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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

(CAHDI)

Meeting report

41st meeting
Strasbourg, 17-18 March 2011

Secretariat of the Public International Law and Anti-Terrorism Division,
Directorate of Legal Advice and Public International Law, DLAPIL

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A. INTRODUCTION

1. Opening of the meeting by the Chairperson, Ms Edwige Belliard

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 41st meeting in Strasbourg on 17 and 18 March 2011 with Ms Edwige Belliard in the Chair. The list of participants is reproduced in **Appendix I** to this report. The Committee sent a message of solidarity and support to the Japanese delegation in the wake of the recent disaster in its country.

2. Adoption of the agenda

2. The draft agenda was adopted as reproduced in **Appendix II** to this report.

3. Approval of the report of the 40th meeting

3. The CAHDI adopted the report of the 40th meeting (document CAHDI (2010) 28 prov), and instructed the Secretariat to publish it on the committee's website.

4. Statement by the Director of Legal Advice and Public International Law, Mr Manuel Lezertua

4. Mr Manuel Lezertua, Director of Legal Advice and Public International Law, informed delegations of recent developments in the Council of Europe. His statement is reproduced in **Appendix III** to this report.

B. ONGOING ACTIVITIES OF THE CAHDI

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

5. The Chairperson presented a compilation of Committee of Ministers decisions relevant to the activities of the CAHDI (document CAHDI (2011) 1). She pointed out that the Committee of Ministers had not sent the CAHDI any formal requests for opinions or comments since its 40th meeting. She also reported on the action taken on the opinions and comments which the Committee had adopted at its previous meeting.

6. The Chairperson drew the Committee's attention to document CAHDI (2011) 1 Addendum containing the Committee of Ministers' request relating to the draft Council of Europe Convention on preventing and combating violence against women and domestic violence, adding that the discussions whose outcome was to be transmitted to the Committee of Ministers would be held under agenda item 18.

6. Immunity of States and international organisations

a. State practice and case-law

7. The Israeli observer informed the CAHDI of a decision given by Beersheba District Court on 15 February 2011[1]. This case originated in a complaint submitted by Israeli citizens against the Egyptian State. The Court had rejected the complaint on the grounds that since the acts ascribed to Egypt had taken place in its own territory, the latter State had enjoyed judicial immunity and none of the exceptions set out in Israeli law had been applicable to the case.

[1] This case is included in the Israeli contribution to the database on State practice on State immunity.

8. The US observers recalled the decision given by the Supreme Court on 1 June 2010 in the case *Samantar vs. Yusuf.* Following the submission of a complaint against Mr Samantar, the former Defence Minister and former Prime Minister of Somalia, for torture and other wrongful actions committed in Somalia by Somali officials under his command, the American Supreme Court had concluded that the US legislation on immunity (the Foreign Sovereign Immunities Act) applied only to States and not to senior officials such as Mr Samantar. The Court had ruled that Mr Samantar was not immune from prosecution, basing its decision on several substantive facts of the case, in conjunction with the applicable principles of customary international law, including the following: the defendant had been an American resident, he had been prosecuted by American citizens, he had been a former official of a State currently lacking a recognised government and enjoyed, in a normal manner, a residual immunity for acts performed in an official capacity. However, the Court had not pronounced on the question whether Mr Samantar enjoyed immunity under customary international law for the alleged acts, and referred the matter to the District Court. The US observers also provided information on a similar pending case, namely *Ahmed vs. Maga.*

9. The Belgian delegation informed the Committee of a recent judgment handed down by Brussels Court of First Instance concerning an international organisation enjoying immunity from prosecution and enforcement. Under an arbitration clause, a private-law company had obtained an award against the said organisation which had been the subject of a registration for enforcement by the President of the Court of First Instance. Having *locus standi*, the Belgian State had challenged this decision. The judge had considered that in the light of Article 6 of the European Convention on Human Rights, immunity from enforcement could not be absolute; consequently, it could not refuse to grant enforceability to the award decision. The Belgian State had since appealed against this decision and was awaiting the judgment from the Court of Appeal.

10. The Portuguese delegation explained the Brazilian practice concerning immunity, particularly immunity from enforcement in the field of labour law. The measures implemented could even include freezing the bank accounts of the embassies in question.

11. The CAHDI decided to retain on the agenda for its next meeting the document entitled "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 (2010) 6 prov). The CAHDI invited the delegations which had not yet done so to submit their contributions to this document.

12. The INTERPOL representative presented the CAHDI with the document *"Repository of Practice: Application of Article 3 of INTERPOL's Constitution in the Context of the Processing of Information via INTERPOL's Channels"* (document CAHDI (2011) Inf 3). He informed the Committee of the Organisation's practice in the immunities field. INTERPOL's decision to open channels for police and judicial co-operation had been aimed not only at ensuring the requisite neutrality of the Organisation, enshrined in Article 3 of its Constitution, but also at respecting the general principles of international law, including those applicable to immunities.

13. He pointed out that INTERPOL's practice in this area was based on the judgment delivered on 14 February 2002 by the International Court of Justice in the case of the *Arrest warrant of 11 April 2000 (Democratic Republic of Congo vs. Belgium)*, more commonly known as the *Yerodia* case. He stressed that the principle enshrined in this judgment faced, in practice, several issues which the Organisation attempted to resolve when dealing with a request for international co-operation. These questions included that of whether or not the list of persons covered by the judgment was exhaustive, the distinction between the acts committed in a private and the ones committed in an official capacity, State recognition, and lastly, the scope of immunities in the case of requests for co-operation under a criminal investigation. The INTERPOL presentation is reproduced in **Appendix IV** to this report.

14. One delegation was also considering the possibility of extending the scope of immunities to other persons. Moreover, it distinguished four categories of immunity: diplomatic immunity, State

immunity, immunity of special missions and immunity on the part of an official accompanying a high State representative.

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

15. The Chairperson said that since the previous meeting only Saudi Arabia had ratified this Convention. She added that participation in this Convention was disappointing, with a total of only eleven ratifications to date.

16. The French delegation informed the CAHDI that the French Senate had adopted at first reading the draft Law authorising the ratification on 22 December 2010. It also pointed out that the National Assembly's Foreign Affairs Committee had heard the ministries concerned in March 2011, which meant that the ratification procedure should be completed fairly quickly. Furthermore, France would not be entering any reservations to the Convention.

17. The Spanish delegation also informed the Committee of the progress in Spain's procedure for accession to the Convention, adding that the Council of Ministers had taken the decision to forward the text to Parliament on 4 February 2011. The Council of State had already issued an opinion on possible authorisation for the accession, and the delegation added that Spain would also be entering no reservations to or declarations on the Convention.

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

a. Questions dealt with by offices of the Legal Adviser which are of wider interest and related to the drafting of implementing legislation, foreign litigation, peaceful settlements of disputes, and other questions of relevance to the Legal Adviser

b. Updates of the website entries

18. The Chairperson invited the CAHDI delegations to present orally their national developments on the organisation and functions of the Office of the Legal Adviser (OLA) and to contribute regularly to the relevant database. She stressed that knowledge of the operation of offices in other member States could be very useful in improving the efficiency and efficacy of national OLAs.

19. The Danish delegation informed the Committee of a recent reshuffle in the Danish Ministry of Foreign Affairs, under which the Ministry's Legal Adviser had been assigned additional responsibility for promoting human rights and democracy in developing countries under specific projects.

8. National measures to implement UN sanctions and respect for human rights

20. Ms Kimberly Prost, Ombudsperson of the UN Security Council Committee set up under Resolution 1267 (1999) concerning Al Qaida and the Taliban, informed the Committee of the work in which she had been engaged since the creation of the Office of the Ombudsperson. Her duties consisted in providing individuals and entities subject to the Security Council's relevant sanctions with an independent recourse mechanism for applying for removal from the list of sanctions, and mentioned three major challenges which she had met in discharging these duties.

21. First of all, Ms Prost said that in order to guarantee access by listed individuals to the Ombudsperson mechanism, she had been actively publicising the existence of the Office of the Ombudsperson. There were several ways of doing so, including using the Internet, sending letters to individuals on the Security Council's list and making contact with organisations working on the ground. In this connection, she was open to any suggestions which might help make her better known to the persons concerned. She informed the CAHDI that to date only Al Qaida cases had

been referred to her, which meant that lack of publicity could possibly be the reason for the absence of Taliban cases.

22. Secondly, Ms Prost mentioned an issue which she considered vital, namely the effectiveness of her Office in guaranteeing the independence and impartiality of the sanctions mechanism. There had been two different approaches when the Office of the Ombudsperson had been created, which had made her work very difficult. First of all, there was the idea that the Ombudsperson's remit came under the responsibility of the Security Council, and secondly, the view that this new Office gave rise to major expectations on the part of individuals. She said that she was currently striving to take both these viewpoints into account and to perform her duties in accordance with her mandate.

23. Lastly, Ms Prost reported on the progress in the work of the Office of the Ombudsperson. It was still too soon to fully assess the work accomplished, as only one report had been published so far. She stressed that the main problem she had to face was that of access to information, and she hoped, should her mandate be extended, that stricter language would be used vis-à-vis inter-State co-operation. She also noted that the lack of information on the requisite procedure and the pressure from the wide-ranging expectations made reports difficult to prepare. Lastly, the 1267 Committee had to take full account of the Ombudsperson's reports in order to provide a reasoned decision guaranteeing the fairness of the process. Ms Prost's presentation is reproduced in **Appendix V** to this report.

24. Several delegations voiced their support for the work of the Office of the Ombudsperson, and their hope to continue the dialogue and possibly to conclude agreements on the exchange of confidential information. They pointed out that the Ombudsperson's work was also useful to States in the context of national cases of removing persons from Security Council lists.

25. Several delegations wondered about the resources available to the Ombudsperson for carrying out her work, and the support provided to the Ombudsperson by the UN, particularly its 1267 Committee.

26. One delegation asked about the scope of the Ombudsperson's mandate, and requested information on the analysis of the preventive nature of the measures. It also wished to know whether the Ombudsperson only produced exonerating evidence or if she supplied both incriminating and exonerating evidence.

27. Ms Prost informed the CAHDI that the mechanism was operating properly, despite the shortage of staff and funding. She mentioned the backing from the 1267 Committee, and noted the importance of the statement by the President of the Security Council on 28 February 2011 welcoming the first report from the Bureau of the Ombudsperson. While stressing that the Bureau had to remain independent, she attached considerable importance to interaction with the Security Council Committee.

28. Where her mandate was concerned, Ms Prost was hoping that her resources would be increased so that she could, for instance, visit States involved in delisting cases. Furthermore, she considered that all evidence should be submitted to the entity responsible for the delisting request, including facts concerning the process leading up to the Ombudsperson's observations. She said that she tried, whenever possible, to draw attention to the information available to her, whether it constituted incriminating or exonerating evidence. In connection with the preventive nature of the measures, she pointed out that the analyses concerned the present time, but that she was aware of the issues behind this question.

29. The Chairperson thanked Ms Prost for her presentation, adding that the subsequent exchange of views had been very useful.

30. Before closing the discussions under this item, the European Commission outlined the developments vis-à-vis the EU sanctions regime since CAHDI's 39th meeting (Strasbourg, 18 and 19 March 2010), as set out in document CAHDI (2011) Inf 5.

9. The European Union's accession to the European Convention of Human Rights (ECHR)

31. The Chairperson thanked Mr Erik Wennerström, CAHDI observer with the Informal Group on the European Union's accession to the ECHR, and Mr Jean-Claude Bonichot, Judge at the Court of Justice of the EU, for attending the meeting, and asked them to speak on the subject of the EU's accession to the ECHR.

a. Information provided by Mr Erik Wennerström, observer of the CAHDI to the Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH – UE)

32. Mr Wennerström informed the Committee of the progress in the work of the CDDH–UE, the Informal Group mandated by the CDDH to prepare a draft treaty of accession by 30 June 2011. The Group had met six times since the launch of the negotiations. Mr Wennerström said that, from now on, the Group had a working document comprising a draft accession agreement.

33. Mr Wennerström said that a number of general principles had been highlighted to guide the Group's work, such as: preserving the ECHR system and limiting amendments and adaptations of the system to what is strictly necessary for the purpose of the EU's accession; respecting the distribution of competencies between the EU and its Member States, as well as among the EU institutions; and the need to ensure that future reforms of the system would apply to all present and future States Parties, as well as to the EU.

34. Mr Wennerström presented the substantive issues which were being negotiated, and stressed two categories in particular: the first concerned questions of a general nature – especially technical adjustments – such as replacing references to "the State", "the States Parties", and so on. The second concerned more technical issues relating to the nature of the EU as a contracting party, including creating the co-defendant mechanism. Mr Wennerström then informed the CAHDI about the Working Group's discussions on institutional issues.

35. Lastly, Mr Wennerström mentioned that some of the adaptations and novelties would be the subject of specific provisions in the treaty of accession and that a reference to the latter would be added to the ECHR. The other adaptations would be made through amendments to the ECHR. Mr Wennerström's statement is reproduced in **Appendix VI** to this report.

36. A number of participants thanked Mr Wennerström for this encouraging information, expressing the hope that practical solutions to the remaining questions, many of which were difficult, would be pinpointed within the timeframe allotted to the Working Group.

b. Exchange of views with Mr Jean-Claude Bonichot, judge of the Court of Justice of the European Union

37. Mr Bonichot, the French judge of the Court of Justice of the European Union (CJEU), addressing the CAHDI on a personal basis concerning the EU's accession to the ECHR, spoke of the difficulties and differences of opinion which had emerged on this matter during the preparation of the Lisbon Treaty. He noted, however, that the discussion paper published by the CJEU in May 2010 and the joint communication by the Presidents of both Courts (CJEU and ECtHR) showed that opinions were evolving and beginning to converge.

38. Mr Bonichot began with the question of EU primary law and possible supervision by the ECtHR of decisions taken under the EU's common foreign and security policy. He added that it

was necessary to guarantee that the CJEU retained its role in interpreting EU treaties. Furthermore, where the issue of fundamental rights was concerned, he pointed out that each court would necessarily be called upon to develop its own specific lines of reasoning and that consequently, divergent conceptions could not be excluded. Mr Bonichot then mentioned situations where the national court had not applied to the CJEU for an interpretation of the EU texts challenged before the ECtHR. In such cases, a mechanism would be needed to ensure that the CJEU could pronounce prior to the ECtHR decision. A mechanism enabling the case to be referred to the CJEU in such cases was currently under discussion. Mr Bonichot's statement is reproduced in
Appendix VII to this report.

39. In reply to a question from one delegation on access to the court for individuals and economic operators, Mr Bonichot said that direct access to the Court of the EU was currently fairly restricted in that EU acts were first challenged before the national courts, which decided whether or not to refer cases to the CJEU. However, he pointed out that the Lisbon Treaty provided for relaxing the conditions for appeal admissibility.

40. Mr Bonichot informed the Committee that there were regular contacts between the ECHR and the CJEU. Following the annual meeting between both courts, the Presidents had issued a joint declaration illustrating the common interest in the question of the EU's accession to the ECHR.

41. One delegation asked for information on the compatibility of the primacy and autonomy principles with EU accession to the ECHR. Mr Bonichot pointed out that although the primacy principle did not raise any problems *a priori*, the autonomy principle did raise a number of issues because of the need to organise relations between two systems based on different rationales: the ECHR system was basically geared to protecting the individual, whereas the EU system strove to ensure a balance between individual rights and the general interest of the EU.

42. The Chairperson thanked Mr Bonichot on behalf of the CAHDI for his very interesting and useful personal thoughts on the complex issue of the EU's accession to the ECHR.

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

43. The Chairperson stressed that this item was set to become increasingly important, particularly from the angle of EU accession to the ECHR.

44. The British delegation provided information on the current cases against the United Kingdom, particularly *Al-Skeini et al, Al Jedda* and *Jones and Mitchell & Ors.* The CAHDI was also informed of the case of *Othman vs United Kingdom* concerning Article 3 ECHR, as well as Article 1 of the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

11. Peaceful settlement of disputes

45. The Chairperson said that the CAHDI had received information on the jurisdiction of the International Court of Justice under international treaties and agreements, particularly the list of Council of Europe member and observer States which were parties to these treaties and agreements (document CAHDI (2011) 2). She invited the delegations to submit any relevant information on this subject to the Secretariat.

46. The British delegation mentioned the Mauritian Government's decision to submit the dispute over the Chagos Marine Protected Area between Mauritius and the United Kingdom to an arbitral tribunal in accordance with Appendix VII to the UN Convention on the Law of the Sea.

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

47. The Chairperson presented the document listing the outstanding reservations and interpretative declarations to international treaties (CAHDI (2011) 3) and opened the debate on reservations and declarations to treaties concluded outside the Council of Europe.

48. In connection with the ***reservations entered by Pakistan*** to the *International Covenant on Civil and Political Rights*, the British delegation pointed out that since the previous meeting the British authorities had been regularly discussing the issue of these reservations with the Pakistani authorities. In the wake of these discussions, the Pakistani Government had signalled its willingness to reconsider all these reservations, particularly that to Article 40, in the light of the more detailed information which might be forwarded to it on the concerns which they raised. Accordingly, the British delegation informed the Committee of the British intention to present the Pakistani authorities with a relevant non-paper, adding that the delegation would take stock of the situation in May 2011.

49. The Dutch delegation expressed its concern about the Pakistani reservations. It was in contact with the Pakistani authorities and would like to talk to delegations which had also established contacts with Pakistan. Lastly, it pointed out that should Pakistan fail to amend its reservations, the Netherlands would enter an objection against them.

50. In connection with the ***partial withdrawal of reservations by Malaysia*** to the *Convention on the Elimination of All Forms of Discrimination against Women* and the ***partial withdrawals of reservations by Malaysia and Thailand*** to the *Convention on the Rights of the Child*, the Chairperson stressed that in light of the practice in this matter, the objections registered against the "original" version of the reservation were maintained to the extent that they concerned an aspect of the reservation which had not been covered by the withdrawal. On the other hand, any objections which had been registered for the first time at the time of the partial withdrawal would have no effect.

51. The German delegation stated that Germany had registered objections to the "original" version of both Malaysian reservations.

52. This delegation and the Dutch delegation concurred with the explanation given by the Chairperson, and referred to the study by Professor Alain Pellet, Special Rapporteur at the International Law Commission on the subject of reservations to treaties. They also pointed out that it would be useful to hold an exchange of views on this subject with Professor Pellet at one of the forthcoming CAHDI meetings.

53. In connection with the ***reservation entered by Malaysia*** to the *Convention on the Rights of Persons with Disabilities*, the French delegation said that France had recently entered an objection against it.

54. The Dutch, Austrian, Hungarian and German delegations and the Mexican observer pointed out that their respective States were considering the possibility of objecting to this reservation.

55. The Belgian delegation was considering objecting to the reservation which had been entered to Articles 15 and 18 of the Convention.

56. The Swedish delegation observed that Sweden would be registering an objection to Malaysia's reservation.

57. In connection with the ***reservation entered by Morocco*** and the ***declaration by China*** to the *International Convention for the Suppression of Acts of Nuclear Terrorism*, the German delegation said that Article 32 (2) of the Convention explicitly authorised this kind of reservation and that they therefore would not appear to raise any problems.

58. In connection with the ***interpretative declaration by El Salvador*** to the *Convention on Cluster Munitions*, the Dutch delegation wondered about the nature of this declaration and asked the other delegations for their views on this subject.

59. The Mexican observer considered that the interpretative declaration raised no problems, as it merely clarified El Salvador's position vis-à-vis the jurisdiction of the International Court of Justice.

60. The German and Irish delegations also considered that it was an interpretative declaration rather than a reservation and that they were therefore not intending to object to it.

61. In connection with the ***reservations entered by Greece*** to the *United Nations Convention against Transnational Organised Crime*, the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime* and the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organised Crime*, the Greek delegation provided the Committee with information on their national legislation which had prompted these reservations.

62. The table summarising the delegations' positions is reproduced in **Appendix VIII** to this report.

C. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

13. Information on work undertaken by the Council of Europe on the review of Council of Europe Conventions

63. The Chairperson presented the information document by the Secretary General of the Council of Europe (document SG/Inf (2011) 2 FINAL) on the "*Outline of Convention review"*, and invited Mr Manuel Lezertua, Director of Legal Advice and Public International Law and Jurisconsult of the Council of Europe, to provide information on this item.

64. Mr Lezertua presented the priorities for 2011 established by the Secretary General of the Council of Europe, Mr Thorbjørn Jagland, which included the proposal to analyse the relevance of Council of Europe conventions. On 16 February 2011 the Secretary General had presented the "*Outline of Convention review"* to the Committee of Ministers. This exercise, which had been approved by the Committee of Ministers, consisted, in its initial phase, in preparing a full Report for the Committee of Ministers by the end of September 2011 highlighting the categories of conventions in order of relevance. The second stage would be to submit to the Committee of Ministers for consideration concrete proposals for possible action on each category of convention.

65. Furthermore, Mr Lezertua pointed out that the outline of the methodology selected would be prepared in consultation with the States Parties and with the Council of Europe Steering Committees and various other bodies, including the CAHDI. He informed the Committee that the Secretary General was currently setting up a group to formulate the said report, led by the Directorate of Legal Advice and Public International Law.

66. Mr Lezertua accordingly invited delegations to send the Secretariat their comments on the Outline as soon as possible. The Committee would also be consulted on the basis of the draft report at the next CAHDI meeting.

67. The Chairperson thanked Mr Lezertua for all this information and stressed, firstly, that the CAHDI should be given sufficient time to consider the draft report. Secondly, she drew a distinction between the two goals of this exercise: analysing the state of the conventions, and encouraging further ratifications. She also noted that the question of the EU accession clause should be examined on a case-by-case basis in accordance with the EU's competences. Lastly, she said that decisions to suspend obsolete conventions should be taken by the States Parties to these conventions and not by the Committee of Ministers.

68. In connection with the EU accession clause, a number of delegations backed the idea of case-by-case examination. Nevertheless, some delegations considered that it would also be useful to hold a general discussion on EU accession to Council of Europe conventions and to draw up model clauses to be used as a basis for any accession, whether by the EU or by other similar organisations. One delegation, however, opined that it was too early to adapt the final clauses of the Council of Europe conventions in order to facilitate EU accession.

69. In connection with the Committee of Ministers' role in deciding to declare a convention obsolete, several delegations agreed with the Chairperson. They considered that since it was for the national governments to ratify a convention, it was also incumbent on States to decide whether or not a convention was obsolete.

70. One delegation considered that the CAHDI's comments should be forwarded to the permanent representations of the member States of the Council of Europe in Strasbourg, as the ambassadors were currently engaged in the same debate.

14. Consideration of current issues of international humanitarian law

71. The representative of the International Committee of the Red Cross (ICRC) informed the CAHDI of the consultations which had been proceeding with the States since October 2010 on the necessity and possibility of reinforcing international humanitarian law in order to improve the protection of victims of armed conflicts. While the ICRC deemed all the existing rules of international humanitarian law highly appropriate, it felt that the legal framework should be further developed in four fields, namely protecting persons deprived of their liberty, particularly in non-international armed conflicts, monitoring the implementation of international humanitarian law and compensation for victims, protecting the natural environment, and protecting displaced persons. In the coming weeks, the ICRC would be deciding, on the basis of dialogue with the States, in which of these four fields practical measures might be needed to reinforce international humanitarian law. The ICRC would be presenting its analysis and the main conclusions of its internal survey at the 31st International Conference of the Red Cross and Red Crescent in Geneva in November 2011.

72. The ICRC representative said that on the occasion of this 31st Conference, the ICRC would be presenting a report on "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts", and another on the main security issues concerning provision of and access to healthcare in armed conflicts and other situations of violence. The CAHDI was also informed of the results of the *3rd Universal Meeting of National Commissions responsible for implementing International Humanitarian Law*, which had been held in Geneva from 27 to 29 October 2010. The ICRC representative's presentation is reproduced in **Appendix IX** to this report.

73. The Swiss delegation informed the Committee of the state of ratification of the Geneva Conventions and Protocols. Since the previous CAHDI meeting, the additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III) had been ratified by three further States: Serbia, on 18 August 2010, Spain, on 10 December 2010, and Argentina, on 16 March 2011. The Swiss delegation also invited the States which had not yet done so to join in the "Montreux Document on Private Military and Security Companies" initiative.

74. The Israeli observer thanked the ICRC for its survey of international humanitarian law, and said that he would like to enter discussions with it on this document.

15. Developments concerning the International Criminal Court (ICC)

75. The Chairperson informed the Committee of the many recent developments in the ICC, including the follow-up to the Revision Conference for the Statute of Rome, which had taken place in Kampala (Uganda) from 31 May to 11 June 2010, the tenth session of the Assembly of States Parties to the ICC Statute to be held from 12 to 21 December 2011, the setting up of the Research Committee for the Position of ICC Prosecutor and the recent publication of the annual ICC report on awareness-raising activities.

76. One delegation informed the Committee about the Search Committee for the Position of ICC Prosecutor, which was mandated to facilitate the nomination and election by consensus of a new Prosecutor. It explained that the mandate of the Search Committee, which comprised five experts representing each regional group, had been drawn up by the Bureau of the Assembly of States Parties to the Statute of Rome. The Search Committee would be submitting to the Bureau, by October 2011, a list of at least three candidates deemed eligible to the position of Prosecutor. The Bureau would, however, be free to form its own opinion. The election of the new ICC Prosecutor would take place during the tenth session of the Assembly of States Parties to the ICC Statute (11-21 December 2011).

77. Another delegation recalled that under the Statute of Rome it was incumbent on the States, not the Search Committee, to elect the ICC Prosecutor. Moreover, it wondered on how the Search Committee's mandate will be dealt with in the light of the chronological aspect of the selection procedure.

16. Implementation and functioning of other international criminal tribunals (ICTY, ICTR, Sierra Leone, Lebanon, Cambodia)

78. The CAHDI decided to retain this item on the agenda of its subsequent meeting.

17. Fight against terrorism - Information about work undertaken by the Council of Europe and other international bodies

79. Ms Marta Requena, Head of the Council of Europe's Task Force against Terrorism, presented the recent developments in the Council of Europe in the anti-terrorism field. She mentioned the organisation of an International Conference by the Public International Law and Anti-Terrorism Division under the Turkish Chairmanship of the Committee of Ministers of the Council of Europe on "Prevention of terrorism: prevention tools, legal instruments and their implementation", in Istanbul on 16 and 17 December 2010. Secondly, she informed the Committee of the progress in the installation by the Committee of Experts on Terrorism (CODEXTER) of the mechanism for monitoring the implementation of the *Convention on the Prevention of Terrorism* (CETS No. 196).

80. Furthermore, Ms Requena informed the CAHDI that the Council of Europe would be hosting the *Special meeting of the Committee with international, regional and sub-regional organisations* in Strasbourg from 19 to 21 April 2011. The theme of the meeting would be "the prevention of terrorism". Particular attention would be paid to the implementation of the preventive aspects of the relevant resolutions of the United Nations Security Council and the UN Global Counter-Terrorism Strategy.

81. Lastly, Ms Requena informed the CAHDI that an international conference jointly organised by the Council of Europe, the OAS/CICTE and the Spanish Government in co-operation with the Basque Autonomous Community and the Municipality of San Sebastian, on "Victims of terrorism", would take place in San Sebastian (Spain) on 16 and 17 June 2011.

18. Topical issues of international law

a. Exchange of views on the draft Council of Europe Convention on preventing and combating violence against women and domestic violence

82. The Chairperson presented the request sent to the CAHDI by the Committee of Ministers regarding the draft Council of Europe Convention on preventing and combating violence against women and domestic violence (document CAHDI (2011) 1 Addendum). In a decision of 4 March 2011, the Committee of Ministers had asked the CAHDI for the *results of the discussions* which it would be holding on this matter, especially *the compatibility of Articles 3, 4, 5, 60 and 61 of the draft Convention […] with international law, including human rights law.* The Chairperson recalled that during the discussions on this draft in the Committee of Ministers, some delegations had proposed amendments to the convention and highlighted certain legal problems. She suggested that any delegations who so wished should talk with Mr Rolf Einar Fife and Ms Concepción Escobar Hernández, former Chairperson and current Vice-Chairperson of the CAHDI respectively, who would compile the written and oral observations of interested delegations with a view to preparing the draft CAHDI reply to the Committee of Ministers.

83. Moreover, the Secretariat stressed that following the same Committee of Ministers decision, the Council of Europe's Legal Adviser had, on 16 March 2011, forwarded to the Committee of Ministers an opinion on the compatibility of the above-mentioned articles with international law, including in terms of human rights. As some delegations had received this opinion via their permanent representations, the Secretariat asked the permission of the Chairman of the Committee of Ministers to distribute it to all CAHDI members.

84. The British delegation then presented document DD(2011)141 comprising questions to the CAHDI from the United Kingdom on the draft Convention. From the outset, it pointed out that the United Kingdom did not intend these questions to undermine the Convention, but rather wished to obtain clarifications on certain points in order to increase participation in this instrument. The first question from the British delegation was whether or not the Convention was geared to creating a new human right horizontally applicable to all individuals coming under the jurisdiction of a State Party. The second question reflected the United Kingdom's concern about the vocabulary used in the title of Article 5, "State obligations and due diligence", which he considered inappropriate to the content of the article. The third and last question related to the requisite interpretation of Article 60 of the draft Convention and its compatibility with the 1951 Convention relating to the Status of Refugees and Article 3 ECHR as interpreted by the case-law of the European Court of Human Rights.

85. The Turkish delegation thought that violence against women and domestic violence were a concern shared by all States, and that it was therefore a collective challenge. Given the importance of this Convention, it considered inappropriate to reopen the negotiations on the draft, as its text was already the result of compromise. It stated that Turkey wished to open the Convention for signature by States on 11 May 2011 in Istanbul, during the 121st Ministerial Session of the Committee of Ministers.

86. The Norwegian delegation informed the Committee that it fully supported the draft Convention as it stood and considered it inappropriate to reopen negotiations, given that this instrument reflected existing rules and principles. It declared that linguistic ambiguities might subsist in the text but that the explanatory report supplied sufficient clarification to prevent any misinterpretations.

87. The Spanish delegation stressed that none of the provisions of the draft Convention could be interpreted as imposing obligations on individuals. It informed the Committee that the concerns raised could be dealt with by means of minor amendments which would not modify the object or the purpose of the Convention.

88. During the exchange of views requested by the Committee of Ministers, most delegations came down against reopening the negotiations on the draft Convention. A consensus emerged on the interpretation of the provisions mentioned in the Committee of Ministers' request. The Committee considered, in connection with Articles 3 and 4, that the draft Convention was an inter-State agreement, which meant that it could only impose obligations on States. Furthermore, it did not create new rights but rather clarified existing human rights. Secondly, several delegations argued that the current title of Article 5 was unsuited to its content and that if it remained as it stood, its interpretation could have consequences transcending the framework of the Convention. The CAHDI therefore proposed amending the title of this provision. Lastly, where Articles 60 and 61 were concerned, the CAHDI pointed out that these provisions on the right of asylum and non-refoulement as set out in this draft had been designed in a manner compatible with the 1951 *Convention relating to the Status of Refugees* and Article 3 of the ECHR, as interpreted by the case-law of the European Court of Human Rights. The delegations agreed on the proposal to the effect that the Committee's conclusions should be reflected in the text of the explanatory report to the Convention in order to clarify the provisions in question.

89. In the light of the exchange of views on the draft Convention, the Chairperson noted that the delegations agreed on the reply to be sent to the Committee of Ministers. The results of the CAHDI's discussion on the draft Council of Europe Convention on preventing and combating violence against women and domestic violence as adopted on 18 March 2011 appear in **Appendix X** to this report.

b. Intervention by Mr Hans van Loon, Secretary General of the Hague Conference on Private International Law, on the correlation between recent case-law of the European Court of Human Rights and the Conventions adopted in the framework of the Hague Conference on Private International Law

90. Mr Hans van Loon, Secretary General of the Hague Conference on Private International Law, informed the CAHDI of the longstanding relationship between the Council of Europe and the Hague Conference on Private International Law. He pointed out that the formal basis for this co-operation lay in a treaty of 13 December 1955 providing that the two organisations should avoid any overlapping in their respective activities, but he added that their work was in any case complementary. He recalled that the Council of Europe mainly emphasised substantive law and acted at the regional level, whereas the Hague Conference concentrated primarily on private international law and worked globally.

91. He then noted the interaction between the ECHR and the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction,* and presented the purpose, object and main provisions of the latter instrument. Given that the Hague Convention did not provide for an individual complaints procedure, complaints concerning violations of the Articles of the Hague Convention could be channelled through the ECHR mechanism. In this connection, Mr van Loon drew the delegations' attention to the issues raised by the recent case-law of the European Court of Human Rights relating to requests for return lodged on the basis of the Hague Convention (*Neulinger and Shuruk v. Switzerland*, 6 July 2010; *Raban v. Romania*, 26 October 2010). Mr van Loon's presentation is reproduced in **Appendix XI** to this report.

D. OTHER

19. Date, place and agenda of the 42nd meeting of the CAHDI

19. The CAHDI decided to hold its next meeting in Strasbourg on 22 and 23 September 2011. The Committee instructed the Secretariat, in consultation with the Chairperson, to prepare in due course the provisional agenda for this meeting.

20. Other business

93. Following the presentation by the Serbian delegation of Resolution 1782 of the Parliamentary Assembly of the Council of Europe on “The investigation of allegations of inhuman treatment of people and illicit trafficking in human organs in Kosovo”, the Chairperson said that the question of a possible binding legal instrument on organ trafficking was for the moment outside the scope of activities of the CAHDI.

94. The CAHDI concluded its 41st meeting by adopting the abridged report as reproduced in **Appendix XII** to this report.

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ANNEXE I

LIST OF PARTICIPANTS

ALBANIA/ALBANIE:
Ms Ledia HYSI, Director of Treaties and International Law Department, Ministry of Foreign Affairs

ANDORRA/ANDORRE: **-**

ARMENIA/ARMENIE: -

AUSTRIA/AUTRICHE:
Mr Helmut TICHY, Ambassador, Legal Adviser, Federal Ministry for European and International Affairs

AZERBAIJAN/AZERBAIDJAN: -
Mr Elvin ASHRAFZADE, Attaché, The Division of International Legal Issues of the Multilateral Cooperation, International Law and Treaties Department, Ministry of Foreign Affairs

BELGIUM/BELGIQUE:
M. Paul RIETJENS, Directeur général des Affaires juridiques, Service public fédéral des Affaires Etrangères

M. Patrick DURAY, Conseiller Général à la Direction Générale des Affaires Juridiques, Service public fédéral des Affaires Etrangères

BOSNIA AND HERZEGOVINA/BOSNIE-HERZEGOVINE:
Mme Gildzana TANOVIC, Conseillère, Ministère des Affaires Etrangères

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CZECH REPUBLIC/REPUBLIQUE TCHEQUE:
Mr Milan DUFEK, JUDr, Director, International Law Department, Ministry of Foreign Affairs

Mr Petr RYBÁK, International Law Department, Ministry of Foreign Affairs

Mr Pavel ŠTURMA, Vice-Dean, Head of International Public Law Department, Charles University

DENMARK/DANEMARK:
Mr Thomas WINKLER, Ambassador, Under-Secretary for Legal Affairs, Ministry of Foreign Affairs

Mr Christian KARSTENSEN, Head of Section, Department of International Law, Ministry of Foreign Affairs

ESTONIA/ESTONIE:
Ms Dea HANNUST, Director of the Human Rights Division, Ministry of Foreign Affairs

FINLAND/FINLANDE:
Ms Päivi KAUKORANTA, Director General, Legal Service, Ministry for Foreign Affairs

Ms Anu SAARELA, Director, Legal Service, Ministry for Foreign Affairs

FRANCE:
Mme Edwige BELLIARD, Directeur des affaires juridiques, Ministère des Affaires Etrangères
(Chair/*Présidente*)

M. Claude CHAVANCE, Sous-Directeur du droit international public, Ministère des Affaires Etrangères

Mme Céline FOLSCHE, Sous-direction du droit international public, Direction des Affaires Juridiques, Ministère des Affaires Etrangères

GEORGIA/GEORGIE:
Ms Tinatin GOLETIANI, Director of International Law Department, Ministry of Foreign Affairs

Mr Mamuka JGENTI, Ambassador, Permanent Representative of Georgia to the Council of Europe, Permanent Representation of Georgia to the Council of Europe

GERMANY/ALLEMAGNE:
Mr Guido HILDNER, Head of Division 500, Federal Foreign Office

GREECE/GRECE:
Ms Phani DASCALOPOULOU-LIVADA, Legal Adviser, Head of the Legal Department, Ministry for Foreign Affairs

HUNGARY/HONGRIE:
Mr István HORVÁTH, Legal Adviser, Department of International and EU Public Law, Ministry for Foreign Affairs

Dr Éva GRÜNWALD, International Law Department, Ministry for Foreign Affairs

ICELAND/ISLANDE:
Ms Sigridur EYSTEINSDÓTTIR, LL.M., Legal Officer, Office of the Legal Advisor, Ministry for Foreign Affairs

IRELAND/IRLANDE:
Mr James KINGSTON, Legal Adviser, Department of Foreign Affairs

ITALY/ITALIE:
Mr Paolo PALCHETTI, Professore di Diritto Internazionale, Università di Macerata

LATVIA/LETTONIE:
Ms Irina MANGULE, Director of the Legal Department, Ministry of Foreign Affairs

LIECHTENSTEIN:
Mr Daniel OSPELT, Permanent Representative of Liechtenstein to the Council of Europe, Permanent Representation of Liechtenstein to the Council of Europe

Ms Theresa LANKES, Stagiaire, Permanent Representation of Liechtenstein to the Council of Europe

LITHUANIA/LITHUANIE:
Mr Gintautas VASIULIS, Deputy Director, Law and International Treaties Department, Ministry of Foreign Affairs

LUXEMBOURG: -

MALTA/MALTE:
Dr Sarah VASSALLO, Lawyer, Office of the Attorney General

MOLDOVA:
Mr Emilian BRENICI, Head a.i. of the International Law Department, Ministry of Foreign Affairs and European Integration

MONACO:
M. Bernard GASTAUD, Conseiller pour les Affaires Juridiques et Internationales, Ministère d'Etat

MONTENEGRO:
Ms Bozidarka KRUNIC, International Law Department, Ministry of Foreign Affairs and European Integration

NETHERLANDS/PAYS-BAS:
Mrs Liesbeth LIJNZAAD, Legal Adviser, Head of the International Law Division, Ministry of Foreign Affairs

NORWAY/NORVEGE:
Mr Rolf Einar FIFE, Director General, Department for Legal Affairs, Ministry of Foreign Affairs

Mr Erland FLATERUD, Senior Adviser, Department for Legal Affairs, Section for Humanitarian and Criminal Law, Ministry of Foreign Affairs

POLAND/POLOGNE:
Mr Ryszard SARKOWICZ, Ambassador, Legal and Treaty Department, Ministry of Foreign Affairs

Mr Piotr DOLATA, First Secretary, Legal and Treaty Department, Ministry for Foreign Affairs

PORTUGAL:
Mr Miguel DE SERPA SOARES, Director, Department of Legal Affairs, Ministry of Foreign Affairs

ROMANIA/ROUMANIE:
Mr Ion GALEA, Director General for legal affairs, Ministry of Foreign Affairs

RUSSIAN FEDERATION/FEDERATION DE RUSSIE:
Mr Igor PANEVKIN, Deputy Director, Legal Department, Ministry of Foreign Affairs

SAN-MARINO/SAINT-MARIN: –

SERBIA / SERBIE:
Mr Bozidar JOVANOVIC, Head of the Department for International Legal Affairs, Ministry of Foreign Affairs

SLOVAK REPUBLIC/REPUBLIQUE SLOVAQUE:
Mr Igor BARTHO, Director General, Directorate for Legal and Consular Affairs, Ministry of Foreign Affairs

SLOVENIA/SLOVENIE:
Mr Mihael ZUPANČIČ, Head of the International Law Department, Ministry of Foreign Affairs

Ms Tjaša TANKO, III. Secretary, International Law Division, Ministry of Foreign Affairs

SPAIN/ESPAGNE:
Mme Concepción ESCOBAR HERNÁNDEZ, Chef du Bureau Juridique International, Ministère des Affaires Etrangères et de la Coopération **(Vice-Chair/*Vice-Présidente*)**

M. Maximiliano BERNARD ALVAREZ DE EULATE, Professeur de Droit international public et d'Institutions et droit communautaire européens

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Dr Erik WENNERSTRÖM, Senior Legal Adviser, Department for International Law, Human Rights and Treaty Law, Ministry for Foreign Affairs

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M. l'Ambassadeur Jürg LINDENMANN, Directeur suppléant de la Direction du droit international public

"THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA"/"L'EX-REPUBLIQUE YOUGOSLAVE DE MACEDOINE":
Ms Natasha DESKOSKA, Head of Sector; Directorate of International Law, Ministry of Foreign Affairs

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Mr Münci ÖZMEN, Deputy to the Permanent Representative of Turkey to the Council of Europe, Legal Adviser, Permanent Representation of Turkey to the Council of Europe

Ms Buket KABAKCI, Deputy to the Permanent Representative of Turkey to the Council of Europe, Permanent Representation of Turkey to the Council of Europe

UKRAINE :
Mr Volodymyr PUZYRKO, Director General for Treaties and Legal Affairs, Ministry of Foreign Affairs

UNITED KINGDOM/ROYAUME-UNI:
Mr Daniel BETHLEHEM, Legal Adviser, Foreign and Commonwealth Office

Mr Shehzad CHARANIA, Assistant Legal Adviser, Legal Advisers Department, Foreign and Commonwealth Office

EUROPEAN UNION / UNION EUROPEENNE

EUROPEAN COMMISSION / COMMISSION EUROPEENNE

Mme Sonja BOELAERT, membre du Service Juridique de la Commission Européenne

COUNCIL OF THE EUROPEAN UNION / CONSEIL DE L'UNION EUROPEENNE

Ms Emer FINNEGAN, Conseil de l'Union Européenne, Service juridique

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MEXICO/MEXIQUE:

Mr Joel HERNÁNDEZ GARCÍA; Legal Adviser, Ministry of Foreign Affairs

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Mr Vincent-Paul CARVER, Consul General, Deputy Permanent Observer of the United States to the Council of Europe, Consulate of the United States to the Council of Europe

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UNITED NATIONS/NATIONS UNIES:
Mr Brian C. WILSON, Analytical Support and Sanctions, Monitoring Team for Al-Qaida and the Taliban, United Nations

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD)/ORGANISATION DE COOPERATION ET DE DEVELOPPEMENT ECONOMIQUES (OCDE): -

EUROPEAN ORGANISATION FOR NUCLEAR RESEARCH (CERN)/ORGANISATION EUROPEENNE POUR LA RECHERCHE NUCLEAIRE (CERN):
M. Jean-Michel FAVRE, Service Juridique

THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW/CONFERENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVE:
Mr Hans VAN LOON, Secrétaire général de la Conférence de La Haye de droit international privé

INTERPOL:
Mr Joël SOLLIER, General Councel, Office of Legal Affaird, ICPO-INTERPOL, General Secretariat

Mr Yaron GOTTLIEB, Counsel, Office of Legal Affairs, ICPO-INTERPOL, General Secretariat

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M. Knut DÖRMANN, Chef de la Division Juridique

M. Thomas GRADITZKY, Conseiller juridique, Service Consultatif du droit international humanitaire

NORTH ATLANTIC TREATY ORGANISATION (NATO) / ORGANISATION DU TRAITE DE L'ATLANTIQUE NORD (OTAN) :
Mrs Laura MAGLIA, Legal Assistant, Legal Department, NATO HQ

SPECIAL GUESTS/INVITES SPECIAUX

M. Jean-Claude BONICHOT, Juge, Cour de Justice de l'Union Européenne

Ms Kimberly PROST, Ombudsperson, Office of the Ombudsperson of the UN Security Council's Al-Qaida and Taliban Sanctions Committee (1267 Committee)

SECRETARIAT GENERAL

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

M. Manuel LEZERTUA, Jurisconsult, Director of Legal Advice and Public International Law/ Jurisconsult, Directeur du Conseil Juridique et du Droit International Public

CAHDI SECRETARIAT / SECRETARIAT DU CAHDI

Mrs Marta REQUENA, Secretary to the CAHDI / Secrétaire du CAHDI, Head of the Public International Law and Anti-Terrorism Division / Chef de la Division du droit international public et de la lutte contre le terrorisme

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Mrs Isabel CRISTOVAM-BELLMANN, Assistant/Assistante, Public International Law and Anti-Terrorism Division / Division du droit international public et de la lutte contre le terrorisme

INTERPRETERS / INTERPRETES:

Pascale MICHLIN, Robert SZYMANSKI, Josette YOESLE-BLANC, Cynera JAFFREY

APPENDIX II

AGENDA

I. INTRODUCTION

1. Opening of the meeting by the Chair, Ms Edwige Belliard

2. Adoption of the agenda

3. Approval of the report of the 40th meeting

4. Statement by the Director of Legal Advice and Public International Law, Mr Manuel Lezertua

II. ONGOING ACTIVITIES OF THE CAHDI

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

6. Immunities of States and international organisations

   a. State practice and case-law

      - recent national developments and updates of the website entries

      - 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

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

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

   a. Questions dealt with by offices of the Legal Adviser which are of wider interest and related to the drafting of implementing legislation of international law as well as foreign litigation, peaceful settlements of disputes, and other questions of relevance to the Legal Adviser

   b. Updates of the website entries

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

   - Exchange of views with Ms Kimberly Prost, Ombudsperson at the UN Security Council Committee created by resolution 1267 (1999) concerning Al-Qaida and the Taliban

9. European Union's accession to the European Convention of Human Rights (ECHR)

   a. Information provided by Mr Erik Wennerström, observer of the CAHDI to the Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH – EU)

b. Exchange of views with Mr Jean-Claude Bonichot, judge of the Court of Justice of the European Union

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

11. Peaceful settlement of disputes

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

- List of outstanding reservations and declarations to international treaties

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

13. Information on work undertaken by the Council of Europe on the review of Council of Europe Conventions

14. Consideration of current issues of international humanitarian law

15. Developments concerning the International Criminal Court (ICC)

16. Implementation and functioning of other international criminal tribunals (ICTY, ICTR, Sierra Leone, Lebanon, Cambodia)

17. Fight against terrorism - Information about work undertaken by the Council of Europe and other international bodies

18. Topical issues of international law

a. Exchange of views on the Draft Council of Europe Convention on preventing and combating violence against women and domestic violence

b. Intervention by Mr Hans van Loon, Secretary General of the Hague Conference on Private International Law, on the correlation between recent case-law of the European Court of Human Rights and the Conventions adopted in the framework of the Hague Conference on Private International Law

IV. OTHER

19. Date, place and agenda of the 42nd meeting of the CAHDI

20. Other business

APPENDIX III

French only

STATEMENT OF Mr MANUEL LEZERTUA, JURISCONSULT, DIRECTOR OF LEGAL ADVICE AND PUBLIC INTERNATIONAL LAW, COUNCIL OF EUROPE, ON THE OCCASION OF THE 41ST MEETING OF THE COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

Strasbourg, 17 March 2011

Madame la Présidente,
Mesdames et Messieurs,

C'est un plaisir et un honneur pour moi, en tant que Directeur du Conseil juridique et du Droit international public du Conseil de l'Europe, d'accueillir de nouveau le CAHDI à Strasbourg.

Comme le veut la coutume, je vais prendre quelques minutes pour évoquer devant vous l'actualité politique et juridique du Conseil de l'Europe ainsi que les développements importants survenus au sein de notre Organisation depuis notre dernière rencontre en septembre 2010, à Tromsø, lors de la 40ème réunion du CAHDI. Plus spécifiquement, je souhaiterais faire un tour d'horizon dans les domaines qui touchent au droit international public.

* * *

Comme vous le savez, la vie politique de notre Organisation est rythmée, tous les six mois, par les changements de présidence du Comité des Ministres, organe exécutif décisionnel du Conseil de l'Europe.

À présent, et depuis le mois de novembre, c'est au tour de la Turquie de présider l'organe décisionnel de l'Organisation. L'actuelle présidence a axé ses priorités sur cinq thèmes principaux, à savoir notamment la réforme du Conseil de l'Europe, la réforme de la Cour européenne des droits de l'homme, le renforcement des mécanismes de suivi et l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme. Elle entend surtout au travers de son action en faveur des mécanismes de suivi indépendants, renforcer la visibilité du Conseil de l'Europe, en organisant des conférences, des séminaires, des tables rondes et des ateliers.

En outre, la présidence turque est convaincue que le Conseil de l'Europe, en posant les fondements depuis 60 ans de la sécurité et de la stabilité en Europe, est l'acteur régional et international le mieux placé pour relever les nouveaux défis des sociétés multiculturelles en Europe, thème qui constitue la 5ème priorité de cette présidence.

L'Ukraine va succéder, en mai 2011, à l'actuelle présidence et nous vous informerons le temps voulu des priorités de la future présidence ukrainienne.

* * *

Je souhaiterai ensuite mentionner très brièvement la célébration d'une série de réunions et conférences de haut niveau organisées au sein du Conseil de l'Europe depuis 6 mois, qui constituent des rendez-vous politiques importants ayant une influence indéniable sur les activités de notre Organisations, notamment :

- La 30ème Conférence du Conseil de l'Europe des Ministres de la Justice, qui s'est tenue du 24 au 26 novembre 2010 à Istanbul, et ayant eu pour thème *« Moderniser la justice au troisième millénaire : une justice transparente et efficace ; les prisons dans l'Europe d'aujourd'hui »*. Les participants à cette Conférence ont adopté des résolutions portant sur :
    1. une justice moderne, transparente et efficace,
    2. la politique pénitentiaire dans l'Europe d'aujourd'hui et

3. la protection des données et la vie privée au troisième millénaire.

Ces résolutions seront examinées par le Comité des Ministres dans les prochains temps.

- La Conférence du Conseil de l'Europe sur la *« Prévention du terrorisme : les moyens de prévention, les instruments juridiques et leur mise en œuvre »*, qui s'est tenue à Istanbul les 16 et 17 décembre 2010, et dont Mme Marta Requena, Chef de la Division du droit international public et de la lutte contre le terrorisme, exposera les principales avancées sous le point 17 de votre ordre du jour ;

En outre, une Conférence de haut niveau sur l'avenir de la Cour européenne des droits de l'homme se tiendra à Izmir les 26 et 27 avril 2011. Elle permettra de faire le bilan des progrès accomplis depuis la Conférence d'Interlaken et de prendre des décisions cruciales pour des travaux futurs, ainsi que de réfléchir sur l'avenir de la Cour à long terme.

* * *

En ce qui concerne l'organisation interne du Conseil de l'Europe, M. Thorbjørn Jagland, Secrétaire Général du Conseil de l'Europe depuis le 1er octobre 2009 a poursuivi sa grande réforme interne de l'organisation pour laquelle il a obtenu le soutien direct et unanime des Etats membres.

Le Secrétaire Général a, entre autre, attribué une grande importance à la consolidation des outils politiques et de contrôle interne, notamment en instaurant un nouveau programme d'activités et budget, considéré comme l'une des pierres angulaires de la réforme en cours. C'est ainsi que le 24 novembre 2010, le Comité des Ministres a adopté son programme et budget pour l'année 2011.

Ces derniers reflètent le besoin de maîtrise des dépenses, réduction des coûts et redéploiement de ressources vers des secteurs prioritaires, comprenant notamment la consolidation et une meilleure coordination des mécanismes de suivi (monitoring) existants. Dorénavant, les Etats membres se sont accordés sur le principe du passage à un programme et budget bisannuel à partir de 2012.

De ce fait, le 23 novembre 2010, les Délégués des Ministres ont approuvé la proposition du Secrétaire Général que les mandats de tous les comités directeurs et comités *ad hoc*, ainsi que leurs groupes subordonnés, prennent fin le 31 décembre 2011. Cette décision est évidemment pertinente pour le CAHDI. Par conséquent, le projet de mandat que vous préparerez vraisemblablement lors de votre prochaine réunion devra prendre en compte les priorités et activités pour 2012-2013.

* * *

En ce qui concerne les **activités juridiques de notre Organisation**, je souhaiterai dans un premier temps faire le point sur les relations entre le Conseil de l'Europe et l'Union européenne, et plus particulièrement sur l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme.

Comme exposé lors de notre dernière réunion, cette question se trouve toujours au cœur des priorités de l'Organisation. Votre ordre du jour reflète le ralliement du Comité à cette priorité du Conseil de l'Europe ainsi que l'importance accordée par le CAHDI à ce sujet.

Je tiens à présent à vous faire part des avancements relatifs à certaines conventions du Conseil de l'Europe :

- Le Troisième Protocole additionnel à la Convention européenne d'extradition, complétant la Convention à certains égards afin de simplifier et d'accélérer la procédure d'extradition lorsque l'individu recherché consent à l'extradition, a été ouvert à la signature le 10

novembre 2010. À ce jour, 12 Etats ont signé le Protocole, qui nécessite 3 ratifications pour son entrée en vigueur.

- Le Comité des Ministres a adopté, le 8 décembre 2010, une convention internationale – la Convention « Medicrime » – qui constitue, pour la première fois, un instrument juridique contraignant dans le domaine du droit pénal criminalisant la contrefaçon, mais aussi la fabrication et la distribution produits médicaux mis sur le marché sans autorisation ou en violation des normes de sécurité. Destinée à protéger la santé publique, la Convention introduit des sanctions pénales et des mesures de prévention et de protection des victimes. Elle est ouverte aux pays du monde entier, et offre un cadre de coopération internationale et des mesures destinées à améliorer la coordination au niveau national. La Convention sera ouverte à la signature au courant de l'année 2011.

* * *

Avant de terminer ce rapide tour d'horizon, je tiens à évoquer avec vous la question du Projet de Convention du Conseil de l'Europe sur la prévention et la lutte contre la violence à l'égard des femmes et la violence domestique, que vous serez amené à discuter sous le point 18 de votre ordre du jour.

En décembre 2008, le Comité des Ministres a créé le Comité ad hoc pour prévenir et combattre la violence à l'égard des femmes et la violence domestique (CAHVIO) et l'a chargé d'élaborer un instrument juridiquement contraignant « pour prévenir et combattre la violence domestique, y compris les formes spécifiques de violence à l'égard des femmes, d'autres formes de violence à l'égard des femmes, et pour protéger et soutenir les victimes de tels actes de violence et poursuivre les auteurs ». Le CAHVIO – qui réuni environ 65 experts nationaux ainsi qu'un nombre importants de Comités, organisations internationales et organisations non-gouvernementales – a débuté son travail en avril 2009, et a approuvé, lors de sa réunion en décembre 2010, le projet de Convention, qui est le fruit d'un difficile consensus entre les différents acteurs qui ont contribué à ce processus de négociation. Son travail a ensuite été conclu en janvier 2011, avec l'approbation du projet de rapport explicatif.

Lors de sa dernière réunion en 2010, les Délégués des Ministres ont insisté sur l'importance du projet d'instrument élaboré par le CAHVIO et, par décision du 2 mars 2011, ils ont demandé à ce que le Service du Conseil juridique donne un avis sur la compatibilité des articles 3, 4, 5, 60 et 61 du projet de Convention du Conseil de l'Europe sur la prévention et la lutte contre la violence à l'égard des femmes et la violence domestique avec le droit international, y compris en matière de droits de l'homme, à la lumière des préoccupations spécifiques soulevées par certaines délégations. Mon service et moi-même avons soumis cet avis hier au Secrétariat du Comité des Ministres, tel qu'il nous a été demandé. C'est à présent au tour du CAHDI de répondre à la demande des Délégués et de soumettre les résultats des discussions à ce sujet au Comité des Ministres, qui reprendra l'examen de ce point lors de la réunion du Groupe de rapporteurs sur la coopération juridique – le GR-J – le 22 mars 2011 afin de préparer l'examen par le Comité des Ministres lors de sa 1110ème réunion, les 30 et 31 mars prochains.

En vous souhaitant un fructueux débat et une très agréable 41ème réunion, j'en ai terminé avec ce rapide tour d'horizon des activités du Conseil de l'Europe. Le Secrétariat reste bien évidemment à votre entière disposition pour toute information supplémentaire.

Je vous remercie de votre attention.

APPENDIX IV

CONTRIBUTION OF INTERPOL ON « IMMUNITIES OF STATES AND INTERNATIONAL ORGANISATIONS »

Introduction

- Questions concerning immunity of state officials from criminal jurisdiction have direct implications for INTERPOL's work. In this speech, I would like to highlight the pertinent legal challenges that our Office has had to address in deciding whether INTERPOL could become involved in cases where questions of immunity have arisen.

- This information was recently shared with the Special Rapporteur appointed by the International Law Commission to address the various dilemmas in this field.

Scope of application

- One of INTERPOL's core functions is to facilitate the exchange of information in criminal matters among its member countries.

- This entails that in the context of INTERPOL's work, questions concerning immunities of state officials generally arise with regard to:
    - Publication of INTERPOL's Notices, notably the Red Notice which is a request to arrest a person with a view to his/her extradition.
    - Other messages (called "Diffusions") exchanged directly among member countries with a similar aim (i.e. to arrest a person).

- Indeed, the International Court of Justice (ICJ), in its landmark decision in the case of *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, also known as the *Yarodia Case*, on 14 February 2002 also mentioned the role of INTERPOL in the circulation of national arrest warrants against state officials.

- It is also noteworthy that the question is evaluated in the context of INTERPOL's work not only based on the general principles of international law and the obligation of INTERPOL's members to respect the immunity principle – but also in application of Article 3 of INTERPOL's Constitution, which forbids the Organization from intervening in cases of political character.

Two categories of immunities:

- In the context of INTERPOL's work, a general distinction can be drawn between two types of immunities:
    - Immunities conferred upon an individual under the national law of the country which seeks his/her arrest
    - Immunities conferred upon an individual under international law.

Immunities under national law:

- In most (if not all) countries, certain State officials such as the Head of State and members of the Parliament enjoy certain immunities under national law. The immunity conferred is usually **functional** and hence the national law will usually provide for instances where the immunity may be waived following a certain procedure (e.g. a vote by the Parliament).

- INTERPOL's rules clearly dictate that compliance with national law is a *sine qua non* condition for the processing of information via INTERPOL's channels.

- Accordingly, a Red Notice or Diffusion issued against a person who cannot be brought to justice in the requesting country due to immunity accorded under the national law of that country would appear not to be in compliance with INTERPOL's rules.

- At the same time, INTERPOL's rules provide for a general presumption according to which information sent by member countries is considered "*a priori* to be accurate and relevant." Thus, there is a presumption that a request for police cooperation (Notice/Diffusion) was sent by the member country in compliance with its national laws.

- To strike the right balance between the two principles, INTERPOL applies the following guidelines:

  As a general rule, the assumption is that a wanted person does not enjoy immunity under the national law of the country seeking his/her arrest. Thus, as a matter of normal procedure, the requesting country will not be required to address the question of immunity under national law.

  Nonetheless, there might be some exceptions to this general rule. In particular, a concern may arise where a Notice/Diffusion is sent after **an unconstitutional seizure of power** (e.g. a coup d'etat) in the requesting country. In such a case an in-depth review of the Notice/Diffusion should generally include an inquiry into the question of immunity. This exception corresponds to the general practice in the application of Article 3 of the Constitution, according to which a higher degree of due diligence is required in assessing requests following an unconstitutional seizure of power.

Immunities under international law: Primary challenges

INTERPOL's General Secretariat has consistently implemented the *Yerodia* holding. Thus, where a Red Notice is requested by one country against the Head of State, Head of Government or Minister of Foreign Affairs of another country, the request will be refused by INTERPOL based on the principle of immunity under international law.

Yet, in application of the immunity principle, INTERPOL's General Secretariat has had to address a number of interesting legal challenges. The following are noteworthy:

Scope of immunity: Which officials enjoy immunity under international law?

- The question is which State officials enjoy immunity *ratione personae*, specifically whether the immunity extends to officials other than the Head of State, Head of Government, and Minister of Foreign Affairs. For example, should a Minister of Defence enjoy the same immunity?

- Bearing in mind that INTERPOL's aim is to promote international police co-operation, and in light of the ambiguity and lack of clear criteria regarding the application of immunity to State officials other than those explicitly mentioned in the *Yerodia Case*, INTERPOL's general practice has been not to recognize the immunity of individuals who hold other positions (e.g. Ministers of Defence).

- It nonetheless appears that this stance may require further consideration. One possible option is to broaden the scope of immunity from criminal jurisdiction and apply this principle where the individual concerned has the capacity to represent his or her State at the international level. Thus, for example, the category of State officials enjoying immunity may include persons representing their State in the negotiation, adoption or authentication of the text of a treaty (see Article 1(c) of the Vienna Convention on the Law of Treaties).

Scope of immunity: Acts committed by former officials in a public/private capacity:

- As indicated in the *Yerodia Case*, the immunity of State officials does not prevent prosecution in certain circumstances. Among the exceptions mentioned by the Court is where a person ceases to hold public office. The Court held that in such a case, the court of one State may try a former official of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

- Distinguishing between public/private acts is not always an easy task. INTERPOL's practice can be summarized as follows:

    - The test is not applied with regard to requests from international tribunals such as the ICTY or the ICTR.

    - The test applies where a request is sent by one country against a former State official of another country, whose acts were clearly carried out in his/her official capacity (e.g. the ordering of a military operation). In such a case, INTERPOL will generally apply Article 3 of the Constitution to ensure that the Organization does not intervene in an inter-State dispute or otherwise compromise its neutrality.

    - The test applies where a request is sent by one country against a former State official of another country who may enjoy immunity under international law, namely a former Head of State, Head of Government or Minister of Foreign Affairs. In such a case, the request will be denied by INTERPOL if the country of the individual concerned protests against the request, since this protest is understood to be an indication that the protesting country considers the acts to be official in nature.

The question of recognition:

- The question is whether immunities should be accorded to individuals representing territories that have not been recognized as States (or whose recognition is still under dispute).

- In one case, an INTERPOL member country sent a Diffusion seeking the arrest of an individual, and the information was registered in INTERPOL's databases. The individual was later elected as the Prime Minister of a territory which is not a member country of INTERPOL or a Member State of the United Nations, and is recognized only by some States.

  INTERPOL decided to block in its databases all the information concerning this individual. This decision derived, *inter alia*, from an application of the principle of immunity under international law, based on which it was considered that the immunity of a Head of Government has functional objectives. These objectives included enabling this Head of Government to travel internationally freely for the purpose of representing the territory concerned in the negotiations with international actors and the State from which the territory was trying to secede. Accordingly, it was considered that maintaining the individual's status in INTERPOL's databases as "wanted" would not be in compliance with the principle of immunity and its underlying rationale.

  Naturally, INTERPOL's decision to block the information concerning that individual had no implications concerning recognition of the particular territory under international law.

Scope of immunity in the context of a criminal investigation:

- The question is whether the principle of immunity applies during a criminal investigation which has not yet yielded an attempt to exercise criminal jurisdiction over an individual. This matter was also addressed (but not yet fully resolved) by the ICJ in its Judgment of 4 June 2008 in the case of *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*.

- To address this question, INTERPOL adopted a dual-test:

    1. What is the purpose for which the information is being processed via INTERPOL's channels, i.e. is the information being processed for the purpose of exercising jurisdiction or for other purposes, such as obtaining information for a preliminary investigation?
    2. Would the processing of information prevent the individual from performing his/her duties or otherwise interfere with the conduct of foreign relations of his/her country?

- Accordingly, each Notice or Diffusion requires an analysis on a case-by-case basis to decide whether immunity applies.

Final note

- In addition to immunities of state officials, INTERPOL has also addressed situations involving immunities of diplomats as well as immunities of international civil servants – in each case INTERPOL applied the relevant principles of international law.

APPENDIX V

PRESENTATION BY MS KIMBERLY PROST, OMBUDSPERSON AT THE UN SECURITY COUNCIL COMMITTEE CREATED BY RESOLUTION 1267 (1999) CONCERNING AL-QAIDA AND THE TALIBAN REGARDING NATIONAL IMPLEMENTATION MEASURES OF UN SANCTIONS AND RESPECT FOR HUMAN RIGHTS

Let me thank you for inviting me to join with you today, at this CADHI meeting, for a discussion of my work to date in the role of Ombudsperson for the Security Council Al Qaida/Taliban Sanctions Committee (1267 Committee). It provides me with an opportunity to share some thoughts on developments to date and, with an impressive group such as this, to obtain views and comments on the issues which present in the context of this unique position.

My comments today will centre on the key challenges. I would frame them as follows:

a) Will the Office of the Ombudsperson be used?
b) Does the Office of the Ombudsperson have the potential to provide fair process?
c) Will the Office of the Ombudsperson provide fair process?

1. Use of the Office

To begin with, it is evident that to be effective, the Office of the Ombudsperson must be known and it must be accessible. From the start, this has been a key concern and efforts to publicize the Office are ongoing.

I have tried a variety of methods to 'advertise' the Office which have included the creation of my website, briefings to governments – bilaterally and multilaterally - and various presentations in different fora. I am in the process of sending letters to those on the Consolidated List with addresses and I am aware that individuals, who write to governments and regional bodies, about their listings, are receiving information about my office in any response. I have also attempted to reach out to listed persons and entities who have no access to technology and communication facilities, by asking those who work in the field – the Monitoring Team, CTED, UNODC for example - to distribute flyers about my work.

There have been successes. I know that some of the current cases have reached me because of the website and because of government letters. But the challenge remains and I am open, as always, to any suggestions as to how to better publicize the office, especially to those who might wish to make a delisting request.

2. Fair Process and the Potential of the Office of the Ombudsperson

It is no secret that the birth of the Office of the Ombudsperson was a difficult one. It was the product of a compromise forged between two very different perspectives on this use of the Security Council sanctions powers. For the members of the Security Council and those who work in this context, the suggestion of some form of review or involvement of an outside body in the decisions of the Security Council was seen as contrary to the fundamental nature and clear powers of the Council. From this perspective the fact that the sanctions have a direct application on individuals did not justify altering the process or allowing for intervention into the prerogatives of the Security Council.

From the opposite perspective, particularly for those individuals and entities subject to the sanctions, it in essence "feels like" a measure which was the product of a judicial or administrative process. This raises expectations that there will be the types of protections and recourse which normally surrounds such proceedings whatever the origin of the sanction.

The creation of the Office of the Ombudsperson – designed to bring elements of that procedural fairness without affecting the decision making power of the Council – was the compromise forged to bridge that gap. As a good compromise it meant that no one on either side, or in between, was happy. For some, it was seen as an encroachment "too far" into the Security Council process and for those of the other view – too little too late - in terms of due process.

Coming into a position which has this particular background, I have chosen not to delve into that debate but rather to focus on the powers which have been accorded to me in this post. It is my aim to use them as robustly as possible to provide fair process, while still remaining operationally within the confines of my mandate.

In this regard, I believe there is clear consensus on one point which is that there must be appropriate fair process in relation to Security Council sanctions imposed on individuals and entities. What is much less clear, and an issue which ultimately will have to be addressed in other fora, is, what is fair process in this unique context?

For my part, I focus on the core elements - some of the fundamental principles of fairness - and whether those can be addressed through the Ombudsperson process.

Right to Know the Case
First, the right to know the case against you. In addressing this requirement I look to use the information gathering phase of the process to draw out information, particularly from the relevant states. Now, clearly I have not been accorded any compulsory powers in this respect. However, I do find that the combined effect of the process having been established by the Security Council, with the mandate to report to the Committee and the Council, to be very "persuasive". And I stress I do not approach this task passively such that I write letters and await replies. I follow up by email, by letter, by phone or by appointment. I ask questions about the information I receive and seek more details where those are lacking. Generally, I make myself an irritant to many in pursuit of information.

Right to be Heard
If I am successful in this first stage in obtaining information, I then use the dialogue phase to put that information to the Petitioner and, importantly, to draw out an answer to that case. Ultimately, it is that response which can be incorporated as part of my report thereby addressing a second fundamental concept – the right to be 'heard' by the decision maker.

Review
Finally, I move to perhaps the most challenging component of fairness – review. It is clear that I have not been accorded any form of review mandate in terms of the decisions of the Security Council, for very obvious reasons. Nor in fact has there been any shift in the decision making power through the creation of this Office. The power to set and interpret the criteria and to decide on listing and delisting in accordance with it rests solely with the Security Council and its Committee.

Nonetheless, it is within my mandate to gather and review relevant information in the case, to analyze it and to provide my 'observations' to the Committee. In this way, I bring an independent, third party 'eye' to the underlying information related to the listing. In my view, this is a form of review not with respect to decisions, of course, but in relation to the information. To this end, I have from the start indicated that while I have not been accorded a right to make recommendations, I do consider that it is within my mandate to 'observe' or comment on the underlying information. In fact, I have always said I will tell the Committee what I think about the sufficiency of the information, as it stands today, with reference to the listing. In my view, though it is not a conventional approach to review, I believe that it may be adequate to meet this aspect of due process.

It is on this basis that I venture the opinion that the Office of the Ombudsperson can bring sufficient fair process, even if it is in this unusual way. It is arguably a distinct form of fair process suitable to this unique context.

3. Will the Office of the Ombudsperson accord fair process?

While the potential is there, many challenges exist to the fulfilment of that potential. Obviously, it is too early to make any definitive pronouncements. At best, at this stage, I can only identify some of the challenges.

Access to information
First and foremost is the question of access to information. When I mention this issue, immediately, thinking turns to the issue of classified information and whether states are prepared to share that with me. Of course, that remains a critical question. However, it is not just protected information which is problematic.

States may be reluctant to provide answers or face impediments to the release of information even where classification is not the issue. Further, even where the hurdle of providing the information is overcome, it may not occur on a timely basis, thereby impeding the effectiveness of the process overall. There are many reasons for these difficulties, ranging from resources and priorities to a natural reluctance on the part of operational agencies to discuss their cases generally.

As indicated in my Security Council report submitted in January, at least in the early stages cooperation has been good in that states are providing responses. However, as the cases increase I expect there will be issues and challenges in this respect.

Classified/Confidential Information
I return then to the topic of classified information. While there are some cases where resort to such material may be unnecessary, ultimately the cases will arrive where access to classified information is essential. Reflecting on the fundamentals of due process again, even if the information is shared only with me, there is still much value added in having an independent party review it and, to the extent possible, comment as to whether it is sufficient to support a particular point or not. This would be similar to domestic processes which deal with sensitive or national security information, particularly in the context of administrative proceedings.

There are, however, legal and policy obstacles which make the sharing of this information with the Office, a challenge for many states. For this initial period, I have looked for interim and ‘case by case’ solutions which might allow me access. However, in the long term, arrangements or agreements which are institutional are needed to support the practice of sharing such information with the Office of the Ombudsperson. To date, I have secured an arrangement with Switzerland which has allowed for the sharing of information. I continue to appeal to other states to explore the possibility of entering into such agreements or arrangements. In my view, it is of the utmost importance that states support the Office in this way.

Allowing for the Petitioner to be “heard”
As for the use of the dialogue phase and the report, to allow the Petitioner to be “heard”, the first case has certainly demonstrated that these combined mechanisms do work. Thus, it simply remains to be seen whether that pattern will continue in future cases.

Consideration of the Report and the Decision
While one comprehensive report has been submitted to the Committee, no case has been through the full process elaborated by the Council as of yet. Thus, it is premature to comment on the particular challenges of the final aspect of the process which involves consideration of the report by the Committee and decision making. Obviously, it is only once some cases have proceeded through to the end of the process that we will be in a position to fully assess the effectiveness of the Office of the Ombudsperson. In my view, however, that assessment should not focus solely on

outcome but rather the process leading to the outcome. In particular, I think it is critical that the Committee gives careful consideration to the comprehensive reports submitted and ultimately provides a reasoned decision. Those elements, combined with the earlier features of the process as discussed, are, in my view, the means by which fair process can best be measured.

Conclusion

I will leave off there to allow time for discussion. I remain optimistic about the role that this Office can play in bringing enhanced fair process to the 1267 regime. I do so bearing in mind that what is being asked of governments and their agencies is very much a 'sea change' and this of course will take time. However, the stakes in terms of this important counter terrorism regime and the fundamental rights of individuals are very high, so I will continue to strive to do my best to meet the challenges that arise.

APPENDIX VI

PRESENTATION BY MR ERIK WENNERSTRÖM, OBSERVER OF THE CAHDI TO THE INFORMAL WORKING GROUP ON THE ACCESSION OF THE EUROPEAN UNION TO THE EUROPEAN CONVENTION IF HUMAN RIGHTS (CDDH – EU) CONCERNING THE EUROPEAN UNION'S ACCESSION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Through the entry into force of protocol 14 to European Convention of Human Rights (ECHR) 1 June 2010 a legal basis was created in the ECHR for the future accession of European Union (EU) to the convention. With the entry into force of the Treaty of Lisbon and its protocol 8 on 1 December 2009, an obligation was created for the EU to accede to the ECHR, and to accede through an accession treaty.

In the negotiations, the Council of Europe is represented by the Steering Committee for Human Rights (CDDH), while the Commission (CION) has received the negotiating mandate from the EU member States to negotiate the accession treaty. Negotiations were launched in 7 July 2010 in Strasbourg, in an informal working group under CDDH: CDDH-UE that is mandated by CDDH to produce proposals for provisions to an accession treaty up until 30 June 2011.

The group is currently in its sixth meeting since the launch of negotiations, and I would like to state that great progress has been made. Stressing the caveats of the group being informal, noting that every expert has underlined that nothing is agreed until everything is agreed and not at all excluding dissenting opinions, we now have a working document containing a draft accession agreement. Let me take you through some of the main avenues of the discussions held so far.

Among the general principles guiding the work of the group, the central pillars are:

- the need to preserve the system of the Convention as it stands and to limit amendments and adaptations of the system to what is strictly necessary for the purpose of the accession of the EU as a non-state entity with a complex legal system;
- the need to respect the distribution of competencies between the EU and its member states, as well as between the EU institutions;
- the need to permit the EU to join the Strasbourg system on an equal footing with other High Contracting parties.

The issues that our deliberations have focused on are the issues that need to be settled in order to make EU accession possible. Some of these issues relate to the fact that the ECHR and its system were created having exclusively States in mind as high contracting parties. Other issues relate to the specific character of the EU as a legal order with a specific division of competences between its institutions and its member states. In addition to these two categories of issues, the negotiators need to go through the traditional provisions of multilateral treaties, i.e. deciding on the scope of the accession treaty, its relationship to other, neighboring treaties, signatures, entry into force, reservations and the deposit of instruments.

In the first category – technical adaptations – the draft accession treaty will list in an interpretative clause a number of replacements of references to "State", "State parties", "country", "territory", "national laws" etc., terms that need to be transposed into the corresponding functions of the EU.

In the second category – modifications required by the specific character of the EU as a legal order – we find the creation of a co-respondent mechanism, a novelty in the Strasbourg system.

The introduction of a co-respondent mechanism is the chosen way to ensure a proper functioning of the Convention system after the accession of the EU, noting the essential differences between the situation of "multiple respondents" and of "co-respondents". The necessity if this mechanism, permitting the EU to enter as a co-respondent, is most clearly seen when a sole respondent EU

member State would not be in a position to execute the judgment resulting from the violation, i.e. by abolishing the violating act.

With regard to the circumstances in which the mechanism would apply, the co-respondent mechanism might be applied in cases in which there is a substantive link between the alleged violation and a provision of EU law and in which the application is directed against one or more EU member State(s), but not against the EU (or vice versa). The mechanism would therefore allow the EU, the High Contracting Party which is substantively implicated by the application, to join the proceedings as a full party.

Unlike the situation where there are multiple respondents, each answering horizontally to the complaint raised to the extent the Court decides, the co-respondent mechanisms suggests a vertical relationship between the EU and its member States – the EU member States could only avoid violating ECHR by violating EU law. In that situation, the member State cannot carry the full burden of compensating and taking corrective measures for the violation on its own, but the Union shall enter "behind" or "above" the respondent to carry its responsibility.

The group has agreed on the following general principles:

- the request to the Court to be granted leave to join the proceedings as a co-respondent at an early stage should be made by the potential co-respondent and should be reasoned;
- time-limits should be set for the Parties wishing to join the proceedings as co-respondents;
- the final decision on the admission of a co-respondent should be taken by the Court; such decision does not imply a substantive determination of the existence of the link between the alleged violation and a provision of EU law;
- the EU and its member States should adopt internal binding rules setting up their respective obligations and duties in relation to the functioning of the mechanism, including an indication of the circumstances in which a request for joining the proceedings as co-respondent should be made to the Court, and more specifically of the circumstances in which the potential co-respondent would be obliged to request to join the proceedings.

The introduction of a co-respondent mechanism would not alter the current practice under which the Court makes a preliminary assessment of an application, with the result that many manifestly ill-founded or otherwise inadmissible applications are not communicated. (more than 90 %).

As regards the principle of exhaustion of domestic remedies, according to Articles 34 and 35(1) ECHR, the applicant would be required to exhaust only those remedies available in the legal system of the High Contracting Party (or Parties) against which the application was lodged, i.e. if the EU later joins as a co-respondent, the applicant would not be required to exhaust also the EU's "domestic" remedies.

It should also be noted that this mechanism is not likely to become a frequent feature of the Strasbourg system in the future. In recent years, the group has learned of three cases that could, had they occurred after EU accession, have triggered this mechanism:

- Matthews v United Kingdom (App.24833/94) (Article 3 Protocol 1 violation)
- Bosphorus Airlines v Ireland (App. 45036/98)(Article 1 Protocol 1 violation)
- Nederlandse Kokkelvisserij v the Netherlands (App. 13645/05)(Article 6 violation)

Linked to the co-respondent mechanism, are the procedural means to guarantee the prior involvement of the EU Court of Justice in cases in which it has not been able to pronounce on compatibility of an EU act with fundamental rights. In cases where the European Union is a co-respondent, the Court of Justice of the European Union should have the opportunity to rule, if it has not yet done so, on the conformity of the act of the European Union at issue with the EU Charter on Fundamental rights. For this purpose an internal EU accelerated procedure should be identified

and referred to in the accession agreement. On this basis, the working document contains a text for a provision for the accession agreement dealing with the matter.

Turning to the institutional issues, “equal footing” with the other High Contracting Parties requires a judge to be elected in respect of the EU, a judge that participates equally with the other judges in the work of the Court and have the same status and duties. Provisions are needed to permit a delegation of the European Parliament to participate, with the right to vote, in the sittings of the Parliamentary Assembly of the Council of Europe whenever it exercises its functions under Article 22 of the Convention. Provisions are likewise needed to permit the EU to participate in the Committee of Ministers of the Council of Europe when it exercises functions under the Convention. A separate provision will be included in the agreement setting out the financial arrangements between the EU and the Council of Europe linked to EU accession.

Only the current High Contracting Parties to the Convention and the EU will become parties to the accession agreement, and therefore a classical provision opening the latter for signature by any (current and future) party to the Convention will not be necessary. As regards States becoming High Contracting Parties to the Convention after the opening for signature of the accession agreement, the possible need to ensure that they are bound by the provisions of the accession agreement which have “permanent” effects shall be ensured otherwise.

Some of the adaptations and novelties will be achieved by provisions in the accession treaty and a reference to the accession treaty to be introduced in the Convention by an amendment. Other adaptations can only be achieved by amendments to the Convention. As regards the effects of the entry into force of the accession agreement, the ratification of the accession agreement by the 47 High Contracting Parties to the Convention and by the European Union, and the consequent entry into force, will have the simultaneous effect of amending the Convention and include the European Union among its Parties.

The group has a mandate lasting till end of June. No reason to believe that the group will not fulfill its mandate until then – progress is good, even on the tricky parts. A Draft Agreement has now been presented by the Secretariat and the CDDH-UE-group is in session this week deliberating on its provisions. There will probably be issues open until the very end of our mandate. But once the mandate is concluded and the draft accession treaty is presented this summer, the responsibility for it will pass to the decision-making bodies of the Council of Europe and the EU.

APPENDIX VII

French only

INTERVENTION BY MR JEAN-CLAUDE BONICHOT, JUDGE OF THE COURT OF JUSTICE OF THE EUROPEAN UNION RELATED TO THE EUROPEAN UNION'S ACCESSION TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS (ECHR)

L'adhésion de l'Union européenne à la Convention européenne des droits de l'homme est une vieille affaire. Elle est discutée depuis longtemps. Il n'en est que plus étonnant de voir que l'on semble aujourd'hui découvrir l'un après l'autre les problèmes, parfois difficiles, qu'elle pose.

La question n'est pas de savoir si l'adhésion est une bonne ou une mauvaise chose. Elle a ses avantages qui peuvent être grands. Elle a aussi un certain nombre d'inconvénients. Dans des cas de ce genre il appartient aux responsables politiques de décider. C'est ce qu'ils ont fait du côté de l'Union européenne avec le Traité de Lisbonne. C'est ce qu'ils ont aussi fait avec l'adoption, du côté du Conseil de l'Europe, du Protocole 14. Le premier prévoit l'adhésion de l'Union européenne ; le second la permet.

Il n'en demeure pas moins que l'adhésion est pour l'Union européenne une « question constitutionnelle », comme l'avait relevé la Cour de justice dans son avis 1/94.

C'est la raison pour laquelle elle est subordonnée, du côté de l'Union européenne, à un certain nombre de conditions énumérées dans le Protocole 8 au Traité de Lisbonne qui a la même valeur que ce Traité et donc rang de droit primaire de l'Union.

Quelles sont les questions que pose l'adhésion et qu'il est nécessaire de bien voir afin d'en apprécier toute la portée et les problèmes auxquels il est impératif d'apporter des solutions claires ?

Je ne vais pas entrer dans leur détail et me concentrer seulement sur celles qui intéressent plus particulièrement le système juridique communautaire ou, si on préfère, de l'Union.

Mais avant, je voudrais faire une observation.

Les questions posées par l'adhésion sont réelles. Les mettre en avant ne relève nullement d'une volonté de faire obstacle à l'orientation qui a été prise dans le Traité de Lisbonne. Cela ne relève pas non plus d'une « guerre des juges », comme on le laisse parfois entendre. Il n'y a notamment pas d'hostilité de principe de la Cour de justice de l'Union européenne à l'adhésion, ni de crainte frileuse de se retrouver d'une certaine façon sous le contrôle de la Cour de Strasbourg.

La réalité est que les deux systèmes de la Convention européenne des droits de l'homme et de l'Union européenne sont deux systèmes très différents, même s'ils ont leur origine à la même époque et dans le même contexte politique. Ils n'ont pas les mêmes buts, ni la même logique, et il est donc périlleux de vouloir sans autre précaution les coller l'un à l'autre.

Lorsqu'on veut rapprocher des systèmes juridiques différents, il faut soit les fusionner, soit les subordonner l'un à l'autre, soit les coordonner. Quelle que soit l'option retenue, elle suppose que soient fixées des règles claires d'organisation de leurs rapports. Ne pas le faire expose à d'inextricables difficultés, dont, en fin de compte, les citoyens sont les victimes.

C'est, à cet égard, un grand progrès de ces derniers mois que de l'avoir réalisé. En effet, l'idée qu'il fallait avant tout réaliser l'adhésion le plus vite et avec le moins de formalités possibles et que les problèmes qui viendraient éventuellement seraient réglés de manière pragmatique plus tard en comptant sur la bonne volonté des uns et des autres a été au fur et à mesure abandonnée. On est maintenant conscient de l'importance des enjeux et de la nécessité de régler en amont et de la

manière la plus claire possible toutes les questions qui peuvent être raisonnablement envisagées. C'est un bien, car en matière d'institutions et de pouvoirs publics l'improvisation se paye toujours tôt ou tard. Les institutions appellent des règles, et cela vaut encore plus lorsqu'il s'agit de faire travailler ensemble des institutions différentes qui ont chacune leur esprit, leur histoire et leurs traditions.

A ce stade, je ferai juste deux remarques. La première est que la Convention européenne des droits de l'homme a été conçue comme un instrument de contrôle des Etats. Or l'Union européenne n'est pas un Etat : elle est, d'une certaine manière, plus et moins qu'un Etat. La seconde est que la Cour de justice de l'Union européenne n'est pas, contrairement à ce qu'on dit ça et là, dans une situation comparable à celle d'une juridiction d'un Etat. Elle est, comme la Cour européenne des droits de l'homme elle-même, une juridiction supranationale. Elle a à cet égard une fonction particulière et notamment la tâche d'assurer dans l'Union l'unité d'application du droit de l'Union. Dans cette exercice elle réalise déjà un rapprochement et même dans une certaine mesure une harmonisation des droits nationaux. Il ne faut pas beaucoup pour que cette délicate fonction soit mise à mal, et il faut y prendre garde.

J'en viens aux principales questions posées par l'adhésion au système juridique de l'Union européenne.

1) La première, à laquelle on n'avait curieusement pas prêté toute l'attention qu'elle méritait, est tout simplement le statut du droit primaire de l'Union.

Le droit primaire est la constitution de l'Union européenne qui est bien différente de celles des Etats. Ce sont les règles des Traités. Ceux-ci réalisent un équilibre, une forme de compromis, entre les Etats à un moment donné. Ils prévoient non seulement les objectifs de l'Union, mais la distribution des compétences et la manière dont elles seront exercées en posant dans certains domaines le principe d'un développement progressif.

Une première constatation peut ici être faite : la « constitution » de l'Union prévoit des régimes juridiques différents selon les domaines. Ainsi, par exemple, la politique étrangère et de sécurité commune est-elle presque entièrement soustraite au contrôle de la Cour de justice de l'Union européenne[1]. Il serait assez paradoxal que, soustraite à son juge naturel, elle soit sujette au contrôle de la Cour de Strasbourg. En tout cas les Etats membres de l'Union européenne doivent être conscients qu'une adhésion sans précision à cet égard aurait cet effet.

Autre constatation : cette « constitution » prévoit un « système complet », comme l'a dit la Cour de justice à de multiples reprises, de voies de recours juridictionnelles. Ce système « complet » est ainsi conçu que les actes généraux ne peuvent être attaqués que dans de strictes conditions de recevabilité devant la Cour de justice et que les particuliers les contestent à l'occasion de l'application qui leur est faite du droit de l'Union à l'intérieur des Etats devant leurs juridictions. Celles-ci saisissent si besoin est la Cour de justice des questions d'interprétation et, le cas échéant, de validité qui se posent. Il s'agit donc d'un système décentralisé. Ce système « complet » qui fonctionne bien a notamment ce double avantage que les juridictions de l'Union ne sont saisies que d'un nombre limité de litiges qu'elles arrivent, au prix d'ailleurs d'un effort constant, à juger dans des délais raisonnables et qu'il assure une protection juridictionnelle qui s'est révélée au fil des années tout à fait satisfaisante.

Il va de soi qu'il ne saurait être question que ce système puisse être remis en cause d'une quelconque manière du fait de l'adhésion, sous peine de déséquilibrer toute la construction communautaire qui repose, cela mérite d'être répété, sur la décentralisation de l'application du droit de l'Union.

[1] A l'exception notable mais unique des mesures restrictives qui peuvent être prises à l'encontre de personnes physiques ou morales, par exemple dans le cadre de la lutte contre le terrorisme.

Une troisième remarque du point de vue du droit primaire est l'importance de la fonction d'interprétation de la Cour de justice de l'Union européenne.

A cet égard, un élément cardinal doit être relevé. En effet, lorsqu'on s'interroge sur les rapports du droit de la Convention européenne des droits de l'homme et du droit de l'Union et donc sur le rôle que pourrait jouer à cet égard la Cour européenne des droits de l'homme, on met surtout en avant le contrôle de la validité, autrement dit de la légalité, du droit de l'Union et on insiste à juste titre sur le monopole à cet égard de la Cour de justice. Je reviendrai d'ailleurs sur ce point par après. Mais il faut bien voir que tout aussi importante est l'interprétation du droit de l'Union. C'est en donnant au droit de l'Union son interprétation que la Cour de justice assure avant tout dans la pratique l'unité de mouvement de l'Union, c'est-à-dire assure que dans tous les Etats membres les règles de la Communauté soient appliquées de la même manière. C'est pourquoi on a pu dire que cette interprétation était le moteur de l'Europe communautaire. Elle en est le moteur car la Cour de justice est seule à même de délivrer l'interprétation qui soit dans la logique de la législation et des politiques de l'Union. C'est aussi à l'occasion de l'interprétation qu'elle en donne que la Cour de justice garantit que le droit de l'Union reçoit un contenu conforme aux droits fondamentaux et notamment à la Charte des droits fondamentaux de l'Union. Dès lors, s'il convient d'assurer une coordination de l'intervention de l'une et l'autres Cours, cela vaut tout autant pour les questions de validité que pour celles d'interprétation[2].

Enfin, si l'on peut dire, il faut tenir compte de l'adoption de la Charte des droits fondamentaux de l'Union européenne et de la valeur de droit primaire qui lui a été donnée par le Traité de Lisbonne. Il va de soi que l'existence même de la Charte change les données du problème. Il est certes vrai que celle-ci pose dans son article 52 la règle selon laquelle les droits qu'elle reconnaît et qui correspondent à des droits qui figurent dans la Convention européenne des droits de l'homme ont le même sens et la même portée que ceux que leur confère la convention, et donc la jurisprudence de la Cour de Strasbourg[3]. Il n'en demeure pas moins, d'une part, que la Cour de justice est naturellement amenée à appliquer en priorité la déclaration des droits propre à l'Union, d'autre part, que cette dernière prévoit expressément la prise en compte des objectifs d'intérêt général de l'Union européenne.

2) La deuxième question, techniquement fort difficile, est de savoir comment assurer pour ce qui est de l'Union, l'application de ce principe de base de la Convention européenne des droits de l'homme qu'est le principe de subsidiarité.

Comme on le sait, les organes de contrôle de la Convention européenne des droits de l'homme n'interviennent qu'en dernier ressort, une fois que les organes nationaux ont exercé leurs propres fonctions. Ainsi est garanti le rôle spécifique de la Cour de Strasbourg et assuré qu'elle ne se substitue pas aux administrations et juridictions nationales. Ainsi est aussi assuré un certain filtrage des affaires qui lui sont soumises. C'est là le rôle de cette règle cardinale dans le système européen de protection des droits de l'homme qu'est l'épuisement des voies de recours internes.

Il est tout à fait évident que cette règle doit s'appliquer aussi vis-à-vis de l'Union européenne. Il est non moins évident que cela pose des difficultés particulières compte tenu de la nature de l'Union, partant de sa structure et de son mode de fonctionnement qui sont différents de ceux des États.

Ce ne sont pas tellement les mises en cause directes d'actes ou de comportements des organes de l'Union qui font problème. En effet, sous réserve de ce qui a été dit à l'instant à propos du système "complet" de voies de recours des Traités, la règle de l'épuisement devrait jouer normalement. C'est-à-dire qu'il doit être exigé que l'intéressé qui conteste un acte de l'Union ou

[2] La nécessité de cette coordination a été mise en avant dans un "Document de réflexion de la Cour de justice de l'Union européenne sur certains aspects de l'adhésion de l'Union européenne à la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales, du 5 mai 2010. Une telle déclaration de la Cour de justice alors que des négociations sont en cours est une première.

[3] Ce dont la Cour de justice a déjà tiré les conséquences dans sa jurisprudence: CJUE, 5 octobre 2010, J. McB, C-410-PPU ; 22 décembre 2010, DEB Deutsche Energiehandels-und Beratungsgesellschft mbh, C-279/09.

une action de ses institutions ou organes utilise les recours qui sont à sa disposition en vertu du droit de l'Union avant de saisir la Cour européenne des droits de l'homme.

En revanche, la question est plus difficile si l'on se place du point de vue de l'application du droit de l'Union dans les différents États membres, dans le cadre de ce système décentralisé dont j'ai déjà parlé.

Il faut commencer par bien déterminer la position du problème.

Le droit de l'Union est largement appliqué dans les États membres et par les États membres. Les juridictions nationales sont, selon une expression consacrée, les juges de droit commun de l'Union européenne. Afin d'assurer l'unité d'application du droit de l'Union, ils peuvent et parfois doivent saisir la Cour de justice de questions préjudicielles[4]. Celles-ci peuvent porter sur l'interprétation du droit de l'Union ou sur la validité des actes adoptés par les institutions de l'Union. On dit souvent que c'est "la clé de voûte" du système communautaire.

C'est à l'occasion de l'application du droit de l'Union dans les États membres et donc à l'occasion aussi des litiges portés devant leurs juridictions que peuvent se poser des questions de respect de la Convention européenne des droits de l'homme. En effet, un justiciable peut soutenir que telle règle du droit de l'Union porte directement atteinte ou porte atteinte par la manière dont elle est appliquée aux droits consacrés par la convention.

Dans ce cas de figure, le juge national peut interroger la Cour de justice à titre préjudiciel et lui demander si telle règle du droit dérivé est légale ou, comme on dit aussi, valide, compte tenu des exigences de la convention. Il sera d'ailleurs aussi enclin à poser la question par rapport à la Charte des droits fondamentaux de l'Union européenne. De même, le juge national peut demander à la Cour de justice comment il faut interpréter une disposition du droit primaire dont il serait soutenu qu'elle porte atteinte aux libertés fondamentales.

Telle est la voie que l'on peut qualifier de normale. Saisie de la question préjudicielle, la Cour de justice dira si l'acte contesté, règlement ou directive, par exemple, est ou non valide. Dans cet exercice, elle pourra mettre en balance les droits garantis et l'intérêt général de l'Union, comme le font toutes les cours suprêmes ou constitutionnelle des États. Elle pourra aussi donner du texte une "interprétation neutralisante", c'est-à-dire délivrer, avec autorité de chose jugée, une interprétation qui respecte les droits fondamentaux, comme elle le fait souvent. La même chose vaut pour le droit primaire. Ainsi, par exemple, la Cour de justice a-t-elle été amenée à mettre en balance la liberté de prestation de services et la liberté d'établissement avec le droit d'action collective des salariés d'une entreprise. De même s'est-elle interrogée sur les rapports entre la liberté de prestation de services et la dignité humaine.

Il est nécessaire que cette "voie normale" soit suivie et donc qu'il soit bien clair que lorsque la Cour de justice a été saisie d'une question préjudicielle, le principe de subsidiarité et la règle qui en découle, de l'épuisement des voies de recours internes, imposent que la Cour de Strasbourg ne puisse être saisie qu'une fois que la Cour de justice aura rendu son arrêt et que le juge national en aura tiré les conséquences.

Cela paraît à de nombreux observateurs aller de soi, mais encore faut-il le dire expressément. C'est une règle qui doit être posée.

Mais le problème ne s'arrête pas là.

En effet, la voie préjudicielle n'est pas un droit des justiciables. C'est, comme l'a dit depuis très longtemps la Cour de justice, et comme elle le répète souvent encore aujourd'hui, un mécanisme

[4] C'est le mécanisme bien connu de l'article 177 CEE, devenu article 267 TFUE.

de coopération entre les juges nationaux et la Cour, ou selon cette expression très parlante, un "dialogue de juge à juge".

C'est ce qui explique que le juge national confronté à une difficulté d'application du droit de l'Union puisse parfaitement, et en toute légalité par rapport à la jurisprudence de la Cour de justice sur le renvoi préjudiciel, ne pas saisir la Cour. Il peut le faire lorsqu'il s'estime à même de résoudre la difficulté lui-même. Il peut aussi le faire parce qu'il considère que la Cour de justice l'a déjà tranchée. Il peut encore le faire parce qu'il estime pouvoir déduire de la jurisprudence de la Cour la réponse à sa question.

Dans des situations de ce type aussi, c'est à dire lorsque se pose une question de droit de l'Union et qu'elle n'en a pas été saisie, la Cour de justice doit pouvoir jouer son rôle. Si dans un tel cas de figure un requérant soutient que le droit de l'Union tel qu'il lui a été appliqué viole tel ou tel droit fondamental, la Cour de justice doit pouvoir prendre préalablement position. Autrement, la Cour de Strasbourg pourrait être amenée à se prononcer sur une question de droit de l'Union sur laquelle la Cour de justice n'aurait pas eu la possibilité de s'exprimer.

Amenée à prendre position dans ce cas de figure, la Cour de justice pourra jouer le rôle qui est le sien et, comme on l'a vu précédemment, dire si l'acte appliqué est ou non légal, éventuellement donner l'interprétation conforme au respect des droits fondamentaux qui doit en être donnée, ou encore donner son interprétation du droit primaire et assurer, du point de vue du droit de l'Union la nécessaire conciliation des doits et libertés avec les objectifs et l'intérêt général de l'Union. Le cas échéant, elle peut être amenée à modifier sa jurisprudence existante sur laquelle le juge national s'était précisément fondé pour ne pas la saisir d'une question préjudicielle.

A la Cour européenne des droits de l'homme, éventuellement saisie ensuite, de remplir la fonction qui est la sienne et de dire si ce qu'a dit la Cour de Luxembourg est compatible avec la Convention européenne des droits de l'homme.

Il faut bien voir, en effet, que le dialogue des juges tel qu'il est organisé dans l'Union européenne est un dialogue institutionnel qui repose sur la confiance mutuelle. Il en résulte que la question préjudicielle n'est pas du tout conçue comme un droit subjectif des justiciables. C'est un instrument de coopération en vue de la bonne application du droit de l'Union. Ce mécanisme qui a été construit au fil des années par la Cour de justice et par les juridictions nationales, qui fonctionne bien et qui est essentiel pour la bonne marche de l'Union européenne, doit être combiné avec le contrôle de la Cour de Strasbourg.

C'est pourquoi il a été proposé de réfléchir à un système permettant que la Cour de justice puisse dans tous les cas se prononcer préalablement sur la question de savoir si l'application du droit de l'Union conduit ou non à la violation de tel ou tel droit fondamental, c'est-à-dire aussi lorsque aucune question préjudicielle ne lui aurait été posée. Cette proposition a d'abord été faite par M. Timmermans, ancien président de chambre à la Cour de justice, sous la forme d'une sorte de question préalable qu'aurait pu soulever la Commission européenne.

A la suite de cette proposition, l'idée de ce qu'il est désormais convenu d'appeler "implication préalable" de la Cour de justice a fait son chemin. La question est tellement importante pour le bon fonctionnement de l'adhésion qu'elle a fait l'objet d'une "communication commune" des présidents de la Cour européenne des droits de l'homme et de la Cour de justice du 24 janvier 2011, à la suite de la rencontre annuelle des deux Cours[5].

[5] On peut lire dans cette "déclaration", sur le point en question: "afin que le principe de subsidiarité puisse être respecté également dans cette situation, il est indiqué de mettre en place, dans le cadre de l'adhésion de l'UE à la Convention, une procédure souple susceptible de garantir que la CJUE puisse effectuer un contrôle interne avant que n'intervienne le contrôle externe exercé par la CEDH. Les modalités de la mise en œuvre d'une telle procédure, qui n'exige pas une modification de la Convention, devraient tenir compte des caractéristiques spécifiques du contrôle juridictionnel exercé respectivement par ces deux juridictions. A cet égard, il importe que la typologie des cas de figure dans lesquels la CJUE peut être saisie soit clairement définie. De même, l'examen de la conventionalité de l'acte litigieux ne devrait reprendre avant que les parties intéressées n'aient été en mesure d'apprécier utilement les éventuelles conséquences à

La "Déclaration commune" est une contribution importante au débat. Elle montre clairement le souci commun des deux Cours d'assurer expressément dans l'accord d'adhésion la coordination du système de la Convention européenne des droits de l'homme et de celui de l'Union. Elle fait apparaître la nécessité de cette structuration des deux systèmes. Elle doit toutefois être prise comme un cadre de réflexion et non comme l'énoncé d'une règle. Ainsi, si elle parle du problème de la "validité" d'un acte de l'Union, elle le fait évidemment au sens large et doit être lue en ce sens que lorsque la compatibilité du droit de l'Union ou la manière dont il est appliqué ou interprété sont mises en cause la Cour de justice doit se prononcer d'abord. Cela tant pour le droit dérivé, qu'on appelle aussi secondaire, que pour le droit primaire.

Il est important de noter qu'il ne s'agit pas seulement de parer au risque, en soi déjà majeur, que deux Cours européennes se prononcent parallèlement sur la même question du respect des droits de l'homme ou des libertés fondamentales et prennent éventuellement des positions divergentes.

Cette "implication préalable" de la Cour de justice a aussi de sérieux avantages. Le premier est de permettre de résoudre une question en amont en décidant s'il y a ou non violation d'un droit ou d'une liberté dans l'ordre juridique de l'Union, ce qui peut mettre un point final à l'affaire. Le deuxième est de permettre l'expression de ce qu'on pourrait appeler le "point de vue communautaire". Il est en effet essentiel qu'une question de droits fondamentaux puisse être appréciée à l'aune du droit de l'Union, comme elle l'est à l'aune du droit national lorsqu'elle se pose dans ce dernier contexte. A cet égard, il ne faut pas perdre de vue que le système de l'Union a sa logique et ses nécessités propres et qu'en particulier les administrations ainsi que les juges nationaux doivent appliquer une législation souvent complexe et qui souvent aussi est matière à interprétation. Enfin, il ne faut pas oublier que l'intervention préalable de la Cour de justice permet la prise en compte de la déclaration des droits de l'Union européenne qu'est la Charte des droits fondamentaux qui doit, comme on sait, se combiner avec la Convention européenne des droits de l'homme.

Les textes qui ont été mis au point jusqu'à présent dans le cadre des négociations prennent en compte dans une certaine mesure ces préoccupations. On est donc sur la bonne voie. Il me semble toutefois que les réflexions doivent être poursuivies et approfondies. En particulier, je crois que, comme il est dit dans la "communication commune" des présidents des deux Cours, les cas de figure du renvoi d'une affaire à la Cour de justice doivent être mieux définis. Je pense aussi que la question de l'implication préalable de la Cour de justice est une question distincte de celle de l'institution d'un mécanisme de codéfendeur.

3) Bien d'autres questions se posent qui ne sont pas l'objet principal de mon intervention d'aujourd'hui.

Je ne ferai donc que les évoquer en terminant et avant de répondre aux questions, si vous en avez.

On peut bien sûr se demander ce qu'il adviendrait en cas de conflit persistant entre les deux Cours sur un point important. A cet égard on avait mis en avant il y a déjà quelques années la nécessité d'un organe ou, au moins un système de règlement des conflits.

Comme vous le savez, le mécanisme du codéfendeur fait l'objet de discussions. Il s'agit d'un point important sur lequel tous les États de l'Union peuvent ne pas être d'accord. Il revient, en effet, à lier leur défense devant la Cour de Strasbourg à celle de l'Union, alors qu'ils peuvent ne pas le vouloir, ne serait-ce que parce qu'ils peuvent ne pas vouloir défendre un acte à l'adoption duquel ils étaient opposés.

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tirer de la position prise par la CJUE et, le cas échéant, de soumettre des observations à cet égard à la CEDH, dans un délai qui leur sera imparti à cette fin conformément aux dispositions régissant la procédure devant cette dernière. Pour éviter que la procédure devant la CEDH ne soit différée de manière déraisonnable, la CJUE pourrait être amenée à statuer en procédure accélérée".

Doit aussi être résolue la question du juge de l'Union et de la représentation de celle-ci au comité des ministres.

Tous ces points doivent faire l'objet d'un accord pour que l'adhésion puisse se réaliser.

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Je vous remercie de votre attention et je suis maintenant à votre disposition pour répondre à vos questions.

APPENDIX VIII

TABLE OF OBJECTIONS

OBJECTIONS TO OUTSTANDING RESERVATIONS AND DECLARATIONS TO INTERNATIONAL TREATIES
OBJECTIONS AUX RÉSERVES ET DÉCLARATIONS AUX TRAITÉS INTERNATIONAUX SUSCEPTIBLES D'OBJECTION

Legend / *Légende*:

Sign. : Made upon signature / *Formulée lors de la signature*
● State has objected / *L'Etat a fait objection*
⭘ State intends to object / *L'Etat envisage de faire objection*
◘ State does not intend to object / *L'Etat n'envisage pas de faire objection*
♦ State intends to make a declaration upon ratification / *L'Etat envisage de faire une déclaration au moment de la ratification*

TREATIES / *TRAITÉS*

PART I / *PARTIE I* : RESERVATIONS AND DECLARATIONS TO TREATIES CONCLUDED OUTSIDE THE COUNCIL OF EUROPE / *RESERVES ET DECLARATIONS AUX TRAITES CONCLUS EN DEHORS DU CONSEIL DE L'EUROPE*

A. International Covenant on Civil and Political Rights / *Pacte international relatif aux droits civils et politiques*, New York, 16 December / *décembre* 1966
B. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment / *Convention contre la torture et autres peines ou traitements cruels, inhumains ou dégradants*, New York, 10 December / *décembre* 1984
C. Convention on the Elimination of All Forms of Discrimination against Women / *Convention sur l'élimination de toutes les formes de discrimination a l'égard des femmes*, New York, 18 December / *décembre* 1979
D. Convention on the Rights of the Child / *Convention relative aux droits de l'enfant*, New York, 20 November / *novembre* 1989
E. Convention on the Rights of Persons with Disabilities / *Convention relative aux droits des personnes handicapées*; New York, 13 December / *décembre* 2006
F. International Convention against the Taking of Hostages / *Convention internationale contre la prise d'otages*, New York, 17 November / *novembre* 1979
G. International Convention for the Suppression of Acts of Nuclear Terrorism / *Convention internationale pour la répression des actes de terrorisme nucléaire*, New York, 13 April / *avril* 2005
H. Convention on Cluster Munitions / *Convention sur les armes a sous-munitions*, Dublin, 30 May / *mai* 2008
I. United Nations Convention against Transnational Organized Crime / *Convention des Nations Unies contre la criminalité transnationale organisée*, New York 15 November / *novembre* 2000
J. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime / *Protocole additionnel à la Convention des Nations Unies contre la criminalité transnationale organisée visant à prévenir, réprimer et punir la traite des personnes, en particulier des femmes et des enfants* , New York 15 November / *novembre* 2000
K. Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime / *Protocole contre le trafic illicite de migrants par terre, mer et air*, *additionnel à la Convention des Nations Unies contre la criminalité transnationale organisée,* New York, 15 November / *novembre* 2000

PART II / *PARTIE II* : RESERVATIONS AND DECLARATIONS TO COUNCIL OF EUROPE TREATIES / *RESERVES ET DECLARATIONS AUX TRAITES CONCLUS AU SEIN DU CONSEIL DE L'EUROPE*

A. Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data / *Convention pour la protection des personnes à l'égard du traitement automatisé des données à caractère personnel*, (ETS N° 108), 1 October / *octobre* 1985
B. Council of Europe Convention on Action against Trafficking in Human Beings / *Convention du Conseil de l'Europe sur la lutte contre la traite des êtres humains*, (CETS N° 197), 1 February / *février* 2008

PART I / *PARTIE I* : RESERVATIONS AND DECLARATIONS TO TREATIES CONCLUDED OUTSIDE THE COUNCIL OF EUROPE / *RESERVES ET DECLARATIONS AUX TRAITES CONCLUS EN DEHORS DU CONSEIL DE L'EUROPE*

States / *Etats*	Convention	A	B	C	D		E	F	G		H	I	J	K
		1	2	3	4	5	6	7	8	9	10	11	12	13
	Reservation/ *Réserve*	Pakistan *Pakistan*	Pakistan *Pakistan*	Malaysia *Malaisie*	Malaysia *Malaisie*	Thailand *Thaïlande*	Malaysia *Malaisie*	Singapore *Singapour*	Morocco *Maroc*	China *Chine*	El Salvador *El Salvador*	Greece *Grèce*	Greece *Grèce*	Greece *Grèce*
	Deadline *Délai*	28/06/11	28/06/11	27/07/11	27/07/11	14/12/11	03/08/11	08/11/11	05/04/11	14/11/11	16/01/12	18/01/12	18/01/12	18/01/12
Albania / *Albanie*														
Andorra / *Andorre*														
Armenia / *Arménie*														
Austria / *Autriche*														
Azerbaijan / *Azerbaïdjan*														
Belgium / *Belgique*														
Bosnia and Herzegovina / *Bosnie-Herzégovine*														
Bulgaria / *Bulgarie*														
Croatia / *Croatie*														
Cyprus / *Chypre*														
Czech Republic / *République tchèque*														
Denmark / *Danemark*														
Estonia / *Estonie*														
Finland / *Finlande*														
France							●							
Georgia / *Géorgie*														
Germany / *Allemagne*				●	●									
Greece / *Grèce*														
Hungary / *Hongrie*														
Iceland / *Islande*														
Ireland / *Irlande*														
Italy / *Italie*														
Latvia / *Lettonie*														

States / *Etats*	Convention	A	B	C	D		E	F	G		H	I	J	K
		1	2	3	4	5	6	7	8	9	10	11	12	13
	Reservation/ *Réserve*	Pakistan *Pakistan*	Pakistan *Pakistan*	Malaysia *Malaisie*	Malaysia *Malaisie*	Thailand *Thaïlande*	Malaysia *Malaisie*	Singapore *Singapour*	Morocco *Maroc*	China *Chine*	El Salvador *El Salvador*	Greece *Grèce*	Greece *Grèce*	Greece *Grèce*
	Deadline *Délai*	28/06/11	28/06/11	27/07/11	27/07/11	14/12/11	03/08/11	08/11/11	05/04/11	14/11/11	16/01/12	18/01/12	18/01/12	18/01/12
Liechtenstein														
Lithuania / *Lituanie*														
Luxembourg														
Malta / *Malte*														
Moldova														
Monaco														
Montenegro														
Netherlands / *Pays-Bas*														
Norway / *Norvège*														
Poland / *Pologne*														
Portugal														
Romania / *Roumanie*														
Russian Federation / *Fédération de Russie*														
San Marino / *Saint-Marin*														
Serbia / *Serbie*														
Slovakia / *Slovaquie*														
Slovenia / *Slovénie*														
Spain / *Espagne*														
Sweden / *Suède*							o							
Switzerland / *Suisse*														
"the former Yugoslav Republic of Macedonia"/ *"l'ex-République yougoslave de Macédoine"*														

States / *Etats*	Convention	A	B	C	D		E	F	G		H	I	J	K
		1	2	3	4	5	6	7	8	9	10	11	12	13
	Reservation/ *Réserve*	Pakistan *Pakistan*	Pakistan *Pakistan*	Malaysia *Malaisie*	Malaysia *Malaisie*	Thailand *Thaïlande*	Malaysia *Malaisie*	Singapore *Singapour*	Morocco *Maroc*	China *Chine*	El Salvador *El Salvador*	Greece *Grèce*	Greece *Grèce*	Greece *Grèce*
	Deadline *Délai*	28/06/11	28/06/11	27/07/11	27/07/11	14/12/11	03/08/11	08/11/11	05/04/11	14/11/11	16/01/12	18/01/12	18/01/12	18/01/12
Turkey / *Turquie*														
Ukraine														
United Kingdom / *Royaume-Uni*														
Canada														
Holy See / *Saint-Siège*														
Israel														
Japan / *Japon*														
Mexico / *Mexique*														
United States of America / *Etats-Unis d'Amérique*														

(*) Consideration of political statement / *Considération d'une déclaration de nature politique*
(**) If confirmed upon ratification / *Si confirmé lors de la ratification*
(***) Considers it a late reservation and therefore not in force / *Considère ceci comme une réserve tardive et donc pas en vigueur*

PART II / *PARTIE II* : RESERVATIONS AND DECLARATIONS TO COUNCIL OF EUROPE TREATIES / *RESERVES ET DECLARATIONS AUX TRAITES CONCLUS AU SEIN DU CONSEIL DE L'EUROPE*

	Convention	A	B
		1	2
States / *Etats*	**Reservation/ *Réserve***	Azerbaijan *Azerbaïdjan*	Azerbaijan *Azerbaïdjan*
	Deadline *Délai*	06/05/11	01/07/11
Albania / *Albanie*			
Andorra / *Andorre*			
Armenia / *Arménie*			
Austria / *Autriche*			
Azerbaijan / *Azerbaïdjan*			
Belgium / *Belgique*			
Bosnia and Herzegovina / *Bosnie-Herzégovine*			
Bulgaria / *Bulgarie*			
Croatia / *Croatie*			
Cyprus / *Chypre*			
Czech Republic / *République tchèque*			
Denmark / *Danemark*			
Estonia / *Estonie*			
Finland / *Finlande*			
France			
Georgia / *Géorgie*			
Germany / *Allemagne*			
Greece / *Grèce*			
Hungary / *Hongrie*			
Iceland / *Islande*			
Ireland / *Irlande*			
Italy / *Italie*			
Latvia / *Lettonie*			
Liechtenstein			
Lithuania / *Lituanie*			
Luxembourg			
Malta / *Malte*			
Moldova			
Monaco			
Montenegro			
Netherlands / *Pays-Bas*			
Norway / *Norvège*			
Poland / *Pologne*			
Portugal			
Romania / *Roumanie*			
Russian Federation / *Fédération de Russie*			
San Marino / *Saint-Marin*			
Serbia / *Serbie*			
Slovakia / *Slovaquie*			
Slovenia / *Slovénie*			
Spain / *Espagne*			
Sweden / *Suède*			
Switzerland / *Suisse*			
"the former Yugoslav Republic of Macedonia"/ *"l'ex-République yougoslave de Macédoine"*			
Turkey / *Turquie*			
Ukraine			
United Kingdom / *Royaume-Uni*			
Canada			
Holy See / *Saint-Siège*			
Israel			
Japan / *Japon*			
Mexico / *Mexique*			
United States of America / *Etats-Unis d'Amérique*			

(*) Consideration of political statement /
Considération d'une déclaration de nature politique

(**) If confirmed upon ratification /
Si confirmé lors de la ratification

(***) Considers it a late reservation and therefore not in force / *Considère ceci comme une réserve tardive et donc pas en vigueur*

APPENDIX IX

PRESENTATION BY THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) REGARDING THE CONSIDERATION OF CURRENT ISSUES OF INTERNATIONAL HUMANITARIAN LAW

Since October of last year, the ICRC has conducted consultations with States on the need and feasibility of strengthening international humanitarian law to better provide protection for victims of armed conflicts. Whereas the ICRC believes that overall existing rules of international humanitarian law remain appropriate, it also considers that this legal framework should be developed in four specific areas to strengthen the protection of persons affected by armed conflicts. This was announced and further explained on 21 September 2010 by the ICRC President in a speech delivered to the States' permanent missions in Geneva.

These four areas identified include first the *protection for persons deprived of liberty*. One of the main concerns is the lack of procedural safeguards for persons detained for security reasons during non-international armed conflicts. In practice, such persons may be subjected to long periods of internment without being properly informed of the reasons for their detention, and there is no process available to them for challenging the lawfulness of their internment. Another issue of concern is the risks to which detainees are exposed when they are transferred from one authority to another. In certain instances, such persons have endured serious violations of their rights, such as persecution, torture, forced disappearance, and even murder. The need to ensure satisfactory conditions of detention, especially for particularly vulnerable persons, such as women or children, must in our view also be addressed through legal development.

Implementation of humanitarian law is the second area in which legal development should be contemplated. Failure to comply with international humanitarian law is without a doubt the main cause of suffering in armed conflicts. Yet, most of the mechanisms provided under humanitarian law to ensure compliance with the law have proved to be insufficient so far. While it is true that monitoring activities in armed conflicts were made possible through the use of mechanisms developed outside the ambit of humanitarian law, these mechanisms, too, have their limitations. Linked with the issue of implementation, reparation for victims of violations of humanitarian law is another crucial issue.

The third area of concern in which humanitarian law has to be reinforced is *protection of the natural environment*. The serious harm done to the natural environment during a number of armed conflicts has only added to the vulnerability of those affected by the fighting. However, the law protecting the environment during armed conflict is not always clear; nor is it sufficiently developed. For instance, treaty law does not contain a specific requirement to protect and preserve the environment in hostilities during non-international armed conflict.

Lastly, the *protection of internally displaced persons* in armed conflicts is the fourth area in which the ICRC believes humanitarian law should be strengthened. Humanitarian law should develop for instance measures that enable internally displaced persons to return to their homes or places of residence in satisfactory conditions. Legal development is also necessary to ensure that family unity is preserved or that internally displaced persons have access to the documents they need in order to enjoy their rights.

The ICRC will decide in the coming weeks, on the basis of its assessment of the current States' consultation, which of these four areas it will keep promoting for possible reinforcement of international humanitarian law. The ICRC will present its assessment, together with the main conclusions of its internal study, to the 31st International Conference of the Red-Cross and Red-Crescent in November/December for further debate. The main question that the ICRC would like to ask on this occasion is whether the participants in the Conference consider that further consultation should be pursued with a view to determine the most appropriate solutions. The ICRC will therefore not come to the International Conference with concrete substantive proposals for

further strengthening the law. This would have to be discussed at a later stage with States. The ICRC received the mandate to propose and prepare possible developments of international humanitarian law, but only States have the power to really make changes in this regard.

The ICRC would like to thank all those who expressed their interest in this study and already participated in the consultation. The ICRC will pursue discussions with States with a view to prepare the International Conference and possible follow-up. Developing international humanitarian law is a long term process requiring broad participation. The ICRC would therefore very much appreciate to enter into further dialogue with States on the most appropriate way to conduct this process.

The 31st International Conference of the Red Cross and Red Crescent will not only be a platform for discussion of the ICRC Study on the need and feasibility to develop international humanitarian law. It will also be an opportunity to discuss further challenges concerning the interpretation and/or application of this body of law and to promote its compliance. In that respect, the ICRC will submit a report on "IHL and the Challenges of Contemporary Armed Conflicts" on the model of those already produced respectively for the 2003 and 2007 International Conferences. This report may serve as a basis for debate and reflection on some key IHL challenges during the International Conference.

The ICRC will also present a report on the main security issues affecting the provision of and access to health care in armed conflicts and other situations of violence. States and components of the Red Cross / Red Crescent Movement have stressed the importance of provision of and access to health care based on accepted domestic and international norms. The IC should debate the outcomes and recommendations of the report and examine how best to address the challenges and propose a way forward for Governments and Movement components.

As the International Conference is getting closer, it is time to assess and report on the implementation of pledges – many of which IHL-related – made in the framework of the previous Conference, in 2007. Participants in the upcoming International Conference of the Red Cross and Red Crescent should also start working on the identification of new pledges they are ready to make, individually or jointly with others, for the coming few years.

I would like to conclude my intervention by mentioning the successful organization by the ICRC, in October 2010, of the Third Universal Meeting of National Committees for the Implementation of IHL. The Meeting addressed the role, functioning and activities of such National Committees and the implementation of the ICC Statute. Members from 78 national IHL bodies (including those of 21 Member States of the Council of Europe*), representatives from States interested in establishing such structures and from regional and international organizations, as well as members of National Red Cross and Red Crescent Societies and experts attended the event. They discussed, amongst other issues, the advantages and challenges of a broad approach to the implementation of the ICC Statute at a domestic level. A report of the meeting is being prepared by the ICRC Advisory Service on IHL and will include information on States' best practices in this domain.

*Austria, Belgium, Croatia, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, Moldova, Poland, Romania, Serbia, Slovenia, Spain, Sweden, Switzerland, Ukraine and United Kingdom.

APPENDIX X

RESULTS OF THE DISCUSSIONS IN THE COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI) ON THE DRAFT COUNCIL OF EUROPE CONVENTION ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE

1. During its 41st meeting, the Committee of Legal Advisers on Public International Law (CAHDI) held an exchange of views on the request of the Committee of Ministers regarding Articles 3, 4, 5, 60 and 61 of the *draft Council of Europe Convention on preventing and combating violence against women and domestic violence*.

2. During this exchange of views, there was a consensus that it would not be appropriate for CAHDI to reopen the negotiations on the draft Convention, because of its importance, with a view to its adoption, and, to this end, delegations agreed that the clarifications below should be reflected in the explanatory report.

3. In CAHDI, a consensus has been reached on the interpretation of the provisions contained in the request of the Committee of Ministers and it has been acknowledged that the legal issues raised could helpfully be clarified, as follows:

4. With regard to Articles 3 and 4, CAHDI noted that the draft Convention is an agreement between States, which would create obligations only for them. These provisions do not create any new rights but clarify existing human rights. Any obligations for individuals would follow from such legislative and other measures which State Parties adopt in accordance with the convention.

5. With regard to the title of Article 5, delegations agreed that the reference to "State responsibility" was not in conformity with the content of the provision and that it should be changed to "*State obligations and due diligence*". It was agreed that no adjustment should be made to the content of the provision, which reflects the case-law of the European Court of Human Rights.

6. With regard to Articles 60 and 61, the provisions of the Convention are intended to be read so that they are compatible with the 1951 *Convention relating to the Status of Refugees* and Article 3 of the *European Convention of Human Right* as interpreted by the European Court of Human Rights. In addition, these provisions do not go beyond the scope of application of the said instruments but give them practical dimension.

7. Delegations agreed that in addition to this note it would be appropriate to reflect paragraphs 4, 5 and 6 above in the explanatory report.

APPENDIX XI

PRESENTATION BY MR HANS VAN LOON, SECRETARY GENERAL OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, ON THE CORRELATION BETWEEN RECENT CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS AND THE CONVENTIONS ADOPTED IN THE FRAMEWORK OF THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

Introduction: The Relationship between the Council of Europe and the Hague Conference: Complementarity

1. The Council of Europe and the Hague Conference on Private International Law have a long-standing working relationship. The formal basis for our cooperation is a treaty of 13 December 1955[1]. This agreement also provides that the two organisations should avoid overlap in their work, and that the Committee of Ministers of the Council will, in principle, refer matters relating to the unification of private international law to the Hague Conference.

A glorious example of such a referral is the Hague *Convention of 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*. A proposal to simplify the legalisation requirement was originally proposed by the United Kingdom to the Council of Europe. It was then agreed that it was preferable that the Hague Conference include the topic on its agenda. Next month, the 1961 Apostille Convention, as it is now known, will have 100 States Parties.

2. This example also shows that the Hague Conference now has a truly global span. The organisation has 71 Member States, plus the European Union, representing 4.5 billion people. In addition, 60 more States are Parties to one or more of the almost 40 post-War Hague Conventions on private international law. All Members of the Council are Members of the Hague Conference, with the exception of *Andorra, Armenia, Azerbaijan, Liechtenstein, Moldova* and *San Marino*. But even these six States are Parties to one or more (up to six) Hague Conventions[2].

3. Cooperation between the Council of Europe and the Hague Conference has been fruitful. Sometimes we have had differing views, but we have usually been able to resolve such differences by agreement. In many respects our work has been complementary. At this very moment one of my colleagues is here to follow the work of the Council of Europe on the rights and status of children and parental responsibilities, the private international law aspects of which are on the agenda of the Hague Conference. Relocation of children is a topic of interest to the Council of Europe, but it is a global issue. There are many examples from the past of complementary work, in fields as diverse as access to justice, bankruptcy, protection of adults and adoption of children.

For example, the Council of Europe Convention on the Adoption of Children of 1967, and its 2008 revision, dealt with the substantive law aspects of adoption of children, whilst the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption deals with its private international law or cross-border aspects, i.e. with cooperation and protection of children in the context of inter-country adoption. The 1993 Convention is a global instrument, in force for 83 States around the globe.

So there is complementarity along two dimensions: the Council of Europe's focus is on substantive law and regional work, the Hague Conference focuses on private international law and global work.

4. More recently, this double complementarity has made its appearance in the case-law of the European Court of Human Rights. That this could happen is due to the fact that several Hague Conventions may be seen as supporting and implementing global human rights norms, norms that are also found in the *Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950* (the European Convention on Human Rights).

[1] Published in *Tractatenblad van het Koninkrijk der Nederlanden*, 1958, 80
[2] See the website of the Conference, http://www.hcch.net.

Interaction between the European Convention on Human Rights and the Hague Child Abduction Convention

5. Of particular importance at this point in time is the interaction between the European Convention on Human Rights and the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction* ("the Child Abduction Convention"). With the exception of *Andorra, Azerbaijan, Liechtenstein* and the *Russian Federation*, all Member States of the Council of Europe and Parties to the European Convention on Human Rights, are also Parties to the Hague Convention. In addition, 41 other States around the world are Parties to the Child Abduction Convention, making up a total of 84 Contracting States.

6. Those Council of Europe States that are Parties to the European Convention on Human Rights and the Child Abduction Convention must, with respect to each Convention, respect their obligations *vis à vis* all other Contracting States to the Convention in question. Consistent interpretation and application by all States Parties of each Convention is vital to its sound operation.

7. The Child Abduction Convention addresses a growing global problem, i.e. the unilateral removal of children across borders, usually by one of the child's parents. Unfortunately, the wrongful removal and retention of children across international borders is an aspect of globalisation that causes increasing concern[3].

8. The Convention is specifically designed to protect children internationally from the harmful effects of their wrongful abduction or retention. It establishes machinery and procedures to ensure their prompt return to the State of their habitual residence, and to secure protection for rights of access. In many instances the Convention achieves this result in an amicable way, thanks to the cross-border cooperation between Central Authorities designated under the Convention. Where an amicable solution is not possible, i.e. in about 50 % of the cases, and a wrongful abduction or retention has occurred to a Contracting State, the authorities of that State are required to order the return of the child forthwith (Art 12).

9. The Convention is based on the general principle that it is in the child's best interests that the authorities of the child's habitual residence fully examine the child's circumstances and, on that basis, take a decision on the merits of custody issues. That is why the proceedings before the State of the abduction or retention can be characterized as *summary proceedings*, why they are to be *expeditious*, and why there is an express rule to the effect that the *return decision shall not be taken to be a determination on the merits of any custody issue* (Art 19).

10. The duty imposed by Article 12 is not mechanical or automatic, however. The Convention recognizes that there may be circumstances in which the return of the child would be contrary to his or her interests and it therefore provides a number of exceptions to the duty to order return, in particular Article 13(1) b: if there is a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation, then the requested State is not bound to return the child. Article 13(1) b is from time to time invoked before the courts, especially in cases – currently some 70% of cases brought before the courts – where the removing or retaining parent is the primary, or joint primary, care taker.

11. The Child Abduction Convention does not have a procedure for individual (or inter-State) complaints before an international judicial body. But the Hague Conference has established a wide range of tools to achieve effective implementation and consistency of operation of the Convention. First, the Child Abduction Convention establishes a system of reciprocal administrative cooperation through Central Authorities which each Contracting State must designate. This system is

[3] A statistical study carried out by Prof. Nigel Lowe from Cardiff University at the request of the Hague Conference which will soon be published shows an overall increase of 30% in return applications when the figures concerning applications made in 2008 are compared to those made in 2003.

reinforced by regular review gatherings of these Central Authorities[4]. Second, the Conference has set up a variety of instruments and tools to assist with the implementation, and to monitor and support the proper operation of the Convention. Guides to Good Practice, advice to Central Authorities, an international case law database with comments on important decisions—these and other tools assist in ensuring consistency in the Convention's application. Finally, alongside the global network of administrative cooperation, a global network of judicial cooperation is emerging, supported by judicial conferences, and other means[5].

12. It remains true that an individual complaints procedure for the Convention is not available at the global level. And this explains why, in Europe, the mechanism of individual complaints under the European Convention on Human Rights has been used for complaints regarding violations of its Articles 6 and 8, in particular, as a result of the application of the Hague Child Abduction Convention.

The Case Law of the European Court of Human Rights

13. The European Court of Human Rights has, in a series of remarkable judgments since the beginning of this century, stressed the positive obligations of Council of Europe Members arising form Article 8 of the European Convention in both child abductions and trans-frontier contact cases. It has upheld challenges against States deemed not to have taken all necessary steps to facilitate the execution of Hague Convention return orders. On several occasions it has found Contracting States to the Child Abduction Convention to have failed in their positive obligations to act expeditiously or to enforce a return order. It has dismissed challenges by parents who have argued that enforcement measures, including coercive steps, have interfered with their rights to a family life. This large body of case law has helped considerably in reinforcing the operation of the Child Abduction Convention. And since the jurisprudence of the European Court of Human Rights has been in harmony with jurisprudence and good practice all over the world, these cases have helped to achieve a convergence of jurisprudence and to avoid frictions between the European Convention and the Hague Convention.

14. More recently, however, the Court's case law has given some cause for concern. The concern relates, in some cases, to the length of proceedings before the Court itself, but also, in particular, to a suggestion which may be found in the Court's recent case law, that the court seized with the return application is the appropriate court to enter into a broad examination of the merits that bear on substantive custody issues. In the *Raban v. Romania* case of 26 October 2010 the Court says that it *"must ascertain whether the domestic courts conducted an in-depth examination of the entire family situation and of a whole series of factors, in particular of a factual, emotional, psychological, material and medical nature, and made a balanced and reasonable assessment of the respective interests of each person, with a constant concern for determining what the best solution would be for the abducted child in the context of an application for his return to his country of origin."*

15. This is very broad language, suggesting that in each individual application for return brought under the 1980 Convention, the court should examine in depth the entire family situation and a wide variety of factors relating to the welfare of the child; in short a full 'best interests' test. However, the in-depth examination enjoined by the Court is appropriate when a domestic court is addressing the merits of the underlying issues relating to the long-term custody, contact and relocation arrangements for the child. But this is *not* the function of a court dealing with a return application under the 1980 Convention.

16. The *Raban* decision, if it were to be confirmed, would undermine the jurisdictional principle underlying the Hague Child Abduction Convention, which has also been accepted in other international instruments, including several Conventions drawn up by the Council of Europe (e.g.

[4] Special Commission meetings to review the practical operation of the Convention have been held in 1989, 2001, 2002 and 2004. The next Special Commission meeting will be split into two parts, the first part of which will take place from 1-10 June 2011 at the Peace Palace in The Hague, and the second part will be held early in 2012.
[5] See the *Child Abduction Section* on the Hague Conference website (*supra*, fn.2)

the *European Convention on Recognition and Enforcement of Decisions concerning Custody of Children and on Restoration of Custody of Children* (Luxemburg, 20.V.1980) and the *Convention on contact concerning children* (Strasbourg, 15.V.2003)).

17. *Raban* may also be seen as rewarding the taking or retaining parent by conceding to him or her procedural advantages and by conferring authority to determine the merits of a dispute on the courts of the country in effect selected by that parent. It could also result in the slowing down of Hague return proceedings in order to allow adequate time to the court seized for a full consideration of the issue of best interests relating to the merits. It may affect the way in which return orders are managed by judges, and could compromise the requirement of expeditious procedures and the principle of prompt return under the Convention.

18. One of the parties in the *Raban* case has requested the European Court of Human Rights to refer the case to the Grand Chamber. Two States Parties to the European Convention on Human Rights and to the Child Abduction Convention, Germany and the United Kingdom, have also requested a review by the Grand Chamber. It is not known at this point if the Court will accede to this request. It might not be willing to do so because it was only on 6 July 2010 that the Grand Chamber rendered a judgment in a similar but not quite identical case, the case of *Neulinger and Shuruk v. Switzerland*. Although that case also raises some concerns in and of itself (including concerning the length of proceedings before the Court) it is the subsequent use and interpretation of the *Neulinger* decision in *Raban* which causes the utmost concern. One of the differences between *Raban* and *Neulinger* is that in *Neulinger* it was clear that the full examination enjoined by the Court had to take place in the context of the Article 13(1)b defence of the Hague Child Abduction Convention.

19. Whether or not the Court will accept the request to review *Raban* – and I am not commenting on the actual outcome of that case, but only on the possible impact of some of the reasoning of a general nature regarding Hague proceedings made by the Court – it may be hoped that in its future case law, the Court will find an opportunity to dispel the doubts that *Raban* has raised. The Court has an impressive record in terms of assisting the Member States of the Council of Europe in achieving the aims of both the European Convention on Human Rights and the Hague Child Abduction. It is to be hoped that this jurisprudential consistency will confirm itself.

20. For the purpose of this meeting, we thought it was important to alert the Legal Advisers of the Council of Europe to the important phenomenon of interaction between the European Convention of Human Rights and the Hague Child Abduction Convention, to be aware of the specifics of both, and of the need to ensure that they are both applied in a consistent manner, and in harmony with each other.

APPENDIX XII

LIST OF ITEMS DISCUSSED AND DECISIONS TAKEN
ABRIDGED REPORT

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 41st meeting in Strasbourg, on 17 and 18 of March 2011, with Ms Edwige Belliard (France) in the Chair. The list of participants is set out in Appendix I of the meeting report[1].

2. The CAHDI adopted its agenda as set out in **Appendix I** of the present report. It also adopted the report of its 40th meeting (Tromsø, 16-17 September 2010), and authorised the Secretariat to publish it on the CAHDI's website.

3. The CAHDI was further informed about the developments concerning the Council of Europe since the last meeting of the Committee and the intervention on this matter of Mr Manuel Lezertua, Director of Legal Advice and Public International Law (DLAPIL) and Jurisconsult, is set out in Appendix III of the meeting report. The Committee took note in particular of the developments concerning the Council of Europe Treaty Series and the final version of the contribution of the Directorate of Legal Advice and Public International Law (DLAPIL) to the International Law Commission Draft Articles on "Responsibility of International Organisations".

4. The CAHDI further considered the decisions of the Committee of Ministers relevant to its work and requests for the CAHDI's opinion. The CAHDI took note of the fact that on 2 March 2011, at 1107th meeting of the Committee of Ministers, the Deputies considered the draft Council of Europe Convention on preventing and combating violence against women and domestic violence. In this respect, the Deputies decided to request the Council of Europe Legal Adviser for an opinion, by 16 March 2011 at the latest, on the compatibility of Articles 3, 4, 5, 60 and 61 of the draft Council of Europe Convention on preventing and combating violence against women and domestic violence with international law, including human rights law, in the light of the specific concerns raised by some delegations and decided to resume consideration of this item at their 1110th meeting (30-31 March 2011) in the light of the opinion of the Legal Adviser and the results of the discussions in the Committee of Legal Advisers on Public International Law (CAHDI).

As requested by the Committee of Ministers, the Committee conducted the discussions on the draft Council of Europe Convention on preventing and combating violence against women and domestic violence. The results of these discussions are set out in **Appendix II** to the present report.

5. The CAHDI considered State practice and case-law regarding State immunities on the basis of contributions by the delegations and invited delegations to submit or update their contributions to the relevant CAHDI database at their earliest convenience. The CAHDI welcomed in particular the presentation from INTERPOL regarding "Repository of Practice: Application of Article 3 of INTERPOL's Constitution in the Context of the Processing of Information via INTERPOL's Channels". The Committee also took stock of the process of ratification by its member and observer States of the United Nations Convention on Jurisdictional Immunities of States and Their Property.

In addition, following a decision taken at the 38th meeting, the CAHDI continued to exchange views – on the basis of contributions provided by the delegations to the relevant questionnaire – on possibilities for the Ministry of Foreign Affairs to raise public international law issues in procedures pending before national tribunals and related to States' or international organisations' immunities. The CAHDI agreed to keep this item on the agenda of its next meeting and invited delegations which have not yet done so to submit their contributions to the aforementioned questionnaire.

[1] Document CAHDI (2011) 5 prov

6. The CAHDI further considered the issue of organisation and functions of the Office of the Legal Adviser of the Ministry for Foreign Affairs. The delegations were invited to submit or update their contributions to the relevant database at their earliest convenience.

7. The CAHDI further discussed the issue of national implementation of UN sanctions and respect for human rights on the basis of contributions by delegations, including the updated contributions of Estonia and European Union as well as new contribution of Serbia to the relevant CAHDI database. Delegations were invited to submit or update their contributions to the said database at their earliest convenience. Moreover, the Committee took note of information on cases that have been submitted to national tribunals by persons or entities removed from the lists established by the UN Security Council Sanctions Committee.

In this respect, the Committee also held an exchange of views Ms Kimberly Prost, Ombudsperson at the UN Security Council Committee created by resolution 1267 (1999) concerning Al-Qaida and the Taliban.

8. The CAHDI considered the issue of the accession of the European Union to the European Convention of Human Rights. In this respect, the Committee welcomed the information provided by Mr Erik Wennerström, observer of the CAHDI to the Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH – UE) and had an exchange of views with Mr Jean-Claude Bonichot, judge of the Court of Justice of the European Union.

9. The CAHDI took also note of cases brought before the European Court of Human Rights (ECtHR) involving issues of public international law and further invited delegations to keep the Committee informed on any judgments or decisions, pending cases or relevant forthcoming events.

10. In the context of its consideration of issues relating to the peaceful settlement of disputes, the CAHDI invited the delegations to submit to the Secretariat any relevant information for the update of the document CAHDI (2011) 2 containing information on the International Court of Justice's jurisdiction under international treaties and agreements.

11. In the framework of its activity as the European Observatory of Reservations to International Treaties, the CAHDI considered a list of outstanding reservations and declarations to international treaties and the follow-up given to them by the delegations. The table summarising the delegations' positions is set out in **Appendix III** to the present report.

12. With regard to the general issues concerning public international law, Mr Manuel Lezertua, Director of Legal Advice and Public International Law (DLAPIL) and Jurisconsult, relayed to the CAHDI information on work undertaken by the Council of Europe on the review of Council of Europe Conventions, one of the Secretary General's Priorities for 2011 (document SG/Inf(2011)2 FINAL). The CAHDI took note that one of the main proposals of the Secretary General is the elaboration of a Comprehensive Report for the attention of the Committee of Ministers by the end of September 2011, which will need to be the object of consultations. In this respect, Committee welcomed the proposal of the Secretary General to obtain the views about Report's content (in all or in part) with the CAHDI, probably in its September 2011 Session, and stood ready to contribute to this review of Council of Europe Conventions.

13. On the basis of contributions from the delegations, the CAHDI took stock of current issues of international humanitarian law, recent developments concerning the International Criminal Court (ICC), developments concerning the implementation and functioning of other international criminal tribunals and work undertaken by the Council of Europe and other international fora in the area of the fight against terrorism.

14. The Committee also considered some topical issues of international law and in this regard, the Committee welcomed an intervention by Mr Hans van Loon, Secretary General of the Hague

Conference on Private International Law, on the correlation between recent case-law of the European Court of Human Rights and the Conventions adopted in the framework of the Hague Conference on Private International Law.

15. The CAHDI decided to hold its next 42nd meeting in Strasbourg on 22-23 September 2011. It instructed the Secretariat, in consultation with the Chair of the Committee, to prepare in due course the provisional agenda of the meeting.