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CAHDI (2003) 4

COMMITTEE OF LEGAL ADVISERS
ON PUBLIC INTERNATIONAL LAW
(CAHDI)

25th meeting
Strasbourg, 17 - 18 March 2003

DECISIONS OF THE COMMITTEE OF MINISTERS CONCERNING THE CAHDI

Secretariat memorandum
Prepared by the Directorate General of Legal Affairs

816th meeting, 13 November 2002

Item 10.1

**Committee of Legal Advisers on Public International Law (CAHDI) –
Abridged report of the 24th meeting (Bratislava, 9-10 September 2002)
(CM(2002)140)**

Decisions

The Deputies

1. adopted the specific terms of reference of the Committee of Legal Advisors on Public International Law (CAHDI) for the period 2003-2004 as they appear in Appendix 7 to the present volume of Decisions;
2. took note of the CAHDI's opinion concerning the possibility of partial denunciation of the 1963 Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality (ETS 43), as set out in Appendix II to CM(2002)140;
3. took note of the abridged report of the CAHDI's 24th meeting (CM(2002)140), as a whole.

Appendix 7

Specific terms of reference

1. Name of committee:

Committee of legal advisers on public international law (CAHDI)

2. Type of committee:

Ad Hoc Committee of experts

3. Source of terms of reference:

Committee of Ministers

4. Terms of reference:

Under the authority of the Committee of Ministers, the Committee is instructed to examine questions of public international law, to exchange and, if appropriate, to co-ordinate the views of member states at the request of the Committee of Ministers, Steering Committees and *Ad Hoc* Committees and at its own initiative.

5. Membership of the Committee:

a. The Committee is composed of experts by member States, preferably chosen among the Legal Advisers to the Ministries of Foreign Affairs. Travel and subsistence expenses of one expert per member state (two for the State assuming the Chair of the Committee) are borne by the Council of Europe budget.

b. The European Community may send representatives, without the right to vote or to a refund of expenses, to meetings of the Committee.

c. The following observers with the Council of Europe may send a representative to meetings without the right to vote or to a refund of expenses:

- Canada
- Holy See
- Japan
- Mexico
- United States of America.

d. The following observers with the Committee may send representatives to meetings of the Committee, without the right to vote or to a refund of expenses

* Federal Republic of Yugoslavia¹

Australia

Israel²

New Zealand

The Hague Conference on Private International Law

NATO³

The Organisation for Economic Co-operation and Development

The United Nations and its specialised agencies⁴

6. Structures and working methods:

The CAHDI may set up working parties and have recourse to consultant experts.

7. Duration:

The present terms of reference expire on 31 December 2004.

Note 1

Note * Subject to specific rules applicable to this state.

Note See CM/Del/Dec(2000)735, item 2.1a, para. 4 and SG/Inf(2000)48, para. 34. and CM/Del/Dec(2001)742, item 10.1, Appendix 8.

Note ² Admitted as observer "for the whole duration of the Committee" by the CAHDI, March 1998. The same is valid for subordinated committees. Decision confirmed by the Committee of Ministers (CM/Del/Dec(99)670, item 10.2 and CM(99)57, para. D15).

Note ³ See CM/Del/Dec/Act(93)488/29 and CM/Del/Concl(92)480/3.

Note ⁴ For specific items at the request of the Committee.

**Domestic slavery –
Parliamentary Assembly Recommendation 1523 (2001)**

(CM/Del/Dec(2002)808/10.3, REC_1523 (2001) and CM/AS(2003)Rec1523 final, GR-J(2003)5)

Decision

The Deputies adopted the reply to Parliamentary Assembly Recommendation 1523 (2001) on domestic slavery, as it appears at **Appendix 5** to the present volume of Decisions (attached hereafter).¹

Note ¹ See also CM/AS(2003)Rec1523 final

Appendix 5

(Item 10.4)

**Reply to Parliamentary Assembly Recommendation 1523 (2001)
on domestic slavery**

*(Adopted by the Committee of Ministers on 27 February 2003
at the 829th meeting of the Ministers' Deputies)*

1. The Committee of Ministers has examined with interest Recommendation 1523 (2001) of the Parliamentary Assembly on domestic slavery. It thanks the Assembly for the list of recommended measures to combat domestic slavery and has duly drawn them to the attention of member states' governments.
2. In response to these proposals the Committee of Ministers has sought the expert opinions of the Committee of Legal Advisers on Public International Law (CAHDI), the European Committee on Crime Problems (CDPC) and the Steering Committee for Equality between Women and Men (CDEG). These committees' opinions are appended to this reply.
3. The Committee of Ministers is currently continuing its examination of the feasibility of a draft European Convention on action against trafficking in human beings, whose aim would be to protect human rights, and in particular those of the victims of trafficking, with a view to avoiding all forms of exploitation. The Assembly's recommendations will make a significant contribution to these discussions.
4. The Committee of Ministers recognises that, as with other forms of human exploitation such as trafficking in human beings, the phenomenon of domestic slavery as described in the recommendation calls for co-operation between states in the criminal law field. It refers in this context to the opinion of the CDPC, which outlines the activities undertaken in this area and makes a number of points in connection with this issue, with which the Committee of Ministers agrees.
5. It considers that the efforts to be undertaken should, both at national and at international level, focus in particular on the detection and punishment of these acts, as well as on police training and awareness. A set of pertinent guidelines, defined by the Committee of Ministers in several Recommendations¹ to member states, may help to harmonise and optimise this action.
6. With regard to the possible amendment of the 1961 Vienna Convention on Diplomatic Relations, the Committee of Ministers draws the Assembly's attention to the universal nature of this treaty, which is a key element for the stability of diplomatic relations, and considers that amending it is not a realistic solution as a means of tackling the problem of domestic slavery and is not advisable on policy grounds. The focus should be on making use of the

possibilities that the Convention and international co-operation machinery offer, as the CAHDI points out in its opinion.

7. The fundamental principles and rights enshrined in the European Convention on Human Rights to which the Assembly refers are fully acknowledged by member states and incorporated into their national legislation. Reference should also be made to the provisions and case-law of the European Social Charter, in particular Article 1 paragraph 2, in which the contracting parties undertake "to protect effectively the right of the worker to earn his living in an occupation freely entered upon".

8. The Committee of Ministers also draws the Assembly's attention to the high priority it accords to combating organised crime. It therefore urges member states to sign and ratify the International Convention against Transnational Organised Crime and its protocols.

9. In its opinion the CDEG reiterates the Assembly's concerns about gender discrimination and emphasises the need for equality policies and national machinery for applying them. The Committee of Ministers has taken this point into account and the next monitoring exercise of compliance with member states' commitments will look at the question of machinery at national level "to secure equal rights between women and men in compliance with the relevant Council of Europe instruments".

10. Furthermore, in the Declaration and Programme of Action adopted by the 5th European Ministerial Conference on Equality between Women and Men (Skopje, 22-23 January 2003), the European Ministers responsible for equality issues agreed that the activities undertaken by the Council of Europe to protect and promote the human rights of women should be focused, among others, on the objective to prevent and combat violence against women and trafficking in human beings and proposed a specific programme of action to be carried out by the CDEG.

11. In the light of the existing legal body of social and employment rights, the Committee of Ministers does not consider making the drafting of a domestic workers' charter of rights one of the Council of Europe's immediate priorities.

Appendix 1

Opinion of the CAHDI on Parliamentary Assembly Recommendation 1523 (2001) on domestic slavery

The Committee of Legal Advisers on Public International Law (CAHDI) held its 22nd and 23rd meetings in Strasbourg respectively on 11-12 September 2001 and on 4-5 March 2002. The agenda of both meetings included an item on "Decisions of the Committee of Ministers concerning the CAHDI".

In the framework of this item, pursuant to the Council of Ministers' decision at their 762nd meeting (Strasbourg, 5 September 2001), the CAHDI examined

Parliamentary Assembly Recommendation 1523 (2001) on Domestic Slavery and, in accordance with its terms of reference and its role in the Council of Europe intergovernmental structure, concentrated on what it understood to be the public international law issues connected with the Recommendation, and adopted the following

Opinion

The CAHDI welcomes the adoption by the Parliamentary Assembly of Recommendation 1523 (2001) which acknowledges the seriousness of the issue of domestic slavery and the need to deal with it appropriately in order to prevent this phenomenon and to protect the victims' rights.

In certain circumstances, states may have a positive obligation in relation to such matters by virtue of Articles 3 and 4 of the European Convention on Human Rights. The CAHDI points out that the European Court of Human Rights has recently held that domestic legislation providing for state immunity in respect of disputes between a diplomatic mission and the members of staff of the mission does not infringe Article 6(1).

With regard to *paragraphs 8 and 10, iv* concerning the possible amendment of the Vienna Convention on Diplomatic Relations of 1961 (VC), since the VC is a universal multilateral treaty, member states of the Council of Europe cannot undertake any amendments thereof.

The CAHDI stresses that the VC is a key element for the stability of diplomatic relations. Any question of amendment thereto is therefore a sensitive matter and would have to be carefully considered.

Excluding immunity for *all* offences committed by diplomats in the sphere of their private life as suggested by the Parliamentary Assembly would amount in practice to reduce the scope of immunities granted under international law to functional immunity and thus put at stake the legitimate interest of the international community in facilitating international relations between states.

In any event, the CAHDI notes that the VC does not grant immunity to international civil servants although they do enjoy some degree of immunity by virtue of other instruments, e.g. headquarters agreements, specific conventions on privileges and immunities, etc.

The CAHDI recognises that diplomatic immunities may represent an obstacle for the prosecution of the authors of offences connected with domestic slavery. However, such immunities do not exempt the persons enjoying them from the duty to respect the laws and regulations of the receiving state and could not be considered incompatible with the provisions of the ECHR.

Moreover, the CAHDI notes that under the VC the receiving state may request the sending state to waive the immunity of a diplomat or any other member of the staff of the mission to allow them to be prosecuted where appropriate and,

if such waiver is not granted, may declare the individual concerned persona non grata or not acceptable and expel him or her.

Further, the CAHDI wishes to recall that the VC does not exclude the authorities of the receiving state from exerting other methods of control over diplomats and other staff of missions in their territory and dealing with abuses in a way which is fully compatible with the VC. Such methods could include, for instance, devising procedures for the exchange of information between Ministries of Foreign Affairs regarding mistreatment of domestic employees and abuses of immunities and privileges in relation thereto so that, where necessary, the diplomat concerned could be declared persona non grata as provided by the VC, or a residence permit for the domestic servant could be withheld (e.g. on applying for entry).

The CAHDI would like to stress furthermore that according to the VC, the immunity of a diplomatic agent from the jurisdiction of the receiving state does not exempt him from the jurisdiction of the sending state and, therefore, states should be encouraged to exercise such jurisdiction to prosecute offences connected with domestic slavery.

In view of the above, the CAHDI concludes that in order to tackle the problem of domestic slavery, amending the VC is not a realistic solution nor is it advisable on policy grounds, and that the focus should be put on making use of the possibilities that the VC and international co-operation mechanisms offer.

Appendix 2

Opinion of the CDPC on Parliamentary Assembly Recommendation 1523 (2001) on domestic slavery

By Decision No. CM/799/05092001, the Committee of Ministers invited the CDPC to give an opinion, by 31 March 2002 (extended to 30 June 2002), on Parliamentary Assembly Recommendation 1523 (2001) on domestic slavery.

The CDPC examined the Assembly recommendation at its 51st plenary session (17-21 June 2002) and adopted the following

Opinion

The CDPC welcomes the recommendation and shares the Assembly's concern. The phenomenon of slavery has a number of crime-related aspects. It will only be effectively countered with a multidisciplinary approach to the problem, including a socio-economic and gender perspective, capable of tackling the complexity of the problem, which can entail related abuse, such as torture, physical or psychological cruelty, rape, sexual aggression, or deprivation of medical care and food. It can also entail related crime such as corruption, money-laundering and organised crime. It raises issues requiring co-operation between states in criminal matters.

Ultimately, any kind of slavery, "ownership" or control of one person by another, is a serious abuse of fundamental rights and freedoms and therefore deserves an appropriate crime policy response. It is interesting to note that the slave trade and later slavery as such were the subject of the first international treaties motivated by a desire to protect individuals, as opposed to state interests. Furthermore, in a recent codification of international criminal law, the Rome Statute of the International Criminal Court lists 'enslavement' as a crime against humanity (in Article 7). Enslavement is defined as the 'exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children'. Under the Rome Statute, crimes against humanity entail the commission of the listed acts as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. Although domestic slavery is a wider problem which would not usually satisfy the contextual requirements of crimes against humanity, the definition of enslavement is nevertheless useful as an international reference.

As is apparent in the above definition of enslavement, a link often exists between slavery and trafficking in human beings. By virtue of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime (Palermo, 2000), an acceptable international definition of trafficking in human beings does exist and measures to be taken at the national level have been agreed upon. According to Article 5 of the UN Trafficking Protocol, an obligation of states Parties exists to establish as criminal offences the actions set out in Article 3 of the Protocol, i.e. trafficking in human beings for the purpose, in particular, of exploitation, including forced labour or slavery.

The CDPC finds the definition contained in article 3 of the UN Protocol satisfactory and, in line with paragraph 10 (v) of the Assembly's recommendation, would encourage its implementation in the national legislation of Council of Europe member states.

At the national level, mechanisms should be put in place to enable domestic slavery to be investigated, uncovered, prosecuted and punished. Thus every step of combating domestic slavery needs to be facilitated. In particular, at every stage of the justice process, these measures will have to include awareness-raising among justice operators.

Criminalisation: A harmonised approach towards this issue in the criminal laws of member states is likely to be beneficial for the prevention and repression of this phenomenon, at least where it is linked to trafficking in human beings. In this respect, the CDPC would like to point out that a number of Council of Europe recommendations are devoted to relevant issues such as sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults (Recommendation R(91)11) and action against trafficking in human beings for the purpose of sexual exploitation (Rec(2000)11). Discussions are also under way, within the CDEG, concerning

the feasibility of drafting a Council of Europe convention on trafficking in human beings.

Investigation and enforcement: In terms of crime detection, it is certain that measures need to be in place to counter the practical obstacles arising from the situation of reclusion and consequent silencing of victims. In this respect, measures similar to those recommended in Recommendation R(85)4 on violence in the family, which looks *inter alia* at the limiting of personal freedom within the household, could apply *mutatis mutandis* also to the problem of detection of domestic slavery.

The CDPC welcomes paragraph 10 (iii) of the Assembly's recommendation, according to which police should receive adequate training to equip them with the necessary skills to deal with the complexity of domestic slavery. In particular, awareness should be fostered among the police forces. This concern should also form part of a broader policy to achieve some gender balance within the police forces, as recommended in the European Code of Police Ethics (Recommendation Rec(2001)10), which, in paragraph 25, refers to a recruitment policy "with the overall objective of making police personnel reflect the society they serve". The Code, in paragraph 49, also calls for police investigations to "be sensitive and adaptable to the special needs of persons, such as children, juveniles, women, minorities including ethnic minorities and vulnerable persons."

Diplomatic immunity as an obstacle to investigation: The CDPC would like to make the following observations with regard to paragraph 10 (iv) of the Assembly's recommendation: although Council of Europe member states are not in a position to amend unilaterally the Vienna Convention as recommended in paragraph 10 (iv), they are in a position to waive the immunity of their diplomatic staff with respect to such acts as domestic slavery. Immunity from criminal jurisdiction, inviolability of private residence, papers, correspondence and property as well as immunity from arrest and detention will mean that, in case of criminal activity by the diplomatic agent, the host state may notify the sending state that he or she is *persona non grata*. As provided under the Convention, the person may then be recalled, or the receiving state could refuse to recognise the person.

Protection of victims: Over the past decades the CDPC has prepared recommendations concerning victims, which are relevant also in the context of domestic slavery: Recommendation R(85)11 on the victim's position in the framework of criminal law and procedure; R(87)21 on assistance to victims and the prevention of victimisation; and R(97)13 concerning intimidation of witnesses and the rights of the defence;

Appendix 3

Opinion of the CDEG on Parliamentary Assembly Recommendation 1523 (2001) on domestic slavery

General remarks

The Steering Committee for Equality between Women and Men (CDEG) has noted Parliamentary Assembly Recommendation 1523 (2001) on domestic slavery with interest.

The CDEG welcomes the Parliamentary Assembly's recommendation to adopt the necessary measures to combat domestic slavery. In this connection, it refers to its participation in 1999 in the seminar organised by the Committee on Equal Opportunities for women and men on "Violence towards women: from domestic abuse to slavery."

The CDEG also refers to its own work in this field, beginning at the end of the 1970s, on combating all forms of violence against women. All this research and awareness-raising work resulted in the production of two recommendations adopted by the Committee of Ministers in 2000 and 2002:

- Recommendation Rec(2000)11 on action against trafficking in human beings for the purpose of sexual exploitation, and
- Recommendation Rec(2002)5 on the protection of women against violence.

These two legal instruments propose measures for prevention, prosecution and victim protection similar to some of the measures advocated by the Parliamentary Assembly. The CDEG emphasises that they also propose information, awareness-raising, education and training measures to mobilise public opinion and the media.

The CDEG emphasises the importance of increasing co-operation between the member states to combat trafficking in human beings and refers to its proposal for drafting a convention on human trafficking, with the aim of protecting human rights and recognising the status of victims of all forms of exploitation. Such a convention should embrace all forms of human trafficking, including domestic slavery and forced labour.

Specific comments

Paragraph 10 viii : the Committee reiterates the necessity of putting in place equality policies and national machinery for implementing them as well as gender mainstreaming strategies in order to combat discrimination against women, particularly in the workplace. It refers in this connection to the proceedings of the Forum organised in Warsaw in 1996 on "equality in the labour market and reconciliation of family life and professional life: trends and perspectives".

Note ¹ Recommendations No. R(85)4 on violence in the family – No. R(91)11 on sexual exploitation, pornography, prostitution of, and trafficking in, young adults – Rec(2000)11 on action against trafficking in human beings for the purpose of sexual exploitation – Rec(2001)10 on the European Code of Police Ethics – Rec (2002) 5 on the protection of women against violence.