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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

(CAHDI)

Meeting report

57th meeting
Strasbourg (France), 21-22 March 2019

Public International Law Division
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I. INTRODUCTION

1. Opening of the meeting by the Chair of the CAHDI, Mr Petr VÁLEK

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 57th meeting in Strasbourg (France) on 21-22 March 2019, with Mr Petr Válek (Czech Republic) in the Chair. The list of participants is set out in **Appendix I** to this report.

2. The Chair opened the meeting and expressed his pleasure to chair the CAHDI meeting for the first time, assuring experts that he will do his outmost to be worthy of the trust placed on him to chair the CAHDI. The Chair further welcomed the experts who were attending the CAHDI for the first time.

3. The Chair introduced the new member of the CAHDI Secretariat, the trainee of the Public International Law Division, Ms Pauline Larrochette, a national of France, who holds a law degree and masters in International and European Law from the University of Grenoble Alpes (France).

2. Adoption of the agenda

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

3. Examination and adoption of the report of the 56th meeting

5. The CAHDI examined and adopted the report of its 56th meeting (document CAHDI (2018) 28 prov), held in Helsinki (Finland) on 20-21 September 2018, and instructed the Secretariat to publish it on the website of the CAHDI.

6. The Chair took the opportunity to thank wholeheartedly the CAHDI's previous Chair, Ms Päivi Kaukoranta, for the excellent work that she carried out during the last two years as Chair of the CAHDI.

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

7. The Director of Legal Advice and Public International Law of the Council of Europe, Mr Jörg Polakiewicz, informed the CAHDI of the latest developments within the Council of Europe since the last meeting of the CAHDI, held on 20-21 September 2018 in Helsinki (Finland). In particular, he provided information to the CAHDI in relation to the 70th anniversary of the Council of Europe and the Ministerial Session which will be held in Helsinki in May 2019; the three-year "Contingency Plan" that takes account of the Organisation's reduced budget; the *Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (CETS No. 223), which was be opened for signature in Strasbourg (France) on 10 October 2018 and which has been signed by 26 member States and Uruguay; and the ongoing negotiation of a Second Protocol to the *Convention on Cybercrime* of the Council of Europe (CETS No.185). The latter Protocol will include provisions to, amongst other things, facilitate more effective mutual legal assistance, extend transborder searches, and increase direct cooperation with service providers.

8. The CAHDI took note of the information provided by the Director of Legal Advice and Public International Law about the most important developments within the Council of Europe since the last meeting of the Committee.

9. The Chair – while admitting that the budget issues are beyond the competence of the CAHDI - expressed his concern about possible negative impact of current budget saving proposals on the future work of the CAHDI. He further encouraged CAHDI members to contact colleagues in their capitals who take part in the budgetary discussions concerning the Council of Europe, as well as their Permanent Representatives in Strasbourg, in order to be aware of the extent of such budgetary reductions. The Chair requested the Secretariat to keep the CAHDI informed of any development at its next meeting.

II. ONGOING ACTIVITIES OF THE CAHDI

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

- **Exchange of views with the Chair of the Committee of Ministers' Rapporteur Group on Legal Co-operation (GR-J), Ambassador Emil RUFFER, Permanent Representative of the Czech Republic to the Council of Europe**

10. The Chair welcomed and thanked Ambassador Emil Ruffer, Chair of the Committee of Ministers' Rapporteur Group on Legal Co-operation (GR-J), for having accepted the invitation of the CAHDI. Ambassador Ruffer provided the CAHDI with an overview of the role and work of the Committee of Ministers' Rapporteur Groups, in particular the one on Legal Co-operation (GR-J), which he currently chairs. He further presented the interaction between the work of the CAHDI and the GR-J, which reviews the draft terms of reference of the CAHDI and other intergovernmental committees, and examines the legal opinions prepared by the CAHDI in order for the Committee of Ministers to reply to Recommendations adopted by the Parliamentary Assembly of the Council of Europe (PACE). Ambassador Ruffer recalled important contributions of the CAHDI to the work of the Council of Europe in the field of public international law, such as the CAHDI's work on the 2017 review of the 1980 "*Model Final Clauses for Conventions, Additional Protocols and Amending Protocols concluded within the Council of Europe*", and CAHDI's involvement in the negotiations of *Protocol No.14bis to the European Convention on Human Rights* (CETS No. 204), in 2009, as well as in the final stage of the negotiation of the *Council of Europe Convention to Prevent and Combat Violence against Women and Domestic Violence* (CETS No. 210), in 2011. Finally, Ambassador Ruffer reported on the current activities of the GR-J which may be of interest for the CAHDI. In particular, he mentioned the forthcoming examination by the GR-J of a request for guidance by the Steering Committee on Legal Co-operation (CDCJ) concerning the draft European rules on the administrative detention of migrants; the on-going review of certain Rules within the 2006 European Prison Rules, and work planned for 2020 regarding a feasibility study on a possible Convention on the profession of lawyer, and the preparation of a second additional protocol to the Council of Europe *Convention on Cybercrime* (CETS No. 185).

11. The presentation by Ambassador Ruffer was followed by questions from CAHDI members about the preparation of Committee of Ministers' replies to PACE Recommendations, and the role and weight of CAHDI's legal opinions therein. He replied that the GR-J appreciates and values very much the CAHDI opinions which are taken into account to a large extent, together with the opinions of other Steering Committees, when replying to the PACE.

12. The Chair thanked Ambassador Ruffer for the interesting presentation and fruitful exchange of views, and expressed the CAHDI's wish to continue to co-operate and interact with the GR-J.

a. Draft Terms of Reference of the CAHDI for 2020-2021

13. The Chair introduced the draft Terms of Reference of the CAHDI for 2020-2021, as contained in document CAHDI (2019) 1 prov *Restricted*.

14. The CAHDI examined and agreed on its draft Terms of Reference for 2020-2021 as contained in the above mentioned document. The CAHDI took note that its Terms of Reference for the next biennium will be adopted by the Committee of Ministers on 19-21 November 2019 at the 1361st (Budget) meeting of the Ministers' Deputies.

b. Other Committee of Ministers' decisions and activities of relevance to CAHDI's activities

15. The Chair presented a compilation of the Committee of Ministers' decisions of relevance to CAHDI's activities (document CAHDI (2019)19 *2* rev *Restricted*), including the full replies of the

Committee of Ministers to the four Recommendations by the Parliamentary Assembly of the Council of Europe on which the CAHDI adopted opinions last year (namely Recommendation 2122 (2018) on "Jurisdictional immunity of international organisations and rights of their staff" ; Recommendation 2125 (2018) on "State of emergency: proportionality issues concerning derogations under Article 15 of the *European Convention on Human Rights*"; Recommendation 2126 (2018) on "Humanitarian needs and rights of internally displaced persons in Europe"; and Recommendation 2130 (2018) on "Legal challenges related to hybrid war and human rights obligations"). Furthermore, the CAHDI noted that on 28 November 2018 the Committee of Ministers examined the Abridged Report of its 56th meeting (Helsinki, Finland, 20-21 September 2018).

16. The Chair informed the CAHDI that he will present the work of the CAHDI to the Committee of Ministers on 12 June 2019 and will hold an exchange of views with the Minister's deputies on that occasion. He will report back on that exchange at the next CAHDI meeting in September 2019.

17. Reporting back on some of the main highlights of Finland´s Presidency of the Committee of Ministers of the Council of Europe (November 2018 - May 2019), the representative of Finland stressed the importance of 2019 as the year marking the 70th anniversary of the Council of Europe, and informed the CAHDI that a ministerial meeting will be held in Helsinki on 16-17 May 2019. The reform of the Council of Europe and important institutional issues for the future of the Organisation will be discussed at that meeting.

6. Immunities of States and international organisations

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

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

18. 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 CAHDI at the 47th meeting in March 2014 at the request of the delegation of the Netherlands. The delegation of the Netherlands had prepared a document in this respect (document CAHDI (2014) 5 *Confidential*) aimed in particular at facilitating a discussion on the topical questions related to the settlement of third-party claims for bodily injury or death and for loss of property or damage allegedly caused by an international organisation, as well as on the effective remedies available to claimants in these situations. The document contains five questions addressed to members of the CAHDI.

19. The written comments to these questions of 20 delegations (Albania, Andorra, Armenia, Austria, Belarus, Belgium, Canada, Czech Republic, Denmark, Estonia, Germany, Greece, Hungary, Israel, Mexico, Serbia, Slovenia, Spain, Switzerland and the United Kingdom) are contained in document CAHDI (2019) 3 prov *Confidential Bilingual*. There have been no new contributions submitted to the Secretariat since the last CAHDI meeting.

20. The Chair invited further written contributions of CAHDI delegations on the five questions on this issue. The Chair also reminded delegations that contributions remain confidential as the discussions are still in an embryonic phase and the replies are only used, at this stage, as a basis for the examination of this issue by the CAHDI.

21. The Chair recalled that, at the CAHDI meeting in September 2017, the representative of the Netherlands presented a document (CAHDI (2017) 21 *Confidential*) summarising the main trends of the replies from States and further examining this issue in the context of peacekeeping and police operations.

22. The representative of the United Kingdom shared with CAHDI members his country's experience on this matter and indicated that, as individuals cannot pursue their claims against international organisations, they are turning, as an alternative, to sue the British Government or the

Foreign and Commonwealth Office. This includes UK nationals who are seconded to EULEX and peace-keeping missions. According to their claims, their actions are attributable to the UK Government rather than to the peace-keeping mission itself. The representative of the United Kingdom invited other CAHDI members to share their experiences on similar types of litigation, which is a concern for the UK Government.

ii. Immunity of State owned cultural property on loan

23. The Chair introduced the sub-theme concerning the Immunity of State owned cultural property on loan for which a Declaration and a Questionnaire exist.

- Declaration on Jurisdictional Immunities of State Owned cultural Property

24. The Chair recalled that this topic was included in CAHDI's agenda at its 45th meeting, in March 2013, following a joint initiative of the delegations of the Czech Republic and Austria to prepare a Declaration in support of the recognition of the customary nature of the relevant provisions of the 2004 *United Nations Convention on Jurisdictional Immunities of States and Their Property* (henceforth the 2004 UN Convention) in order to guarantee the immunity of State cultural property on loan. The Declaration on Jurisdictional Immunities of State Owned Cultural Property had been elaborated as a legally non-binding document expressing a common understanding of *opinio juris* on the basic rule that certain kind of State property (cultural property on exhibition) enjoys jurisdictional immunity.

25. The Chair informed the delegations that, since the last CAHDI meeting, there had been no new signatures of the Declaration. The Declaration had hence already been signed by the Ministers of Foreign Affairs of 20 States (Albania, Armenia, Austria, Belarus, Belgium, Czech Republic, Estonia, Finland, France, Georgia, Holy See, Hungary, Ireland, Latvia, Luxembourg, the Netherlands, Portugal, Romania, Russian Federation and Slovak Republic). The Committee noted that the Secretariat of the CAHDI performed the functions of "depositary" of this Declaration and that the text of this Declaration was available in English and French on the website of the CAHDI.

26. The Chair strongly encouraged those States that have not yet done so, to sign this Declaration, since it has proved to be a practical tool to facilitate the loans of State-owned cultural property. The Chair further stressed that signing the Declaration does not prejudice States in their position vis-à-vis the 2004 UN Convention, and there should be no obstacle in signing it.

- Questionnaire on the Immunity of State Owned Cultural Property on Loan

27. The Chair recalled that, besides the Declaration, this issue is mirrored in the CAHDI activities in the form of a questionnaire on national laws and practices concerning the topic of "*Immunity of State Owned Cultural Property on Loan*", drafted by the Secretariat and the Presidency of the 47th CAHDI meeting in March 2014.

28. The CAHDI welcomed the replies submitted by 27 delegations (Albania, Andorra, Armenia, Austria, Belarus, Belgium, Canada, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Mexico, the Netherlands, Norway, Romania, Spain, Switzerland, Ukraine, the United Kingdom and the United States of America) to this questionnaire (document CAHDI (2019) 4 prov *Confidential Bilingual*). There have been no new contributions to this questionnaire since the last CAHDI meeting.

29. The representative of the Russian Federation underlined the importance of this topic and his country's support to the Declaration, which they have already signed. He called for wider support to the Declaration and informed the CAHDI that the Russian Federation will be shortly sending written comments on the Questionnaire.

30. The representative of Mexico recalled that they are a Party to the United Nations *Convention on Jurisdictional Immunities of States and Their Property* since 2015 and urged States

to ratify or accede to this Convention, as some of its provisions are part of customary international law and the Council of Europe Declaration is codified in the United Nations Convention so the Declaration is complementary to the Convention. Furthermore, she indicated that each State has exclusive competence to determine which property should be considered State property for the purpose of immunity.

31. The representative of Norway informed the CAHDI that they are a Party to the United Nations Convention and recalled that some countries have signed the Declaration but not ratified the Convention, which he encouraged to do with the aim that the Convention enters into force. The representative of Norway further stated that both instruments should not be considered as alternatives and he urged Council of Europe member states to speedily ratify the United Nations Convention.

32. The Chair underlined that the Council of Europe Declaration is open to signature by non-member States of the Council of Europe and that the Declaration has already been signed by a non-member State: Belarus. He further recalled that the initiative of the Czech Republic and Austria was triggered by the lack of entry into force of the United Nations Convention. The Chair also recalled the circulation of the Declaration among the UN missions in New York.

iii. Immunities of special missions

33. Delegations were reminded that the topic of "*Immunities of special missions*" was included in the agenda of the CAHDI in September 2013, during its 46th meeting, at the request of the delegation of the United Kingdom, which provided a document in this regard (document CAHDI (2013) 15 *Restricted*). Following this meeting, the Secretariat and the Chair drafted a questionnaire aimed at establishing an overview of the legislation and specific national practices in this field.

34. The CAHDI took note of the information provided on the issue of the "Immunities of special missions". In this respect, the CAHDI was informed that an analytical report has been prepared by Sir Michael Wood, member of the United Nations International Law Commission (ILC) and former Chair of the CAHDI, and Mr Andrew Sanger (Lecturer, Faculty of Law, University of Cambridge), taking into account the main trends arising from the replies by 38 delegations to the questionnaire prepared by the CAHDI on this matter, as contained in document CAHDI (2019) 5 prov *Bilingual:* Albania, Andorra, Armenia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Hungary, Ireland, Israel, Italy, Japan, Latvia, Malta, Mexico, the Netherlands, Norway, Republic of Moldova, Romania, Russian Federation, Serbia, Slovenia, Spain, Sweden, Switzerland, Ukraine, the United Kingdom and the United States of America. The CAHDI further took note that a book containing the analytical report is being printed by Brill-Nijhoff Publishers and that it will be presented and distributed at the next CAHDI meeting in September 2019.

iv. Service of process on a foreign state

35. Delegations were reminded that the discussion on the topic "*Service of process on a foreign State*" was initiated at the 44th meeting of the CAHDI in September 2012, following which a questionnaire on this topic had been prepared. Up to this meeting, 31 delegations (Albania, Andorra, Austria, Belarus, Belgium, Bosnia and Herzegovina, Canada, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Latvia, Mexico, the Netherlands, Norway, Portugal, Romania, Serbia, Slovenia, Spain, Switzerland, the United Kingdom and the United States of America) have submitted their replies. These contributions were reproduced in document CAHDI (2019) 6 prov *Confidential Bilingual*.

36. Since the last CAHDI meeting, Estonia submitted its contribution. The Chair encouraged delegations which had not yet done so, to submit or update their contributions to the questionnaire, which are treated as confidential.

37. The Chair further recalled that the Secretariat also prepared a summary of the replies received, as contained in document CAHDI (2014) 15 *Confidential*. The purpose of this document was to highlight the main practices and procedures of States in relation to the service of documents initiating proceedings in a foreign State.

38. The representative of Austria informed the CAHDI that his country is currently engaged in the ratification process of the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* of 15 November 1965. In this respect, he underlined that his country's main concerns in relation to such ratification are related to the service of process on the State and that they are trying to carefully draft a reservation. He furthermore underlined that the service on the State itself would have to be done through diplomatic channels.

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

39. The Chair reminded the Committee that the CAHDI followed the status of ratifications and signatures to the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (2004) since its 29th meeting in March 2009. In this respect, he informed the Committee that, since its last meeting, no State represented within the CAHDI had signed, ratified, accepted, approved or acceded to the 2004 UN Convention. He further underlined that, up to this CAHDI meeting, 22 States had ratified, accepted, approved or acceded to the 2004 UN Convention. Finally, he pointed out that in order for the 2004 UN Convention to enter into force, the deposit of 30 instruments of ratification, acceptance, approval or accession with the Secretary General of the United Nations is needed.

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

40. The CAHDI noted that, up to this meeting, 35 States (Andorra, Armenia, Austria, Belgium, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Mexico, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey and the United Kingdom) and one organisation (European Union) had submitted a contribution to the database on "*The Immunities of States and International Organisations"*.

41. The Chair invited delegations to submit or update their contributions to the relevant database so that it provides a picture as accurate and varied as possible of the current State practice regarding State immunities.

42. The representative of Canada informed the CAHDI about the arrest in Canada of the Chief Financial Officer of Huawei Technologies (Ms Meng, a Chinese citizen), on 1 December 2018, pursuant to an extradition request from the United States of America in the framework of the *Treaty on Extradition Between the Government of Canada and the Government of the United States of America*. Following this arrest, two Canadian citizens were taken into custody in China (Michael Kovrig, an officer of Canada's Foreign Service who served in Canada's Embassy in Beijing in 2014-2016, and Michael Spavor, a Canadian businessman working in China and North Korea). The representative of Canada further informed the CAHDI that no formal charges have been filed against these two Canadian nationals, who have been in custody and subject to interrogation for over 100 days, while Chinese media have reported that they are being investigated for spying. Mr Kovrig has been interrogated about his activities in 2014-2016, when he was an accredited diplomat serving as the political officer at the Canadian Embassy. The representative of Canada underlined that Mr Kovrig's activities were entirely consistent with the permitted functions under Article 3 of the *Vienna Convention on Diplomatic Relations* (VCDR) and the investigation of his activities as a diplomatic agent contravenes Article 39(2) of the VCDR which provides for "residual" or "continuing" immunities that protect diplomatic activities even after the diplomatic assignment in which they were undertaken has come to an end. Furthermore, both Mr Kovrig and Mr Spavor are reportedly being held under the harsh conditions of what is known under Chinese law as "residential surveillance at a designated place", with no access to legal counsel and only limited access to consular support under conditions that are closely monitored by Chinese authorities. The

representative of Canada thanked the many countries that have shown support in this situation, and informed the CAHDI that Canada considers the Chinese actions as arbitrary and in breach of international law. As regards Ms Meng, he explained that as Canada is a "rule of law" nation, the matter is presently under the jurisdiction of a Canadian court of law which will render a decision according to treaty and extradition law. The representative of Canada stated that Ms Meng has access to unrestricted and unmonitored legal counsel and consular support, and is on bail and living in her own home in Vancouver pending the outcome of the extradition procedure. He further indicated that the Canadian authorities will continue to protect the international rules-based order, their diplomatic staff and the interests of their citizens. The representative of Canada made available to CAHDI members a two-page document on "Residual Diplomatic Immunity from Criminal Jurisdiction under the *Vienna Convention on Diplomatic Relations*", prepared by Canada's Department of Foreign Affairs, Trade and Development (*Global Affairs Canada*), in March 2019.

43. The representative of Germany expressed his deep concern regarding the arrest and interrogation of the former Canadian official of the Ministry of Foreign Affairs in China, which Germany has already conveyed to the Chinese authorities. He mentioned that this case was a violation of Article 39 of the *Vienna Convention on Diplomatic Relations* and expressed his country's worry about the possible arbitrary arrests in China of former diplomats, and its contribution to the overall erosion of diplomatic immunities and international relations.

44. The representative of Belgium further supported the Canadian authorities as regards the arrest of their diplomatic official in China, and informed the CAHDI that they have already reacted to this in their bilateral contacts with the Chinese authorities, stressing that the *Vienna Convention on Diplomatic Relations* (VCDR) is the basis for international relations. The representative of Belgium further informed the CAHDI about a judgment by his country's *Cour de Cassation* delivered on 2 January 2019[1]. The case concerns an Iranian diplomat based in Austria and arrested in Germany after holidays in Belgium and while he was returning to Austria. The Belgian authorities had requested the surrender of the diplomat on the basis of a European arrest warrant, and on suspicion that he had been involved in plans for a terrorist attack. The diplomat had claimed the inviolability provided by Article 29 of the VCDR, as well as the immunity from criminal jurisdiction established in Article 31 paragraph 1 of the VCDR. The Court of Appeal had ruled in November 2018 that the applicant could not enjoy such inviolability as he was on holidays in Germany and Belgium and his arrest had been lawful. The *Cour de Cassation* also held that Article 40 of the VCDR only applies in the situation of transit, and not during holidays. The *Cour de Cassation* confirmed the judgment of the Appeal Court of Anvers as regards the strict interpretation of Article 40 of the VCDR, which only applies in relation to the exercise of the diplomatic functions and therefore does not cover holiday travels.

45. The representative of the Czech Republic shared the concerns expressed by the representatives of Belgium and Germany regarding the arrest of the former Canadian diplomat in China. She further informed the CAHDI about a decision of the Supreme Court of the Czech Republic of 27 March 2018, concerning the immunity from execution (pre-judgment measures of constraint) of the foreign diplomatic mission's bank accounts in connection with a labour law dispute with its local staff member. The Supreme Court concluded that the property of a foreign State which is used or intended for use in the exercise of public (sovereign) powers and functions of state property serving for governmental purposes, including bank accounts used or intended for use in the performance of the functions of diplomatic missions, is immune from any measures of constraint, unless the state consents to the taking of such measures with regard to such property or earmarks such property for the satisfaction of the claim. In this context, the Supreme Court ruled that the official declaration of the head of the diplomatic mission - that the bank accounts of such mission are used exclusively in the performance of its functions - shall be accepted as sufficient evidence, unless different facts are proven in the proceedings. The Supreme Court based its decision on customary international law, as codified in relevant provisions of the United Nations *Convention on Jurisdictional Immunities of States and their Property*.

[1] Ref. P.18.1301.N (*Juridat – case law database*).

46. The representative of Switzerland provided information on the European Court of Human Rights (ECtHR) Chamber judgment of 5 February 2019 in the case *Ndayegamiye-Mporamazina v. Switzerland*[2]. The case concerned a national of the Republic of Burundi employed in 1995 by the permanent mission of the Republic of Burundi to the United Nations Headquarters in Geneva. In August 2007, the permanent mission informed the applicant that it had decided not to renew her employment contract, and the applicant subsequently brought an action for unfair dismissal against the Republic of Burundi before the employment tribunal of the Canton of Geneva. The ECtHR noted that Switzerland is a Party to the 2004 UN Convention, which recognises the general principle of the immunity of a State and its property before the courts of another State. In its Chamber judgment, the ECtHR noted that the applicant's contract of employment comprised an article concerning litigation, which, according to the applicant, constituted an advance waiver by the Republic of Burundi of its immunity from jurisdiction. However, the ECtHR observed that the Swiss Federal Court and the Court of Justice of the Canton of Geneva had allowed the Republic of Burundi's plea of immunity from jurisdiction. The ECtHR further found that the express consent criterion laid down in Article 7(1)(b) of the 2004 UN Convention had been lacking in the present case, and therefore the Republic of Burundi had not waived its immunity from jurisdiction. The ECtHR also observed that the circumstances of the case fell within the scope of Article 11(2)(e) of the 2004 UN Convention ("Contracts of employment") because the applicant had been a national of the employer State when the action had been brought and she had never been permanently resident in Switzerland. The ECtHR found no violation of Article 6(1) of the *European Convention on Human Rights*, as the Swiss courts had not departed from the principles of international law recognised in the sphere of State immunities, and the restriction on the right of access to a court could not be considered disproportionate. Therefore, the ECtHR concluded that Switzerland's honouring of the immunity from jurisdiction of the Republic of Burundi did not disproportionately restrict the applicant's right of access to a court.

47. The Chair referred to the document on "*Exchange of national practices on possibilities for the Ministry of Foreign Affairs to raise Public International Law issues in procedures pending before national tribunals and related to States' or international organisations' immunities*" (document CAHDI (2019) 7 prov *Confidential Bilingual*), and noted that, up to this CAHDI meeting, 30 delegations (Albania, Austria, Belgium, Canada, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Israel, Italy, Japan, Latvia, Luxembourg, Mexico, Montenegro, the Netherlands, Norway, Portugal, Romania, Russian Federation, Slovak Republic, Slovenia, Spain, Sweden and the United States of America) had replied to the questionnaire on this matter. Since the last meeting, no new contributions had been sent to the Secretariat. The Chair 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

48. The Chair introduced the document CAHDI (2019) 8 prov *Bilingual* on the "*Organisation and functions of the Office of Legal Adviser of the Ministry of Foreign Affairs"* and welcomed the replies of 38 States and one Organisation (Albania, Andorra, Armenia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Israel, Italy, Latvia, Lithuania, Luxembourg, Malta, Mexico, Montenegro, Norway, Republic of Moldova, Romania, Serbia, Slovenia, Sweden, Switzerland, Turkey, the United Kingdom, the United States of America and NATO) to the revised questionnaire containing additional questions on gender equality in conformity with the *Council of Europe Gender Equality Strategy*. Since the last meeting, revised contributions were received from Canada, Romania, Sweden and Turkey.

49. The Chair invited delegations to send to the Secretariat any further information in order to complete their replies. The Chair further reminded delegations that the replies to this questionnaire

[2] ECtHR, Ndayegamiye-Mporamazina v. Switzerland, no. 16874/12, Chamber judgment of 5 February 2019.

can equally be found in the relevant online database, where delegations can update existing contributions and insert new ones, as well as consult the replies from other delegations.

50. The Chair made a call to the 13 delegations (Azerbaijan, Bulgaria, Iceland, Japan, the Netherlands, North Macedonia, Poland, Portugal, Russian Federation, Slovak Republic, Spain, Ukraine and Interpol) who replied to the original questionnaire on this issue but who have not replied to the revised one yet, to send to the Secretariat the supplementary information concerning gender equality in order to have a complete overview of the organisation and functions of the Offices of the Legal Adviser of the 52 States and Organisations which have replied so far.

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

51. The Chair introduced document CAHDI (2019) 9 *prov Confidential Bilingual* on "*Cases that have been submitted to national tribunals by persons or entities included in or removed from the lists established by the UN Security Council Sanctions Committees"*. Up to this meeting, 37 States and one Organisation have sent contributions to the database (Albania, Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, Mexico, the Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom, the United States of America and the European Union).

52. The CAHDI took note that no new information on this issue was submitted by delegations.

9. The European Convention on Human Rights and the case law of the European Court of Human Rights involving issues of public international law

53. The CAHDI took note of the annual Appendix to the document with the case law of the European Court of Human Rights related to public international law (document PIL (2019) Case Law Appendix I), prepared by the Secretariat, which contains press releases and legal summaries of relevant judgments and decisions of the European Court of Human Rights (ECtHR) from 1 January to 31 December 2018. The CAHDI further noted that this document is published in the CAHDI website.

54. The Chair invited delegations to report on judgments, decisions and resolutions issued by the European Court of Human Rights involving issues of public international law.

55. The representative of Cyprus informed the CAHDI about the Grand Chamber judgment of 29 January 2019 in the case *Guzelyurtlu and others v. Cyprus and Turkey*[3], which concerns the effectiveness of the investigation into the murder of three Cypriot nationals of Turkish Cypriot origin in the government-controlled areas of the Republic of Cyprus, on 15 January 2005. Parallel criminal investigations into the murders were conducted by the authorities of the Cypriot and the Turkish Governments, including those of the self-proclaimed "Turkish Republic of Northern Cyprus" ("TRNC"). Both investigations reached an impasse in 2008. The ECtHR Chamber judgment of 4 April 2017 held that there had been a procedural violation of Article 2 of the *European Convention on Human Rights* by both Turkey and Cyprus on account of their failure to co-operate effectively with each other. The case was referred to the Grand Chamber at the request of both respondent States. The judgment of the Grand Chamber was delivered on 29 January 2019, dismissing Turkey's jurisdictional objection of incompatibility *ratione loci* as there was a "jurisdictional link" between the applicants and Turkey by virtue of the fact that the "TRNC" authorities had instituted a criminal investigation. The Court further considered that both States had had an obligation to co-operate with each other. With regard to Cyprus, the Grand Chamber found that it had done all that could reasonably have been expected of it to obtain the surrender/extradition of the suspects from Turkey. Moreover, the Grand Chamber held that Cyprus' refusal to submit all the evidence to the authorities of the "TRNC" or Turkey did not amount to a breach of its duty to co-operate, given that

[3] ECtHR, *Güzelyurtlu and Others v. Cyprus and Turkey*, no. 36925/07, Grand Chamber judgment of 29 January 2019.

in such a specific situation it was not unreasonable to refuse to waive its criminal jurisdiction in favour of the courts of an unrecognised entity set up in its territory. On the other hand, the Court found that Turkey had not made the minimum effort required in the circumstances of the case, as they had ignored Cyprus's extradition requests, returning them without reply, contrary to their obligation under Article 2 of the *European Convention on Human Rights* to co-operate. The Grand Chamber held that there had been no violation by Cyprus of Article 2 of the *European Convention on Human Rights*, under its procedural limb, whereas there had been a violation of that provision by Turkey on account of its failure to co-operate with Cyprus for the purposes of an effective investigation into the murder of the applicants' relatives, including failure to provide a reasoned reply to the extradition requests by Cyprus.

56. The representative of Belgium informed the CAHDI about two Chamber judgments from 17 April 2018 concerning Belgium in the cases *Paci v. Belgium*[4] and *Pirozzi v. Belgium*[5]. The former judgment relates to an Italian national convicted in Belgium for international arms trafficking. Mr Paci had argued that his detention in Belgium had been unlawful and that he should have been surrendered to the Italian authorities at the close of the investigation. However, the ECtHR ruled that the detention orders had been valid throughout the criminal proceedings and that Mr Paci's detention had displayed no arbitrariness. The ECtHR therefore found no violation of Articles 5(1) and 6(1) of the *European Convention on Human Rights* as the applicant's detention had been justified and his conviction had not been based on evidence in respect of which he had been unable to exercise his defence rights. As regards the case brought against Belgium by Mr Pirozzi, an Italian national convicted for drug trafficking in Italy but arrested in Belgium and surrendered to Italian authorities under a European arrest warrant, the ECtHR also found no violation of Articles 5(1) and 6(1) of the *European Convention on Human Rights* as the arrest and detention of Mr Pirozzi in Belgium and his surrender to the Italian authorities had been carried out in accordance with lawful procedures. The ECtHR found that the Belgian courts' implementation of the European arrest warrant had not been manifestly deficient such that the presumption of equivalent protection was rebutted, and that Mr Pirozzi's surrender to the Italian authorities could not be considered to have resulted from a trial amounting to a flagrant denial of justice.

57. The representative of Ukraine informed the CAHDI about the different procedural stages of five inter-States applications concerning Ukraine's allegations of violations of the *European Convention on Human Rights* by the Russian Federation pending before the ECtHR. These applications concern: two cases regarding complaints over Crimea and Eastern Ukraine since 2014 (applications no. 20958/14 and no. 8019/16) concerning Articles 2, 3, 5 and 6 of the *European Convention on Human Rights* – these cases are pending before the Grand Chamber of the Court; complaints related to the alleged abduction of three groups of children in Eastern Ukraine and their probable temporary transfer to the Russian Federation in 2014 (application no. 43800/14) - remain pending before a Chamber; application no. 38334/18 concerning Articles 3, 5, 6, 7, 8, 9, 10, 11, 13, 14 and 18 of the *European Convention on Human Rights* regarding the detention and prosecution of Ukrainian nationals on charges of membership of organisations banned by Russian law, incitement to hatred or violence, war crimes, espionage and terrorism; and application no. 55855/18 concerning events in the Black Sea on 25 November 2018 related to the detention and prosecution of 24 officers of the Ukrainian Navy, including the interim measures granted by the European Court of Human Rights at the request of Ukraine under rule 39 of the Rules of the Court.

58. The representative of the Russian Federation referred to the above-mentioned applications to the European Court of Human Rights and informed the CAHDI that they will be presenting their legal position during the forthcoming procedures.

59. The representative of Sweden informed the CAHDI about a Chamber judgment delivered in June 2018 in the case *Centrum för rättvisa v. Sweden*[6], which concerned a complaint brought by a

[4] ECtHR, *Paci v. Belgium*, no. 45597/09, Chamber judgment of 17 April 2018.
[5] ECTHR, *Pirozzi v. Belgium,* no. 21055/11, Chamber judgment of 17 April 2018.
[6] ECtHR, *Centrum för rättvisa v. Sweden*, no. 35252/08, Chamber judgment of 19 June 2018.

public interest law firm alleging that the Swedish legislation permitting signals intelligence for foreign intelligence purposes breached its privacy rights. The ECtHR found that it was clear that the surveillance system, as it stood at the present moment in time, had a basis in domestic law and was justified by national security interests. The ECtHR found that the Swedish system of signals intelligence provided adequate and sufficient guarantees against arbitrariness and the risk of abuse and therefore did not violate Article 8 of the *European Convention on Human Rights*. On 4 February 2019, the ECtHR accepted the applicant's request for referral to the Grand Chamber and a hearing on this case will be held on 10 July 2019.

60. The representative of Turkey expressed his disconformity with the terminology used in the summaries of the case-law of the ECtHR (document PIL (2019) Case Law Appendix I) as regards the cases *Mehmet Hasan Altan v. Turkey*[7] (which refers to the "Gülen movement", when it is a terrorist organisation) and *Fatih Taş v. Turkey*[8] (as regards the Kurdistan Workers Party, PKK, which is a terrorist organisation). As regards the case *Guzelyurtlu and others v. Cyprus and Turkey*[9], he indicated that the Turkish authorities had been prepared to prosecute the suspects.

61. The Chair recalled that following the entry into force of *Protocol No. 16 to the European Convention on Human Rights* (CETS No. 214) on 1 August 2018, after 10 ratifications, the first request for an advisory opinion had been received in October 2018 from the French Court of Cassation. The request relates to the legal parentage of children born to a surrogate mother. The Court of Cassation has adjourned its proceedings until the European Court of Human Right gives its opinion.

10. Peaceful settlement of disputes

62. The CAHDI held an exchange of views on the document CAHDI (2018) 20 prov *Restricted* on *Means of Peaceful Settlement of Disputes*, prepared by the Secretariat and containing an overview of the different means of peaceful settlements of disputes, including the instruments by which a State can accede to them or recognise their jurisdiction.

63. The representative of France thanked the Secretariat for this document and underlined that it is a good basis for the development of future activities on this topic.

64. The representative of Switzerland welcomed the new document and recalled the United Nations "*Handbook on accepting the jurisdiction of the International Court of Justice: model clauses and templates*", indicating that a reference to this document could be made in the CAHDI document on the peaceful settlement of disputes. The Handbook was prepared by Switzerland, the Netherlands, the United Kingdom, Lithuania, Japan, Uruguay and Botswana, together with the United Nations Office of Legal Affairs, and was published in July 2014.

65. The representative of Ukraine informed the CAHDI about recent developments in the proceedings instituted by her country on 16 January 2017 against the Russian Federation before the International Court of Justice (ICJ) concerning the *International Convention for the Suppression of the Financing of Terrorism* (*1999*) (ICSFT) and of the *International Convention on the Elimination of All Forms of Racial Discrimination (1965)* (CERD). She brought to the attention of the Committee the main claims submitted by Ukraine in its Memorial to the ICJ on 12 June 2018[10]. The representative of Ukraine informed the CAHDI that on 14 January 2019 Ukraine had submitted its Written Statement of Observations and Submissions to the ICJ opposing Russia's jurisdictional objections[11]. The next procedural step in this case is a hearing on Russia's jurisdictional objections

[7] ECtHR, *Mehmet Hasan Altan v. Turkey*, no. 13237/17, Chamber judgment of 20 March 2018.
[8] ECtHR, *Fatih Taş v. Turkey*, nos. 45281/08 and 51511/08, Chamber judgment of 24 April 2018.
[9] ECtHR, *Guzelyurtlu and others v. Cyprus and Turkey*, no. 36925/07, Grand Chamber judgment of 29 January 2019.
[10] Ministry of Foreign Affairs of Ukraine, Press Centre, 12 June 2018, Statement of the Ministry of Foreign Affairs of Ukraine on the Filing of its Memorial in its Case against the Russian Federation in the International Court of Justice
[11] Ministry of Foreign Affairs of Ukraine, Press Centre, 14 January 2019, Statement of the Ministry of Foreign Affairs of Ukraine on the Filing of its Written Statement Opposing Russia's Jurisdictional Objections Before the International Court of Justice.

which will be held on 3 June 2019, after which the ICJ will issue a decision on jurisdiction. Furthermore, the representative of Ukraine informed the CAHDI about an arbitration procedure in a case of Ukraine against the Russian Federation brought before an Arbitral Tribunal constituted under Annex VII to the 1982 *United Nations Convention on the Law of the Sea (UNCLOS)* in respect of a dispute concerning coastal State rights in the Black Sea, Sea of Azov, and Kerch Strait. In Procedural Order No. 3, adopted on 20 August 2018, the Tribunal decided to hear the preliminary objections to the Tribunal's jurisdiction in a preliminary phase of the proceedings[12]. The representative of Ukraine drew the attention of the Committee to the responses, filed by Ukraine on 27 November 2018, to Russia's preliminary objections on jurisdiction[13], as well as a letter addressed to the Tribunal by Ukraine[14]. In Procedural Order No. 4, adopted on 27 August 2018[15], the Tribunal set up the timetable for the Parties' written pleadings on jurisdiction. The oral hearings on this case will take place in the second week of June 2019.

66. The representative of the Russian Federation recalled that the *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* is currently being addressed by the ICJ as regards the preliminary objections submitted by the Russian Federation in September 2018 concerning jurisdiction[16]. The pleadings on jurisdictional matters will start on 3 June 2019 and a judgment by the ICJ on these preliminary objections is expected by the end of this year. On the second case concerning the arbitral tribunal constituted under Annex VII to the 1982 *United Nations Convention on the Law of the Sea (UNCLOS)*, the representative of the Russian Federation informed the CAHDI that they filed their preliminary objections in May 2018, also as regards jurisdictional issues, and requested the tribunal to hear objections in a preliminary phase of the procedure. By Procedural Order No.3, of 20 August 2018[17], the tribunal suspended the proceedings on the merits, pending the decision of the Arbitral Tribunal on Russia's jurisdictional objections, which will be made after the oral hearings scheduled for 10-15 June 2019.

67. The Chair concluded the discussions on this item by recalling the well-established CAHDI practice on reporting on cases before the international courts and tribunals, and invited CAHDI delegations to focus, in the future, on providing information in line with this CAHDI practice on final judgments and decisions, rather than to cover each single procedural step.

68. The Chair noted that the CAHDI agreed that document CAHDI (2018) 20 prov *Restricted* on *Means of Peaceful Settlement of Disputes* will be slightly revised to include the above-mentioned Handbook by the Swiss representative, and that this document will be used as a basis for its future discussions under this agenda item.

[12] Permanent Court of Arbitration, Press Release, 31 August 2018, Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (*Ukraine v. The Russian Federation*).
[13] Ministry of Foreign Affairs of Ukraine, Press Centre, 30 November 2018, Statement of Ukraine's Foreign Ministry on the Filing of its Responses to Russia's Jurisdictional Objections in the Ongoing Arbitration Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait.
[14] Ministry of Foreign Affairs of Ukraine, Press Centre, 30 November 2018, Statement of Ukraine's Foreign Ministry on Steps Taken to Alert the Tribunal to Russia's Aggravation of the Situation in the Kerch Strait and Sea of Azov and the Black Sea.
[15] Permanent Court of Arbitration, Procedural Order No. 4 Regarding the Timetable for the Parties' Written Pleadings on Jurisdiction, 27 August 2018.
[16] ICJ, Press Release, 17 January 2017.
[17] Permanent Court of Arbitration, Press Release, 31 August 2018, Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (*Ukraine v. The Russian Federation*).

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

69. In the framework of its activity as the *European Observatory of Reservations to International Treaties*, the CAHDI examined a list of outstanding reservations and declarations to international treaties. The Chair presented the documents containing these reservations and declarations which are subject to objections (documents CAHDI (2019) 10 prov *Confidential* and CAHDI (2019) 10 Addendum prov *Confidential Bilingual*) and opened the discussion. The Chair also drew the attention of the delegations to document CAHDI (2019) Inf 1 containing reactions to reservations and declarations to international treaties previously examined by the CAHDI and for which the deadline for objecting had already expired. Following the request of the representative of Cyprus, the latter document will be revised in order to include the objection of her country in relation to the Declaration made by Turkey about the 2011 *Council of Europe Convention on the Counterfeiting of Medical Products and Similar Crimes Involving Threats to Public Health* (CETS No.211).

70. The Chair underlined that the reservations and declarations to international treaties still subject to objection are contained in the document CAHDI (2019) 10 prov *Confidential*, which includes 11 reservations and declarations. Six of them were made with regard to treaties concluded outside the Council of Europe (Part I of the document) and five of them concerned treaties concluded within the Council of Europe (Part II of the document). No problematic partial withdrawals had been identified since the last meeting of the CAHDI. The Chair further noted that seven of these reservations and declarations had already been discussed at the 56th CAHDI meeting in September 2018, and four had been newly added since then.

71. With regard to the **declaration made by Azerbaijan** to the *Framework Agreement on Facilitation of Cross Border Paperless Trade in Asia and the Pacific*, the representative of Armenia indicated that they are considering objecting to this Declaration, as reflected in the table contained in document CAHDI(2019)10 Addendum prov *Confidential Bilingual*.

72. With regard to the **declaration made by Poland** to the *Doha Amendment to the Kyoto Protocol*, no comments were made by delegations.

73. With regard to the **declaration made by Azerbaijan** concerning the *Convention on the Use of Electronic Communications in International Contracts,* the representative of Armenia informed the CAHDI that his country will make a declaration on this issue upon signature of this Convention.

74. With regard to the **reservations made by Bahamas** to *the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, no comments were made by delegations.

75. With regard to the **reservation and statement made by Qatar** to the *International Covenant on Economic, Social and Cultural Rights*, Germany objected in January 2019 and Poland objected on 20 March 2019. Nine further delegations – namely Austria, Canada, Czech Republic, Finland, France, Hungary, the Netherlands, Norway and Sweden - stated that they will object to this reservation to Article 3 (ensure equal rights between men and women), where Qatar states that it contravenes the Islamic Sharia. Six further delegations (Belgium, Greece, Ireland, Portugal, Romania and Slovak Republic) informed the CAHDI that they are considering objecting to this reservation.

76. With regard to the **two reservations and five interpretative statements made by Qatar** to the *International Covenant on Civil and Political Rights*, Germany objected in January 2019 and Poland objected on 22 March 2019. The representative of Austria informed the CAHDI that his

country will object to Qatar's reservation to Article 23.4 of the International Covenant, but not to the reservation on Article 3. Four further delegations – namely Canada, Czech Republic, France, and the Netherlands – stated that they will object, while 11 other delegations (Belgium, Finland, Greece, Hungary, Ireland, Norway, Portugal, Romania, Slovak Republic, Sweden and the United States of America) stated that they are considering objecting. These reservations concern the non-application of equal rights between women and men on the grounds that it contravenes the Islamic Sharia. Three of Qatar's five interpretative statements on the Covenant are related to the application of the Islamic Sharia, while the other two relate to trade unions and the practice of religion.

77. With regard to the **declaration made by Azerbaijan** to the *Council of Europe Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events* (CETS No. 218), the representative of Armenia informed the CAHDI that his country made a declaration on this issue upon signature of the Convention, on 24 January 2018, and that the declaration will be confirmed upon ratification. He clarified that it will not be an objection but another declaration. The representative of Azerbaijan referred to previous explanations about the character of the aforementioned declarations in paragraphs 71, 73 and in this one, which amount to interpretative declarations and should not be regarded as reservations, since they do not purport to modify the provisions of the relevant Conventions, but rather to clarify the scope of these Convention as regards Azerbaijan, and were made due to the conflict between the two countries.

78. With regard to the **interpretative declaration made by Croatia** to the *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence* (CETS No. 210), no comments were made by delegations.

79. With regard to the **reservation and declarations made by Turkey** to the *European Convention for the Protection of Animals during International Transport (Revised)* (ETS No. 193), the representative of Cyprus informed the CAHDI that her delegation will be filing an objection to the third paragraph of Turkey's "reservation and declarations". The representative of Greece stated that they will also object to the same part of the declaration, like Cyprus. The representative of Turkey informed the CAHDI that their statement made at the 55th CAHDI meeting remains valid.

80. With regard to the **six reservations made by Argentina** to the *Convention on Cybercrime* (ETS No. 185), one of them is allowed by the Convention (in relation to Article 29.4). With regard to the other five (related to Articles 6.1.b; 9.1.d, 9.2.b, 9.2.c and 22.1), Argentina stated that they "are not transposable to its jurisdiction" for different reasons of alleged incompatibility with Argentina's criminal law system. The representative of Austria informed the CAHDI that the fifth reservation made by Argentina (as regards dual criminality) goes beyond the list of permitted reservations and they are considering objecting to it.

81. With regard to the **declaration made by Turkey** to the *European Convention for the Protection of Animals Kept for Farming Purposes* (ETS No.87), Austria and Cyprus have already objected. The representative of Cyprus asked for this information to be reflected in document CAHDI (2019) 10 Addendum prov *Confidential Bilingual*. The representative of Greece stated that they will object to this declaration. The representative of Turkey informed the CAHDI that their statement made at the 55th CAHDI meeting remains valid also for this item.

82. The CAHDI invited delegations to submit to the Secretariat any information relevant for the update of the summary table as set out in document CAHDI (2019) 10 Addendum prov *Confidential Bilingual*.

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

12. Consideration of current issues of International Humanitarian Law

83. The Chair invited the delegations to take the floor on current issues concerning International Humanitarian Law (IHL) and to present any relevant information on this topic,

including forthcoming events. He underlined the importance of this topic this year, in light of the International Conference which will take place in December 2019.

84. The representative of Switzerland referred to the problems related to the implementation of international humanitarian law and the lack of an appropriate framework in which States can have a regular and non-politicised dialogue about IHL. On the basis of the mandate provided by the 32nd International Conference of the Red Cross and Red Crescent, Switzerland and the International Committee of the Red Cross (ICRC) have co-facilitated, since 2015, the intergovernmental process "*Strengthening Respect for International Humanitarian Law*". The 6th and final meeting of States, within this process, took place last week in Geneva, where States took note of the final report drafted by the ICRC and Switzerland, as it had become clear that a consensual outcome of this process cannot be achieved in the current multilateral context. The representative of Switzerland expressed her disappointment about the lack of consensus after many years of efforts. However, she pointed out that there is consensus on the fact that the problem lies in the lack of respect for existing IHL rules, rather than in the lack of rules. The representative of Switzerland informed the CAHDI that the Swiss authorities will continue their efforts to improve respect for IHL and to support exchanges among countries on particular issues, as they are convinced that a better respect for IHL is closely linked to better implementation at the national level. The 33rd International Conference will be the occasion to debate about IHL in a non-politicised environment, and Switzerland welcomes the idea of adopting a four-year action plan focused on national implementation. Finally, the representative of Switzerland underlined the importance of national committees for the implementation of IHL and informed the CAHDI that they will take the opportunity of the 70th anniversary of the Geneva Conventions to disseminate the IHL widely.

85. The representative of the International Committee of the Red Cross (ICRC) supported the intervention of the representative of Switzerland regarding the process to strengthen respect for IHL, and expressed her gratitude to States for their engagement with this process, even though she regretted the lack of progress. The 33rd International Conference of the Red Cross and Red Crescent will take place in Geneva on 9-12 December 2019 and a factual report of the process will be taken note of in an "omnibus resolution" of the Conference, including the work carried out to implement Resolution 1 of the 2015 International Conference, which will be submitted to the 33rd International Conference to be taken note of. The representative of the ICRC informed the CAHDI that there will be four or five resolutions for discussion at the 33rd International Conference (on restoring family links, also linked to data protection; on addressing mental health and psychosocial needs of people who are affected by armed conflicts, natural disaster and other emergencies; on disaster laws and policies and in relation to climate change; on the four-year action plan on IHL; and on the global frameworks). Draft elements of these resolutions will be sent to countries by the end of next week. As regards the draft resolution on a four-year action plan, draft elements will include references to the Action Plans adopted at previous conferences, but the one for discussion in December 2019 will not have a thematic focus but rather address national implementation of IHL, national legislative frameworks and national IHL committees. This year's International Conference will also review a report on challenges for IHL, prepared by the ICRC, with a focus on urban warfare, complex conflicts, new technologies, other protection issues, and IHL implementation. The representative of the ICRC further informed the CAHDI that the formal agenda of the 33rd International Conference will include work in commissions to discuss: elements of the challenges report; protection and prevention work on IHL; and the resolution on the action plan. The next steps in the lead-up to the 33rd International Conference are: feedback requested on the draft elements of resolutions, in the coming weeks, so that a "zero draft" can be prepared; a preparatory meeting in Geneva on 27-28 June 2019, not intended to "pre-negotiate" the resolutions but to hear feedback on the "zero draft" of the resolutions from States and national societies, and to explore possible "tension issues" in order to facilitate the negotiations during the conference. The annual meeting of legal advisers of National Red Cross and Red Crescent societies will be held just prior to the preparatory meeting for the Conference in June 2019. The representative of the ICRC remarked that 2019 is the 70th anniversary of the adoption of the Geneva Conventions, which is an occasion to reaffirm the continued relevance of IHL and the Geneva Conventions. The ICRC will be marking this important milestone and is happy to see States marking it as well.

Finally, the representative of the ICRC informed the CAHDI that the report of the expert meeting held in November 2018 on the potential human cost and consequences of cyber operations in armed conflicts, organised by the ICRC, will be published in the coming months.

86. The representative of Australia expressed his support to Switzerland and the ICRC on the preparations of the forthcoming International Conference next December. He however expressed his disappointment about discussions on compliance back in 2015 and the fact that it is not an issue included in this year's International Conference. The representative of Australia informed the CAHDI that they support a compliance mechanism if it is practical, has State support and is not an extra burden on resources. He added that these discussions should continue at a cross-regional level.

87. The representative of the United Kingdom informed the CAHDI about the publication by the Foreign and Commonwealth Office of the UK's first "*Voluntary Report on the Implementation of International Humanitarian Law at Domestic Level*", on 11 March 2019. Copies of the report were distributed to CAHDI members. The representative of the United Kingdom underlined that this publication reflects the UK Government's commitment to the proper implementation of, and compliance with, IHL. The report brings together the main aspects of how the UK Government implements IHL, including examples of their practice aimed at improving understanding of IHL and encouraging dialogue on IHL issues both within the UK and abroad. Furthermore, he hoped that this report will encourage other States to publish details of their activities to implement IHL at the national level, to better identify best practice and ultimately to improve implementation and compliance with IHL.

88. The representative of Canada also regretted the lack of progress of discussions on compliance. He referred to their G7 Presidency[18] last year and informed the CAHDI that they seek contributions from partners to get improvements on IHL by assisting to incorporate it in field operational decision-making processes, rules of engagement, etc. in order to ensure that their disciplinary and judicial structures are capable of effectively addressing their own IHL violations. The representative of Canada mentioned that the next G7 Presidency will be held by France and they counted on their contribution to this issue.

89. The representative of Finland thanked Switzerland and the ICRC for all their efforts and for the information about this year's International Conference. She expressed her disappointment that the Conference will not include compliance issues and underlined that it is the responsibility of all States to ensure IHL in all circumstances. Furthermore, she added that the action plan to be discussed at the International Conference will be critical. The representative of Finland informed the CAHDI that IHL will be a priority in their forthcoming Presidency of the Council of the European Union (EU), continuing the work done by the Romanian EU Presidency.

90. The representative of Greece thanked Switzerland and the ICRC for the information about the next steps in the preparation of the International Conference. She also regretted the failure of consensus on establishing effective measures to strengthen compliance with IHL. Furthermore, she underlined that the intergovernmental process allows for rich discussions on the respect for IHL and lessons can be learned from this platform. This issue could be taken forward in the future, including at the International Conference in December 2019.

91. The representative of Mexico noted the importance of the intergovernmental process as a forum for discussing topical issues on IHL, and valued the technical and specialised debate in a non-political framework. As regards a possible compliance mechanism in the future, she stated that a voluntary, non-binding and State-led mechanism for compliance would be beneficial. The representative of Mexico informed the CAHDI about a round-table organised in Mexico on 12 October 2018, in co-ordination with the ICRC, to discuss cyber warfare and autonomous weapons systems, in a national dialogue with academics, experts and the ICRC.

[18] See Charlevoix G7 Communiqué (9 June 2018).

92. The representative of Norway congratulated the Swiss authorities for the good process on compliance even if challenges remain. He welcomed the preparatory meeting for the 2019 International Conference but alerted that even if the meeting is not supposed to negotiate the draft resolutions, it should at least narrow down the main issues so that the process is better than at the 2015 International Conference. He added that the resolutions should be very short so that only a few topics are negotiated in Geneva next December.

93. The representative of the ICRC informed the CAHDI that indeed the plan was to have shorter resolutions and discuss many topics during the conference, and not just in the drafting committee. The preparatory meeting in June 2019 aims to smooth this process and identify the main points for discussion.

94. The representative of Germany welcomed the UK report that had been presented and circulated, and mentioned that a similar exercise had been carried out in Germany in 2014. He encouraged other countries to do the same and report on national implementation of IHL. He further thanked the ICRC and shared the disappointment as regards compliance, calling on States to double their efforts on this topic.

95. The representative of Denmark referred to a 2016 Military Manual on international law relevant to Danish armed forces in international operations, covering IHL and international human rights, which is available on the website of the Danish Ministry of Defence free of charge, also in English.

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

96. The Chair welcomed and thanked Judge Ivana Hrdličková, President of the Special Tribunal for Lebanon (STL), for having accepted the invitation of the CAHDI. He underlined that it was a pleasure and a privilege for the Council of Europe and the CAHDI to count with her presence and have an exchange of views on the work and activities of the Special Tribunal for Lebanon.

97. Judge Hrdličková presented the history of the STL, in particular as regards its main case, given that the Tribunal was set up in 2007 by the United Nations Security Council to prosecute the authors of the assassination of the Lebanese Prime Minister Mr Rafic Hariri on 14 February 2005 at Beyrouth and other 21 persons killed during the attack. The trial before the STL started in 2014 and the hearings have been completed in October 2018. The judgment is currently being prepared. Furthermore, Judge Hrdličková explained that the Secretary General of the United Nations extended the mandate of the STL for a further three years from 1 March 2018.

98. Judge Hrdličková focused on several key features of the STL, including the following facts: it is a hybrid tribunal (applying law and procedural rules inspired by both the Lebanese and international legal systems); it is the only Tribunal in the Middle East dealing with terrorism; it features an autonomous Pre-Trial Judge, an independent Defence Office and provides for extensive participation of victims. In addition, the most unique feature of the STL is that it is the first international tribunal since Nuremberg to have *in absentia* trials, which Judge Hrdličková considered hugely beneficial despite the challenges and complexity inherent in such procedures. She further underlined the specific steps that she has taken throughout her Presidency to improve the transparency, efficiency and accountability of the Tribunal, such as the promotion of regular reporting on timelines, the adoption of a Code of Professional Conduct, the facilitation of a Judicial Accountability Mechanism, and the introduction of targeted training for judges. Furthermore, Judge Hrdličková referred to the importance of starting the discussion and consideration of the STL's legacy, including normative aspects and "lessons learned" from the Tribunal's unique features, the transfer of expertise to Lebanon and the wider international community, and the historical records established through the proceedings and the evidence collected. The full speech of Judge Ivana Hrdličková appears in **Appendix III** to this Report.

99. The Chair thanked Judge Hrdličková for her insightful presentation and invited delegations which so wished to take the floor.

100. In reply to a question concerning lessons from the STL that could be of benefit to other international tribunals in order to make them more efficient, Judge Hrdličková stated that now is the crucial time to do so, and that all the necessary tools (such as binding timelines) should be in place from the outset of the tribunal, as there is very limited room for manoeuvre once the trial has started. She agreed that this is very important and was hopeful about the future introduction of measures to improve the efficiency of tribunals.

101. In reply to a question about the opinion of, and the impact on, Lebanon's local population regarding *in absentia* trials, Judge Hrdličková explained that acceptance of the STL in Lebanon is not uniform, with a part of the population supporting it and others less so. This is partly due to the high expectations that the Lebanese people placed in the Tribunal and in its final judgment. This is also why the historical record of facts carried out by the STL is so important, including for victims. She further indicated that *in absentia* trials are part of the Lebanese legal system, the procedure is balanced and has the necessary guarantees. Judge Hrdličková underlined that *in absentia* trials are the second best solution for victims, as it is always preferable to try the authors of the crimes in person, but it is also better than no justice for victims and society. This issue will be part of the "lessons learned" from the work of the STL and its relevance for international criminal law.

102. In reply to a question about the hybrid nature of the STL and its comparison to other hybrid tribunals, including the Kosovo Specialist Chambers (KSC), Judge Hrdličková underlined that the STL is funded by Lebanon at 49%, while voluntary contributions from different states make up the other 51%. The STL has staff from about 62 countries, including from Lebanon, and covers expertise on all legal systems. She further explained that the KSC are part of Kosovo's legal system but have no Kosovar judge, as all judges are foreign but they apply Kosovo's law. The STL is very different and countries should decide on the most efficient system for international tribunals in the future. Judge Hrdličková indicated that every Tribunal needs a similar administrative body and she put forward the idea of a "common Registrar" for different Tribunals in the future, as a way to increase efficiency.

103. In response to a comment regarding the importance of complementarity, the hybrid model of the STL, and the development of shared jurisprudence, Judge Hrdličková pointed out the Paris Declaration signed by all Presidents of international tribunals in October 2017, which has 31 recommendations for action, including criteria for the selection of judges and prosecutors and training for international judges. She further underlined the importance of reinforcing co-operation among tribunals, for instance through joint seminars to discuss issues of common concern. Finally, she recalled that predictability is important, while respecting the independence of tribunals, and that the key aims should be the interest of the Tribunal and justice.

104. In reply to a question about the gender-related work and the importance of the gender focal point in the STL, Judge Hrdličková indicated that about 45% of the STL staff is female but some sectors remain male-dominated. She highlighted that it is crucial to have internal rules and regulations on this issue too, including codes of conduct, before the tribunals are established. The STL's gender focal point is involved in recruitment panels and the review of internal policies. Furthermore, she welcomed the International Gender Champions network, that she joined, and stressed the importance of mentoring young women and men at the STL to stress the importance of gender balance.

105. The Chair of the CAHDI thanked Judge Hrdličková for the interesting and fruitful exchange of views.

106. The Chair drew the attention of CAHDI experts to the document on the "*Developments concerning the International Criminal Court and other International Criminal Tribunals*" (document CAHDI (2019) 11 prov), containing recent developments concerning the International Criminal Court (ICC) and other international criminal tribunals. He further pointed out recent developments

such as Malaysia's accession to the Rome Statute of the International Criminal Court, on 4 March 2019; the ratification by Guyana of the Kampala amendments to the Rome Statute on Article 8 and the crime of aggression; the ratification by Ireland of the Kampala amendment on the crime of aggression; and Switzerland's ratification of the amendment to Article 124 of the Rome Statute.

107. The representative of Ukraine informed the CAHDI that, despite the fact that Ukraine has not ratified the Rome Statute yet, Ukraine has deposited two declarations under Article 12 paragraph 3 of the Statute, on 17 April 2014 and 8 September 2015, accepting the jurisdiction of the International Criminal Court (ICC) over alleged crimes committed on the territory of Ukraine since 21 November 2013. According to these declarations, the situation in Ukraine, including alleged crimes committed after 20 February 2014 in Crimea and Eastern Ukraine, has been under preliminary examination by the Office of the Prosecutor of the ICC. The representative of Ukraine further informed the CAHDI about the Report of the Office of the Prosecutor on Preliminary Examination Activities in 2018, and the ICC Prosecutor's preliminary assessment as regards the qualification of the situation in Crimea and Eastern Ukraine (paragraphs 68 and 72-73 of the 2018 Report). Furthermore, the representative of Ukraine informed the CAHDI that the Ukrainian law enforcement agencies continue to actively engage with the Court's consultations regarding its preliminary examination, including by documenting and providing the Court with additional information about the situation in the temporarily occupied territories of Ukraine.

108. The representative of Japan welcomed Malaysia's accession to the Rome Statute, on 4 March 2019, but also regretted the withdrawal by the Philippines, which had taken effect on 19 March 2019, bringing the total number of Parties to the Rome Statute to 123. He further expressed concern about recent developments in the ICC and explained that a review of this Court is needed, while he expressed appreciation about the work it carries out and the fulfilment of its mission as regards universality and complementarity. The representative of Japan further stated that his country continues to support the ICC and called on all UN members to join the ICC.

109. The representative of Romania referred to the recent measures announced by the USA Government on 15 March 2019 regarding visa restrictions to be applied to personnel of the ICC directly involved in ICC investigations of USA citizens for war crimes and other abuses allegedly committed in Afghanistan. As Presidency of the Council of the European Union, she reiterated, on behalf of the EU and EU Member States the statement by the Spokesperson of the High Representative of the Union for Foreign Affairs and Security Policy on this issue, expressing serious concern about the USA measures and reaffirming strong support to the ICC.

110. The representative of Australia welcomed Malaysia's accession to the Rome Statute and underlined the importance of the core mandate of the ICC and its complementarity. He expressed his country's strong support to ICC's work and mandate, and their willingness to continue working with the Assembly of States Parties to the Rome Statute on reforms.

111. The representative of Liechtenstein expressed support for the ICC, and regret for the USA travel restrictions on ICC officials, as well as for the withdrawal of the Philippines from the Rome Statute.

112. The representative of Switzerland expressed support for the ICC and considered that it should not be the target of political measures. She further referred to the Swiss proposal put forward to the *Working Group on Amendments of the Assembly of States Parties to the Rome Statute of the ICC*, to include starvation of civilians as a war crime in non-international armed conflicts in order to strengthen the protection of civilians. She explained that 60% of the people suffering from hunger live in conflict zones, and she referred to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 which stated, in the case *The Prosecutor v. Duško Tadić*, that "[w]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife". The representative of Switzerland asked for support when the Working Group of the ICC will discuss this proposal. She further

informed the CAHDI that Switzerland is preparing the ratification of the Amendments to Article 8 of the Rome Statute adopted in 2017

113. The representative of the Russian Federation recalled that his country has been vocal in its criticism of the ICC, whose problems are illustrated by recent withdrawals from the Rome Statute. He also indicated that the ICC is exceeding its jurisdiction.

114. The representative of the United States of America explained their position on the ICC, which is long-standing and reflects a strong commitment, shared with the Parties to the Rome Statute, to ensure accountability for war crimes and crimes against humanity. The effectiveness in the operation of the ICC, including the need to ensure checks and balances against politicised prosecutions, is a concern for the United States of America.

115. The representative of Serbia informed the CAHDI about the 2nd Preparatory Conference regarding the *Initiative for a New Multilateral Treaty on Mutual Legal Assistance* (*MLA) and Extradition for Domestic Prosecution of the Most Serious International Crimes*, which was held on 11-14 March 2019 in Noordwijk (The Netherlands). 50 States and 10 non-governmental organisations (NGOs) participated in the Preparatory Conference, which discussed a first draft convention, based on the Rome Statute.

116. The representative of the Netherlands recalled that the First Preparatory Conference had been held in 2017 and that the other members of the core group behind this initiative are Belgium, Slovenia, Senegal, Argentina and Mongolia. He further informed the CAHDI about the successful meeting in Noordwijk and the first review of the draft Convention elaborated by the core group. The main issue that remains to be discussed at the next conference is the definition of international crimes and their criminalisation in the new MLA Convention, and whether to use the Rome Statute or leave out of the convention such definition and criminalisation, and rather have a Convention addressing MLA and extradition, with no definitions, or have a more flexible approach. The representative of the Netherlands informed the CAHDI that 69 States supported this initiative, 35 of which are members of the Council of Europe, and invited the 12 remaining members of the Council of Europe to express their support. Furthermore, he stated that this initiative and the work of the International Law Commission (ILC) on crimes against humanity are complementary and can coexist, which is the position of the core group, which supports both initiatives.

117. The CAHDI took note of the recent developments concerning the ICC and other international criminal tribunals, as contained in document CAHDI (2019) 11 prov. This document will be reviewed and updated by the Secretariat to take account of recent developments in the different international criminal courts and tribunals.

14. Topical issues of international law

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

119. The representative of Belgium informed the CAHDI about two legal cases concerning the return to Belgium of widows and children associated with Daesh, which raises important security issues. In December 2017, the Belgian Government decided to return children under the age of 10. Above that age, decisions would be taken on a case-by-case basis. However, for security reasons it was decided not to return the widows and the fighters themselves. The *case Tatiana Wielandt and Bouchra Abouallal v. the Belgian State* concerns two women of Belgian nationality who filed claims in summary proceedings against the Belgian State requesting to be repatriated from camps in Syria, together with their children. They appealed the Order that found their claim admissible but ill-founded, and which was confirmed by the Court of Appeal in a decision of 12 September 2018. The claimants had argued the applicability of Articles 3 and 5 of the *European Convention on Human Rights*, Article 12 of the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Convention on the Rights of the Child*. As regards the first two Conventions, the Court of Appeal ruled their inapplicability as their scope is limited to the territorial jurisdiction of

each State Party (i.e. in this case, the Belgian territory) and the conditions for an extra-territorial application of the Convention, as established by the case law of the ECtHR, were not present. The Court of Appeal also considered that Article 2(1) of the *International Convention on the Rights of the Child* was not applicable as the children were not covered by the Belgian jurisdiction. As regards the ICCPR, the Court of Appeal recalled that there is no right to be subjected to a prison sentence in Belgium, which could be linked to a transfer or extradition to that country. Despite this decision, the two women filed another claim in summary proceedings on 14 November 2018, on the same issue and on the basis that there were "new facts" (such as visual materials and witnesses about their stay in the Syrian camps). The judge ("*juge des référés*") issued an Order on 26 December 2018 requesting the Belgian state to carry out all the necessary and possible actions to allow for the return of the two women and their children. Even though the two complainants had only asked for the repatriation of their children, the judge ordered also the return of the mothers and established a fine of 5000 Euros per day of delay in the repatriation after the set timeframe of 40 days. The Belgian State appealed this Order on 25 January 2019[19] and a working group was set up in the Ministry of Foreign Affairs to implement the above-mentioned judicial Order. However, on 27 February 2019 the Court of Appeal decided that the claim of Ms Wielandt and Ms Abouallal was inadmissible and recalled the *res judicata* of the Order from 12 September 2018, as the alleged new facts had not been proven. Nevertheless, the above-mentioned working group continues its activities as the main aim is the repatriation of children under the age of 10, as it was decided in December 2017.

120. The representative of Belgium further informed the CAHDI about the case *Ghezzal v. the Belgian State*, in relation to which the Belgian Government had lodged an appeal in January 2019 against a judicial decision of 19 December 2018[20], and on which the judgment is expected before the summer 2019. In this case, the claim was first launched by Ms Amina Ghezzal, in her own name and in that of her two children, of three and four years of age, respectively. The mother, who has dual nationality from Belgium and Algeria, is in prison in Turkey following a sentence for participation in terrorism. In accordance with Belgian law, her children do not have Belgian nationality. They were born in Syria but have no birth certificate and DNA tests could not be conducted. The claim was also for interim measures, like in the previous case, and aimed at facilitating the return of the children in Belgium by delivering travel documents or repatriating them from Turkey. The Belgian State has tried to make the DNA tests possible, without success, and considers that the judicial action is ill-founded, as the necessary urgency of summary proceedings has not been demonstrated. The mother lodged the claim after having spent 10 months in prison and her two children, who had never stayed in Belgium and had no proven link with the country, lived in acceptable conditions with the family of the mother's partner and were not stateless. The claim argued that the children had rights under Article 3 of the *European Convention on Human Rights*, Articles 3, 19, 38 and 39 of the *Convention on the Rights of the Child*, and Articles 2(1), 7 and 24 of the *International Covenant on Civil and Political Rights,* without producing any evidence of the alleged violation of such provisions by Turkey or the right to obtain travel documents from the Belgian authorities. The claim also referred to the decision of the Belgian Council of Ministers about facilitating the return of children under the age of 10. On 19 December 2018, the judge ("*juge des référés*") ruled against the Belgian government and requested that identity and/or travel documents be issued, and a penalty payment in case of delay, even though the decision recognised that there was "no direct legal base, specific and explicit", substantiating the demand of such documents. Belgium appealed the first instance decision, in application of which the children of Amina Ghezzal had received a *laissez-passer* with a visa allowing them to stay in Belgium for one year (the children arrived in Belgium on 4 February 2019). The decision of the Court of Appeal is expected before the summer 2019.

121. The representative of France thanked the Belgian delegation for this interesting information and underlined its value as lawyers often refer to other cases. There have been no judicial

[19] Ministry of Foreign Affairs, External Trade and Co-operation for Development, Belgium, News of 29 January 2019 on the Wielandt-Abouallal case (*in French*).
[20] Ministry of Foreign Affairs, External Trade and Co-operation for Development, Begium, News of 29 January 2019 on the Ghezzal case (*in French*).

decisions on this issue in France yet, but claims have been lodged and several initiatives have reached the UN Committee on the Rights of the Child and the UN Committee against Torture. On a separate note, the representative of France recalled the invitation launched by the President of the French Society for International Law, Professor Alain Pellet, and addressed to all legal advisers, regarding the second world meeting of societies for international law (the first world meeting was held in Strasbourg in 2015). This meeting will take place at the Academy of International Law in The Hague on 2-3 September 2019 and the main theme will be the current challenges for international law and the role of international law societies, including the threat of collapse of the international legal order. Another issue that will be covered in the meeting will be the relationship between global law and regional law.

122. The representative of Germany informed the CAHDI of developments in his country as regards the prosecution in Germany of international crimes committed in Syria, noting that there is no special court for such crimes in Syria, and no possibility for the ICC to act. He further explained that Germany´s General Federal Prosecutor has investigated crimes in Syria since 2011, as regards alleged perpetrators who have returned to Germany. There was a decision in 2018 about an international arrest warrant for crimes against humanity regarding the Head of the Syrian air forces. The representative of Germany further informed about co-operation with France in 2019 to arrest two former intelligence officers accused of torture, in Germany, an another one in France. He underlined the importance of national measures to ensure that the heinous crimes committed in Syria do not go unpunished.

123. The representative of Austria thanked the Belgian delegation for the information on the legal cases and indicated that the issue of returnees from Syria (including foreign fighters, women and children) is also generating a big discussion in Austria. A new consular law has reached Parliament, after 12 years of preparatory work, including issues on which there are difficult legal discussions, such as the conditions under which the benefits from consular protection operate, as well as their scope. This new consular law is connected to other difficult issues, such as the possibility to withdraw citizenship, and its limits if it leads to a person becoming stateless.

124. In reply to questions about whether Article 3 of the *Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto* (ETS No. 46), on the right of every national to enter the State of their nationality, had been discussed in Belgium, and on the reasons given for not applying the *Convention on the Rights of the Child* and the best interest of the child, the representative of Belgium explained that *Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms* (ETS No. 46) had not been invoked by the claimants in Court. As regards the *Convention on the Rights of the Child,* it was not considered applicable as the children were under a *de facto* authority, and not with the Syrian Government or in Belgium, so repatriation was difficult in these circumstances and there was also no obligation to provide consular assistance. The representative of Belgium further informed the CAHDI that the reform of consular law in Belgium, according to which Belgian nationals who are in conflict or dangerous zones cannot count on consular assistance, has been taken to the Constitutional Court by an association of journalists and persons providing humanitarian assistance. The decision of the Constitutional Court will be communicated to the CAHDI once it is available.

125. In reply to a question about the obligations of Belgian Consulates towards Belgian nationals asking to be repatriated, the representative of Belgium explained that in that circumstance the Consulates are obliged to deliver the necessary documents.

126. The Chair closed the discussions on this agenda item noting that the issue of consular protection and its limits was also under debate during the preparatory works on the Law on Foreign Service in the Czech Republic (adopted in 2017). He further informed the CAHDI about the forthcoming Antarctic Treaty Consultative Meeting (ATCM) that will be held in Prague from 1 to 11 July 2019, stressing the importance of the Antarctic Treaty system for the rule of law at the

international level. At the ATCM, the "Prague Declaration" to mark the 60th anniversary of the signing of the Antarctic Treaty is supposed to be adopted.

IV. OTHER

15. Place, date and agenda of the 58th meeting of the CAHDI

127. The CAHDI decided to hold its 58th meeting in Strasbourg (France), on 26-27 September 2019. The CAHDI instructed the Chair of the CAHDI, in co-operation with the Secretariat, to prepare the provisional agenda of this meeting in due course.

16. Any other business

128. No issue was raised under "Any other business".

17. Adoption of the Abridged Report and closing of the 57th meeting

129. The CAHDI adopted the Abridged Report of its 57th meeting, as contained in document CAHDI (2019) 12, and instructed the Secretariat to submit it to the Committee of Ministers for taking note of it. The Chair informed members that the final version of the Abridged Report would be sent out by the Secretariat on Monday 25 March 2019.

130. The representative of Austria took the floor to thank the representative of Belgium, Mr Paul Rietjens, Director General of Legal Affairs at Belgium's Federal Ministry of Foreign Affairs, as this was his last participation in a CAHDI meeting. He expressed his recognition and gratefulness for his excellent Chairmanship of the CAHDI in the past, as well as for his active participation and the insightful information he has provided throughout all CAHDI meetings.

131. The Chair joined the Austrian representative in expressing the CAHDI's recognition of the valuable contribution of Mr Rietjens to the work of the CAHDI and hoped that he will remain in contact with CAHDI members after his retirement. Furthermore, he also expressed the gratefulness of the CAHDI to Mr Ludovic Legrand, legal consultant at the Directorate of Legal Affairs in the Ministry of Europe and Foreign Affairs of France, who is also participating for the last time in a CAHDI meeting as he is taking up a new post to work with Professor Alain Pellet.

132. Before closing the meeting, the Chair thanked all CAHDI experts for their participation and efficient co-operation in the good functioning of the meeting. He also thanked the CAHDI Secretariat and the interpreters for their invaluable assistance in the preparation and the smooth running of the meeting.

APPENDICES

APPENDIX I

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[Apologised / *Excusé*]

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Mr Yukihiro TAKEYA
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SPECIAL GUESTS / INVITES SPECIAUX

Ambassador Emil RUFFER, Chair of the Committee of Ministers' Rapporteur Group on Legal Co-operation (GR-J), and Permanent Representative of the Czech Republic to the Council of Europe /
Président du Groupe de Rapporteurs du Comité des Ministres sur la Coopération juridique (GR-J), et Représentant permanent de la République tchèque auprès du Conseil de l'Europe

Judge Ivana HRDLIČKOVÁ, President of the Special Tribunal for Lebanon / *Présidente du Tribunal spécial pour le Liban*

SECRETARIAT GENERAL

DIRECTORATE OF LEGAL ADVICE AND PUBLIC INTERNATIONAL LAW / DIRECTION DU CONSEIL JURIDIQUE ET DU DROIT INTERNATIONAL PUBLIC

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Ms Elise CORNU
Head of Division / *Chef de Division*
Legal Affairs and Human Rights/ Affairs juridiques et Droits de l'Homme

APPENDIX II

AGENDA

I. INTRODUCTION

1. Opening of the meeting by the Chair of the CAHDI, Mr Petr VÁLEK

2. Adoption of the agenda

3. Adoption of the report of the 56th meeting

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

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

- Exchange of views with the Chair of the Committee of Ministers' Rapporteur Group on Legal Co-operation (GR-J), Ambassador Emil RUFFER, Permanent Representative of the Czech Republic to the Council of Europe

a. Draft Terms of Reference of the CAHDI for 2020-2021

b. Other Committee of Ministers' decisions and activities of relevance to the CAHDI's activities

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. Consideration of current issues of international humanitarian law

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

- Exchange of views with Judge Ivana HRDLIČKOVÁ, President of the Special Tribunal for Lebanon

14. Topical issues of international law

IV. OTHER

15. Place, date and agenda of the 58th meeting of the CAHDI: Strasbourg (France), 26-27 September 2019

16. Any other business

17. Adoption of the Abridged Report and closing of the 57th meeting

APPENDIX III

PRESENTATION BY JUDGE IVANA HRDLIČKOVÁ

President of the Special Tribunal for Lebanon

Committee of Legal Advisers

on Public International Law (CAHDI)

Council of Europe

Strasbourg, 21 March, 2019

Monsieur le Président,

Mesdames et Messieurs du Comité des conseillers juridiques sur le droit international public,

Mesdames et Messieurs,

Je vous remercie de me recevoir parmi vous à Strasbourg pour vous présenter le Tribunal Spécial pour le Liban en ma qualité de Présidente du Tribunal. J'ai été nommée juge de la chambre d'appel en 2012 et j'ai été élue Présidente du tribunal en 2015.

Je vais commencer ma présentation en français mais ensuite je continuerai en anglais, si vous me le permettez. Je souhaite tout d'abord vous présenter l'histoire du Tribunal Spécial pour le Liban, notamment dans quel contexte il a été créé. Je voudrais ensuite évoquer avec vous les dernières actualités du tribunal, notamment par rapport à l'affaire principale relative à l'attentat contre Rafic Hariri. Enfin, je souhaiterais aborder avec vous les défis actuels de la justice pénale internationale, et répondre à vos questions à ce sujet.

Au préable, je voudrais vous exprimer toute ma gratitude. Sans votre soutien, nous ne pourrions pas continuer notre travail et accomplir notre mission. Nous vous en sommes vraiment reconnaissants.

Maintenant je vais revenir sur les conditions de création du Tribunal Spécial pour le Liban. Le Tribunal a été créé en 2007 par le Conseil de sécurité des Nations Unies. Le tribunal a été mis en place pour juger les auteurs de l'attentat du 14 février 2005 à Beyrouth qui a coûté la vie à 22 personnes, dont l'ancien Premier-Ministre libanais Rafic Hariri. Le procès a débuté en 2014, et s'est achevé en octobre 2018. Les juges sont actuellement en train de délibérer et de rédiger le jugement, qui est attendu dans les prochains mois, je vais expliquer cela plus tard.

Le Tribunal Spécial pour le Liban aussi innove dans le paysage de la justice pénale internationale – et je voudrais mentionner 5 caractéristiques spécifiques du Tribunal :

- Nous sommes le premier tribunal international compétent pour le Moyen-Orient et en matière de terrorisme ;
- Nous avons un bureau de la défense indépendant des autres organes, nous accordons une place importante aux victimes ; et nous avons le procès in absentia,
- Nous avons une procédure pénale hybride, caractérisée par un juge de la mise en état avec des pouvoirs renforcés.

- Nous sommes attachés au pluralisme juridique. Notre Statut prévoit la combinaison du droit pénal international et du droit pénal libanais.
- Nous sommes aussi attachés au pluralisme linguistique. Les langues officielles du Tribunal sont l'anglais, le français et l'arabe.

Autre point important : je souhaite que notre tribunal soit aussi pionnier en matière de gouvernance :

- Avec plus de transparence, vis-à-vis des Etats, des organisations internationales, et du public, en améliorant la prévisibilité du déroulement des procès ;
- Avec plus d'efficacité, en identifiant les règles procédurales qui permettent d'aller plus vite sans remettre en cause les droits de la défense ;
- Avec plus de responsabilité, pour les juges et pour l'institution, qui doit être à la hauteur de la mission qui lui a été confiée.

Je vais continuer en Anglais, si vous me le permettez.

Mr. Chair,

Members of the Committee of the Legal Advisers on Public International law,

The Secretary General of the United Nations extended the mandate of the Special Tribunal for Lebanon for a further three years from 1 March 2018, or until the earlier completion of its judicial work. Today, I hope to leave you with an understanding of the nature of our mission, the work we have completed so far and the tasks that lie ahead of us.

As I mentioned, the Special Tribunal for Lebanon was created by the UN Security Council Resolution 1757 in 2007, as an immediate reaction of the assassination of former Lebanese Prime-minister Rafiq Hariri, and became operational in 2009. This new Tribunal was to absorb the investigatory functions of the UN International Independent Investigative Commission and conduct criminal trials of those believed to be responsible for the 14 February 2005 terrorist attack in downtown Beirut, which killed 22 persons, including the former Lebanese Prime Minister and injured more than 200 others. The Special Tribunal also has jurisdiction over other legally connected high profile attacks perpetrated in Lebanon between 1 October 2004 and 12 December 2005 and potentially over other related attacks if there is an additional agreement between Lebanon and the UN.

The Special Tribunal has a number of notable features, many of which are unique in the international criminal justice system. We are a hybrid tribunal, applying law and procedural rules inspired by both the Lebanese and international legal systems. While many other tribunals apply substantive international criminal law, the STL applies the provisions of the Lebanese Criminal Code to the crimes within its jurisdiction, while applying international rules of procedure and evidence that reflect both civil and common law traditions. In fact, ours is a Tribunal of many firsts: we are the first international tribunal dealing with crimes committed in the Middle East, and the only international tribunal to date to address the crime of terrorism in times of peace. As explained by the Tribunal's Appeals Chamber in its 2011 interlocutory decision on the applicable law, the Tribunal's judges consider first the Lebanese domestic definition of the crime of terrorism, but interpret it in light of international law binding upon Lebanon – resulting in a unique legal process to address one of the world's most urgent international crimes.

The Tribunal's structure is also unique: it features an autonomous Pre-Trial Judge, an independent Defence Office, and provides for the extensive participation of victims – permitting them to make submissions and to present their views and concerns during trial. The Tribunal maintains its headquarters in the Netherlands as well as a local Beirut office, and operates in three official

languages, enabling it to maintain impartiality in its proceedings, but readily connect with the Lebanese people.

We are also the first international tribunal since Nuremberg to utilize in absentia trials, that is, trials conducted in the absence of an Accused person. The challenges inherent in implementing such procedures were highlighted by the death of Mr Badreddine, one of the accused in our main case, in May 2016. This was not the first time at an international tribunal that an accused died during proceedings – you will all be familiar with the case of Slobodan Milošević, who died in detention in The Hague while on trial before the ICTY. While in that case verification of Mr Milošević's death was a straightforward matter for a medical examiner to confirm, Mr Badreddine's death, in the midst of in absentia proceedings, raised complications – as none of the usual methods used by international courts were available to confirm his death. This in turn required the Trial and then Appeals Chamber to consider, for the first time, the legal framework applicable to such cases.

Despite such challenges, there is an important rationale and a huge benefit underlying our in absentia proceedings, which are derived from the Lebanese legal system. That is, that the Accused should not be permitted to hinder the administration of justice through their voluntary absence. In this sense, we recognize that the international criminal justice system is not only a mechanism for punishing individuals that have committed serious crimes. It is also concerned with contributing to the historical record, bringing justice to society and, above all, promoting reconciliation in victim communities. What the Special Tribunal seeks to prove through its work is that all of these aims can be achieved in the absence of an accused, so long as proceedings are conducted fairly and in accordance with the accused's rights. It is extremely important both for the victims and the broader international community, to see that justice can be done even if the accused are not immediately present. The message that there is no impunity for a crime such as terrorism, is highly significant, and may serve as both a deterrent to would-be perpetrators and a source of hope for victims of other international crimes.

The Special Tribunal therefore provides a one-of-a-kind opportunity for the international community to explore the potential of in absentia proceedings as a tool for supporting justice initiatives. In that context, it is vital that the Special Tribunal address various issues in the context of its in absentia proceedings so as to foster a continuing dialogue on their potential future role at the international level.

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Once the Tribunal became operational in March 2009, the Prosecution's investigation resulted in the filing of an indictment, and arrest warrants were issued in mid-2011 in a bid to locate and arrest the four Accused. The Trial Chamber then found that the Accused were deliberately absconding, paving the way for in absentia proceedings. After pre-trial proceedings and an adjournment to permit the Prosecution to join a fifth accused to the main case and give his counsel adequate time to prepare, the trial began in earnest in mid-2014.

The Prosecution case has proceeded in three main stages, as the Prosecution has presented: (1) forensic evidence on the cause of the explosion on 14 February 2005 and evidence related to the death and injury of the victims; (2) evidence regarding the preparatory acts allegedly undertaken by the Accused and their co-conspirators in 2004-2005 to prepare for the assassination of Rafik Hariri and in coordinating an alleged false claim of responsibility for the attack; and (3) evidence relating to the identity of the Accused and their respective roles in the attack.

The second and third phases in particular have been characterized by highly technical telecommunications evidence of the kind that has never before been received by an international tribunal and to a scale that is rarely seen on the domestic level. While such technical evidence can at times seem removed from the immediacy and pain of the crimes committed, the Tribunal is setting important precedent in the presentation of telecommunications evidence, which is likely to be critical to the resolution of future international crimes.

The telecommunications data presented by the Prosecution includes so- called “call sequence tables” or “CSTs”, extracted from voluminous raw call data records collected by communication service providers in Lebanon. It also includes technical information regarding the physical location of cell tower sites, their functionality and the direction and nature of their coverage. To give you an idea of the scope of the evidence presented in the proceedings: the testimony of some 323 witnesses was received into evidence; nearly 3,132 exhibits had been admitted into evidence; court hearings had generated over 93,933 pages of transcript. Much of the evidence presented has also been based on call data records, or “CDRs”, which reflect metadata routinely collected from phone calls by Lebanese communication service providers. The Prosecution is using these call data records to aid in attributing certain phone numbers to specific individuals, to demonstrate their movements and attempt to link them to the crimes alleged in the indictment.

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The reality of the scale and complexity of our judicial proceedings does not detract us from our responsibility to ensure the fair and timely administration of justice. This requires balancing an independent judiciary with accountability to stakeholders - both those in Lebanon, and in the broader international community. This is no easy feat, and it is a challenge common to all international criminal tribunals, particularly in the absence of guidance from any central auditing or oversight body.

Throughout my Presidency, I’ve have taken steps to improve the transparency, efficiency, and accountability of Chambers, including: promoting regular reporting on projected timelines for the main case to foster better understanding between all stakeholders of the work achieved and yet to be completed; standardizing the administration of Judges’ professional obligations; facilitating discussion surrounding possible Rule amendments to increase the efficacy of the Special Tribunal’s procedural rules; consulting independent experts on methods for improving the efficiency of future proceedings; the adoption of a Code of Professional Conduct; the facilitation of a Judicial Accountability Mechanism and the introduction of targeted, professional training for Judges. To ensure a proper gender balance, we established a Gender focal point within the Tribunal and all the Principals have joined the International Gender Champions network.

Any judgement may be potentially followed by an appeal. Should that situation arise, we know that a number of key legal issues will not have to be addressed for the first time on appeal. The Tribunal is unique in providing for an interlocutory procedure whereby the Pre-Trial Chamber can refer questions of applicable law to the Appeals Chamber before confirming an indictment. The Pre-Trial Judge used this procedure in relation to the indictment in the main case in 2011, and, in rendering its decision, the Appeals Chamber defined a number of the crimes charged in the indictment, including the crime of terrorism. The procedure was again used in relation to the Connected Cases in 2017.

Now, the Special Tribunal must begin the process of discussing, considering and making decisions about its intended legacy. This process will begin internally and be expanded to include external actors – principally Lebanese stakeholders – whose feedback will be central to furthering local ownership over the Tribunal’s work.

Our legacy will encompass normative aspects – the various legal, regulatory and administrative documents and judicial decisions; institutional and operational aspects – that is, the “lessons learned” from our unique features; the transfer of expertise to Lebanon and the wider international community; and the historical record established through the proceedings and evidence collected. We have already facilitated the creation of the International and Transitional Justice Resource Center, a non-governmental organization whose task will be the continuation of the Inter-University Program on International Criminal Law and Procedure that has been run in conjunction with various Lebanese Universities since 2011. It is one of our top priorities that the Lebanese people feel a direct benefit from the Tribunal’s work, and that they be able to access and derive meaning from the impartial and independent judicial decisions it has rendered. However, the “lessons

learned" should have wider benefits: to identify areas for improvement in operations of the international criminal tribunals and also to assist the member states for the future, should a new international tribunal be established.

We will also leave a legacy of innovation in developing best-practices for judicial governance at international criminal tribunals. Within our mandate, we have worked hand-in-hand with other international tribunals to strengthen international criminal justice. We've developed universal key performance indicators for use at international criminal justice institutions to facilitate independent auditing and have identified best practices for improving the efficiency of international courts. In October 2017, together with other representatives of International courts and tribunals, we adopted the "Paris Declaration on the Effectiveness of International Criminal justice" – 31 principles to strengthen international criminal justice and we are committed to continue this process.

Mr. Chair, Members of the Committee of Legal Advisers on Public International Law, it was a privilege to address the issue of the Special Tribunal for Lebanon and challenges of the International Criminal Justice to you today. Let me conclude with an expression of my sincere gratitude for this opportunity and for your continued support, both financial and diplomatic, without which we would not be able to fulfil our mandate and without which no international tribunal could operate.