisms that may be of relevance to the future work of the International Law Commission (A/CN.4/698).

In his second report, the Special Rapporteur addressed criminalization under national law; establishment of national jurisdiction; general investigation and cooperation for identifying alleged offenders; exercise of national jurisdiction when an alleged offender is present; *aut dedere aut judicare*; fair treatment of an alleged offender; and the future programme of work on the topic. He proposed six corresponding draft articles that were referred to the Drafting Committee. On this basis, the Commission adopted draft articles 5 to 10, together with commentaries.

As for the subsequent programme of work for the topic, the Special Rapporteur has suggested that the third report address issues such as rights and obligations applicable to the extradition of the alleged offender; rights and obligations applicable to mutual legal assistance in connection with criminal proceedings; the obligation of *non-refoulement* in certain circumstances; dispute settlement and monitoring mechanisms; and conflict avoidance with treaties such as the Rome Statute of the International Criminal Court.

The question of the liability of legal persons in the context of crimes against humanity generated much discussion in the plenary debate. As we know, most criminal responsibility under international

and national jurisdictions concerns the liability of natural persons, not legal persons (e.g., corporations). At the end, the Commission decided to include a provision on liability of legal persons for crimes against humanity, given the potential involvement of legal persons in acts committed as part of a widespread or systematic attack directed against a civilian population. In this context, the Plenary requested the Special Rapporteur to draft a concept paper on the matter for consideration of the Drafting Committee. On that basis, he also formulated a text of a draft paragraph 7 of draft article 5 which deals with "*criminalization under national law".* The draft paragraph 7 was modelled on that contained in article 3, paragraph 4, of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted in 2000, and currently accepted by 173 States.[1]

5. Protection of the atmosphere

Since the inclusion of this topic in its programme of work in 2013, the Commission has considered two reports of the Special Rapporteur, Mr Shinya Murase, and provisionally adopted three draft guidelines and four preambular paragraphs, together with commentaries thereto.

At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/692) who, building on the previous two reports, analysed several key issues relevant to the topic, namely, the obligations of States to prevent atmospheric pollution and mitigate atmospheric degradation and the requirement of due diligence and environmental impact assessment. He also explored questions concerning sustainable and equitable utilization of the atmosphere, as well as the legal limits on certain activities aimed at the intentional modification of the atmosphere. Accordingly, the Special Rapporteur proposed draft guidelines on the obligation of States to protect the environment, environmental impact assessment, sustainable utilization of the atmosphere, equitable utilization of the atmosphere and geo-engineering, as well as an additional preambular paragraph. These proposals were referred to the Drafting Committee, and subsequently the Commission provisionally adopted five draft guidelines and a preambular paragraph together with commentaries.

A fourth preambular paragraph has been inserted having regard to considerations of equity, and it concerns the special situation and needs of developing countries. Draft guideline 3 is a central provision according to which States have the obligation to protect the atmosphere by exercising due diligence in taking appropriate measures, in accordance with applicable rules of international law, to prevent, reduce or control atmospheric pollution and atmospheric degradation. Draft guideline 4 deals with environmental impact assessment. Draft guidelines 5 and 6 respectively address the sustainable utilization of the atmosphere and the equitable and reasonable utilization of the atmosphere. Draft guideline 7 deals with activities the very purpose of which is to alter atmospheric conditions. It addresses only intentional modification on a large scale.

The Special Rapporteur indicated that in 2017 the Commission could deal with the question of the interrelationship of the law of the atmosphere with other fields of international law (such as the law of the sea, international trade and investment law and international human rights law).

[1]The adopted text reads as follows: "Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative". (Doc. A/CN.4/L.873/Add.1)

6. ***Jus cogens***

This is a new topic. It was included in the programme of work of the Commission in 2015. At the present session, the Commission had before it the first report of the Special Rapporteur (A/CN.4/693), Mr Dire Tladi. It addressed conceptual issues relating to peremptory norms (*jus cogens*), including their nature and definition, and traced the historical evolution of peremptory norms and, prior to that, the acceptance in international law of the elements central to the concept of *jus cogens*. The report further raised a number of methodological issues on which the Commission was invited to comment, and reviewed the debates held in the Sixth Committee in 2014 and 2015.

In the view of the Special Rapporteur, the debate on *jus cogens* in the Commission was robust and rich. It could be said that a few points of agreement emerged from the debate. First, that the existence of *jus cogens* was no longer seriously contested. Second, that the Commission should avoid an outcome that could result in, or be interpreted as, a deviation from the 1969 Vienna Convention on the Law of Treaties. But also, a number of divergent views on methodology were raised. Probably the most important and divisive, on methodology, was whether the Commission should produce an illustrative list of norms that had acquired the status of *jus cogens*. Members were also divided as to the issue of the existence of regional *jus cogens*. Some argued that it is a possibility that should not, *a priori*, be excluded. Others maintained that such an idea contradicted the very nature of *jus cogens* concept, its universal and peremptory character.

The Commission subsequently decided to refer the draft conclusions, contained in the report of the Special Rapporteur, to the Drafting Committee, before taking note of the interim report of the Chairman of the Drafting Committee on the two draft conclusions 1 (on the scope, identification and legal effects of *jus cogens*) and 2 (definition of *jus cogens*) provisionally adopted by the Committee, which was submitted to the Commission for information only.

As regards the future programme of work, the Special Rapporteur envisages that the Commission would consider the criteria for *jus cogens* in 2017.

7. **Protection of the environment in relation to armed conflicts**

This topic has been considered by the Commission since 2013. Since then, the Commission has considered two reports of the Special Rapporteur, Ms Marie Jacobsson, and took note of the draft introductory provisions and draft principles I-(x) to II-5, provisionally adopted by the Drafting Committee.

At the present session, the Commission had before it the third report of the Special Rapporteur (A/CN.4/700), which focused on identifying rules applicable in post-conflict situations, while also addressing some preventive issues to be undertaken in the pre-conflict phase. The report contained three draft principles on preventive measures, five draft principles concerning primarily the post-conflict phase and one draft principle on the rights of indigenous peoples.

Following the debate in Plenary, the Commission decided to refer the draft principles, as contained in the report of the Special Rapporteur, to the Drafting Committee. The Commission subsequently received the report of the Drafting Committee (A/CN.4/L.876), and took note of draft principles 4, 6, 7, 8, 14, 15, 16, 17 and 18, provisionally adopted by the Drafting Committee. Furthermore, the Commission provisionally adopted the draft principles it had taken note of during its sixty-seventh session, which had been renumbered and revised for technical reasons (A/CN.4/L.870/Rev.1) by the Drafting Committee at the present session, together with commentaries thereto.

Structurally, the set of draft principles are divided into three parts following the initial part entitled “Introduction” which contains draft principles on the scope and purpose of the draft principles. Part One concerns guidance on the protection of the environment before the outbreak of an armed conflict but also contains draft principles of a more general nature that are of relevance for all three

temporal phases: before, during and after an armed conflict. Additional draft principles will be added to this part at a later stage. Part Two pertains to the protection of the environment during armed conflict. Part Three deals with the protection of the environment after an armed conflict.

8. Immunity of State officials from foreign criminal jurisdiction

This topic was included in the programme of work of the Commission in 2007. It has been one of the most challenging topics on our agenda. The Commission has considered three reports from the first Special Rapporteur on the topic, Mr Roman Kolodkin, between 2007 and 2011. Subsequently, between 2012 and 2015, four reports from the current Special Rapporteur, Ms Concepción Escobar Hernández were considered. On the basis of these reports, the Commission has thus far provisionally adopted six draft articles and the commentaries thereto.

At the present session, the Commission had before it the fifth report of the Special Rapporteur (A/CN.4/701), which analysed the question of *limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction.*

In addition, the Commission provisionally adopted draft articles 2, subparagraph (f), and 6 (scope of immunity *ratione materiae*), provisionally adopted by the Drafting Committee and taken note of by the Commission at its sixty-seventh session, together with the corresponding commentaries. Draft article 2, subparagraph (f), provides a definition of the term "act performed in an official capacity" for the purposes of the draft articles. Draft article 6 is intended to define the scope of immunity *ratione materiae*, which covers the material and temporal elements of this category of immunity of State officials from foreign criminal jurisdiction. Draft article 6 complements draft article 5, which refers to the beneficiaries of immunity *ratione materiae*. Both draft articles determine the general regime applicable to this category of immunity.

At the time of its consideration the report was only available to the Commission in two of the six official languages of the United Nations. Therefore, the debate in the Commission was only commenced, and would be continued and completed at the next session of the Commission, in 2017. In the debate, the link between limitations and exceptions and the procedural aspects of immunity was emphasized. In this connection, several members underlined the importance, for next year, of procedural guarantees to take into account the need to avoid proceedings which were politically motivated or an illegitimate exercise of jurisdiction.

9. Provisional application of treaties

This topic has been on the programme of work of the Commission since 2012. Since then, the Commission has considered three reports from the Special Rapporteur, Mr Juan Manuel Gómez-Robledo.

At the present session, the Commission had before it the fourth report of the Special Rapporteur (A/CN.4/699 and Add.1), which continued the analysis of the relationship of provisional application to other provisions of the 1969 Vienna Convention and of the practice of international organizations with regard to provisional application. The report included a proposal for draft guideline 10 on internal law and the observation of provisional application of all or part of a treaty. The addendum to the report contained examples of recent European Union practice on provisional application of agreements with third States. The Commission referred draft guideline 10 to the Drafting Committee.

Subsequently, the Chairperson of the Drafting Committee presented the report of the Drafting Committee on "Provisional application of treaties", containing draft guidelines 1 to 4 and draft guidelines 6 to 9, as provisionally adopted by the Drafting Committee at the sixty-seventh and sixty-eighth sessions of the Commission, respectively. The Commission took note of these draft guidelines. It is anticipated that the Commission will take action on the draft guidelines and commentaries thereto at the next session.

Furthermore, the Commission decided to request from the Secretariat a memorandum analysing State practice in respect of treaties (bilateral and multilateral), deposited or registered in the last 20 years with the Secretary-General, which provide for provisional application, including treaty actions related thereto.

10. Other decisions and conclusions of the Commission

The Commission decided to include in its long-term programme of work two new topics, namely, "*The settlement of international disputes to which international organizations are parties*" and "*Succession of States in respect of State responsibility*".

It also recommended that it holds the first part of its seventieth session in New York. It requested the Secretariat to proceed with the necessary administrative and organizational arrangements to facilitate this. The Commission recommended that a seventieth anniversary commemorative event be held during its seventieth session in 2018. The commemorative event would be held in two parts, the first during the first part of its seventieth session recommended to be held in New York, and the second during the second part of its seventieth session in Geneva.

The Commission continued its exchange of information with the International Court of Justice, the Inter-American Juridical Committee, and the Committee of Legal Advisers on Public International Law of the Council of Europe. An informal exchange of views was held between members of the Commission and the International Committee of the Red Cross.

Let me finish by mentioning that the Commission decided that its sixty-ninth session will be held in Geneva from 1 May to 2 June and 3 July to 4 August 2017.

Thank you very much!