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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

(CAHDI)

Meeting report

51st meeting
Strasbourg, 3-4 March 2016

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

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I. INTRODUCTION

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

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 51st meeting in Strasbourg (France) on 3-4 March 2016 with Mr Paul Rietjens (Belgium) in the Chair. The list of participants is set out in **Appendix I** to this report. The Chair of the CAHDI recalled the success of the Conference on *"The CAHDI contribution to the development of public international law: achievements and future challenges"* organised at the previous meeting to mark the 50th anniversary of the CAHDI meetings. He also underlined the importance of the contributions made during the Conference for the future work of the CAHDI.

2. Adoption of the agenda

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

3. Adoption of the report of the 50th meeting

3. The CAHDI adopted the report of its 50th meeting (document CAHDI (2015) 23 prov 1) and instructed the Secretariat to publish it on the Committee's website.

4. Information provided by the Secretariat of the CAHDI

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

4. Mr Jörg Polakiewicz informed the CAHDI of the latest developments within the Council of Europe since the Committee's last meeting on 24-25 September 2015 in Strasbourg.

5. With regard to the unprecedented migration crisis in Europe, the Director emphasised the Council of Europe's role of reminding member States of their obligations under international law. He referred to the Secretary General's letter of 2 March 2016 to Heads of Government calling on member States to better ensuring the safety and proper treatment of asylum-seeking and refugee children and proposing a set of priority measures. This letter followed up on a letter of the Secretary General dated 8 September 2015 to all Council of Europe member States, reminding them of their obligations under the *European Convention on Human Rights* (ECHR). On this point, the Director also informed the CAHDI of the appointment by the Secretary General of Ambassador Tomáš Boček (Czech Republic) as the Special Representative on Migration and Refugees, tasked with undertaking fact finding missions, liaising with international organisations and partners and reinforcing the Council of Europe's cooperation with these organisations. In this regard, the CAHDI noted that the Special Representative would be conducting a fact finding mission in due course.

6. Concerning the ECHR, the Director informed the CAHDI that, since the last CAHDI meeting, Ukraine submitted on 3 November 2015 a declaration in relation to specific territories concerned by the derogation of rights contained in the ECHR under Article 15 made by Ukraine on 5 June 2015. On 24 November 2015, France informed the Secretary General of the Council of Europe of the declaration of the state of emergency in France and the derogation from some of the rights contained in the ECHR under Article 15 of this Convention. The Secretary General had received a notification on 25 February 2016 in this regard informing that the state of emergency in France had been prolonged for 3 more months. The CAHDI then took note of the Secretary General's decision to use his powers under Article 52 of the ECHR with regard to the execution of the judgment of the European Court of Human Rights on the detention of Mr Ilgar Mammadov in the case *Ilgar Mammadov v Azerbaijan*[1]. Further regarding the execution of judgments, the Director mentioned that the Venice Commission would be adopting an opinion on the amendments

[1] *Eur. Court HR*, *Ilgar Mammadov v Azerbaijan*, First Section Judgment of 22 May 2014, Application No. 15172/13.

of the Federal Constitutional Court of the Russian Federation and its decision of July 2015. The Director also mentioned the mission to Crimea led by Ambassador Stoudmann (25-31 January 2016), which would prepare a report on the human rights and rule of law situation in the peninsula.

7. With regard to the treaty law within the Council of Europe, the CAHDI took note of the 23 signatures (as at 3 March 2016) to the *Protocol to the Council of Europe Convention on the Prevention of Terrorism* (CETS No. 217)[2]. With regard to the *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (ETS No. 108), the Director reminded the CAHDI that this Convention remained the only international standard in the field and that a meeting to finalise the amendments to the Convention would be held later this year. The Director also invited all observer States to the CAHDI to participate in the meeting, emphasising the Convention's recent accession requests by Mauritius, Senegal, Morocco and Tunisia. Finally, the Director also mentioned the on-going work with regard to drawing up a *Draft Council of Europe Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events*, as well as the *Draft Council of Europe Convention on Cinematographic Co-production*, the latter of which revises the 1992 Council of Europe Convention on the same topic.

II. ONGOING ACTIVITIES OF THE CAHDI

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

8. The Chair presented a compilation of Committee of Ministers' decisions of relevance to the CAHDI's activities (documents CAHDI (2016) 1 and CAHDI (2016) 1 Addendum). In particular, the CAHDI took note that the Committee of Ministers had on 21 October 2015 examined the abridged report of its 50th meeting (Strasbourg, 23-24 September 2015). The CAHDI also took note of the main priorities of the current Bulgarian Chairmanship of the Committee of Ministers, which took over from the Bosnian and Herzegovinian Chairmanship on 10 November 2015.

9. The CAHDI also took note of its terms of reference for 2016-2017 as approved by the Committee of Ministers on 24-25 November 2015 during its 1241st meeting. The CAHDI agreed that the successive Chairs and Vice-chairs would be appointed as Gender Equality Rapporteurs. Therefore, the CAHDI appointed Mr Paul Rietjens (Belgium) and Ms Päivi Kaukoranta (Finland) as Gender Equality Rapporteurs for 2016.

10. The CAHDI further recalled that on 10-11 February 2016, the Ministers' Deputies at their 1247th meeting had communicated *Recommendation 2083 (2016) of the Parliamentary Assembly of the Council of Europe (PACE) on "Introduction of sanctions against parliamentarians"* to the CAHDI for information and possible comments by 11 May 2016. A preliminary draft opinion was prepared by the Chair, in cooperation with the Secretariat, and sent to delegations for comments and observations prior to the meeting.

11. The Chair presented the draft opinion of the CAHDI (document CAHDI (2016) 6 prov) together with the comments of delegations received on the preliminary draft. Following an exchange of views, the CAHDI adopted the opinion which appears in **Appendix III** to the present report.

12. In its opinion, the CAHDI firstly made comments in relation to the general question of the rights of members of the PACE and secondly addressed specific questions raised in Recommendation 2083 (2016). With regard to the general question of rights of members of the PACE, the CAHDI noted that the legal situation of members of the PACE travelling in an official capacity to and in Council of Europe member States was governed by the *Statute of the Council of Europe* (ETS No. 001) and the *General Agreement on Privileges and Immunities of the Council of Europe* (ETS No. 002) as well as its *Protocol* (ETS No. 10). The CAHDI further recalled that the

[2] On 30 March 2016, 26 member States and the European Union have signed the Protocol.

Committee of Ministers of the Council of Europe had invited governments of member States on several occasions to fully implement the above mentioned privileges and immunities. With regard to the specific questions raised in Recommendation 2083 (2016), the CAHDI examined the current work of the United Nations International Law Commission (ILC) on "Immunity of State officials from foreign criminal jurisdiction" and noted in particular that the ILC's work excluded "persons connected with […] international organizations." In addition, the CAHDI further considered that the responsibility for imposing restrictive measures on particular individuals, be they foreign parliamentarians or not, rested with the States or the international organisations that had adopted them. The CAHDI noted that with respect to the restrictive measures of the European Union, the Court of Justice of the European Union provided judicial protection to persons addressed in such measures. With respect to restrictive measures adopted by the United Nations, the CAHDI noted that the procedures for listing and delisting had been improved. It considered in closing, that the proposal of the PACE concerning the possibility of the CAHDI carrying out a feasibility study on this subject would go beyond its terms of reference and would thus be outside its purview.

6. Immunities of States and international organisations

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

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

13. The Chair presented the topic "Settlement of disputes of a private character to which an international organisation is a party" which had been included in the agenda of the 47th meeting of the CAHDI at the request of the delegation of the Netherlands, which had also provided a document in this regard (document CAHDI (2014) 5). This document aimed in particular at facilitating a discussion on the topical questions related to the settlement of third-party claims for personal injury or death and property loss or damage allegedly caused by an international organisation and the effective remedies available for claimants in these situations. The immunity of international organisations in many cases prevents individuals who have suffered harm from conduct of an international organisation from bringing a successful claim before a domestic court. This immunity has been increasingly challenged on an alleged incompatibility of upholding immunity with the right of access to court. A relevant element is the existence of an alternative remedy provided to the claimant by the international organisation. Mention was made – for illustrative purposes – to recent events mainly in relation to some peace keeping operations of the United Nations (UN)[3] and case-law of the European Court of Human Rights[4] involving international organisations where their immunity from the civil jurisdiction of domestic courts had been granted. The Dutch document also contained the following five questions addressed to the members of the CAHDI:

- do you share our analysis concerning the current state of the settlement of disputes of a private character to which an international organisation is a party?
- what is your experience with the settlement of disputes of a private character to which an international organisation is a party in your legal system?
- in particular, are there examples in your legal system of perceived shortcomings in the settlement of disputes of a private character to which an international organisation is a party leading claimants to turn to the member States?

[3] In October 2013, lawyers for Haiti Cholera victims filed a class action lawsuit in the Southern District of New York against the UN. The judgment of the Southern District Court of New York handed down on 9 January 2015 concluded that the UN was immune from the plaintiffs' suit. An appeal was lodged on 12 February 2015 before the United States Court of Appeals for the Second Circuit. The oral arguments were heard on 1 March 2016.

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

- do you consider that the strengthening of the settlement of disputes of a private character to which an international organisation is a party merits attention?
- specifically in respect of settlement of private claims in UN peace operations, how do you see the merits of the possible measures described above?

14. The Chair welcomed the written comments submitted by Albania, Andorra, Armenia, Austria, Canada, Czech Republic, Denmark, Germany, Greece, Israel, Mexico, Slovenia, Switzerland and the United Kingdom to the questions contained in document CAHDI (2016) 9 prov and invited delegations to orally present their views on the current state of this issue from their own national experience and on the possible measures to be adopted.

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

16. The delegation of the Netherlands informed the CAHDI that the Dutch *Advisory Committee on Issues of Public International Law* (CAVV)[5] had issued an advice on the responsibilities of international organisations in December 2015 at the request of the Ministry of Foreign Affairs. The delegation underlined that this advice would be translated into English and made available on the website of the Advisory Committee.

17. The delegation of Hungary provided information on a decision rendered by the Constitutional Court of Hungary in 2014 regarding an employment claim involving an international organisation. The Constitutional Court held that the immunity from jurisdiction granted to an international organisation could not lead to a situation in which an employee had no possibility to file an employment claim. Furthermore, the international organisation had to provide to the claimant an effective remedy, in accordance with the Constitution of Hungary.

18. The representative of NATO provided information to the CAHDI on the new internal justice system of 2013 of the NATO and underlined that further information would be given on NATO's experience with regard to the complaints procedures of individuals following damages in the course of military operations. It also informed the CAHDI that the Court of Appeal of Brussels had recently confirmed the validity of the arbitration clauses of NATO in the framework of Article 6 of the *European Convention on Human Rights*.

19. The delegation of the United States provided information on the case of "Georges v. United Nations", the so-called "Haiti Cholera case" to which reference was made in the document provided by the delegation of the Netherlands. It informed the CAHDI that on 1 March 2016, the United States Court of Appeals for the Second Circuit heard oral arguments. On that occasion, the attorney of the United States argued that the immunity of the United Nations under the 1946 *Convention on the Privileges and Immunities of the United Nations* was absolute while the plaintiffs raised a constitutional challenge based on their right to due process arguing that the application of immunity would violate their right of access to the court.

20. The CAHDI agreed to keep this issue on the agenda of its 52nd meeting. Furthermore, the Chair called on delegations to send their comments in writing before the next meeting in order to have sufficient replies for deciphering the main trends on this issue.

ii. Immunity of State owned cultural property on loan

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

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

declaration in support of the recognition of the customary nature of the pertinent provisions of the 2004 *United Nations Convention on Jurisdictional Immunities of States and Their Property* (the UN Convention) related to this question. This Declaration was presented at the 46th meeting of the CAHDI as a non-legally binding document expressing a common understanding of *opinio juris* on the basic rule that certain kind of State property (cultural property on exhibition) enjoyed jurisdictional immunity.

22. Delegations were informed that to date, the Declaration had been signed by the Ministers of Foreign Affairs of 14 States (Albania, Armenia, Austria, Belarus, Belgium, the Czech Republic, Estonia, France, Georgia, Latvia, Luxembourg, the Netherlands, Romania and Slovakia). Furthermore, they were reminded that the Secretariat of the CAHDI performed the functions of "depositary" of this Declaration and that the text of the Declaration was available in English and French on the website of the CAHDI[6].

23. The CAHDI encouraged its members and observers which had not yet done so to sign the Declaration. In this respect, the Chair reminded delegations that the Declaration could be signed, not only during events/conferences mainly in the Czech Republic or in Austria, but also in capitals and be sent to the Secretariat of the CAHDI through diplomatic courier to their Permanent Representations to the Council of Europe in Strasbourg. In this regard, two delegations informed the Committee of the intention of their State to sign the Declaration. Two delegations informed however the Committee that their States had no intention to sign the Declaration.

24. Furthermore, it was recalled that the Secretariat and the Chair had drafted a questionnaire on this issue in order to have an overview of the specific national legislations and practices. Delegations had been invited to submit their replies.

25. In this regard, the CAHDI welcomed the replies submitted by 20 delegations (Albania, Andorra, Austria, Armenia, Belarus, Belgium, Canada, Cyprus, Czech Republic, Finland, France, Germany, Greece, Ireland, Latvia, Mexico, the Netherlands, Romania, the United Kingdom and the United States of America) to this questionnaire contained in document CAHDI (2016) 2 prov and encouraged the delegations which had not yet done so, to submit their replies at their earliest convenience.

26. The delegation of the Russian Federation informed the Committee that a new legislation on the jurisdictional immunities of States and their property had been adopted in November 2015 (see paragraph 37).

27. The delegation of Spain informed the CAHDI that a law on privileges and immunities of States and international organisations had recently been adopted and that it contained a part devoted to cultural goods. The delegation underlined that the law would be circulated to the CAHDI once translated into English.

iii. Immunities of special missions

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

29. The CAHDI welcomed the replies submitted by 24 delegations (Albania, Andorra, Armenia, Austria, Belarus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Ireland, Italy, Latvia, Mexico, the Netherlands, Norway, Romania, Serbia, Sweden, Switzerland, the

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

United Kingdom and the United States of America) to this questionnaire, contained in document CAHDI (2016) 10 prov.

30. The delegation of the United Kingdom welcomed the replies submitted by the delegations and informed the Committee that this topic was generating greater interest and scrutiny in the internal legal system. In this regard, the delegation of the United Kingdom referred to the case of *Khurts Bat v. Federal Court of Germany*[7] of 2011 presented in the abovementioned document. It suggested that a publication by the CAHDI could be done as a guide to State practice on this subject, as it had previously been done in other areas.

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

iv. Service of process on a foreign State

32. The Chair reminded delegations that the topic "Service of process on a foreign State" had been included in the agenda of the 44th meeting of the CAHDI (Paris, 19-20 September 2012), during which the Portuguese delegation referred to the difficulties faced in identifying the manner in which to serve documents instituting proceedings against a foreign State. On this occasion, the Austrian delegation had also provided information on this matter regarding the judgment of the European Court of Human Rights in the case *Wallishauser v. Austria*[8]. At its 46th meeting (Strasbourg, 16-17 September 2013), the CAHDI adopted a questionnaire in order to collect relevant information on this matter.

33. The Chair informed the Committee that 25 replies had been submitted to this questionnaire (Albania, Austria, Belgium, Canada, Cyprus, the Czech Republic, Germany, Greece, Finland, France, Ireland, Israel, Italy, Japan, Latvia, Mexico, the Netherlands, Norway, Portugal, Romania, Serbia, Slovenia, Switzerland, United Kingdom and the United States of America) which were contained in document CAHDI (2016) 12 prov.

34. The Secretariat underlined that the Permanent Bureau of the Hague Conference on Private International Law had sent a letter addressed to the CAHDI on this subject, stating the following:

"As CAHDI may be aware, this particular type of service is able to be effected under the *Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* (Service Convention), which presently counts 69 Contracting States. More specifically, the Hague Service Convention may be used to effect service upon States, including a government, a governmental agency or any person acting for a State, consular or diplomatic agent, or State-owned company or upon a territorial unit of a State.

In addition, it is pertinent to note that in the responses to the Hague Conference Questionnaire of July 2008 *(Preliminary Document No 2 of July 2008 for the attention of the Special Commission of February 2009 on the practical operation of the Hague Apostille, Service, Evidence and Access to Justice Conventions)*, 11 Contracting States reported having used the Service Convention to serve documents on foreign States or States officials.

The Permanent Bureau also recalls that there was no specific reference to the Hague Service Convention in the CAHDI Questionnaire circulated in 2013 ahead of the 46th meeting. It is thus hoped that the above clarifications will prove useful to the Committee, and the Permanent Bureau will of course follow the outcome of the discussions with great interest.

More detailed information on the use of the Hague Service Convention for service of process on foreign States is available in the recently published *Practical Handbook on the Operation of the*

[7] Administrative Court, *Khurts Bat v. Federal Court of Germany,* [2011] EWHC 2029 (Admin), judgment of 29 July 2011.
[8] *Eur. Court HR, Wallishauser v. Austria, Judgment* of 17 July 2012, Application No. 156/04.

Service Convention (4th edition), which is now available for purchase on the Hague Conference website in either e-Book or hard copy format."

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

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

36. The Chair informed the Committee that since the previous meeting of the CAHDI, Mexico and the Slovak Republic had ratified the 2004 *UN Convention on Jurisdictional Immunities of States and of their Property* (hereinafter the "UN Convention") respectively on 29 September 2015 and 29 December 2015. He furthermore underlined that to date, 21 States had ratified the Convention and that in order for the Convention to enter into force, 30 ratifications were needed. The Chair therefore invited delegations to provide information with regard to possible future ratifications.

37. The delegation of the Russian Federation informed the CAHDI that on 3 November 2015, the President of the Russian Federation signed the *Law on Jurisdictional Immunity of a Foreign State and the Property of a Foreign State in the Russian Federation* which came into force on 1 January 2016. The law is to a large extent based on the UN Convention which was signed by the Russian Federation on 1 December 2006.

38. The delegation of Norway informed the Committee of a case of the Court of Appeal of Oslo concerning an employee of an embassy in Norway claiming damages for an alleged wrongful dismissal. The City Court of Oslo had previously dismissed the case on the grounds that the State in question enjoyed immunity in the matter. It had referred in this regard to the UN Convention and considered that its provisions reflected customary international law. The Court of Appeal upheld the immunity with reference to the provisions of the UN Convention reflecting customary international law. It argued that:

- as the case related to a contract of employment, the immunity could in principle be excluded, based on Article 11 paragraph 1[9] of the UN Convention;
- however, considering that the employee performed particular functions in the exercise of governmental authority (security work), the exception to Article 11 contained in its paragraph 2.a)[10] was found applicable.

39. The delegation of Canada informed the Committee about the *Justice for Victims of Terrorism Act*, which amended in 2012 the Canadian *State Immunity Act* and which lifts the immunity from jurisdiction of the States listed by the Canadian government as States for which there are reasonable grounds to believe that they supported or support terrorism, in proceedings brought against them for their support of terrorism. It pointed out that this legislation was considered incompatible in some aspects with the UN Convention and, therefore, prevented Canada from ratifying it.

40. The delegation of Armenia informed the Committee that the new Constitution of Armenia had been adopted and that it would enter into force in 2018. It underlined that following this adoption, Armenia would envisage ratifying the UN Convention.

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[9] Article 11 paragraph 1: *"Unless otherwise agreed between the States concerned, a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to a contract of employment between the State and an individual for work performed or to be performed, in whole or in part, in the territory of that other State."*

[10] Article 11 paragraph 2.a): *"Paragraph 1 does not apply if […] the employee has been recruited to perform particular functions in the exercise of governmental authority […]."*

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

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

42. The delegation of Belgium provided information on the two cases which had been added to the updated contribution.

The case of *NML Capital v. Republic of Argentina*[11] concerned the payment of debts that were brought up by "vulture funds" on the secondary market in Argentinian sovereign debt. NML Capital Ltd., an investment company with registered office on the Cayman Islands, had purchased Argentinian government bonds in 2001 and 2003. In 2006, it obtained a judgment from a New York district court ordering the debtor to repay the amount of the debt plus interest. As the judgment was not voluntarily enforced by the Republic of Argentina, the company made several attempts to secure enforcement. In Belgium, it notably obtained an attachment order in respect of bank accounts belonging to the Embassy of Argentina in Brussels (Belgium). In June 2013, the Court of Appeal of Brussels requested that the attachment order be lifted. Consequently, NML Capital lodged an appeal with the Court of cassation *(Cour de cassation)*. On 11 December 2014, the Court of cassation rejected the appeal and held that there had been:

- no violation of Article 6 paragraph 1 of the *European Convention on Human Rights* (right to a fair trial): the Court considered that a State could not be forced to disregard the principle of immunity of States from execution;
- no violation of Article 6 of the *Belgian Judicial Code*[12]: the Court considered that the Court of Appeal had expressed its own independent conviction of a previous judgment of the Court of cassation[13], citing a precedent which contradicted with the argument of NML Capital according to which the 1961 *Vienna Convention on diplomatic Relations* did not create an independent immunity from execution for the bank accounts of an embassy.

The case of *Etat belge (SPF Affaires étrangères) v. Michel Poortmans*[14] concerned the jurisdictional immunity of NATO. In 2006, NATO concluded a service contract with Mr Poortmans which was terminated by NATO in 2010. Mr Poortmans brought a case before a Belgian court in order to seek damages for the unilateral termination of the contract. On 12 October 2010, the Court ordered NATO to pay the damages. Belgium filled an opposition to this judgment which was declared admissible but unfounded. Belgium then made an appeal in order to uphold the immunity of NATO. On 11 January 2016, the Court of Appeal of Brussels quashed the judgment of 12 October 2010 and held that the arbitration clause contained in the contract guaranteed the right of Mr Poortmans of access to a court pursuant to Article 6 paragraph 1 of the *European Convention on Human Rights*. The Court furthermore recognised that Belgium, as host country and member of NATO, had a *locus standi*.

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[11] Cour de cassation, *NML Capital c. République d'Argentine*, n° C.13.0537.F, decision of 11 December 2014.

[12] Article 6 of the Belgian Judicial Code (French only): *" Les juges ne peuvent prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises."*

[13] In its judgment of 22 November 2012 in the case *Republic of Argentina v. NMC Capital Ltd.*, the Court of cassation had recognised the application of Articles 22 and 25 of the *Vienna Convention on Diplomatic Relations* (1961) to the protection of bank accounts assigned to the functioning of a diplomatic mission and established that the *ne impediatur legatio* rule had the binding force of an international custom

[14] Cour d'appel de Bruxelles, *Etat belge (SPF Affaires étrangères) c. Michel Poortmans*, n° 2014/AR/2570, decision of 11 January 2016.

43. The delegation of Australia provided information on the case of *Firebird Global Master Fund II Ltd. v. Republic of Nauru & Anor*[15] concerning bonds issued by an entity which was guaranteed by the government of Nauru. The applicant (Firebird) was the holder of bonds guaranteed by Nauru. After the issuer of the bonds defaulted, Firebird obtained judgment in the Tokyo District Court for ¥1,300 million together with interest and costs (the "foreign judgment") against Nauru as guarantor, and subsequently obtained an order from the Supreme Court of New South Wales that the foreign judgment be registered under the *Foreign Judgment Act* (1991). The summons for the order for registration was not served on Nauru. Firebird then obtained a garnishee order against the Australian bank in which the accounts of Nauru were kept. Nauru filed motions seeking to set aside the registration of the foreign judgment and the garnishee order, and the Supreme Court made those orders. Firebird made an appeal to the Court of Appeal. The Court of Appeal held that Nauru was entitled to the immunity from jurisdiction recognised in the *Foreign States Immunities Act* (1985) and that the exception of that Act for "commercial transactions" did not apply to the proceedings for registration under the *Foreign Judgment Act*. The Court of Appeal agreed with Nauru's contention that service of the summons for the order for registration should have been effected upon Nauru before the foreign judgment was registered. It further held that the funds in the accounts of the Australian bank were immune from execution under the garnishee order by virtue of the *Foreign States Immunities Act* and that the exception for "commercial property" did not apply. Firebird appealed to the High Court. On 2 December 2015, the High Court dismissed the appeal and held that the proceedings for registration of the foreign judgment under the *Foreign Judgments Acts* were proceedings to which the *Foreign States Immunities Act* applied so that Nauru was immune from the jurisdiction of Australian courts, subject to the exceptions for which the *Foreign States Immunities Act* provides. These exceptions applied to the proceedings for the registration of the foreign judgment in this case because they concerned a commercial transaction. Consequently, Nauru lost its immunity from jurisdiction. However, Nauru was immune from execution against the bank accounts held in Australia under the *Foreign States Immunities Act* because the purposes for which these accounts were in use, or for which the monies in them were set aside, were not commercial purposes. The High Court held that there was no requirement that the summons for registration of the foreign judgment under the *Foreign Judgments Act* be served on Nauru before the foreign judgment was registered.

44. The delegation of Canada provided information on the case of *World Bank Group v. Kevin Wallace, et al.* currently on appeal before the Supreme Court of Canada. In 2010, the World Bank Group, an international organisation with headquarters in Washington D.C (United States of America), began receiving information suggesting that there might be corruption involving foreign public officials and representatives of SNC-Lavalin Group Inc., an engineering and construction company, regarding a construction supervision contract related to the construction of the Padma Bridge in Bangladesh. Criminal proceedings were brought against SNC-Lavalin under the Canadian *Corruption of Foreign Public Officials Act*. During these proceedings to which the World Bank was not a party, the Ontario Superior Court of Justice required the World Bank to produce the documents and records on the case, which the World Bank refused. The delegation of Canada informed the Committee that Canada had submitted a factum as one of the respondents in which it argued that the archives of the World Bank enjoyed a complete inviolability and that the production order could not be issued under domestic disclosure law. The Ontario Superior Court of Justice concluded however that the principle of inviolability enshrined in Section 5 of Article 7 of the World Bank's Articles of Agreement[16] did not preclude compelled production by the World Bank. The World Bank has appealed to the Supreme Court of Canada.

45. The delegation of the United Kingdom provided information to the CAHDI on three cases.

The first case concerned the decision of the Secretary of State for Foreign and Commonwealth Affairs to issue a "special mission immunity" certificate to Egyptian Chief of Defence who visited the United Kingdom in September 2015. Representatives of Egypt's Freedom and Justice Party

[15] High Court of Australia, *Firebird Global Master Fund II Ltd. v. Republic of Nauru & Anor*, case no. S29/2015, judgment of 2 December 2015.
[16] Section 5 of Article 7 of the World Bank's Articles of Agreement: *"The archives of the Bank shall be inviolable."*

had applied a judicial review of this decision arguing that the immunity of special mission had no ground in UK law and that the decision was incompatible with the obligations of the United Kingdom under the 1984 *United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Indeed, the representatives argued that this certificate blocked opportunities to arrest or interview the Egyptian Chief of Defence, who could face prosecution for war crimes allegedly committed in Egypt since 2013. The delegation of the United Kingdom informed the Committee that it had argued that some aspects of the special mission immunity had become customary international law and that the Secretary of State for Foreign and Commonwealth Affairs was the wrong defendant. Indeed, the role of the Secretary of State was to consent to such status whereas the issue of immunity was a matter for the court.

The two other cases concerned the entitlement to immunity of a person claiming to be a diplomat. The High Court of the United Kingdom had reached opposite conclusions as to how far a court may inquire into whether a person is in fact acting as a diplomatic agent.

In the case of *Estrada v. Al-Juffali*[17], the respondent was a Saudi citizen who married the applicant in 2001. The applicant claimed financial relief pursuant to divorce proceedings issued on 13 August 2014. The respondent was then appointed Permanent Representative of St. Lucia to the International Maritime Organisation (IMO) and applied to strike out the applicant's claim on the grounds that he enjoyed immunity. The High Court considered that the certificate of appointment issued by the Foreign and Commonwealth Office was not conclusive considering that the defendant had not undertaken any duties of any kind in the pursuit of function of office and that he had "sought and obtained a diplomatic appointment with the sole intention of defeating [the applicant]'s claims". Consequently, the defendant's claim to immunity in respect of the matrimonial proceedings failed. The delegation of the United Kingdom informed the CAHDI that the respondent had made an appeal and that the oral arguments had been heard on 3 March 2016.

In the case of *Al Attiya v. Bin-Jassim Bin-Jaber Al Thani*[18], the respondent was a member of a prominent Qatari family who served as Minister of Foreign Affairs (1992-2013) and Prime Minister (2007-2013). On 28 August 2013, Qatar notified the Foreign and Commonwealth Office that the respondent was appointed as Minister Counsellor at the Embassy of Qatar in London. In 2015, the applicant had brought a claim before the High Court for damages in respect of trespass to his land and to his person. He alleged, *inter alia*, that the respondent confiscated his land in 2003 and had him detained and tortured in Qatar from October 2009 to January 2011. The respondent contended that he was presently a member of the diplomatic staff of the Qatar Embassy in the United Kingdom, in addition to the positions he had previously held and that he thus enjoyed State and diplomatic immunity. The High Court considered that the certificate of appointment issued by the Foreign and Commonwealth Office was conclusive as to the fact stated therein, i.e. that the defendant was notified as having arrived in the United Kingdom on 6 November 2013 as a member of the diplomatic staff of the Qatari Embassy. Consequently, this precluded the court from conducting its own factual enquiry as to whether the defendant had in fact performed any functions as a diplomat.

46. The delegation of Finland referred to a case concerning the interaction between the Ministry of Foreign Affairs and national authorities in cases of immunities. In December 2015, the Finnish Unemployment Insurance Fund (the "Fund"), the authority in charge of collecting unemployment insurance contributions for work conducted in Finland, reversed its decision and decided thus not to execute an earlier decision to collect certain unemployment insurance contributions concerning locally employed staff members of an embassy through enforcement. The delegation of Finland informed the Committee that prior to this decision, the Fund had requested a statement from the Ministry of Foreign Affairs on measures of execution in relation to insurance fees with an embassy. In its statement, the Ministry of Foreign Affairs had paid attention to Article 22 paragraph 3 of the 1961 *Vienna Convention on Diplomatic Relations* and had referred to Part IV of the 2004 *United Nations Convention on Jurisdictional Immunities of States and Their Property*

[17] High Court, *Estrada v. Al-Juffali*, [2016] EWHC 213 (Fam), judgment of 8 February 2016.
[18] High Court, *Al Attiya v. Bin-Jassim Bin-Jaber Al Thani*, [2016] EWHC 212 (QB), judgment of 15 February 2016.

regarding State immunity from measures of constraint in connection with proceedings before a court.

47. The delegation of the United States of America provided update to the Committee on two cases previously presented to the CAHDI.

The case of *OBB Personenverkehr AG v. Carol P. Sachs*[19] concerned a Californian resident who brought a suit against OBB Personenverkehr AG, Austria's national railway and a foreign sovereign instrumentality under the Foreign Sovereign Immunity Act (FSIA), in a California federal court. The plaintiff had been seriously injured while attempting to board a train in Austria and asserted negligence, design defect, failure to warn, and breach of implied warranty claims. She claimed that the railway, by selling train tickets in the United States through an internet seller, was carrying on commercial activity in the United States. She relied on the "commercial activity exception" of the FSIA which allows a US court to hear suits involving a foreign State when the action is "based upon" the State's commercial activity in the United States. The District Court for the Northern District of California dismissed the complaint on the grounds that OBB Personenverkehr AG was entitled to sovereign immunity. However, the Court of Appeals for the Ninth Circuit reversed this decision. On 1 December 2015, the Supreme Court of the United States of America reversed the decision of the Court of Appeals holding that the suit fell outside the commercial activity exception and was therefore barred by sovereign immunity. The Supreme Court argued that the "based upon" inquiry required a court to determine the "particular conduct on which the action is 'based,' and identify that conduct by looking to "the 'gravamen of the complaint'". In the present case, the conduct in the heart of the plaintiff's case was the railway's alleged tortious conduct overseas and not the ticket sale in the United States.

The case of *RJR Nabisco v. European Community*[20] concerned a complaint brought in the early 2000s by the European Community and 26 of its member States against RJR Nabisco (RJR) under the *Racketeer Influenced and Corrupt Organizations* (RICO) Statute alleging that RJR had facilitated a worldwide money-laundering scheme in connection with organized crime groups, laundered money through New York financial institutions, and committed common law torts in violation of New York law. The United States District Court for the Eastern District of New York dismissed the complaint on the grounds that the RICO Statute has no extraterritorial application, and also dismissed the State law claims on the grounds that the European Community did not qualify as an organ of a foreign State under Title 28 of the US Code §§ 1322, 1603, which "deprived the court of jurisdiction over the State law claims." The Second Circuit disagreed and held that the Congress had clearly manifested an intent for RICO to apply extraterritorially in the type of circumstances alleged here. The Second Circuit further held that the European Community qualified as a "foreign State" under Title 28 of the US Code § 1332(a)(4), and "its suit against 'citizens of a State or of different States' comes within the diversity jurisdiction." On 1 October 2015, the Supreme Court of the United States of America granted review on the question of whether, or to what extent, RICO applies extraterritorially. On 18 December 2015, the United States filled its *amicus curiae* and argued that the judgment of the Court of Appeals should be vacated on the following grounds:

- RICO applies extraterritorially when the underlying crimes in the action have extraterritorial application;
- RICO has limited extraterritorial application in the RICO enforcement actions brought by the government of the United States for violations of the Statute;
- a private RICO plaintiff must allege a domestic injury.

The delegation of the United States informed the Committee that the case was scheduled for oral arguments in March 2016.

[19] Supreme Court of the United States, *OBB Personenverkehr AG v. Carol P. Sachs*, case no. 11-15458.
[20] Supreme Court of the United States, *RJR Nabisco v. European Community*, case no. 11-2475-cb.

The delegation of the United States finally informed the Committee that the United States had filled four suggestions of immunity on behalf of foreign officials who enjoyed status based immunity under customary international law and US common law: the President of China, the Emperor and Prime Minister of Japan, the President and Prime Minister of Laos and the President and Foreign Minister of Myanmar.

48. On possibilities for the Ministry of Foreign Affairs to raise public international law issues in procedures pending before national tribunals and related to States' or international organisations' immunities, the CAHDI noted that to date, 29 delegations (Albania, Austria, Belgium, Canada, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Israel, Italy, Japan, Latvia, Luxembourg, Montenegro, the Netherlands, Norway, Portugal, Romania, the Russian Federation, Slovakia, Slovenia, Spain, Sweden, and the United States of America) had replied to the questionnaire on this matter (document CAHDI (2016) 13). The CAHDI invited delegations which had not yet done so to submit or update their replies to the questionnaire.

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

49. The Chair reminded delegations that a *Revised questionnaire on the organisation and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs* had been presented at the 47th meeting of the CAHDI and contained additional questions on gender equality in conformity with the Council of Europe Gender Equality Strategy for 2014-2017. He welcomed the replies submitted by 30 delegations (Albania, Andorra, Armenia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Canada, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Israel, Italy, Latvia, Luxembourg, Mexico, Montenegro, Norway, Slovenia, Sweden, Switzerland, the United Kingdom, the United States of America and NATO) to this revised questionnaire as contained in document CAHDI (2016) 11 prov.

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

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

- *Exchange of views with Ms Catherine Marchi-Uhel, Ombudsperson of the United Nations Security Council's ISIL (Da'esh) and Al-Qaida Sanctions Committee*

51. The Chair welcomed and thanked Ms Catherine Marchi-Uhel, Ombudsperson of the United Nations Security Council's ISIL (Da'esh) and Al-Qaida Sanctions Committee for having accepted the invitation of the CAHDI. The Chair underlined that it was an honour for the Council of Europe and the CAHDI to count with the presence of the newly appointed Ombudsperson, one year after the exchange of views with her predecessor, Ms Kimberly Prost. The statement of Ms Marchi-Uhel appears in **Appendix IV** to the present meeting report[21].

52. Ms Marchi-Uhel previously worked in the French Ministry of Foreign Affairs, Legal Affairs Division, Human Rights Section and served as a *Juge des enfants* for criminal cases involving juveniles. She also served as a full-time international judge at the Extraordinary Chambers in the Courts of Cambodia (ECCC) and was a Senior Legal Officer with the International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber. In addition, she served as International Judge of the Pre-Trial Chamber of ECCC, Reserve International Judge of the Supreme Court Chamber of ECCC and International Judge with the United Nations Mission in Kosovo. From July 2014 to April 2015, Ms Marchi-Uhel was seconded to the United Nations

[21] The statement of Ms Marchi-Uhel is also available on the website of the CAHDI at the following link.

Mission in Liberia (UNMIL) as Principal Rule of Law Officer, advising the Special Representative of the Secretary-General and the Deputy Special Representative of the Secretary-General for Rule of Law on justice and security matters. Before being appointed as Ombudsperson, she was serving as Head of Chambers at the ICTY.

53. Ms Marchi-Uhel informed the CAHDI of the transition period between the term of Ms Prost and her term as well as the challenges faced by the Ombudsperson and the recent developments in these areas.

54. Ms Marchi-Uhel was appointed by the Secretary General of the United Nations on 13 July 2015, the same day as the term of office of Ms Prost expired. She took up her official duties on 27 July 2015. The interaction between herself and Ms Prost was therefore crucial, considering firstly that four transition cases had to be examined, i.e. cases for which Ms Prost had issued comprehensive reports but for which the oral presentation of these reports to the Sanctions Committee had not yet taken place. Ms Marchi-Uhel informed the Committee that in order to respect the procedure required by the Sanctions Committee and to guarantee fairness to the petitioners, Ms Prost was associated to these cases and presented therefore the reports to the Sanctions Committee and replied to the questions. Secondly, Ms Marchi-Uhel underlined that the exchanges with Ms Prost were necessary in order to ensure consistency of approaches in the practice of the Ombudspersons. For this purpose, Ms Marchi-Uhel had decided to create a database available to the Ombudsperson and her Office containing the key findings of the comprehensive reports. Finally, Ms Marchi-Uhel underlined the importance of making timely arrangements and preparing legacy tools in the future in order to organise adequately the next transition.

55. Regarding the challenges faced by the Ombudsperson, Ms Marchi-Uhel provided information to the Committee on the nature, the amount and the quality of the information to which the Ombudsperson has access as well as on the lack of transparency on the practice of the Ombudsperson.

56. With regard to the information, Ms Marchi-Uhel underlined that a challenge laid in the nature of the information available to the Ombudsperson, considering that the source sometimes could not be identified and tested. Furthermore, the confidentiality of the information could sometimes raise fairness issues, as it could not be shared with the petitioner. With regard to the amount of information available to the Ombudsperson, Ms Marchi-Uhel pointed out that it often depended on the capacity of States and other providers to actually acquire relevant information and the willingness to share it. In this regard, she underlined that the Office of the Ombudsperson had concluded arrangements/agreements on access to confidential or classified information with 17 States and encouraged the States which had not yet done so, to consider concluding such arrangements/agreements. Finally, on the quality of the information, Ms Marchi-Uhel underscored that she paid much attention to the means by which the information was obtained and affirmed that like her predecessor, no information obtained through torture or manipulated was relied upon.

57. Regarding the lack of transparency on the practice of the Ombudsperson, Ms Marchi-Uhel recalled that the Security Council requires that the Ombudsperson treat its comprehensive reports and their content as strictly confidential. She underlined that in order to improve this situation and provide to the largest extent information to the petitioner, positive developments had occurred and the analysis of the Ombudsperson was hence more extensively disclosed to the petitioner through reasons letters. With regard to the absence of case-law of the practice of the Ombudsperson, Ms Marchi-Uhel informed the Committee that she had prepared a document addressing the Ombudsperson's approach to analysis, assessment and use of information which had been made available on the website of the Office of the Ombudsperson on 17 February 2016[22]. This document contains information on the assessment of information pertaining to issues such as determining the existence of an association with ISIL (Da'esh) or Al-Qaida, the required mental element for

[22] The document on the "Approach to Analysis, Assessment and Use of Information" is available at the following link.

retaining a listing, actions of individuals as a basis for retaining the listing of an entity, other forms of support as well as factors relevant to establishing disassociation. The aim of this document is to facilitate the task of petitioners and their counsel in the preparation of their case.

58. In conclusion, Ms Marchi-Uhel underlined that the recourse to the Ombudsperson was effective and emphasised that the progress made over the last years was very important for individual rights involved, but equally significant in terms of bringing credibility and strength to the targeted sanctions regimes.

59. The Chair of the CAHDI thanked Ms Marchi-Uhel for her presentation and invited delegations which so wished to take the floor.

60. Delegations welcomed the presence of Ms Marchi-Uhel in the Council of Europe and commended her important, efficient and independent work. Many delegations highlighted that her functions contributed to the strengthening, effectiveness and credibility of the ISIL (Da'esh) and Al-Qaida sanctions regime. Moreover, the report published on 17 February 2016 on the website of the Office of the Ombudsperson on "Approach to Analysis, Assessment and Use of Information" was commended and considered as an important tool for petitioners.

61. Delegations voiced their views that despite Ms Marchi-Uhel and her predecessor's outstanding efforts, the mandate needed to be further reformed and strengthened. In this respect, many delegations referred to the proposals of the Group of Like-Minded States on Targeted Sanctions[23] advocating for, amongst other, the institutional stability of the Office of the Ombudsperson, the extension of the mandate to other sanctions regimes and improved information sharing between member States and the Ombudsperson as well as between the Sanctions Committee and Member States, national and regional Courts, and other authorities [24]. With regard to the latter proposal of the Group of Like-Minded States, Ms Marchi-Uhel noted with interest that in its recent judgment of 27 January 2016 in the case *Youssef v. Secretary of State for Foreign and Commonwealth Affairs*[25], the Supreme Court of the United Kingdom had shared in its reasoning some of the findings of the Ombudsperson who recommended to maintain the listing. Reference was also made to the judgment of the Court of Justice of the European Union in the case *Al-Faqih and others v. Commission*[26] in which the General Court had obtained information from the Sanctions Committee. Individuals in that case had been delisted by the Committee without having recourse to the Ombudsperson. Ms Marchi-Uhel underlined that there was no need to speculate much to advance that access to reasons following recommendations by the Ombudsperson to delist could only strengthen the demonstration that the fundamental rights of the individual had been respected, including the right to be heard and to have access to reasons. Ms Marchi-Uhel expressed the view that in order to enhance such cooperation and promote transparency, parts of the reports of the Ombudsperson could be disclosed when needed by other entities.

62. In reply to several questions on the institutionalization of the Office of the Ombudsperson, Ms Marchi-Uhel welcomed the adoption of the *United Nations Security Council Resolution 2253 (2015) on "Threats to international peace and security caused by terrorist acts"*[27] on 17 December 2015 in which the Security Council "underscores the importance of the Office of the Ombudsperson, and requests the Secretary-General to continue to strengthen the capacity of the Office of the Ombudsperson by providing necessary resources, including for translation service, as appropriate, and to make the necessary arrangements to ensure its continued ability to carry out its mandate in an independent, effective and timely manner, and to provide the Committee an update

[23] The Group of Like-Minded States comprises Austria, Belgium, Costa Rica, Denmark, Finland, Germany, Liechtenstein, the Netherlands, Norway, Sweden and Switzerland.
[24] The Group of Like-Minded States also advocates for the need for transparency and enhanced transparency, timely provision of information and reasoned decisions about the listings.
[25] Supreme Court, *Youssef v. Secretary of State for Foreign and Commonwealth Affairs*, [2016] UKSC 3.
[26] Court of Justice of the European Union, Case T-134/11, *Al-Faqih and others v. Commission*, judgment of 28 October 2015.
[27] See the text of Resolution S/RES/2253(2015) at the following link.

on actions taken in six months". Ms Marchi-Uhel expressed the hope that the report which will be issued in six months would contain proposals and solutions to the institutional challenges faced by the Ombudsperson since the creation of the Office.

63. On the possibilities for States to further support the work of the Ombudsperson, Ms Marchi-Uhel firstly reaffirmed the importance of the information sharing between member States and the Ombudsperson, underlining that such cooperation was critical to the effective operation of the Office. Acknowledging that it was a two-way process, i.e. information provided by States and motivated requests made by the Ombudsperson, Ms Marchi-Uhel encouraged States to conclude arrangements with the Office for the sharing of confidential information. Secondly, Ms Marchi-Uhel underlined that raising the profile of the mechanism and conveying appreciation to the system which finds a balance between the right of the individuals and the necessity to protect national interest as well as to fight against terrorism would highly support the work of the Ombudsperson. Finally, Ms Marchi-Uhel underlined that supporting the possibility to expand the mandate of the Ombudsperson so as to give the possibility to the Sanctions Committee to seize the Ombudsperson in cases where the triennial review did not generate information would be valuable.

64. Concerning the Focal Point for De-Listing which receives de-listing requests from petitioners on all committee sanctions lists, other than the ISIL (Da'esh) and Al-Qaida Sanctions List, Ms Marchi-Uhel welcomed the proposal made by the Group of Like-Minded States to entitle the Office of the Ombudsperson to receive requests for humanitarian exemptions by listed individuals or entities. She underlined that, while this prerogative belongs to date to the Focal Point, this would be beneficial to the coherence of the ISIL (Da'esh) and Al-Qaida sanctions regimes.

65. With regard to the possible extension of the mandate of the Ombudsperson to other sanctions regimes, several delegations welcomed such proposal which would improve due process guarantees in other targeted sanctions regimes. Ms Marchi-Uhel indicated that in principle, it was difficult to justify why listed individuals and non-State entities in other sanctions regimes were not granted such guarantees. Acknowledging that each sanctions regime and its underlying political situation was unique and that some sanctions regimes could be more suitable for such extension than others, Ms Marchi-Uhel took the view that such process should be undertaken with a pragmatic approach, on a case by case basis and with the possible need to adapt the Ombudsperson's mandate.

- ***Cases that have been submitted to national tribunals by persons or entities included in or removed from the lists established by the United Nations Security Council Sanctions Committees***

66. The Chair recalled document CAHDI (2016) 14 on the *Cases that have been submitted to national tribunals by persons or entities included in or removed from the lists established by the United Nations Security Council Sanctions Committees* and invited all delegations to submit information in this respect.

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

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

68. The delegation of Lithuania informed the CAHDI of the case of *Vasiliauskas v. Lithuania*[28] concerning the retroactive conviction of the applicant for the crime of genocide. The applicant was a security services officer from 1952 to 1975 of the Lithuanian Soviet Socialist Republic (the "LSSR") during the years of Soviet period. At the time the nation-wide partisan resistance

[28] *Eur. Court HR*, *Vasiliauskas v. Lithuania*, Grand Chamber Judgment of 20 October 2015, Application No. 35343/05.

movement aimed at re-establishing an independent Lithuania was forcefully suppressed by the Soviet authorities. In 2004 the applicant, who took part in person in the killing of two partisan brothers in 1953, being at that time a Ministry of State Security (MGB) officer, was charged with and subsequently sentenced to six years imprisonment for the crime of genocide under Article 99 of the new Lithuanian Criminal Code. This Criminal Code was not in force at the time of the killing, but it included criminal liability for genocide of political groups. The *Convention on the Prevention and Punishment of the Crime of Genocide* of 1948 ("Genocide Convention") at the time of the killing was already in force but definition of genocide enshrined in its Article II included no political groups. Relying on Article 7 (no punishment without law) of the ECHR, the applicant argued before the Court that his conviction had amounted to retrospective conviction for a crime which did not exist under public international law at the time. The Grand Chamber of the Court in its analysis agreed with the applicant, underlying that the retrospective application of criminal law was contrary to the ECHR. The Court also further analysed the state of public international law and concluded that in the definition of genocide crime in 1953 'political groups' were not included – neither in treaty nor in customary international law. In response to the defendant's argument that the partisans had been "part" of a national group and therefore protected by Article II of the Genocide Convention, the Court noted that there was no case law in favour of such an interpretation. Furthermore, the Court rejected the defendant's argument that the applicant's acts were recognised as criminal according to the general principles of law recognised by civilised nations (reference to Article 38 (c) of the ICJ Statute). In conclusion, the Court held that there had been a violation of Article 7.

69. The delegation of Belgium drew the attention of the CAHDI to two cases.

The first was the case of *M.D. and M.A. v. Belgium*[29] concerning the removal of a Russian couple of Chechen origin from Belgium to the Russian Federation. The applicants had left Russia following a deadly family dispute and a warning that certain people were looking for them. Their brother-in-law, who had remained in Chechnya, was later murdered after their departure. Upon arrival in Belgium, the applicants applied for asylum, but their application was declared inadmissible by the Belgian authorities on the grounds that a personal vendetta did not constitute a reason for granting asylum. The applicants appealed this decision four times and the decision was upheld at every appellate instance, except at the fourth appellate instance where a consideration of the appeal, and the corresponding new material supporting it, was refused. Relying on Article 3 (prohibition of torture and inhuman or degrading treatment) of the ECHR, the applicants argued that their expulsion to Russia would put them at risk of ill-treatment. In its judgment, the Second Section of the Court firstly observed that the refusal of the fourth appeal had been in line with Belgian law. However, the Court noted that the evidence put forward as new material supporting the applicants' fourth appeal was not sufficiently stringently examined. This, the Court stated, placed a disproportionate burden on the applicants to prove that they would be at risk of ill treatment. Consequently, the Court ruled that there would be indeed a violation of Article 3 if the Belgian authorities did not re-examine the risk of ill-treatment in light of the new material provided.

The second case mentioned to the CAHDI by the delegation of Belgium was the case of *Sow v. Belgium*[30], concerning the risk of the applicant facing excision (female genital mutilation) if removed from Belgium to her country of origin, Guinea. While in Guinea, the applicant had been forced to undergo a partial excision and to marry her cousin. The applicant then escaped to Belgium three days after the forced marriage and lodged an asylum application there, claiming *inter alia* that she had been forced to leave Guinea because of her forced marriage. The Belgian authorities denied her refugee status. After an unsuccessful appeal of that decision, the applicant lodged a second asylum application supported by new documents. Following a rejection of this second asylum application, the applicant was served with an order to leave the country and placed in a detention centre. The applicant filed a third asylum application, which was also rejected. The

[29] *Eur. Court HR*, *M.D. and M.A. v. Belgium*, Second Section Judgment of 19 January 2016, Application No. 58689/12 [available only in French].
[30] *Eur. Court HR*, *Sow v. Belgium*, Second Section Judgment of 19 January 2016, Application No. 27081/13 [available only in French].

applicant then requested for a stay of execution, which was dismissed. Relying on Article 3 (prohibition of inhuman or degrading treatment) and Article 13 (right to an effective remedy) of the ECHR, the applicant alleged that she would be at risk of ill-treatment if sent back to Guinea. The Second Section of the Court in its observations noted that the Belgian authorities had examined the first asylum application in detail before reaching the conclusion to reject the applicant's application. In this respect, the Court expounded that it was not relevant that the Belgian authorities had in other asylum cases concerning individual circumstances of young women, taken the risk of re-excision into account. The Court accordingly found no violation of Article 3. With regard to Article 13, the Court noted that national authorities did not need to re-examine asylum applications if the examination had been detailed and rigorous. In this respect, the Court highlighted that the situation would be different if new facts were presented. However, in this case, the Court concluded that the risk of re-excision had been fully considered. Therefore the Court found no violation of Article 13.

70. The Secretariat presented to the CAHDI an internal document on the *"Case law of the European Court of Human Rights concerning Public International Law"* (document PIL (2015) Case Law Draft) prepared by the Division of Public International Law and containing the press releases of the judgments of the European Court of Human Rights which have been examined by the CAHDI during its meetings as well as other cases related to public international law. The Secretariat underlined that this document, which is still a draft, could be useful for the CAHDI experts as it contains in a single document the main case law in this field. The CAHDI welcomed this initiative and thanked the Secretariat. The CAHDI further agreed that the final version of this document would be distributed at its next meeting.

10. Peaceful settlement of disputes

71. On the topic of peaceful settlement of disputes, the Chair presented a document on the *Compulsory jurisdiction of the International Court of Justice* (document CAHDI (2016) 3) and informed the CAHDI that since its last meeting, Bulgaria (27 November 2015) and Japan (6 October 2015) had amended their declarations of compulsory jurisdiction of the International Court of Justice ("the ICJ").

72. The Chair also mentioned the case of *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*[31], the judgment of which was rendered by the ICJ on 16 December 2015. In its judgment, the ICJ found that Nicaragua had violated Costa Rica's territorial sovereignty and navigational rights, as well as the Court's Order of 8 March 2011 indicating provisional measures. The ICJ also found that Nicaragua had not breached procedural or substantive environmental obligations through its dredging of the San Juan River.

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

- *List of outstanding reservations and declarations to international treaties subject to objection*

73. In the framework of its activity as the *European Observatory of Reservations to International Treaties*, the CAHDI examined a list of outstanding reservations and declarations to international treaties. The Chair presented the documents updated by the Secretariat containing these reservations and declarations (documents CAHDI (2016) 4 and CAHDI (2016) 4 Addendum prov) and opened the discussion. The Chair also drew the attention of the delegations to document CAHDI (2016) Inf 2 containing reactions to reservations and declarations to international treaties previously examined by the CAHDI and for which the deadline for objecting had already expired.

[31] International Court of Justice, *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Application lodged on 18 November 2010, Judgment delivered on 16 December 2015.

74. With regard to the **reservations and declarations of Singapore** to the International Convention on the Elimination of all Forms of Racial Discrimination, one delegation indicated that the declaration contained in paragraph 1 could be considered as forbidden.

75. With regard to the **declaration of Panama** to the United Nations Convention on the Law of the Sea, one delegation indicated that it constituted an interpretative declaration and not a reservation.

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

77. With regard to the **declaration of Turkey** to the Optional Protocol to the Convention on the Rights of Persons with Disabilities, the delegation of Turkey informed the CAHDI that as long as Cyprus was divided into a Greek and a Turkish part, Turkey would maintain the declaration. One delegation informed the CAHDI that its State had circulated an "opposition" to this declaration because of the use of the term "defunct 'Republic of Cyprus'" considered as unacceptable. Another delegation informed the Committee that it had objected to the declaration and another delegation was considering objecting as the declaration could amount to a reservation contrary to the object and purpose of the Protocol.

78. With regard to the **declaration of Azerbaijan** to the Council of Europe Convention on Mutual Administrative Assistance in Tax Matters, the delegation of Azerbaijan informed the CAHDI of the scope and content of its declaration, explaining that from a practical point of view, it was difficult for Azerbaijan to apply a convention to States with which it had no diplomatic relations. The delegation of Azerbaijan underlined that the declaration was not directed against a specific country. One delegation informed the Committee that it had objected to the declaration while another considered the declaration to amount to a reservation.

79. With regard to the **declarations of Poland** to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, the delegation of Poland explained that the reference to the Polish Constitution was a result of politically sensitive debates in Poland and that the declaration was an expression of the domestic legal order according to which the Polish Constitution prevails over international conventions. Nevertheless, a number of delegations expressed their concern about the reference to the national Constitution. One delegation informed the CAHDI that it had objected to the declarations while other delegations underlined that they were considering objecting.

- *Exchange of views on the opportunity to pursue the examination of partial withdrawals of reservations in the framework of the CAHDI Observatory of reservations to international treaties*

80. The Chair presented document CAHDI (2016) 7 on the *"Opportunity to pursue the examination of partial withdrawals of reservations in the framework of the CAHDI Observatory of reservations to international treaties"*. This document had been prepared following the announcement made at the 50th meeting of the CAHDI on the reflection that had to be carried out on the need to maintain or not the partial withdrawals of reservations on the list within the framework of the CAHDI Observatory, as they were not subject to objection.

81. The Chair recalled that the CAHDI has been performing the functions of *"European Observatory of Reservations to International Treaties"* since its 20th meeting (Strasbourg, 12-13 September 2000) and for this purpose, has itself compiled and considered outstanding reservations to international treaties. While the texts serving as a basis for the work of the CAHDI

as the *"European Observatory of Reservations to International Treaties"* did not expressly foresee the examination by the CAHDI of partial withdrawals of reservations, the CAHDI had in practice examined these partial withdrawals.

82. The Chair further noted that no article of the *Vienna Convention on the Law of Treaties* concerned specifically the partial withdrawals of reservations and their effects, but underlined that the issue had been examined by the International Law Commission (hereinafter the "ILC") which had adopted, at its 63rd Session in 2011, the *Guide to Practice on Reservations to Treaties*[32]. Guideline 2.5.11 of this Guide[33] was in conformity with the position of the CAHDI expressed in 2011 at its 41st meeting (Strasbourg, 17-18 March 2011), according to which *"in light of the practice in this matter, the objections registered against the "original" version of the reservation [are] maintained to the extent that they [concern] an aspect of the reservation which [has] not been covered by the withdrawal. On the other hand, any objections which [have] been registered for the first time at the time of the partial withdrawal would have no effect."*[34]

83. However, the Chair underlined that two questions arose regarding these objections:

- first of all, the question was whether the authors of an objection must formally confirm it or whether it must be understood to apply to the reservation in its new formulation. The practice on this matter seemed to confirm that this assumption of continuity was essential.

- secondly, while the CAHDI had underlined that objections registered for the first time at the time of the partial withdrawal would have no effect, there existed an exception to this principle. Indeed, *"while there seems to be no example, a partial withdrawal might have a discriminatory effect. […] [In this case], it would seem necessary for [the Parties] to be able to object to the reservation even though they had not objected to the initial reservation"*[35]

84. The Chair finally pointed out that a partial withdrawal of reservation could sometimes be considered as a new reservation as the modification of the original text could extend its initial scope. Consequently, it could amount to a late reservation.

85. Several delegations agreed that the CAHDI should continue examining partial withdrawals of reservations on the *"List of outstanding reservations and declarations to international treaties"* as these withdrawals could sometimes amount to a modification of reservation.

86. Following this exchange of views, the CAHDI agreed to pursue the examination of partial withdrawals of reservations and that the partial withdrawals of reservations could be dissociated from the reservations and declarations and appear in another part of the document on the *"List of outstanding reservations and declarations to international treaties"*.

12. Review of Council of Europe conventions

87. The Chair presented document CAHDI (2016) 5 on the *"Main findings of the CAHDI on the conventions and protocol for which it had been given responsibility"*. He recalled that following the decision of the Ministers' Deputies of 10 April 2013 on the review of Council of Europe conventions in the light of the Secretary General's report, the CAHDI had drawn up a work plan at its 46th

[32] See the *Guide to Practice on Reservations to Treaties* at the following link (document A/66/10/Add.1).
[33] According to Guideline 2.5.11: *"1. The partial withdrawal of a reservation modifies the legal effect of the reservation to the extent provided by the new formulation of the reservation. An objection formulated to the reservation continues to have effect as long as its author does not withdraw it, insofar as the objection does not apply exclusively to that part of the reservation which has been withdrawn.*
2. No new objection may be formulated to the reservation resulting from the partial withdrawal, unless that partial withdrawal has a discriminatory effect."
[34] Document CAHDI (2011) 5 paragraph 50.
[35] *Guide to Practice on Reservations to Treaties*, guideline 2.5.11, commentary paragraph 6.

meeting (Strasbourg, 16-17 September 2013) for the follow-up of the conventions for which it had been given responsibility. The conventions and protocols for which the CAHDI had been given responsibility and which were included in its terms of reference for 2014-2015 and for 2016-2017 were the following:

- the *European Convention for the Peaceful Settlement of Disputes* (ETS no. 23);
- the *European Convention on Consular Functions* (ETS no. 61);
- the *Protocol to the European Convention on Consular Functions concerning the Protection of Refugees* (ETS no. 61A);
- the *Protocol to the European Convention on Consular Functions relating to Consular Functions in respect of Civil Aircraft* (ETS no. 61B);
- the *European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers* (ETS no. 63);
- the *European Convention on State Immunity* (ETS no. 74);
- the *Additional Protocol to the European Convention on State Immunity* (ETS no. 74A);
- the *European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes* (ETS no. 82).

88. The Chair recalled that the CAHDI had decided at its 46th meeting to examine the *European Convention on Consular Functions* (ETS No. 61) but not its two additional protocols, namely the *Protocol to the European Convention on Consular Functions concerning the Protection of Refugees* (ETS No. 61A) and the *Protocol to the European Convention on Consular Functions relating to Consular Functions in respect of Civil Aircraft* (ETS No. 61B), as it considered that these two protocols could be considered as "inactive" given that they had not entered into force 20 years after being opened for signature in 1967.

89. At its 50th meeting (Strasbourg, 24-25 September 2015), the CAHDI completed the examination of these conventions and protocol. The Chair informed the delegations that in order to reply to the instructions of the Ministers' Deputies to report back to the Committee of Ministers, the document CAHDI (2016) 5 contained:

- for each convention/protocol, a brief description of the convention/protocol as well as its state of ratification;
- the paragraphs of the meeting reports summarising the discussions held on each convention/protocol;
- grey boxes containing the main findings of the CAHDI on each convention/protocol.

90. The Chair invited delegations to examine the main findings contained in the grey boxes and to consider whether they could be adopted.

91. Following an exchange of views, the CAHDI adopted the main findings contained in these grey boxes and decided to send them to the Committee of Ministers.

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

13. Consideration of current issues of international humanitarian law

92. The Chair invited the delegations to take the floor on current issues concerning international humanitarian law and to present any relevant information on this topic, including forthcoming events.

93. The representative of the International Committee of the Red Cross (ICRC) took the floor to inform the CAHDI of the outcome of the 32nd International Conference of the Red Cross and Red Crescent[36] held on 8-10 December 2015 in Geneva (Switzerland).

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

94. To that end, the representative of the ICRC informed the CAHDI that the Conference had been an overall success and that the high expectations for the Conference had largely been met. There was a record level of participation and the interest in the Conference by the public media was presumably due to the high stakes issues addressed during the Conference. In terms of the agenda for that Conference, the ICRC recognised that it had been too compact and took this as a lesson learned for its next conference. With respect to the numerous parallel side events that had taken in place in different formats during the Conference, the ICRC noted that the attendance of them had been a challenge for a reduced number of delegations but that the side events had added to making the Conference a major platform for humanitarian debate. In terms of substance, the Conference was successful in achieving the adoption by consensus of ten resolutions, four of which were on international humanitarian law issue.

95. With regard to the resolution on *"Health care in danger: continuing to protect the delivery of health care together"*[37], the representative of the ICRC reported that the aims of the resolution, to have a strong basis of continued cooperation between States of the ICRC as well as other stakeholders in order to address the humanitarian issues in this regard, had been fulfilled.

96. In respect of the resolution on *"Sexual and gender-based violence: joint action on prevention and response"*[38], the representative of the ICRC noted that the comments that had been received during the consultations had shown a strong shared concern about the topic. He explained that sexual and gender-based violence was often invisible and further highlighted the importance of the topic.

97. The resolution on *"Strengthening international humanitarian law protecting persons deprived of their liberty"*[39] had the objective of building on the consultation of the last years by opening a new phase of discussion on the issue. The CAHDI was informed that the resolution recommended that further work be done by States, in close cooperation with the ICRC, to strengthen the legal protection of persons deprived of their liberty.

98. With regard to the resolution on *"Strengthening compliance with international humanitarian law"*[40], the representative of the ICRC informed the CAHDI that the adopted text was shorter and less detailed than the draft presented and that, in the ICRC's point of view, the text had thus been a disappointing compromise. To this end, the ICRC hoped that all States would engage actively in the new phase and underlined that it stood ready to facilitate.

99. In respect of the resolution on *"Strengthening compliance with international humanitarian law"*, the delegation of Switzerland reminded the CAHDI that the resolution had been adopted by all States in consensus. The CAHDI was also informed that an election would be held on 8 December 2016 in Bern (Switzerland) to elect the 15 new members of the International Humanitarian Fact-Finding Commission[41]. In this regard, it was recalled that the members are elected by secret ballot from a list of persons to which each of the High Contracting Parties may nominate one person. The Chair of the CAHDI therefore appealed to all delegations to respond to the Swiss invitation.

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[37] The Resolution on *"Health care in danger: continuing to protect the delivery of health care together"* is available at the following link.

[38] The Resolution on *"Sexual and gender-based violence: joint action on prevention and response"* is available at the following link.

[39] The Resolution on *"Strengthening international humanitarian law protecting persons deprived of their liberty"* is available at the following link.

[40] The Resolution on *"Strengthening compliance with international humanitarian law"* is available at the following link.

[41] In order to secure the guarantees afforded to the victims of armed conflicts, Article 90 of the First Additional Protocol to the Geneva Conventions of 1949 provides for the establishment of an International Fact-Finding Commission. The Commission was officially constituted in 1991 and is a permanent international body whose main purpose is to investigate allegations of graves breaches and serious violations of international humanitarian law. The Commission is composed of 15 individuals acting in their personal capacity and elected by the States which have recognised its competence.

100. Concurring with the comments made by the representative of the ICRC regarding the resolution on *"Strengthening compliance with international humanitarian law"*, the delegation of Canada expressed its disappointment at the lack of agreement on an implementing mechanism for international humanitarian law, but reiterated its view that the best way to strengthen international humanitarian law would be to focus on implementation, and further assured the CAHDI of its intention to participate actively in future discussions to that end. The CAHDI further took note of Canada's general satisfaction with regard to the resolution on *"Strengthening international humanitarian law protecting persons deprived of their liberty"* and was informed that on 31 March 2015 Canada had advised the United Nations Security Council (UNSC) of their collective self-defence actions in Syria on the basis that Syria had been unable to or unwilling to prevent the Islamic State of Iraq and the Levant ("ISIL") from carrying out its attacks on its soil[42].

101. The delegation of Australia expressed that the outcome of the recent Conference had been very much welcomed as it considered it to be very important work. The delegation however also concurred with the sentiment of disappointment in terms of the outcome on compliance with regard to the resolution on *"Strengthening compliance with international humanitarian law"* and considered the outcome very weak. The delegation however informed the CAHDI that it would try to find a way to take the issue forward and was looking forward to hearing from others what could potentially be done.

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

- Exchange of views with Judge Silvia Fernández de Gurmendi, President of the ICC

102. The Chair welcomed and thanked Judge Silvia Fernández de Gurmendi, President of the International Criminal Court (ICC) for having accepted the invitation of the CAHDI. The Chair underlined that it was a privilege for the Council of Europe and the CAHDI to count with her presence.

103. President Fernández gave the CAHDI an overview of the current situation and state of affairs at the ICC ("the Court"), focusing on the main challenges facing the Court. Her presentation is reproduced in **Appendix V** to the present report[43].

104. President Fernández stressed that the Court had entered into an unprecedented level of activities in all areas, facing a higher workload than ever before. The Prosecutor of the Court had opened investigations into ten situations under all three trigger mechanisms available under the *Rome Statute of the ICC*: there had been five State Party referrals in the situation in the Democratic Republic of the Congo, Uganda, Central African Republic (twice) and Mali; two United Nations Security Council referrals in the situations in Darfur and Libya; and three *proprio motu* investigations in the situation in Kenya, Côte d'Ivoire and Georgia. The Prosecutor was also currently conducting preliminary examinations into seven on-going situations (Palestine, Ukraine, Iraq, Afghanistan, Colombia, Guinea, Nigeria), with the main purpose of these preliminary examinations being the analysis of whether the statutory criteria for opening an investigation are met.

105. With respect to the judicial work of the Court, the CAHDI took note of the unprecedented number of cases, four in total, in trial hearings this year and the overall increasing workload of the Court. In that regard, President Fernández updated the CAHDI on the progress of current cases. The Court was currently at the reparations stage in the *Lubanga*[44] and *Katanga*[45] cases, and

[42] The Letter dated 31 March 2015 from the Chargé d'affaires a.i. of the Permanent Mission of Canada to the United Nations addressed to the President of the Security Council is available at the following link.
[43] The statement of Judge Fernández de Gurmendi is also available on the website of the CAHDI at the following link.
[44] The case of *"The Prosecutor v. Thomas Lubanga Dyilo"* is available at the following link.
[45] The case of *"The Prosecutor v. Germain Katanga"* is available at the following link.

currently at the pre-trial stage with respect to the case concerning the destruction of cultural monuments in Timbuktu (Mali)[46]. There had also been two confirmation of charges hearings in 2016, one in the case of *Dominic Ongwen*[47] and another in the case of *Ahmad Al Faqi Al Mahdi*[48].

106. Following from all this activity was the first main challenge facing the Court, namely to enhance its efficiency and effectiveness, which the President had set as the main priority of her mandate due to the growing caseload of the Court, as well as to maintain and increase the confidence of the global community in the Court. To this end, the judges had been engaged in collective efforts to expedite the criminal process by adopting best practices and revising their working methods. The results of these efforts were reflected in a Chambers Practice Manual, which is published on the ICC's website[49]. The judges had also provisionally amended Rule 165 of the *Rules of Procedure and Evidence* in order to improve certain procedures related to proceedings for offences against the administration of justice, pursuant to Article 70 of the *Rome Statute*. This had been done to remedy the lack of available judges, since the Court was reaching the maximum capacity of cases it could conduct with the 18 judges in light of the fact that for each case, three judges were required for the pre-trial phase, another three judges for the trial phase, and another five judges for the appeals phase. A judge that had sat in one phase could not sit on the same case in another phase. With the new provisional amendments, it was now possible for only one judge, instead of three, to hear the pre-trial and trial phases of cases concerning offences against the administration of justice, and for three judges to hear the appeal, instead of five. In terms of internal governance, the CAHDI was informed that the Court had been working on the establishment of tangible and meaningful performance indicators. In addition, the Court was in the midst of redesigning and improving several elements of its budget process.

107. With respect to the second challenge facing the Court, President Fernández addressed the issue of State cooperation. While reminding the CAHDI of the Court's independence in its judicial functions, she also acknowledged that the Court relied on the cooperation of States with respect to the conduct of proceedings, access to evidence, protection of witnesses, arrest of suspects and enforcement of sentences. Noting that the States Parties and non-States Parties generally speaking provided good cooperation, she also remarked that there was still room for improvement. In this respect, she highlighted that States could notably appoint a dedicated focal point or a central national authority for ICC matters, adopt effective national procedures for handling requests for cooperation and conclude bilateral framework agreements on voluntary cooperation regarding relocation of witnesses, enforcement of sentences, interim release and release upon acquittal. Furthermore, President Fernández underlined that the ICC had been organising seminars on fostering cooperation in different regions with the assistance of the European Commission in order to allow substantive dialogue with States on cooperation challenges. In this context, she informed the CAHDI that a *High-Level Seminar for Fostering Cooperation with the International Criminal Court*[50] would be held in Bucharest (Romania) on 21-22 March 2016 and that the Council of Europe had been invited to participate along with the countries of the Eastern European Group of States.

108. The third challenge of the Court discussed by President Fernández was the lack of universal ratification, which meant that the Court could not intervene in all situations where core international crimes were committed with impunity. To remedy this, the Court has been ready to engage in dialogue with any State wishing to join the *Rome Statute*. On a final note, the CAHDI was informed that El Salvador was going to deposit its instrument of accession, bringing the number of States Parties to the Rome Statute to 124.

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[46] The case of *"The Prosecutor v. Ahmad Al Faqi Al Mahdi"* is available at the following link.
[47] The case of *"The Prosecutor v. Dominic Ongwen"* is available at the following link.
[48] *Ibid.* footnote 46.
[49] The Chambers Practice Manual is available at the following link.
[50] Two press releases of the Seminar can be consulted respectively at a first link and a second link. The Recommendations adopted at the Seminar are available at the following link.

109. The Chair of the CAHDI thanked President Fernández for her presentation and invited any delegations which so wished to take the floor.

110. In reply to questions on the relationship between African States and the Court, notably with regard to cooperation, President Fernández welcomed the establishment of an independent Africa Group for Justice and Accountability composed of senior African experts on international criminal law and human rights. She informed the CAHDI that the Group's objective was to support efforts to strengthen justice and accountability measures in Africa through domestic and regional capacity building, advice and outreach, and enhancing cooperation between Africa and the Court. She also referred to a regional Seminar for Counsel and the Legal Profession organised by the Court in Arusha, Tanzania, in February 2016. She further underlined that the Court benefited from very good cooperation provided by a number of African States in the context of investigations and proceedings. To further improve cooperation with African States, President Fernández informed the Committee of her intention to meet with the African Group of States in the near future in order to discuss particular issues of concern.

111. With regard to principles on the reparation of victims, President Fernández emphasised the importance of a victim oriented approach and commended the work of the Trust Fund for Victims. She reminded the CAHDI that the Trust Fund had been created by the *Rome Statute* as an independent institution and that it advocated for victims and mobilised individuals, institutions with resources, and the goodwill of those in power for the benefit of victims and their communities. The Trust Fund set up innovative projects to meet victims' physical, material and psychological needs. It could also administer judicial reparations orders of the Court. She recalled that it was funded through public and private donors, as well as court-ordered fines and forfeitures and invited therefore States to continue donating to the Trust Fund.

112. With regard to questions on enhancing cooperation with the Court and increasing its efficiency, President Fernández recalled that in all of its activities, the Court relied on international cooperation, in particular from States. She reminded delegations that under the Rome Statute, States Parties were obliged to cooperate fully with the Court in its investigations and prosecutions. Therefore, dialogue was extremely important in achieving the goals of the Court noting however that a balance had to be made between dialogue and the need to preserve the independence and integrity of the Court.

113. President Fernández further remarked that the Court's first years had shown how challenging it was to apply the hybrid legal system of the Court. In this respect, many issues had been solved, but the Court was now facing other ones. The collective efforts of judges to harmonise working methods were very important and enriching, but had to be done with great care so as not to affect the independence of judges.

114. The Chair thanked President Fernández once again for having accepted the invitation of the CAHDI and for having taken the time to address the CAHDI on issues of the Court which were rarely ever discussed.

115. The Chair then informed the CAHDI of the latest developments concerning the ICC and other international criminal tribunals.

i. The International Criminal Court (ICC)

116. Regarding the two amendments to the Rome Statute of the International Criminal Court adopted at the Review Conference of the Rome Statute held in Kampala (Uganda) on 31 May 2010 to 11 June 2010, the so called "Kampala amendments"[51], the following States had ratified:

[51] See the United Nations Treaty Collection at the following link.

- the amendment to Article 8: Finland (30 December 2015), Georgia (3 November 2015), Lithuania (7 December 2015), and "The former Yugoslav Republic of Macedonia" (1 March 2016).

- the amendments on the crime of aggression: Finland (30 December 2015), Lithuania (7 December 2015), and "The former Yugoslav Republic of Macedonia" (1 March 2016).

117. As regards the latest developments of the ICC:

- on 26 September 2015 in the case of *The Prosecutor v. Ahmad Al Faqi Al Mahdi*[52], Mr Ahmad Al Mahdi Al Faqui (Abu Tourab) was surrendered to the ICC by Niger. Mr Al Faqi is suspected of having committed war crimes in Timbuktu (Mali). This case signified the first case brought before the ICC concerning the destruction of religiously and historically dedicated buildings and monuments. The case also signified the first in the context of the Prosecutor's investigation into the situation in Mali, which had been referred to the ICC by the government of Mali on 13 July 2012. On 30 September 2015, Mr Al Faqi made his appearance before the ICC. The charges were confirmed on 13 January 2016, and the hearing was opened on 1 March 2016.

- on 29 September 2015, the case *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*[53] went to trial. The defendants are on trial for offenses against the administration of justice with regard to witness testimonies in the earlier case of *The Prosecutor v. Jean-Pierre Bemba Gomba*[54], the judgment of which is scheduled for 21 March 2016, according to an order issued by Trial Chamber III on 2 February 2016.

- on 13 October 2015, the Prosecutor of the ICC, Ms Fatou Bensouda, requested an authorisation to initiate an investigation into alleged crimes against humanity and war crimes committed during the armed conflict in Georgia in August 2008. The investigation will span the time between 1 July 2008 and 10 October 2008. Amongst other things, it is estimated that between 51 and 113 ethnic Georgian civilians were killed during the armed conflict, with an estimate of between 13,400 and 18,500 ethnic Georgians having been forcibly displaced. On 27 January 2016, Pre-Trial Chamber I of the ICC authorised the Prosecutor to open an investigation into the alleged crimes committed.

- on 13 November 2015, a review of Mr Germain Katanga's sentence was conducted and it was decided to reduce his sentence, making the date for the completion of his sentence the 18 January 2016. In *The Prosecutor v. Germain Katanga*[55], Mr Katanga had been sentenced on 23 May 2014 to a total of 12 years' imprisonment for crimes committed on 24 February 2003 during the attack on Bogoro, Democratic Republic of the Congo. Since the time spent in detention was deducted from the sentence, Mr Katanga had by September 2015 already served the statutory two-thirds of the sentence. In November 2015, the Panel of three Judges of the Appeals Chamber of the ICC considered the factors in favour of reducing Mr Katanga's sentence and concluded that a reduction was appropriate.

- on 8 December 2015 and pursuant to Article 103 of the Rome Statue, the Presidency of the ICC designated the Democratic Republic of the Congo (DRC) as the State of enforcement of imprisonment sentences in respect of Mr Thomas Lubanga Dyilo and Mr Germain Katanga. This marked the first time the ICC had designated a State for the enforcement of imprisonment sentence. On 19 December 2015, Mr Lubanga and Mr Katanga were transferred to the DRC. With regard to the case of *The Prosecutor v. Thomas Lubanga*

[52] International Criminal Court, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, case No. ICC-01/12–01/15.
[53] International Criminal Court, *The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, case No. ICC-01/05-01/13.
[54] International Criminal Court, *The Prosecutor v. Jean-Pierre Bemba Gomba*, case No. ICC-01/05-01/08.
[55] International Criminal Court, *The Prosecutor v. Germain Katanga*, case No. ICC-01/04-01/07.

Dyilo[56], on 9 February 2016 Trial Chamber II of the ICC ordered the Trust Fund for Victims to add the executive collective reparations plan presented to the Chamber on 3 November 2015 to its reparation plan of the case.

- on 21 January 2016, the confirmation of charges hearing in the case of *The Prosecutor v. Dominic Ongwen*[57] in the situation of Uganda was opened. The confirmation of charges hearing was held to determine the level of evidence needed to establish substantial grounds to believe that the person in question had committed each of the crimes charged. Earlier in 2005, an arrest warrant had been issued for Mr Dominic Ongwen for seven counts of crimes against humanity and war crimes committed on or about 20 May 2004 on the basis of his individual criminal responsibility during the events that transpired at the Lukodi internationally displaced person Camp in the Gulu District. Mr Ongwen was then surrendered to the ICC on 16 January 2015 and on 21 December 2015 the Prosecutor further charged Mr Ongwen with additional crimes not listed in the arrest warrant, making it a total of seventy counts.

- on 28 January 2016, the trial of the case of *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*[58] in the situation of the Côte d'Ivoire opened before the Trial Chamber I of the ICC. The trial started with a reading of the charges against both defendants. Both Mr Gbagbo and Mr Blé Goudé have been accused of four counts of crimes against humanity allegedly committed in the context of post-electoral violence in Côte d'Ivoire between 16 December 2010 and 12 April 2011.

- on 12 February 2016, the Appeals Chamber of the ICC reversed the decision of the ICC Trial Chamber V(A) of 19 August 2015 with regard to the case of *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*[59], which had granted the Prosecutor's request for admission of prior recorded testimony into evidence. The trial of Mr Ruto and Mr Sang was opened on 10 September 2013, both having been accused of crimes against humanity in the context of the 2007 and 2008 post-election violence in Kenya.

- on 15 February 2016, the ICC signed a Memorandum of Understanding on cooperation with the Inter-American Court of Human Rights (IACtHR).[60] The agreement defines the terms of the cooperation between the ICC and the IACtHR and aims at establishing close relations between both courts for the purposes of knowledge, experience and expertise exchange.

ii. Other international criminal tribunals

118. The CAHDI was also informed of the recent developments concerning the functioning of other international criminal tribunals.

119. As regards the latest developments of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the United Nations Mechanism for International Criminal Tribunals (MICT):

- on 15 December 2015, the Appeals Chamber ordered a retrial of Jovica Stanišić and Franko Simatović (Serbia) on all counts of the indictment. The Trial Chamber in the case of *The Prosecutor v. Jovica Stanišić & Franko Simatović*[61] reached its judgment on 30 May 2013, acquitting the defendants of four counts of crimes against humanity and one count of

[56] International Criminal Court, *The Prosecutor v. Thomas Lubanga Dyilo*, case No. ICC-01/04-01/06.
[57] International Criminal Court, *The Prosecutor v. Dominic Ongwen*, case No. ICC-02/04-01/15.
[58] International Criminal Court, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, case No. ICC-02/11-01/15.
[59] International Criminal Court, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, case No. ICC-01/09-01/11.
[60] For the full text, see the following link.
[61] International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Jovica Stanišić & Franko Simatović*, case no. IT-03-69.

violations of the laws or customs of war committed in large areas of Croatia and Bosnia and Herzegovina. The Prosecution's Appeal Hearing was held on 6 July 2015. The Prosecution had argued, *inter alia*, that the Trial Chamber had erred in law in applying the elements of joint-criminal-enterprise liability. Moreover, the Prosecution had argued that the Trial Chamber had erred in law when it required the acts of an aider and abettor to be specifically directed at assisting the commission of a crime. The Appeals Chamber in December 2015 observed that the Trial Chamber had indeed erroneously applied the law, and thus granted part of the Prosecution's appeal and held that the case gave rise to a retrial pursuant to Rule 117 (c) of the Tribunal's rules of Procedure and Evidence.

- on 8 February 2016, Mr Zdravko Tolimir (Bosnia and Herzegovina) passed away in the United Nations Detention Unit in Scheveningen and a standard investigation has been mandated under Dutch national law. On 8 April 2015 and in the case of *The Prosecutor v. Zdravko Tolimir*[62], Mr Tolimir had been convicted of genocide, conspiracy to commit genocide, crimes against humanity, and violations of the laws or customs of war and subsequently sentenced to life imprisonment. Mr Tolimir passed away while awaiting transfer to a State of enforcement of the sentence.

- the Trial Chamber judgment of in the case of *The Prosecutor v. Radovan Karadžić*[63] was scheduled for 24 March 2016. Mr Karadžić (Bosnia and Herzegovina) had been arrested on 21 July 2008 and transferred to the ICTY on 30 July 2008 on two counts of genocide, five counts of crimes against humanity and four counts of violations of the laws of customs of war for his involvement in an joint-criminal-enterprise to permanently remove Bosnian Muslims and Bosnian Croats from Bosnia-Serb claimed territory in Bosnia and Herzgeovina from at least October 1991 to 30 November 1995. Mr Karadžić, founding member of the Serbian Democratic Party and President of Republika Srprska and Supreme commander of its armed forces until July 1996, is one of the highest ranking officials to ever be tried in the ICTY/MICT, making the case of significance.

- the Trial Chamber judgment in the case of *The Prosecutor v. Vojislav Šešelj*[64] was scheduled to be rendered on 31 March 2016. Mr Šešelj was indicted on 14 February 2003 and surrendered to the ICTY on 23 February 2003 for three counts of crimes against humanity and six counts of violations of the laws or customs of war from approximately August 1991 until September 1993 against the non-Serb population of Croatia, Bosnia and Herzegovina and the province of Vojvodina in the Republic of Serbia. On 3 November 2005, a not guilty plea was entered on his behalf. Trial commenced on 7 November 2007 and closing arguments were delivered in March 2012.

120. With regard to the International Criminal Tribunal for Rwanda (ICTR), the last judgment of the ICTR was given in the *Nyiramasuhuko et al.*[65] case on 15 December 2015. Earlier, Trial Chamber II in the same case on 24 June 2011 had found the following:

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

[62] International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Zdravko Tolimir*, case no. IT-05-88/2.
[63] International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Radovan Karadžić*, case no. IT-95-5/18.
[64] International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Vojislav Šešelj*, case no. IT-03-67.
[65] International Criminal Tribunal for Rwanda, *The Prosecutor vs. Nyiramasuhuko et al. (Butare)*, case no. ICTR-98-42.

25 years of imprisonment, Nteziryayo to 30 years of imprisonment, and Kanyabashi to 35 years of imprisonment.

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

121. In the judgment of 15 December 2015, the Appeals Chamber considered all of the appeals and dismissed the Prosecution's appeal and upheld all of the convictions. The Appeals Chamber further reduced the sentences of Ms Nyiramasuhuko, Mr Ntahobali and Mr Ndayambaje, who had been sentenced to life imprisonment, to 25, 30 and 35 years respectively. The Appeals Chamber further ordered the release of Mr Nsabimana and Mr Kanyabashi in consideration of the time they had already spent in prison.

122. The ICTR closed permanently when it ceased its services on 31 December 2015.

123. As regards the latest developments of the Extraordinary Chambers in the Courts of Cambodia (ECCC):

- *Case 002/02*[66] is currently at trial in the ECCC. It is the second trial against Mr Khieu Samphân and Mr Nuon Chea including, *inter alia*, charges of genocide against the Cham and Vietnamese people and crimes committed against Buddhists and former Khmer Republic officials. On 30 November 2015, the evidence hearing shifted to the treatment of the Vietnamese people.

- on 9 December 2015, the International Co-Investigating Judge in *Case 004*[67] charged Mr Yim Tith with genocide of the Khmer Krom, crimes against humanity, grave breaches of the Geneva Conventions of 1949 and violations of the 1956 Cambodian Penal Code. Case 004 is focused on alleged crimes committed between 17 April 1975 and 6 January 1979 in relation to the Cham population in Kampong Cham, the Khmer Krom population in Takeo and Pursat, the East Zone evacuees, purges of the Central Zone and purges of the North-West Zone. The case is currently still under investigation. In the same case, and on 18 December, the judicial investigation against Ms Im Chaem for alleged crimes committed between 17 April 1975 and 6 January 1979 was concluded.

- on 14 December 2015, in *Case 003*[68], the International Co-Investigating Judge charged Mr Meas Muth with genocide, crimes against humanity, grave breaches of the Geneva Conventions of 1949 and of violations of the 1956 Cambodian Penal Code. The crimes were allegedly committed at various security centres, against members of Divisions 164, 502, 117 & 310, at Wat Enta Nhien Security Centre, at Stun Hav work side, by the Navy of Democratic Kampuchea, at the Ream area, and in Kampong Som. The case is currently still under investigation.

- on 16 February 2016, the Supreme Court Chamber of the ECCC resumed its Appeal Hearing in *Case 002/01*.[69] Case 002/01 is the first of at least two trials against Khieu Samphân, former Head of State of Democratic Kampuchea and Nuon Chea, former Deputy

[66] Extraordinary Chambers in the Courts of Cambodia, *Case 002/02*.
[67] Extraordinary Chambers in the Courts of Cambodia, *Case 004*.
[68] Extraordinary Chambers in the Courts of Cambodia, *Case 003*.
[69] Extraordinary Chambers in the Courts of Cambodia, *Case 002/01*.

Secretary of the Communist Party of Kampuchea. They appealed against their convictions for crimes against humanity committed between April 1975 and December 1977, resulting in sentences of life imprisonment. The ECCC is awaiting further progress on this case.

124. As regards the latest developments of the Special Tribunal for Lebanon (STL):

- the trial in the contempt case *STL-14-06*[70] began on 28 January 2016. The parties, amicus prosecutor and defence made their cases until 1 March 2016. Mr Ibrahim Mohamed Ali Al Amin and Mr Akhbar Beirut S.A.L are each charged with one count of contempt and obstruction of justice under rule 60 *bis* of the Tribunal's Rules of Procedure and Evidence.

15. Topical issues of international law

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

126. The delegation of Belgium informed the CAHDI of the latest developments concerning the initiative for a *Multilateral Treaty for Mutual Legal Assistance and Extradition for Domestic Prosecution of the Most Serious International Crimes*. In this respect, in Autumn 2011, Netherlands, Belgium and Slovenia had conducted expert consultations to assess the international legal framework of judicial cooperation and extradition in connection with the repression by national jurisdictions of international crimes – genocide, crimes against humanity, war crimes. It emerged from these consultations that the current framework was not suitable for effective judicial cooperation between States for the continuation of crimes of such nature. The CAHDI was reminded that the investigation and prosecution of persons suspected of having committed crimes of genocide, crimes against humanity and war crimes were primarily heads of national jurisdictions.

127. Due to the very nature of these serious international crimes, suspects, witnesses, evidence or assets relating to these crimes were often not limited to the territory of one single State. This meant that States which had to investigate and prosecute these crimes would have to cooperate practically and judicially in order to be truly effective in the fight against impunity, to comply with their international obligations and to avoid the creation of safe havens for perpetrators of mass atrocities.

128. For this reason, the Netherlands, Slovenia, Belgium and Argentina decided to advance the idea of negotiating an international instrument which would govern the mutual legal assistance and extradition of suspected perpetrators of war crimes, crimes against humanity and genocide.

129. The CAHDI took note that at this stage nearly 50 States from all regions of the world, some Parties and some non-Parties to the *Rome Statute*, had already expressed their support for this joint initiative. In this regard, it underlined the importance of sharing information and activities conducted by the promoters of the initiative at the resumed 13th Assembly of States Parties of the Rome Statute which was held on 18-26 November 2015 in The Hague (Netherlands) and at the 32nd International Conference of the Red Cross and Red Crescent held on 8-10 December 2015 in Geneva (Switzerland) since the last CAHDI meeting. To that end, the CAHDI took note that a permanent declaration was open for signature by all States that were in favour of the idea of starting negotiations in order to achieve the adoption of such an instrument. The United Nations Special Adviser on the Prevention of Genocide, Mr Adama Dieng, had also agreed to present the initiative to the representatives of the member States and observer States of the International Organisation of La Francophonie on 17 June 2016 in Brussels (Belgium).

[70] Special Tribunal for Lebanon, *Case against Akhbar Beirut S.A.L. & Ibrahim Mohamed Al Amin*, STL-14-06.

IV. OTHER

16. Place, date and agenda of the 52nd meeting of the CAHDI: Brussels (Belgium), 15 – 16 September 2016

130. The CAHDI decided to hold its 52nd meeting in Brussels (Belgium) on 15-16 September 2016. On that occasion, Mr Miguel de Serpa Soares, Under-Secretary General for Legal Affairs and United Nations Legal Counsel, will be invited as special guest of the CAHDI. The CAHDI instructed the Secretariat, in consultation with the Chair and the Vice-Chair of the CAHDI, to prepare and communicate the agenda of this meeting.

17. Other business

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

131. The Chair drew the attention of the CAHDI to *Recommendation No. R (97) 11* of the Committee of Ministers on the *"Amended Model Plan for the Classification of Documents concerning State Practice in the Field of Public International Law"* adopted on 12 June 1997 and document CAHDI (2015) 19 on the *"Advantages of an updated Model Plan for the Classification of Documents concerning State Practice in the Field of Public International Law"*, prepared by the delegation of the United Kingdom. To this end, the Chair of the CAHDI invited the delegation of the United Kingdom to provide further comments on this initiative.

132. The delegation of the United Kingdom stated that the Model Plan had been very useful, but expressed that it was in need of updating since it was missing additional areas which could benefit from being included in the Model Plan.

133. The CAHDI then held an exchange of views on the overall utility of the Model Plan and whether there was a need for updating it.

134. Several delegations stated that they had very limited to no use for the Model Plan, and therefore considered that the current plan is sufficient or could be updated on an *ad hoc* basis depending on the specific needs of each country. Consequently, they considered a revision of the model plan and the ensuing time investment not a priority for the CAHDI at the present stage. Several delegations however expressed their willingness to contribute towards and comment with further detail on a potential update of the Model Plan in the near future, should the need arise.

135. In order to expedite the progress of the work on this issue, the delegation of the United Kingdom agreed to undertake an assessment of the views expressed by the experts of the CAHDI concerning the need and the usefulness of revising the Model Plan. The delegation of the United Kingdom will revert to the CAHDI in order that the CAHDI can make a final decision.

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

136. The Chair drew the attention of the Committee on the document CAHDI (2016) 8 on the *"Draft model final clauses for conventions, additional protocols and amending protocols concluded within the Council of Europe"* prepared by the Treaty Office of the Council of Europe

137. The Secretariat, the Head of the Public International Law Division and Treaty Office of the Council of Europe, Ms Marta Requena, presented the above-mentioned document and informed the CAHDI on the main reasons for updating the *"Model Final Clauses for Conventions and*

Agreements concluded within the Council of Europe" adopted by the Committee of Ministers at its 315th meeting in February 1980 (see document CM/Del/DEC(80)315/9E). She further informed the Committee that the CAHDI held an exchange of views on these 1980 Model Final Clauses before submitting them to the Committee of Ministers for adoption.

138. Concerning the present "draft model final clauses" in front of the CAHDI, she informed the Committee that despite the fact that the 1980 Model Final Clauses had been used at least partially in most of the conventions and agreements elaborated within the Council of Europe, some developments which had taken place since 1980 revealed the need for certain changes to the current model final clauses for the elaboration of future conventions and protocols. These developments concern in particular:

- the type of international legally binding instrument concluded within the Council of Europe over the last 35 years. Indeed, since 1980 most of these instruments were conventions and protocols (58 conventions, 28 additional protocols and 23 amending protocols) and only three agreements had been concluded. Therefore specific model final clauses for Agreements have become meaningless while there is a need to differentiate the two types of protocols.

- the increased participation of non-member States, the European Union and international organisations in the elaboration of conventions and protocols;

- the global reach and transnational character of the recent Council of Europe conventions and protocols, which led to an increase of requests for accession from non-member States to these instruments. This increased participation and requests for accession led to the need for involving all of them in the final clauses on signatures, consultations, accessions and notifications procedures. In this respect, it should be point out that in order to treat all Contracting States to conventions and protocols on equal footing, the consultation and invitation procedures had been revised in March 2015. Indeed, since this date the Secretariat of the Treaty Office consults simultaneously the member States and the non-member States which have expressed their consent to be bound by a specific convention, on the request for accession, prior formal inscription of the item on the agenda of the Committee of Ministers.

- the need of different final clauses for additional and amending protocols: due to an important increase in the elaboration of additional protocols that complement the existing conventions, it appeared also necessary to elaborate specific model final clauses for additional protocols. In addition and in order to provide guidance on the specificities of protocols aiming to amend existing conventions, a third set of model final clauses had also been prepared. Indeed, there is diversity in the terminology which not always corresponds to the content of the protocols: among the protocols concluded since 1980, 5 amending protocols are entitled as additional ones while 8 amending protocols are simply entitled as Protocol or Protocol number X. Therefore, these separate set of clauses for additional and amending protocols aim at drawing the drafters' attention on misleading or unclear terminology.

Finally, the Head of the Public International Law Division and Treaty Office underlined that – as it was the case for the 1980 Model Final Clauses – these draft Model Final Clauses are designed as a non-binding tool for the Council of Europe's committees and experts groups in charge of drawing up Council of Europe conventions and protocols.

139. The CAHDI held an exchange of views on the document prepared by the Treaty Office of the Council of Europe, and agreed that, in order to allow delegations to further examine these final clauses, this document would be re-examined at its next meeting in September 2016, together with the written comments to be provided by delegations to the Secretariat before 1 June 2016.

APPENDICES

APPENDIX I

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APPENDIX II

AGENDA

I. INTRODUCTION

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

2. Adoption of the agenda

3. Adoption of the report of the 50th meeting

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

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

II. ONGOING ACTIVITIES OF THE CAHDI

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

6. Immunities of States and international organisations

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

   - Settlement of disputes of a private character to which an international organisation is a party
   - Immunity of State owned cultural property on loan
   - Immunities of special missions
   - Service of process on a foreign State

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

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

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

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

   - Exchange of views with Ms Catherine Marchi-Uhel, Ombudsperson of the United Nations Security Council's ISIL (Da'esh) and Al-Qaida Sanctions Committee

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

10. Peaceful settlement of disputes

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

    - List of outstanding reservations and declarations to international treaties subject to objection

12. Review of Council of Europe conventions

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

13. Consideration of current issues of international humanitarian law

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

    - Exchange of views with Ms Silvia Fernández de Gurmendi, President of the ICC

15. Topical issues of international law

IV. OTHER

16. Place, date and agenda of the 52nd meeting of the CAHDI

17. Other business

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

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

APPENDIX III

OPINION OF THE CAHDI

ON RECOMMENDATION 2083 (2016) OF THE PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE – "INTRODUCTION OF SANCTIONS AGAINST PARLIAMENTARIANS"

1. On 10-11 February 2016, the Ministers' Deputies at their 1247th meeting agreed to communicate Recommendation 2083 (2016) of the Parliamentary Assembly of the Council of Europe (PACE) on "Introduction of sanctions against parliamentarians" to the Committee of Legal Advisers on Public International Law (CAHDI), for information and possible comments by 11 May 2016. The text of this Recommendation and the Resolution 2087(2016) associated with it appears in Appendix I and Appendix II respectively to this document.

2. The CAHDI examined the above-mentioned Recommendation at its 51st meeting (Strasbourg, 3-4 March 2016) and made the following comments concerning those aspects of Recommendation 2083 (2016) which are of particular relevance to the Terms of Reference of the CAHDI.

A. Comments in relation to the general question of the rights of members of the PACE

3. From the outset, the CAHDI notes that the legal situation of members of the PACE travelling in an official capacity to and in Council of Europe member States is governed by Article 40[1] of the *Statute of the Council of Europe*, as further elaborated in the *General Agreement on Privileges and Immunities of the Council of Europe* (GAPI) and its *Protocol.* Furthermore, the CAHDI notes that the rights of members of the PACE when seeking to attend an official meeting in a member State, in particular in relation to the freedom of movement, are defined in Article 13[2] of the GAPI. The immunities enjoyed by PACE members are defined in particular in Articles 14[3] and 15[4] of the GAPI. Moreover, Article 3[5] of the *Protocol* to the GAPI extends the immunities defined in Article 15 of the GAPI to the representatives of the PACE and their substitutes attending or travelling to or from meetings of the PACE committees or sub-committees.

4. The CAHDI recalls that the Committee of Ministers of the Council of Europe has invited on several occasions the governments of member States to adopt specific measures in order to fully

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

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

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

[4] **Article 15 (ETS No.2)**: "*During the sessions of the Consultative Assembly, the Representatives to the Assembly and their substitutes, whether they be members of Parliament or not, shall enjoy:*
- *a. on their national territory, the immunities accorded in those countries to members of Parliament;*
- *b. on the territory of all other member States, exemption from arrest and prosecution.*

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

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

implement the above mentioned privileges and immunities enjoyed by the PACE members. For instance, in its Reply to PACE *Recommendation 1373 (1998) on freedom of movement and the issue of visas to members of the Parliamentary Assembly of the Council of Europe* adopted on 20 October 1998 at the 645th meeting, the Committee of Ministers invited the governments of member States to consider taking a series of measures, in conformity with their national legislation, to ensure that members of the Parliamentary Assembly on official journeys benefit from full entry facilities on the territory of member States[6]. These measures were recalled by the Chair of the Committee of Ministers in his reply to the written Question No. 501 by Lord Russell-Johnston: "Visa requirements for members of the Assembly attending Assembly committee meetings". In this regard, the CAHDI recalls, as does the PACE itself in its Resolution 2087 (2016), that international law grants States full sovereignty over their territory. This implies that States can also freely decide, in conformity with their obligations under international law, on the entry of foreign nationals into their territory.

5. Furthermore, the CAHDI recalls its Preliminary Opinion on *Recommendation 1602 (2003) of the Parliamentary Assembly of the Council of Europe on "Immunities of members of the Parliamentary Assembly"* adopted at its 26th meeting in September 2003 (see Appendix III to this document). In this Preliminary Opinion "the CAHDI considered that the issues dealt with by this Recommendation, in particular paragraphs 2[7] and 5.1[8] required an in depth analysis which it could not carry out during the present meeting, and therefore it reserved its consideration of these issues and to return to them at its next meeting in the light of further information" (document CAHDI (2003)14, Appendix III). The Committee of Ministers took into account this CAHDI Preliminary Opinion when replying to the PACE in relation to Recommendation 1602 (2003) on 21 January 2004 (Reply adopted at the 869th meeting of the Committee of Ministers)[9]. The CAHDI pursued its consideration of PACE Recommendation 1602 (2003) at its 27th and 28th meetings, and agreed "to propose to the Committee of Ministers to ask member states, where national legislation permits, to acknowledge unilaterally as an official document the laissez-passer issued by the competent Council of Europe authorities to the members of the Parliamentary Assembly "(document CAHDI (2004) 27 paragraph 27). At their 904th meeting (17 November 2004), the Committee of Ministers decided to follow the CAHDI's proposal and instructed the Secretary General to transmit the invitation to member States[10]. The CAHDI notes that the Council of Europe Protocol will be issuing this year a Council of Europe laissez-passer to:

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

i. according priority to or at least speedy treatment of requests for visas from members of the Parliamentary Assembly in connection with their officials duties, in particular when supported by a Council of Europe card;

ii. granting long-term multiple entry visas whenever possible;

iii. when the granting of long-term multiple visas is not possible, according priority to the speedy processing of requests for single-entry visas;

iv. authorising authorities at ports of entry, in cases of urgency when it has not been possible for the member of the Parliamentary Assembly to obtain a visa prior to departing on an official journey, and when notified of such impossibility by the appropriate domestic authorities, to grant the appropriate visas exceptionally at the port of entry;

v. granting visas free of charge whenever possible".

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

[7] **Recommendation 1602 (2003) paragraph 2**: *"It recalls that in the light of the ongoing work of the Assembly and its bodies throughout the year and the concept of European parliamentary immunity developed by the European Parliament, the notion "during the sessions of the Assembly" covers the entire parliamentary year*".

[8] **Recommendation 1602 (2003) paragraph 5**: "*It recommends that the Committee of Ministers invite member states:* ***5.1****. to interpret the immunities accorded under Article 14 of the general agreement in such a way as to include the opinions expressed by Assembly members within the framework of official functions they carry out in the member states on the basis of a decision taken by an Assembly body and with the approval of the competent national authorities; […]*"

[9] See the text at the following link.

[10] See the text at the following link.

- members of Council of Europe institutions (Parliamentary Assembly and Congress of Local and Regional Authorities);
- judges of the European Court of Human Rights and the Administrative Tribunal;
- members of monitoring bodies, including the European Committee for the Prevention of Torture (CPT) and the European Committee of Social Rights (ECSR);
- staff members of the Council of Europe.

This document will replace the so-called "blue passport" issued by Council of Europe Protocol since the 1970s which will be discontinued.

B. Comments in relation to specific questions raised in Recommendation 2083 (2016)

6. Concerning the reference contained in paragraph 4.3 of the PACE Recommendation 2083 (2016) in relation to the "current work by the United Nations International Law Commission (ILC)" on this subject, the CAHDI underlines that the ILC is currently examining the subject of "Immunity of State officials from foreign criminal jurisdiction". The ILC defined "State official" in its provisionally adopted "Draft articles" as "any individual who represents the State or who exercises State functions" (see draft Article 2(e))[11]. Even if this definition includes "the legislative (…) functions performed by the State"[12], it must be underlined that the ILC has excluded "persons connected with (…) international organizations" from the scope of the "Draft articles" (see draft Article 1.2)[13]. Furthermore, the ILC is only dealing with immunity from foreign criminal jurisdiction.

7. The CAHDI considers that many political and legal issues are raised by the privileges and immunities of parliamentarians and their corresponding rights and obligations, which are governed by the applicable Council of Europe treaties. The CAHDI recalls the rules currently in force and considers that an efficient implementation of these rules would solve most of the issues highlighted by the PACE. Consequently, the CAHDI considers that at present the drafting of any standard-setting work would not be the best way forward.

8. The CAHDI further considers that the responsibility for imposing restrictive measures on particular individuals, be they foreign parliamentarians or not, rests with the States or the international organisations that have adopted them. It is up to those States or international organisations to meet the requirements of legal certainty and to accompany the said measures by appropriate procedural guarantees taking into account *inter alia* the relevant jurisprudence of the European Court of Human Rights. The CAHDI notes that with respect to the restrictive measures of the European Union, the Court of Justice of the European Union provides judicial protection to persons addressed in such measures. With respect to restrictive measures adopted by the United Nations, the procedures for listing and delisting have been improved.

9. The CAHDI consequently considers that the proposal of the PACE concerning the possibility of the CAHDI carrying out "a feasibility study on the creation of an international status for parliamentarians and any related rights and obligations" would require, in an area which falls to a large extent under the national sovereignty, a prior evaluation of the needs in this field. Accordingly, the question of creating a specific status for parliamentarians goes beyond the sole competence of the CAHDI. Furthermore, recalling its Terms of Reference wherein the CAHDI is instructed by the Committee of Ministers to deal with immunities of States and international organisations, the CAHDI considers the specific immunities, rights and obligations of parliamentarians to be outside its purview.

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[11] Text of draft article 2(e) provisionally adopted by the ILC, see A/69/10, para. 131, p. 231.
[12] See Commentary to article 2 (e), see A/69/10, para.11 p. 235.
[13] Text of draft article 1.2 provisionally adopted by the ILC A/68/10, p.51; and see also commentary in particular paragraphs (1) (9) (10) (14) and (15), pp. 52, 55, 56 and 57.

APPENDIX IV

STATEMENT BY MS CATHERINE MARCHI-UHEL

OMBUDSPERSON OF THE SECURITY COUNCIL ISIL (DA'ESH) AND AL-QAIDA SANCTIONS COMMITTEE

TO THE 51ST MEETING OF THE COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI) OF THE COUNCIL OF EUROPE

(STRASBOURG, 4 MARCH 2016)

INTRODUCTION

It is a great pleasure and an honor for me to be given the opportunity to address the CAHDI on the occasion of its 51st meeting and to share some of the recent developments in the Office of the Ombudsperson.

A year ago, my predecessor Ms Kimberly Prost was here in my stead. On the eve of the end of her term and after five years in the position as the first Ombudsperson, she was sharing some thoughts on the office of the Ombudsperson. She reminded you of the origins of this office and of the mechanism purpose and process of the Ombudsperson which offers to individuals and entities on the ISIL (Da'esh) and Al-Qaida sanctions list recourse to an independent and impartial review for their delisting requests. She insisted on some of its assets and notably the opportunity for petitioners to know, subject to confidentiality restrictions, details of the information gathered in their case, and to be heard by the Committee via the Ombudsperson's comprehensive report. She also shared her thoughts about the impact of the Kadi II decision, before elaborating on some of the key remaining challenges for the Office, namely its lack of institutionalisation, the lack of transparency as well as the difficult access to information.

I will focus my address on the transition which took place during the few first months of my term. It is the first time such transition between two Ombudspersons occurs since the function was established. It may therefore be interesting to reflect on it. Then I will share my thoughts about some of the challenges I face as Ombudsperson, before updating you on developments in these areas.

TRANSITION

I was appointed by the Secretary General of the United Nations on 13 July 2015, on the very day the term of my predecessor expired. I was able to report on duty on 27 July. My interaction with Ms Kimberly Prost was crucial during the first few months following my appointment.

We had to deal with four transition cases, i.e. cases for which she had issued the comprehensive report before the end of her mandate but for which the oral presentation of the report to the Committee was yet to come. She and I were of the view that it was critical that she be associated to such oral presentation. This was for several reasons: to respect the procedure required by the Committee and for its full information as well as in fairness to the petitioners.

There were a few administrative hurdles on the way but we were able to achieve our goal. While I, as the Ombudsperson, formally introduced the four such cases before the Committee, Ms. Prost was able to orally present her reports to the Committee and to respond to questions from members of the Committee when they arose. I also associated her to my exchanges with members of the Committee during the critical phase of the drafting of reasons in the four transition cases.

All of these cases have been presented to the Committee within the timelines prescribed by the Security Council. They have now been disposed of by the Committee following review and

recommendation by the Ombudsperson, resulting in the delisting of three individuals and in the retention of the fourth individual's name on the list.

The second aspect of the transition period which I wish to address is about the legacy of the first Ombudsperson and transmission between the two Ombudspersons. The transition involved extensive exchanges between us immediately after my appointment as well as once I had more concrete and to the point questions for her arising from my reading of her comprehensive reports and other internal working documents.

My focus, I should probably say, my obsession, as I was starting to deal with my first cases was to ensure consistency of approaches in the practice of the Ombudspersons. I therefore had to quickly familiarise myself with the content of about 60 comprehensive reports she had issued as a result of her review of delisting requests. Only those reveal the way she has concretely applied such approach in cases. If I were to at any stage even slightly depart from a previous approach, it would have to be in full knowledge and with cogent reasons to do so, not as a result of my ignorance of such practice.

When I joined the Office it had no data base capturing key findings in the comprehensive reports to illustrate this practice in cases dealt with by the Ombudsperson and organising them in a searchable way. Having conducted the exercise of reviewing all of these reports, I found it important to organise the product of this review into such an internal database which is now available to the Ombudsperson and her support team.

I learned two main lessons from the transition exercise. First, there is a need to make timely arrangements in the future to avoid any serious impact the next transition could have on the fairness to petitioners. In one of the cases referred to by the first Ombudsperson in her last report to the Security Council fairness issues arose from the minimal amount of time she had to present her comprehensive report. Second, it is already time for me to think of further legacy tools for future transition.

Let me now turn to a few of the challenges I face as Ombudsperson as announced in my introduction. The first one concerns the nature, amount and quality of information I have access to. The second concerns the lack of transparency about the practice of the Ombudsperson. On this last point, I will share with you some positive developments.

NATURE, AMOUNT AND QUALITY OF INFORMATION

Nature of the information:

For a practitioner with a judicial background it is unusual to apply a legal standard based on material which rarely amounts to evidence in a strict sense. Of course, when I test the credibility of the Petitioner, or when I get to review a document whose source is identified and can be tested, I feel on familiar ground. But the information I gather from States consists for a large part of statements – or I should say – of summaries of the relevant information about the activities of the Petitioner they are able and willing to share. I rarely get to know the source of such information. The process whereby I assess the credibility of the information is therefore very different from the one whereby judges or parties test the credibility or authenticity of evidence. I carefully review all the information. However, my assessment of whether there is sufficient information to provide a reasonable and credible basis for maintaining the listing at the time of review – this is the test I apply – is a challenging task.

Another consideration relating to the nature of the information is confidentiality. Such type of information can be very useful, notably when it supports or corroborates information of a general nature, or even when it associates a source to a piece of information already gathered. But in itself making use of classified or confidential information is complex. Providers of such information place restrictions on its use which I am bound to respect. I cannot share it with anyone, including the

petitioner, or only in the way consented to by the provider. The Ombudsperson's mechanism does not involve a special advocate or an equivalent that would mitigate this problem. Depending on how decisive the confidential information is, and especially if it is the only base on which the listing could be maintained, relying on such information without sharing it with the petitioner may raise serious fairness issues.

Amount of information

The amount of information I gather is another part of the challenge. In part, it depends on the capacity of States and other providers to actually acquire relevant information. Then it depends on their willingness to share such information, particularly when it comes to classified information. My office has concluded arrangements/agreement on access to confidential or classified information with 17 States. I signed the last in date with the United States in November 2015. The signature of such instruments is very important and I strive to convince a maximum number of States to do so. But it is important to recall that States with which I have concluded such arrangements determine in the context of each case whether they have relevant classified information they are in position to share with me.

Quality of information

The quality of the information communicated is also at issue, particularly in so far as it consists of statements or summaries. It is very difficult to weigh vague statements which are devoid of any details or specifics. Like my predecessor, I do not rely on information if I am satisfied that it has been obtained through torture. I also give serious consideration to an allegation by a petitioner that information has been manipulated, for example 'planted' by a State, provided that such allegation is supported by credible and specific material.

LACK OF TRANSPARENCY ABOUT THE PRACTICE OF THE OMBUDSPERSON

The Security Council requires that the Ombudsperson treat its comprehensive reports and their content as strictly confidential. Even Petitioners do not access to the full comprehensive report issued in their own case. To improve this situation the only thing I could do was to continue to engage with the Committee and to convince it to disclose to the fullest extent my analysis to the petitioner through reasons letters. Real progresses have been made in this respect compared with the situation deplored by my predecessor in several of her reports to the Security Council. In spite of these progresses, such disclosure does equate access to the full comprehensive report.

There is another consequence of the confidentiality requirement. Since I took up my functions as Ombudsperson, I have interacted with a number of petitioners and their counsel. They have expressed that the absence of a case law – or equivalent – of the practice of the Ombudsperson has a negative impact on the presentation of their case. As comprehensive reports are not publically available, even duly diligent counsel cannot review past practice of the Ombudsperson to assist their client.

Of course petitioners and counsel have access to some information about the Ombudsperson process. There is the information I mentioned earlier placed by the first Ombudsperson on the website of the Office. When acknowledging receipt of a request for delisting, I inform the petitioner or counsel of the general procedure for considering delisting requests and the various phases of the process. I also refer them to the website for further information about the applicable standard and the assessment of information.

The first Ombudsperson published the document on the evaluation of information in November 2012. This was in response to grave concerns expressed by the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. At that time only 22 comprehensive reports had concluded through the Ombudsperson process, about a third of cases concluded as of today. The Ombudsperson's approach has

obviously expanded through the examination of cases in the last three years. In addition, this document does not elaborate on other important aspects of the approach of the Ombudsperson with respect to the assessment of information in the context of delisting requests and how recommendations are reached. This in turn has an impact on the quality of petitions and information they contain.

I have therefore come to the conclusion that the best approach to address these concerns would be to expand the information already available on the website. Specifically, I have drafted a document addressing the Ombudsperson's approach to analysis, assessment and use of information. Before finalising this document I consulted the Monitoring Team, the UN Department of Political Affairs as well as the Office of Legal Affairs and the Office of the High Commissioner for Human Rights. The document in question contains explanations on the assessment of information pertaining to issues such as:

- determining the existence of an association with ISIL (Da'esh) or Al-Qaida;
- the required mental element for retaining a listing;
- actions of individuals as a basis for retaining the listing of an entity;
- other forms of support;
- how inferences are made; and
- factors relevant to establishing disassociation.

I then briefed the 1267 Committee on my intention to publish this update on the Website of the Office of the Ombudsperson and the reasons for it. This was on 27 January 2016. I did not seek the endorsement of the members of the Committee but I informed them of my intention and gave them an opportunity to comment on the draft before finalising it. The document was uploaded on the Website of my office on 17 February. In making this information publicly available while respecting the confidentiality of comprehensive reports my primary aim is to facilitate the task of petitioners and their counsel in the preparation of their case, a further step towards fairness. It should also lift some of the unnecessary mystery in which the process before the Ombudsperson remains shrouded.

CONCLUDING REMARKS

In concluding I would like to stress that if the recourse to the independent Ombudsperson to the UN Security Council, 1267 Sanctions Committee is short of offering a judicial protection, it is an effective recourse. The Ombudsperson does not decide on the merits of delisting petitions, but the weight of her recommendations is as you know much higher than the term would suggest. Ms Kimberly Prost was stressing last year that none of the two scenarios under which, according to the terms of resolution 1989 (2011), the Committee can decide not to follow a recommendation by the Ombudsperson that it considers delisting the name of a petitioner occurred. This remains the case to date. The Mechanism has been seized by 67 individuals and entities seeking to be delisted from the ISIL (Da'esh) and Al Qaida sanctions list. Out of the 59 delisting requests fully completed through the Ombudsperson process, only 11 delisting requests have been refused and 43 individuals and 28 entities have been delisted. Thus, I repeat, the recourse before the Ombudsperson is particularly effective.

From a pragmatic perspective, some of those individuals or entities whose names have been retained by the Committee following recommendation by the Ombudsperson may have been tempted to turn to regional courts. Even some of the petitioners delisted may have been tempted to seek ruling that they should not have been listed in the first place. Indeed, unlike a judicial body which would decide on a delisting request on facts and evidence underlying the listing, the Ombudsperson considers such requests at the time it reviews it. But it is a fact that the existence of the Ombudsperson has filtered off a number of cases to this mechanism. I am convinced that this will only continue as efforts to increase transparency and fairness of the process before this mechanism will produce their effects.

From a human rights perspective, the establishment of this mechanism and its progressive reinforcement significantly improved the situation of individuals and entities listed by the 1267 Committee. My predecessor Ms Kimberly Prost has gone to considerable lengths to afford petitioners maximum fair process within existing limitations and I am firmly committed to pursue this approach.

APPENDIX V

STATEMENT BY JUDGE SILVIA FERNÁNDEZ DE GURMENDI

PRESIDENT OF THE INTERNATIONAL CRIMINAL COURT

TO THE 51ST MEETING OF THE COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI) OF THE COUNCIL OF EUROPE

(STRASBOURG, 3 MARCH 2016)

Good afternoon to you all. It is a great pleasure to be here this afternoon and to have the opportunity to address the Committee of Legal Advisers on Public International Law (CAHDI). I have met earlier today with the Committee of Ministers, where I underlined the shared values between the ICC and the Council of Europe: the promotion of the rule of law and the protection of human rights.

I would like to thank CAHDI for the attention it has paid to the ICC over the years. Already in 1994, the Committee launched discussions under the agenda item "Establishment of an International Criminal Court", and 1994 is indeed the year in which the negotiations started for the establishment of the International Criminal Court.

I also appreciate the very substantive statements made by the CAHDI secretaries on behalf of the Council of Europe at the General Debate of the Assembly of States Parties to the Rome Statute in 2013 and 2014.

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I would like to take this opportunity to update you on the activities of the Court and to give you an overview of the current state of affairs before the institution. In doing so, I underline that the Court is currently entering into an unprecedented level of activity in all areas, from investigations and preliminary examinations to trial proceedings.

The Court has now opened investigations in ten situations. The Prosecutor has initiated investigations on the basis of all three triggering mechanisms foreseen in the Rome Statute: State Party referral - Democratic Republic of the Congo, Uganda, Central African Republic (twice) and Mali; referral by the United Nations Security Council – Darfur (Sudan) and Libya; and *proprio motu* - Kenya, Côte d'Ivoire and, most recently, Georgia.

According to the Office of the Prosecutor, preliminary examinations are currently ongoing in seven situations: Palestine, Ukraine, Iraq, Afghanistan, Colombia, Guinea and Nigeria. As you well know, the main purpose of a preliminary examination is for the Prosecutor to analyse whether the criteria for the opening of an investigation are met, in particular whether the Court has jurisdiction for the alleged crimes, and whether the alleged crimes are being adequately addressed by national courts, which have primacy under the Rome Statute in accordance with the system of complementarity.

Where to investigate and who to prosecute are the two most difficult and important questions for our Court. These questions are first addressed by the Office of the Prosecutor, which is an independent organ of the Court but affect the legitimacy of the Court as a whole. Earlier this week, the ICC Prosecutor has publicly issued a Draft Policy Paper on Case Selection and Prioritisation for comments. The document is available on the ICC's website and comments are requested by 18 March. This document is intended to give more transparency and more predictability on the way these decisions are made by the Prosecutor.

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As I indicated before, the Court is going through unprecedented judicial activity, because for the first time in its history, four trials are ongoing at the same time.

First, the trial in *Ruto & Sang* case, in the Kenya situation, where the prosecution case has concluded and, at the moment, the Chamber is considering a motion on no case to answer. Secondly, the trial of Bosco Ntaganda, in the situation in the Democratic Republic of the Congo: this trial started on 2 September 2015. The third one is the trial of Laurent Gbagbo and Charles Blé Goudé, which started 28 January 2016.

The fourth ongoing trial, in the *Bemba et al*. case, concerns allegations of offenses against the administration of justice, rather than core crimes. This is the first such trial at the ICC. The prosecution case has already been completed, the defence case is under way and the trial is expected to conclude later this year.

Reparations proceedings are ongoing in the cases of Thomas Lubanga and Germain Katanga, who were convicted by the Court.

There are also important developments at the pre-trial phase. As you may be aware, earlier this year hearings on confirmation of charges have taken place in two cases. The first one was in the case of Dominic Ongwen, an alleged leader of the Lord's Resistance Army in Uganda. The Chamber is now deliberating on whether or not to confirm the charges – the Chamber has two months from the hearing to this effect, so the decision will come out sometime in March.

The second recent hearing on the confirmation of charges took place in the *Al Mahdi* case. It is the first ICC case involving allegations of destruction of cultural property; this person is accused of attacking buildings dedicated to religion and historic monuments in Timbuktu, Mali. The confirmation hearing was held on 1 March and we expect the decision to be delivered in the coming weeks.

If the charges are confirmed in these two cases, the number of cases on trial will increase from four to six.

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This brings me to the challenges that the Court faces.

The first one, and the one which is the top priority of my mandate as President of the Court, is to enhance the effectiveness and efficiency of the institution. This is imperative due to the growing caseload of the Court, but also to maintain and increase the confidence of the global community in the Court. We all know that justice can be slow, that justice can be expensive, but it is absolutely essential that the proceedings are accelerated to the maximum extent possible, in a way that optimise the resources of the Court. I am happy to say that we have made a lot of progress in this respect.

We are taking stock of the lessons learnt in the first twelve years of existence of the institution and last year we held an extremely useful two-day retreat in Nuremberg to discuss among the judges how to harmonise and improve the proceedings of the Court. The retreat took place with the new judges who joined the Court last year.

The retreat focused to a large extent on pre-trial proceedings and the transitional phase from pre-trial to trial, which we had identified as one of the major challenges in terms of the expeditiousness of proceedings. We also agreed that, to the extent possible, we would try to avoid proposing amendments to the Rules of Procedure and Evidence and rather take measures to expedite proceedings through practice changes.

This is now reflected in a Chambers' Practice Manual, which initially started as a Pre-Trial Practice Manual, reflecting the agreements we reached during and following the retreat on pre-trial proceedings and issues that arise between pre-trial and trial. The Manual is published on the ICC website so that everybody can understand how the judges proceed in the pre-trial phase, and in particular in the confirmation of charges. This is an area where we used to have a lot of diversity between chambers.

The Manual was recently expanded to incorporate additional areas that are common to all phases of proceedings, such as the systems for exception to disclosure in the form of redactions, or issues related to the handling of confidential information during investigations and contact between a party or a participant and witnesses of the opposing party or of a participant. We also have an agreed and harmonised procedure for the admission of victims to participate in proceedings. All of that is now part of the Chambers' Practice Manual which is available online.

As I said, we are trying to avoid amendments to the Rules of Procedure and Evidence because practice changes provide more flexibility and the amendment procedure is cumbersome. Therefore, where possible, we try instead to address issues through agreements to be reflected in the Manual or amendments to the Regulations of the Court. As you are aware, we have an Advisory Committee on Legal Texts, which is currently analysing a number of proposed amendments to the Regulations.

Recently, we have adopted a provisional amendment to the Rules of Procedure and Evidence relating to Article 70 proceedings, i.e. cases concerning offences against the administration of justice. We are reaching the maximum capacity of cases that we can conduct with 18 judges, because a judge that has been sitting in the pre-trial phase cannot sit at the trial phase or the appeal phase of the same case. This frequently makes constituting Chambers difficult. Until now we have applied to Article 70 proceedings the same system applied to core crimes, thereby affecting 11 judges by one case – three at pre-trial, three at trial and five at appeals. This was not a sustainable practice in the long run and the judges therefore unanimously agreed to adopt a provisional amendment to the Rules of Procedure and Evidence that we can apply immediately at the Court, until it is adopted, rejected or amended by the States Parties. This amendment provides that one judge only will deal with the pre-trial proceedings in Article 70 cases, one judge will deal with the trial proceedings and the appeals will be dealt with by a panel of three judges. Accordingly, a total of only five judges would deal with these cases instead of eleven. We hope that this will help us to face the problem of capacity and contribute to expediting proceedings at the same time.

We are also deploying efforts to ameliorate the internal governance of the Court. I would like to mention two major measures that we have undertaken so far. The first one is the development of performance indicators for the Court. Performance indicators are well known in many national systems but this is the first time they are going to be developed for an international court. The idea is to develop tangible and meaningful indicators that may be taken into account in order to assess the performance of the Court.

This is not an easy exercise as the performance of the Court does not depend only on quantitative factors but needs to take into account qualitative factors as well. Further, the performance of the Court depends not only on judges but also the Office of the Prosecutor and the Registry as well as the other parties and participants. We are having a retreat in April 2016 in Glion, Switzerland, where the judges and other principals of the Court will meet in order to seek agreements on performance indicators. Afterwards, we will report on the results of the retreat to the Assembly of the States Parties, following up on a preliminary report that was submitted to the Assembly last year.

We are also trying to improve the budget process, which has proven to be challenging every year. We need to find the right balance between the needs of the Court for the fulfilment of its mandate and the financial constraint that States are experiencing. Immediately after the conclusion of the

last Assembly of States Parties, we embarked in inter-organ discussion intended to produce a better, clearer and more integrated budget document to be presented to the Committee on Budget and Finance and the Assembly.

These were only two examples of what has been done in order to improve the performance of the Court, but there are a number of other measures, including those undertaken by the Prosecutor and the Registry.

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Cooperation is another major challenge for the Court. The Court requires the cooperation of States with respect to the conduct of proceedings, access to evidence, protection of witnesses, arrest and transfer of suspects, the enforcement of sentences, and many other areas. States Parties are legally obliged to cooperate, but the Court also needs to be able to rely on broader voluntary cooperation by States Parties, non-States Parties and organisations.

Generally speaking the Court enjoys good cooperation from States, but there is also room for improvement. Many States that ratified the Statute have not yet adopted implementing legislation. This is a challenge because procedures under national law are necessary in order for States be able to respond effectively to requests for cooperation from the Court. It is also helpful if States appoint a dedicated focal point for cooperation with the ICC.

We urge States to sign bilateral framework agreements with the Court on particular issues that are extremely important for the efficiency of our proceedings. One of these is the relocation of witnesses. The protection of witnesses is a hugely important factor for the success of our proceedings and it is certainly going to be one topic identified in the performance indicators. Sometimes the only way of protecting witnesses under threat is to relocate them to another country, and for this purpose, we need to the voluntary cooperation of States. Voluntary framework agreements are based on double consent: one is to sign the agreement and then when a specific case requiring cooperation arises, the State needs to give its consent again for that particular case.

The Court also needs more States to enter into agreements with the Court on the enforcement of sentences. This was not as urgent in the beginning of our activities, but we are now entering a phase where we will need more States to be ready to accept convicted persons.

Other kinds of voluntary agreements relate to the release of acquitted persons, or the interim release of suspects and accused. The principle is that liberty is the presumption and detention the exception, but we risk not being able to fully uphold this principle, if a person whose release has been ordered by the Court cannot go back to their home country and no other State is willing to receive him or her.

We hope to obtain more cooperation from States by explaining the activities and needs and the activities of the Court in a better way. With the assistance of the European Union, we have organised several cooperation seminars in different parts of the world. The next one will take place in Bucharest, Romania, 21-22 March. It is the first cooperation seminar to be organised in the Eastern European Region and we have extended an invitation to this seminar to the Secretary-General of the Council of Europe. The Court is also interested in the participation of experts of the Council of Europe to discuss specific issues such as developing national implementing legislation or witness protection programs. I sincerely hope that the Council of Europe will be able to participate in the seminar as well as all the Eastern European countries.

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The third challenge is universality. The lack of universal ratification is a constant challenge for the Court as it means that it cannot intervene in all situations where core international crimes are committed with impunity, since our jurisdiction is limited by the treaty. It is therefore important to

expand the number of ratifications, and the Court is always ready to engage in dialogue with any State that is interested in joining the Rome Statute. In this regard, I am pleased to note that later today, in New York, El Salvador will deposit its instrument of accession. When it enters into force, the Rome Statute will have 124 States Parties – still very far from universal ratification.

Ladies and gentlemen, there are several other challenges, but I would like to stop here in order to have a dialogue with you. I look forward to exchanging with you and I thank you once more for this opportunity to address your Committee.