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(CAHDI)

Meeting report

53rd meeting
Strasbourg (France), 23-24 mars 2017

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

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I. INTRODUCTION

1. Opening of the meeting

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 53rd meeting in Strasbourg (France) on 23-24 March 2017 with **Ms Päivi Kaukoranta (Finland)** in the Chair. The list of participants is set out in **Appendix I** to this report.

2. The Chair underlined that she was honoured to chair the CAHDI for the first time. She assured that she would do her utmost to be worthy of the trust that the members of the Committee had placed in her.

3. The Chair further expressed, on behalf of the CAHDI and in her own name, her deep condolences to the victims and their families of the tragic events in London on 22 March 2017.

4. The Chair informed the CAHDI that **Ms Hélène Fester** left the CAHDI Secretariat on 1 October 2016. She thanked Ms Fester for all the excellent work that she carried out during the six years she served the CAHDI and wished her all the success possible in her future endeavours.

5. The Chair introduced the new member of the CAHDI Secretariat, **Ms Irene Suominen**, a national of Finland and Germany, who joined the CAHDI Secretariat on 1 November 2016. Ms Suominen is a qualified lawyer in Germany and holds a Master in International Human Rights Law from the University of Essex (United Kingdom). Before joining the Public International Law and Treaty Office Division, Ms Suominen worked for four years in the Research Division of the European Court of Human Rights.

6. The Chair also introduced the new trainee within the Public International Law and Treaty Office Division, **Ms Irene Melendro Martinez**, a national of Belgium and Spain, who holds a degree in Law from the University of Sussex (United Kingdom) and a Master in Public International Law from the Queen Mary University of London (United Kingdom).

2. Adoption of the agenda

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

3. Adoption of the report of the 52nd meeting

8. The CAHDI adopted the report of its 52nd meeting (document *CAHDI (2016) 23 prov 1*) and instructed the Secretariat to publish it on the Committee's website.

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

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

9. Mr Jörg Polakiewicz informed the CAHDI of the latest developments within the Council of Europe since the Committee's last meeting on 15-16 September 2016 in Brussels (Belgium).

10. Concerning the *European Convention on Human Rights*, the Director informed the CAHDI of the extension of the declarations of France, Turkey and Ukraine under Article 15 of the *European Convention on Human Rights* since the last CAHDI meeting. In this regard, the Secretary General had repeatedly reminded member States that the *European Convention on Human Rights* continued to apply despite the declaration of a state of emergency. Measures derogating from obligations under the Convention were only allowed to the extent strictly required by the exigencies of the situation. The CAHDI also took note of the first applications concerning

measures taken under the state of emergency.[1] The Director furthermore informed the CAHDI of Committee of Ministers' decisions concerning the stage of execution of some judgments of the European Court of Human Rights (hereinafter ECHR[2]).

11. The CAHDI took further note of recent developments concerning the treaty making process within the Council of Europe. In particular, the CAHDI took note of the opening for signature on 30 January 2017 of the *Council of Europe Convention on Cinematographic Co-production (revised)* (CETS No. 220), the on-going negotiations for the *Council of Europe Convention on Offences relating to Cultural Property* as well as the planned next standard setting initiative under the auspices of the Organisation for a *Protocol Additional to the Budapest Convention on Cybercrime on Electronic Evidence*.

12. The Director further informed the CAHDI on the current stage of the negotiations regarding the *Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (hereinafter draft Amending Protocol of Convention 108). The drafting expert group, *Ad Hoc Committee on Data Protection (CAHDATA)*, finalised a first draft in June 2016. Afterwards, taking into account that several issues (EU voting rights, national security exceptions, transborder data flows, entry into force) with important political and legal implications beyond the expert level remained pending, the first draft was submitted to the Rapporteur Group on Legal Co-operation (GR-J) of the Committee of Ministers for examination and decision. The Director pointed out the importance of the outcome of these negotiations for the protection of personal data at the European and international level.

13. The Chair thanked the Director for this overview of the current developments within the Council of Europe and opened the floor for comments and questions. The Permanent Representative of Slovenia to the Council of Europe, Ambassador **Ms Eva Tomič**, who was accompanying her delegate at this CAHDI meeting, also thanked the Director and informed the CAHDI that she is also the Chair of the Rapporteur Group on Legal Co-operation (GR-J) of the Committee of Ministers where this draft Amending Protocol of Convention 108 is currently being discussed. She stressed the need to modernise Convention 108 in a timely manner. She pointed out that it may be relevant for the CAHDI to know that one of the controversies delaying the process was the issue of the way in which the Amending Protocol would enter into force (through a tacit acceptance clause or by the standard procedure of entry into force via signature and ratification). She further indicated that, were the negotiations for the amending Protocol not to be successful, the only remaining option would be to turn to a revised Convention with the complexity resulting from the co-existence of two Convention regimes.

14. Two delegations raised their concerns as to the impossibility of subjecting themselves to an automatic entry into force through a tacit acceptance clause for constitutional reasons, especially with regard to such an important subject matter as data protection. Constructive alternative proposals had been made in the negotiations and the delegations remained optimistic that a compromise could still be reached. Concerning this exchange of views in relation to the revision of Convention 108, the Chair recalled that in accordance with its Terms of Reference the CAHDI was only to provide legal opinions at the request of the Committee of Ministers. Therefore, taking into account that at present the Committee of Ministers through its Rapporteur Group on Legal Co-operation (GR-J) is examining the draft Amending Protocol to Convention 108, she suggested that the CAHDI would only examine questions related to this topic if the Committee of Ministers so requested.

[1] See, in particular, the Chamber decisions declaring the applications inadmissible for lack of exhaustion of domestic remedies in the cases of *Mercan v. Turkey*, no. 56511/16, decision of 17 November 2016; *Zihni v. Turkey*, no. 59061/16, decision of 8 December 2016; *Çatal v. Turkey*, no. 2873/17, decision of 10 March 2017.

[2] See, in particular, the Committee of Ministers decisions at the 1280th meeting, 7-10 March 2017 (DH), CM/Del/Dec(2017)1280/H46-2 and CM/Del/Dec(2017)1280/H-46-26.

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

15. The Chair presented a compilation of Committee of Ministers' decisions of relevance to the CAHDI's activities (documents *CAHDI (2017) 2 restricted* and *CAHDI (2017) 2 Addendum restricted*). In particular, the CAHDI noted that the Committee of Ministers had on 9 November 2016 examined the abridged report of its 52nd meeting (Brussels, Belgium, 15-16 September 2016). The CAHDI took also note of the decision of 8-9 February 2017 by the Committee of Ministers adopting the reply to *Recommendation 2095 (2016) of the Parliamentary Assembly of the Council of Europe – "Parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly"* on which the CAHDI had adopted an opinion at its 52nd meeting as requested by the Committee of Ministers on 6 July 2016.

16. The CAHDI also took note of the main priorities of the current Cypriot Chairmanship of the Committee of Ministers as presented by the Cypriot delegation. Cyprus took over from the Estonian Chairmanship on 22 November 2016. Cyprus' fifth Chairmanship of the Council of Europe aims at embracing the fundamental values of the Council of Europe while targeting the threats identified in the reports of the Secretary General on "State of Democracy, Human Rights and the Rule of Law: a security imperative for Europe". The Cypriot Chairmanship will concentrate on the overarching themes of rights and freedoms for all people without any discrimination, democratic citizenship and the prevalence of the rule of law. Great importance is further attached to the protection of cultural heritage, for instance, by promoting the efforts of the Council of Europe in finalising the new *Convention on Offences related to Cultural Property* and by drawing international attention and support for the pioneering work of the Organisation in this field. The Cypriot delegation further informed the CAHDI of some of the numerous activities and events organised during its Chairmanship. The Ministry of Labour, Welfare and Social Insurance will host a "High-Level Launching conference of the new Council of Europe Disability Strategy (2017-2023)" in Nicosia on 27-28 March 2017. On 28 April 2017, the Supreme Court of Cyprus will host an international Conference on "The freedom of expression and the judgments of the ECHR, in particular, taking into account new trends like the internet". The Youth Peace Camp, entitled "The role of young people and youth policy in peace-building and intercultural dialogue", to be held in Strasbourg on 28 April - 6 May 2017, aims at bringing together young people from conflict areas and helping them develop dialogue, cooperation and peaceful conflict resolution skills. The "Fifteenth Meeting of Official Cosmetics Control Laboratories (OCCL) Network" will take place in Nicosia on 30-31 March 2017.

17. Lastly, the delegation of Belarus drew the attention of the CAHDI to the decision of the Committee of Ministers on the "Abolition of the death penalty in Europe".[3] With regard to this decision, the representative of Belarus made the following statement: "Paragraph 9 of this decision refers to the "minimum international standards with respect to executions" without specifying the legal source for said standards. The Republic of Belarus meets the treaty standards of not sentencing to the death penalty persons below eighteen years of age, pregnant women and mentally ill persons. Furthermore my country goes beyond these standards by not sentencing to the death penalty women. The death penalty also is not applied to elderly men above 65 years of age. The right to appeal and to seek pardon is provided by our national legislation. As for the procedure of execution, the only universally accepted standard thereon is paragraph 9 of the Safeguards guaranteeing protection of the rights of those facing the death penalty, approved by the UN ECOSOC in 1984. This paragraph stipulates that capital punishment shall be carried out so as to inflict the minimum possible suffering. Within our national system this universal standard is definitely met. Belarus also respects The European Union guidelines to policy towards third countries on the death penalty and does not execute the death penalty in public or in any other

[3] "*Abolition of the death penalty in Europe*", decision adopted by the Committee of Ministers at the 1272nd meeting on 30 November 2016.

degrading manner. Thus we are unaware of the international standard of *prior notification on* the execution of the death penalty *to prisoners' relatives and lawyers*. Since the paragraph 9 does not provide the source of this standards, its meaning and possible interpretation remain unclear. Regarding paragraph 10, we appreciate the technical and other assistance being provided by the Secretariat of the Council of Europe to Belarus on the issue of the death penalty. Thus the International conference on "The death penalty abolition and public opinion" was organized in December 2016 in Minsk by the Council of Europe and the Ministry of Foreign Affairs of Belarus. Council of Europe representatives participate in the meetings of the Working Group in the Parliament of Belarus on the death penalty. The latest such meeting of the Parliamentary Working Group is taking place today in Minsk with participation of Mr. Andrea Rigoni, the PACE Rapporteur on Belarus. We are looking forward to further cooperation with the Council of Europe on different aspects of the issue of the death penalty."

6. Immunities of States and international organisations

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

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

18. The Chair presented the topic "Settlement of disputes of a private character to which an international organisation is a party" which had been included to the agenda of the CAHDI at the 47th meeting in March 2014 at the request of the delegation of the Netherlands. The delegation of the Netherlands had prepared a document in this respect (document *CAHDI (2014) 5 confidential*) aimed in particular at facilitating a discussion on the topical questions related to the settlement of third-party claims for personal injury or death and property loss or damage allegedly caused by an international organisation and the effective remedies available to claimants in these situations. The document contained five questions addressed to members of the CAHDI. The contributions of 16 delegations (Albania, Andorra, Armenia, Austria, Belarus, Canada, the Czech Republic, Denmark, Germany, Greece, Hungary, Israel, Mexico, Slovenia, Switzerland and the United Kingdom) could be consulted in document *CAHDI (2017) 3 prov confidential bilingual*. Since the last meeting, only one new contribution, from Belarus, had been submitted to the Secretariat.

19. The Chair recalled that at the request of the delegation of the Netherlands, the Secretariat had sent to all CAHDI experts on 26 September 2016 a Report on "Responsibilities of international organisations" issued by the *Dutch Advisory Committee on Issues of Public International Law* (CAVV) in December 2015 at the request of the Dutch Ministry of Foreign Affairs. The delegation of the Netherlands informed the CAHDI that this report contained important information and suggested some avenues for future action.

20. The CAHDI held an exchange of views concerning this issue. One delegation underlined that in order for the CAHDI to have a proper assessment of this sensitive topic it would be advisable to define the specific scope of what was meant by "dispute of a private character". Furthermore, it was mentioned that in the framework of the UN Peacekeeping Operations and in particular in the so-called "Haiti Cholera case" this was not considered to only encompass damage of a private character.

21. Following this exchange of views, it was agreed that the delegation of the Netherlands will prepare a new document summarising the main trends of the replies already received from the States to their questions and further examine this issue in the context of peacekeeping and police operations. The delegation of the Netherlands encouraged the delegations which had not yet done so, to submit their contributions at their earliest convenience.

22. The Secretariat furthermore drew the attention of the delegations to the fact that the CAHDI had never formally adopted a questionnaire on the issue of the "Settlement of disputes of a private

character to which an international organisation is a party". In reply to some questions from the CAHDI experts the Secretariat confirmed that all the replies sent by the 16 delegations were and continued to be confidential as the discussions on this subject were still at an embryonic stage. The replies would only be used, at this stage, as a basis for the examination of this issue by the CAHDI.

ii. Immunity of State owned cultural property on loan

23. The Chair recalled that the topic "Immunity of State owned cultural property on loan" was included to the agenda of the CAHDI at its 45th meeting in March 2013 following an initiative of the Czech Republic and Austria. The initiative, presented in document *CAHDI (2013)10 restricted* was aimed at elaborating a Declaration in support of the recognition of the customary nature of the pertinent provisions of the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (2004). The Declaration, presented at the 46th meeting of the CAHDI in September 2013, had been elaborated as a legally non-binding document expressing a common understanding of *opinio juris* on the basic rule that certain kind of State property (cultural property on exhibition) enjoyed jurisdictional immunity.

24. The Chair informed the delegations of a new signature of the Declaration by Portugal. The Ambassador and Permanent Representative of Portugal to the Council of Europe had just handed to the Secretariat the Declaration signed by **Mr Augosto Santos Silva**, Minister of Foreign Affairs of Portugal, on 21 February 2017. The Declaration had hence already been signed by the Ministers of Foreign Affairs of 19 States (Albania, Armenia, Austria, Belarus, Belgium, the Czech Republic, Estonia, Finland, France, Georgia, Hungary, Ireland, Latvia, Luxembourg, the Netherlands, Portugal, Romania, the Russian Federation and the Slovak Republic).

25. With regard to the Declaration, the delegation of the Czech Republic informed the CAHDI that the Permanent Representatives of the Czech Republic and Austria to the United Nations had transmitted a letter dated 27January 2017 to the Secretary-General of the United Nations requesting the Declaration to be circulated among the member States of the United Nations for information purposes under the agenda item "The rule of law at the national and international levels" of the United Nations General Assembly.

26. The delegation of the Czech Republic further informed the CAHDI of its intention to organise a seminar on "State Immunity under International Law and Current Challenges" on the occasion of the Czech Chairmanship of the Committee of Ministers. The seminar will take place on 20 September 2017, the day before the 54th meeting of the CAHDI on 21-22 September 2017 in Strasbourg (France). The delegation of the Czech Republic expressed his hope that many of the CAHDI experts could attend the Seminar. The CAHDI delegations would be informed of the agenda of the Seminar as soon as it is available.

27. The Chair recalled that, beside the Declaration, the Secretariat and the Presidency at the time had drafted a questionnaire on national laws and practices concerning the topic of "Immunity of State owned cultural property on loan". The CAHDI welcomed the replies submitted by 24 delegations (Albania, Andorra, Armenia, Austria, Belarus, Belgium, Canada, Croatia, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Mexico, the Netherlands, Norway, Romania, Switzerland, the United Kingdom and the United States of America) to this questionnaire (document *CAHDI (2017) 4 prov confidential bilingual*). Since the last meeting, only one new contribution, from Croatia, had been submitted to the CAHDI Secretariat.

iii. Immunity of special missions

28. Delegations were reminded that the topic of "Immunity of special missions" was included in September 2013 in the agenda of the CAHDI, during its 46th meeting, at the request of the

delegation of the United Kingdom, which had provided a document in this regard (document *CAHDI (2013) 15 restricted*). Following this meeting, the Secretariat and the Chair had drafted a questionnaire aimed at establishing an overview of the legislation and specific national practices in this field. To date, 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 United Kingdom and the United States of America) had submitted their replies to this questionnaire, contained in document *CAHDI (2017) 5 prov confidential bilingual*. Since the last meeting, no delegation had submitted a contribution.

29. The Chair recalled that during the 51st meeting in March 2016[4], the CAHDI had agreed that, considering the topicality and importance of the issue, an analysis outlining the main trends arising from the replies to the questionnaire on "Immunities of special missions" could be prepared by a specialist on this matter which could ultimately become a publication similar to the previous publications[5] of the CAHDI. She further underlined that, when the Secretariat spoke with Brill-Nijhoff Publishers with regard to the two recent CAHDI publications, this publisher expressed its willingness and interest in preparing further CAHDI publications. Obviously, any publication would necessarily entail, as a first step, the disclosure of the replies to the questionnaire. The Chair recalled that the CAHDI held a preliminary exchange of views on the possibility to disclose the replies to the three CAHDI questionnaires on immunities during our last meeting.[6] During this debate the Secretariat informed the CAHDI experts that the replies of delegations to the three following questionnaires are already public and included in three databases:

- "The Immunities of States and International Organisations"
- "The organisation and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs"
- "The implementation of United Nations Sanctions and respect for Human Rights"

It was also pointed out that concerning the Immunities of States the CAHDI also prepared in 2006 a publication with Martinus Nijhoff.[7]

Therefore, the only three CAHDI questionnaires that are not public are the following:

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

30. The Secretariat further pointed out that in relation to this issue, it appeared throughout the latest CAHDI meetings that more targeted information on State practice in the field of "Immunities of special missions" could be of particular relevance not only to the Legal Advisers but also to other international organisations and academics. In replying several questions, the Secretariat underlined that any possible publication would follow the same structure used for the three previous publications mentioned-above related to the CAHDI questionnaires: an introductory part analysing the replies to the questionnaire which would appear in the appendix of the publication. The analytical report would be prepared by a specialist, an individual or a research institution, still to be identified.

31. Considering the topicality and 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. The CAHDI agreed to disclose the replies to this questionnaire after the Secretariat would first send to

[4] CAHDI (2016) 16, para. 31; see, also, CAHDI (2016) 23, para. 40.
[5] *State practice regarding State Immunities* (2006, ISBN-13 9789004150737, xxviii, 1043 pp.); *Treaty Making - Expression of Consent by States to be Bound by a Treaty* (2001, ISBN-13 9789041116925, 720 pp.); *State Practice regarding State Succession and Issues of Recognition* (1999, ISBN-13 9789041112033, 528 pp.).
[6] CAHDI (2016) 23, paras 15-18.
[7] See footnote 5.

all delegations their current contributions in order that they have the opportunity to update or modify them before making them public.

iv. Service of process on a foreign State

32. Delegations were reminded that the discussion on the topic "Service of process on a foreign State" was initiated at the 44th meeting of the CAHDI in September 2012 (Paris, France) following which a questionnaire had been prepared and, to date, 28 delegations (Albania, Andorra, Austria, Belarus, Belgium, Canada, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Latvia, Mexico, the Netherlands, Norway, Portugal, Romania, Serbia, Slovenia, Switzerland, the United Kingdom and the United States of America) had submitted their replies. These contributions were reproduced in document *CAHDI (2017) 6 prov confidential bilingual*. Since the last meeting, only one new contribution, from Andorra, had been submitted to the CAHDI Secretariat. The Chair recalled the CAHDI experts of the confidential character of the replies to this questionnaire and invited delegations which had not yet done so to submit or update their replies to the questionnaire at their earliest convenience.

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

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

34. The Chair informed the Committee that, since the previous meeting of the CAHDI, no State represented within the CAHDI had signed, ratified, accepted, approved or acceded to the 2004 *UN Convention on Jurisdictional Immunities of States and of their Property*. She 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.

35. The delegation of Belgium informed the CAHDI that the ratification of the Convention by Belgium was currently being discussed at the national Council of Ministers. Belgium signed the Convention on 22 April 2005.

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

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

37. 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 Chair 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, the Slovak Republic, Slovenia, Spain, Sweden and the United States of America) had replied to the questionnaire on this matter (document *CAHDI (2017) 7 prov confidential bilingual*). The CAHDI invited delegations which had not yet done so to submit or update their replies to the questionnaire.

38. The delegation of Canada drew the Committee's attention to a judgment rendered by the Supreme Court of Canada on 29 April 2016 in the case of *World Bank Group v. Wallace*[8] overturning an earlier decision by the Ontario Superior Court of Justice which had held that the immunities of the World Bank Group (composed of five separate organisations, including the International Bank for Reconstruction and Development ("IBRD")) and the International Development Association ("IDA")) were to be construed narrowly under Canadian law. The decision had therefore compelled the World Bank to produce certain internal documents of the Integrity Vice Presidency, an independent unit within the World Bank Group responsible for the investigation into fraud allegations, in support of the Royal Canadian Mounted Police's investigation into allegations of corruption and bribery involving a World Bank Group financed contract for a construction project in Bangladesh. In its decision, the Supreme Court of Canada addressed whether the World Bank could be subject to a production order issued by a Canadian court given the immunities accorded to it. The Supreme Court denied the legality of such an order and upheld the immunity of the World Bank Group. The Court made clear that the Bank's privileges and immunities stood firm in preventing access by third parties to its archives and its staff, noting that waiver of such immunities must always be express. Any implied waiver of immunities could have a chilling effect on collaboration with domestic law enforcement.

39. The delegation of France informed the members of the CAHDI of a recent draft law on State immunity from execution measures. Some provisions of this *Law on transparency, the fight against corruption and the modernization of economic life*[9] have already entered into force requiring an express and specific waiver of immunity by the State concerned as well as a prior judicial authorisation for all measures of execution into assets of a foreign State in France.

40. The delegation of the United States of America informed the Committee that the judgment of the United States Court of Appeals for the Second Circuit of 18 August 2016 in the case of *Georges v. United Nations*,[10] upholding the immunities of the United Nations under the 1946 *Convention on the Privileges and Immunities of the United Nations* in the so-called "Haiti Cholera case", had become final after the period to appeal had expired.[11]

41. The delegation of the United Kingdom drew the attention of the Committee to two cases in which the Foreign and Commonwealth Office (hereinafter: "FCO") was intervening as a third party. The first case, *Reyes v. Al-Malki,*[12] was due to be heard by the United Kingdom Supreme Court in May 2017. The delegation of the United Kingdom explained the written intervention of the FCO to be confined to the issue of the incompatibility of the service of process by post on a diplomatic mission or private residence of a diplomatic agent with Article 22 of the 1961 *Vienna Convention on Diplomatic Relations*. Secondly, the delegation of the United Kingdom informed the CAHDI of the joint cases of *Benkharbouche v. Sudan* and *Janah v. Libya*[13] which were due to be heard by the United Kingdom Supreme Court in June 2017. The cases had been brought by Moroccan domestic workers formerly employed by the Sudanese and Libyan missions in London respectively and concerned the compatibility of the United Kingdom's State Immunity Act 1978 with Article 6 of the *European Convention on Human Rights* and Article 47 of the *Charter of Fundamental Rights of the European Union*.

42. The delegation of Belgium informed the Committee of the judgment rendered on 28 October 2016 by the Belgian Court of Cassation (*Cour de Cassation*) in the case of *M.M. v. La*

[8] Supreme Court of Canada, *World Bank Group v. Wallace*, judgment of 29 April 2016, [2016] 1 R.C.S.; See, also, CAHDI (2016) 23, para. 130.
[9] Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique.
[10] United States Court of Appeals for the Second Circuit, *Georges v. United Nations*, judgment of 18 August 2016, 834 F.3d 88 (2016).
[11] See, also, CAHDI (2016) 23, para. 26.
[12] See, the judgment of the Court of Appeal of 5 February 2015, [2015] EWCA Civ 32.
[13] See the judgment of the Court of Appeal of 5 February 2015, [2015] EWCA Civ 33.

Posterie[14] concerning a rental dispute on damages between M.M., the tenant of the house who was a member of the Permanent Mission of the United States of America to the NATO, and the real estate company "SA La Posterie". "SA La Posterie" brought an application before the "juge de paix" of Louvain who found not to have jurisdiction on the basis of M.M.'s diplomatic immunity. On the basis of Article 6(1) of the *European Convention on Human Rights*, the first instance tribunal found that M.M. could not invoke diplomatic immunity due to the fact that the case did not compromise the good functioning of the Permanent Representation of the United States before the NATO. The Belgian Court of Cassation overturned this decision, holding not only that the attribution of immunities and privileges to diplomats is necessary for the good functioning and relations between States but also that immunities are an unlimited principle in both official functions and private life. Nevertheless, the Court confirmed that rental disputes were not covered by immunities.

43. The delegation of the Netherlands informed the CAHDI of a prejudicial ruling of 30 September 2016 by the Supreme Court of the Netherlands (*Hoge Raad*) in the case of *Morning Star International Corporation ("MSI") v. Gabon and the Netherlands*[15] concerning proceedings against the Republic of Gabon for a claim worth approximately € 22.3 million. In order to secure its claim, MSI requested leave from the Amsterdam District Court to levy third party attachments against Gabon. After the Amsterdam District Court granted leave, the bailiff levied the attachments and informed the Ministry of Security and Justice in accordance with the Dutch Code of Civil Procedure. The Minister of Security and Justice, however, held that the attachments were contrary to the presumption that foreign State property is immune from execution as attachments could only be levied against property of a foreign State if it was established that the property is in use or intended for non-governmental purposes. In light of the dilemma of his statutory obligation to perform his official duty to levy the attachments on the one hand and the order of the Minister to lift the attachments on the other, the bailiff initiated summary proceedings between MSI, Gabon and the Dutch State. In its prejudicial ruling, the Supreme Court stated, that the execution of judgments was limited by exceptions recognised in international customary law such as the presumption of the immunity of property of a foreign State from execution. This immunity was, however, not absolute but equally limited through exceptions such as executory attachments on State property that is not in use or intended for non-governmental purposes as laid down in the 2004 *UN Convention on Jurisdictional Immunities of State and their Property*. Although this treaty was not in force, its provisions could partly be considered as codifying customary international law. Confirming thus the existence of a presumption of State immunity in the case at hand, the Supreme Court found that the burden of proof regarding the susceptibility of attachments on property of a foreign State rested with the creditor wanting to levy the attachments.

Finally, the delegation of the Netherlands drew the attention of the Committee to a judgment of the Supreme Court of the Netherlands (*Hoge Raad*) of 20 January 2017 in the case of *SUEPO and Others v. the European Patent Organisation "EPO"*[16]. The Supreme Court held, quashing the previous judgments in the case by the interim relief judge and The Hague Appeal Court, that EPO was entitled to invoke its immunity from jurisdiction in a dispute with two trade unions. The Supreme Court applied the test developed by the ECHR in its jurisprudence on the acceptability of granting jurisdictional immunity to an international organisation thus limiting the right of access to a court under Article 6 of the *European Convention on Human Rights* provided that litigants had a reasonable alternative means of protecting their rights effectively. The Supreme Court found that such alternative means existed in the case of the EPO. The rights of the trade unions were sufficiently protected by the internal dispute settlement procedure provided for by EPO under which individual employees and staff representatives could ultimately take their complaint to the

[14] Cour de Cassation, *M.M. v. La Posterie*, judgment of 28 October 2016, C.16.0039.N/1.
[15] Hoge Raad, *Morning Star International Corporation ("MSI") v. Gabon and the Netherlands*, prejudicial ruling of 30 September 2016, ECLI:NL:HR:2016:2236. The Supreme Court of the Netherlands has since applied this prejudicial ruling in two regular appeal cases of 14 October 2016 (ECLI:NL:HR:2016:2354 and ECLI:NL:HR:2016:2371).
[16] Hoge Raad, *SUEPO and Others v. the European Patent Organisation ("EPO")*, judgment of 20 January 2017, ECLI:NL:HR:2017:57.

Administrative Tribunal of the International Labour Organization. According to the Supreme Court, this meant that the essence of their right of access to a court had not been impaired.

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

44. 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. She welcomed the replies submitted by 37 delegations (Albania, Andorra, Armenia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Canada, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Israel, Italy, Latvia, Lithuania, Luxembourg, Malta, Mexico, Montenegro, Norway, Romania, Serbia, Slovenia, Sweden, Switzerland, Turkey, the United Kingdom, the United States of America and NATO) to this revised questionnaire as contained in document *CAHDI (2017) 8 prov bilingual*.

45. The Chair reminded that the replies to the questionnaire can be found in the new database, allowing the delegations to easily update their contributions and consult those of others.

46. The Chair also reminded that 15 delegations (Azerbaijan, Bulgaria, Iceland, Ireland, Japan, Republic of Moldova, the Netherlands, Poland, Portugal, the Russian Federation, the Slovak Republic, Spain, "the former Yugoslav Republic of Macedonia", Ukraine and Interpol) replied to the original questionnaire but have not sent their complementary information relating to gender equality contained in the new questionnaire yet. Therefore, the Chair invited those delegations to send to the Secretariat this complementary information in order to have a complete overview of the organisation and functions of the Office of the Legal Adviser of all the delegations.

47. In this respect, the Chair praised that almost all delegations represented within the CAHDI (52 States and Organisations) replied to this questionnaire in its original or revised version.

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

48. The Chair introduced document *CAHDI (2017) 9 prov confidential bilingual* on cases litigated before national tribunals by persons or entities included to or removed from the lists established by the UN Security Council Sanctions Committees and invited all delegations to submit information in this respect.

49. The Chair also reminded the delegations that the new database featured the responses of the delegations to a questionnaire on the practice of national implementation of UN sanctions which, like the databases created for immunities and the Office of the Legal Adviser, had been modernised to facilitate the update of existing contributions as well as the insertion of new ones.

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

- *Exchange of views with Mr Guido Raimondi, President of the European Court of Human Rights (ECHR)*

50. The Chair welcomed and thanked Mr Guido Raimondi, President of the European Court of Human Rights (ECHR), for having accepted the invitation of the CAHDI. The Chair underlined that it was a privilege for the Council of Europe and the CAHDI to count with his presence.

51. Mr Guido Raimondi provided the CAHDI with an overview of the challenges currently faced by the ECHR as well as an examination of recent cases involving issues of public international law. The presentation of Mr Guido Raimondi is reproduced in **Appendix III** of the present report.

52. Mr Raimondi started by providing the CAHDI with a general overview of the current workload of the ECHR as well as the scope of its jurisdiction, highlighting that, even though the ECHR deals with some inter-state disputes, most of its cases are focused on individual applications.

53. Regarding the caseload of the ECHR, Mr Raimondi pointed out that although the number of applications had decreased from 160 000 to 65 000 by the end of 2015 following the entry into force of Protocol No. 14, several international events and crises taking place throughout 2016 had had a tremendous impact on the caseload, increasing the number of applications by 32%, reaching a total of 88 000 by 1 March 2017. These events as well as recent crises have resulted in 78% of the cases to come from 6 countries.

54. With respect to the recent migration crisis, Mr Raimondi pointed out that, although the latter had not had a significant impact on the ECHR's caseload so far, it was not excluded that a rise of applications might follow the corresponding increase in asylum applications.

55. Mr Raimondi furthermore stated that a number of recent conflicts had led to the ECHR receiving several inter-state applications. He asserted that, although applications between State Parties of the Council of Europe were not numerous, they tended to be of a more complex and delicate nature. To illustrate this point Mr Raimondi drew the attention of the CAHDI experts in particular to the cases of *Georgia v. Russia (I) and (II)*[17] and to the case of *Slovenia v. Croatia*[18].

56. Following this general overview, Mr Guido Raimondi focused on the case of *Al-Dulimi v. Switzerland*[19] concerning accountability for acts adopted in the context of the United Nations Security Council's resolutions. On this point, he recalled the case of *Bosphorus*[20], asserting that, in this case the Court developed a legal framework whereby States remain responsible under the *European Convention on Human Rights* for measures adopted to implement international legal obligations, even when these derive from their membership to an international organisation to which they have transferred partly their sovereignty. Still, he noted, such a measure must be deemed justified and ought to grant human rights a protection at least equivalent to the protection conferred under the *European Convention on Human Rights*. Mr Raimondi further argued that, although Security Council's sanctions were controversially at the heart of the *Al-Dulimi* case, this question had already been tackled with in the case of *Nada v. Switzerland*[21]. In the latter case, the Court ascertained the binding power of the UN Security Council's resolutions but still considered Switzerland to possess a certain margin of appreciation in the implementation of the resolution, thus leading the ECHR to conclude that Switzerland had violated Article 8 of the *European Convention on Human Rights*. The difference between *Al-Dulimi* and *Bosphorus*, he said, lay in the fact that in this case the State party involved was not a member State of the European Union. Finally, Mr Raimondi affirmed that the approach in *Al-Dulimi* was not novel either, arguing that a similar approach had been adopted in *Al-Jedda*[22] and *Nada*, indicating that in all these cases the Court presumed the compatibility of those measures with the *European Convention on Human Rights* under the assumption that the Security Council did not intent to impose on States obligations that were contrary to their obligations under human rights mechanisms. He

[17] ECHR, *Georgia v. Russia (I)*, no. 13255/07, Grand Chamber judgment of 3 July 2014 and ECHR, *Georgia v. Russia (II)*, no. 38263/08, Chamber decision of 13 December 2011.
[18] ECHR, *Slovenia v. Croatia*, no. 54155/16, application lodged on 15 September 2016.
[19] ECHR, *Al-Dulimi and Montana Management Inc. v. Switzerland*, no. 5809/08, Grand Chamber judgment of 21 June 2016.
[20] ECHR, *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, no. 45036/98, Grand Chamber judgment of 30 June 2005.
[21] ECHR, *Nada v. Switzerland*, no. 10593/08, Grand Chamber judgment of 12 September 2012.
[22] ECHR, *Al-Jedda v. The United Kingdom*, no. 27021/08, Grand Chamber judgment of 7 July 2011.

acknowledged that this was indeed a strong presumption, the aim of which was to prevent conflicts of obligations. In his opinion, the margin of appreciation given to States with regard to the implementation of sanctions did not prevent national jurisdictions from verifying that the domestic measures concerned were in accordance with human rights. Mr Raimondi concluded by stating his view that the decision had been respectful of both the UN Security Council's resolutions and the principles of the ECHR jurisprudence and he noted that *Al-Dulimi* was the first case in which "systemic harmonisation" was explicitly mentioned.

57. Finally, Mr Guido Raimondi cited the case of *Naït-Liman v. Switzerland*[23] in which the ECHR decided that the Swiss authorities did not violate the applicant's right under Article 13 of the *European Convention on Human Rights* when they declined jurisdiction on a reparations claim case for acts of torture allegedly inflicted in Tunisia. The case, raising the interesting question of universal jurisdiction, has been referred to the Grand Chamber and a hearing is scheduled to take place this year.

58. The Chair of the CAHDI thanked President Raimondi for his presentation and invited any delegations which so wished to take the floor.

59. Several CAHDI delegations praised the effective dialogue that the ECHR is engaging with national jurisdictions. Furthermore, in reply to several questions related to the principle of subsidiarity, Mr Raimondi highlighted its importance noting that the ECHR was very faithful to this principle in the sense that national judges are in a privileged position –being closer to the situation– and better equipped to address the specific cases. Nevertheless, he noted that the Court would always be ready to intervene when there is an infringement of the human rights enshrined in the *European Convention on Human Rights* in an individual case.

60. In replying to questions addressing the backlog of applications and the future of the Court's system, Mr Raimondi noted that the ECHR is already using a priority policy in relation to the order in which cases are dealt with, based on the importance and urgency of the matters concerned. However, he underlined that the key to coping with the influx of cases lies at the national level, putting the protection closer to the applicant and acting as a preventive mechanism. In this regard, Mr Raimondi welcomed the current projects in place to cooperate with national courts (e.g. through the Superior Courts Network) as well as the *Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms* [CETS No.214] which will allow the highest courts and tribunals of States Parties to request the ECHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.

61. In replying to the question of the impact that the migration crisis can have on the work of the Court, Mr Raimondi noted that the Court had set up a special unit, within the Registry of the ECHR, dealing with interim measures in accordance with Rule 39 of the Rules of Court[24] which has already been and could continue to be in the future extremely useful in cases related to applications of migrants. Furthermore, Mr Raimondi pointed out that there are already clear trends in the case law of the ECHR concerning the rights of migrants under the European Convention. In

[23] ECHR, *Naït-Liman v. Switzerland*, no. 51357/07, Chamber judgment of 21 June 2016.

[24] "Rule 39 (as amended by the Court on 4 July 2005, 16 January 2012 and 14 January 2013) – Interim measures
1. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings.
2. Where it is considered appropriate, immediate notice of the measure adopted in a particular case may be given to the Committee of Ministers.
3. The Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may request information from the parties on any matter connected with the implementation of any interim measure indicated.
4. The President of the Court may appoint Vice-Presidents of Sections as duty judges to decide on requests for interim measures."

this respect, he mentioned a recent important migration case, namely the case of *Khlaifia and Others v. Italy*[25], where the applicants, Tunisian nationals, successfully alleged, *inter alia*, that their deprivation of liberty in detention centres in Lampedusa and on ships in Palermo harbour (Sicily) during the Arab spring of 2011 had been unlawful (see below paragraph 70).

62. The Chair thanked the delegations for their questions and President Raimondi once again for having accepted the invitation of the CAHDI and for having taken the time to address the CAHDI on the very important developments before the ECHR.

- ***Cases of the European Court of Human Rights (ECHR) involving issues of public international law***

63. The Chair introduced the topic of the cases before the ECHR involving issues of public international law and invited delegations to inform the CAHDI about any judgments or decisions concerning their countries which the ECHR has rendered since the last CAHDI meeting and raising issues of public international law.

64. The delegation of Serbia informed the CAHDI on the case of *Mitrovic v. Serbia*[26] concerning a Bosnia and Herzegovina national living in Sremska Mitrovica in Serbia, who claimed that he had been arrested and imprisoned for over two years by the Serbian authorities on the basis that he was convicted of a crime in 1994 by the courts of the "Republic of Serbian Krajina" – an internationally unrecognised self-proclaimed entity, composed of a territory that is now in the Republic of Croatia – and still had time to serve. The applicant complained to the ECHR that this conviction had been issued by a court of an internationally unrecognised entity, and that the judgment had never been formally recognised by the Serbian courts. The ECHR found that this had constituted a violation of Article 5 of the *European Convention on Human Rights*, holding in particular that any deprivation of a person's liberty must be lawful, meaning that it must conform to the rules of national law. The applicant had been convicted by a "court" operating outside the Serbian judicial system. Under the rules of domestic law, the detention of a person is unlawful when it is based on a decision of a foreign court which has not been recognised by the authorities in an appropriate procedure. In the present case, the Serbian authorities had conducted no proceedings for the recognition of a foreign decision, leading to the finding that the applicant's detention had been unlawful.

65. The delegation of Serbia further referred to a recent decision in the case of *Kamenica and Others v. Serbia*[27] concerning 67 applicants, all nationals of Bosnia and Herzegovina, claiming that they had been unable to pursue criminal complaints lodged with the Serbian Office of the War Crimes Prosecutor in 2011 against their alleged ill-treatment in detention camps on Serbian territory in 1995 and 1996 during the war in Bosnia and Herzegovina. The statute of limitations prevented the prosecution of any of the alleged acts of ill-treatment as anything else than as war crimes. In the view of the ECHR, however, it should have been apparent to the applicants by the time they lodged their criminal complaints that the Office of the War Crimes Prosecutor consistently refused to classify crimes, which were alleged to have taken place on Serbian territory during the war in Bosnia and Herzegovina as war crimes. In none of the cases had there been an indictment for war crimes arising from similar circumstances and in 2010 the domestic courts started delivering final judgments in these cases, thus accepting such practice as legally valid. The ECHR therefore concluded that, at the time when the applicants submitted their criminal complaints before the national authorities, they ought to have known that it would not result in criminal prosecution. Yet, the applicants lodged their application with the ECHR only in December 2014 thus outside the six-month time limit. Consequently, the ECHR declared the application inadmissible.

[25] ECHR, *Khlaifia and Others v. Italy*, no. 16483/12, Grand Chamber judgment of15 December 2016.
[26] ECHR, *Mitrovic v. Serbia*, no. 52142/12, Chamber judgment of 21 March 2017.
[27] ECHR, *Kamenica and Others v. Serbia*, no. 4159/15, Chamber decision of 27 October 2016.

66. The delegation of Greece drew the attention of the CAHDI to the case of *BAC v. Greece*[28]. In this case, the applicant, a Turkish national who sought asylum in Greece, successfully complained that the failure to determine his asylum application for a period of more than 14 years without justification had breached the positive obligations inherent in his right to respect for family life (Article 8 of the *European Convention on Human Rights*) as well as Article 8 in conjunction with Article 13 due to the fact that the competent authorities had failed to provide an effective and accessible means of protecting his right. Moreover, due to the uncertainty of his asylum application, the applicant, a pro-Kurdish left- wing militant repeatedly arrested for undermining the constitutional order of the State and tortured, alleged that he was thereby in danger of being returned to Turkey where he faced a real risk of being subject to ill-treatment. The ECHR took the view that, although Turkey is a State Party to the European Convention, it could not base its assessment on that fact alone. Thus, taking into account the Greek Medical Rehabilitation Centre for Torture Victims report, the ECHR found that the applicant had submitted conclusive evidence in support of his application for asylum and that there would be a violation of Article 3 in conjunction with Article 13 if the applicant were returned to Turkey.

67. The delegation of Germany informed the CAHDI of two cases before the ECHR which have been communicated to the Government. The case of *Hanan v. Germany*[29] concerns an action for compensation against Germany for the death of two of the applicants' sons who died as a result of a fatal airstrike carried out by the Provincial Reconstruction Team (PRT) in Kunduz in the northern part of Afghanistan under the orders of Colonel Klein. The latter ordered the destruction of two fuel tanks previously stolen by the Taliban from the PRT in an attempt to prevent a possible attack. Despite having received information that no civilians were present, the mission led to the death of 100-150 persons, mostly civilians. Colonel Klein, although commanding the PRT Kunduz, remained ultimately subordinate to German orders. A criminal investigation was launched but discontinued shortly after on the basis that there were not sufficient grounds for suspicion, concluding that the Colonel had no intention to kill, harm or cause damage to civilian objects in a degree that would have been disproportionate to the military benefit of the airstrike. The Düsseldorf Court of Appeal (*Oberlandesgericht*) dismissed the applicant's motion to compel public charges and the Federal Constitutional Court (*Bundesverfassungsgericht*) refused to admit the applicant's constitutional complaint for adjudication holding that the Prosecutor's investigation constituted an effective investigation and that further investigatory measures would not have provided any further relevant information, as the investigation was discontinued based on questions of intent. The applicant complains that the investigation carried out was not effective, thus invoking Article 2 of the *European Convention on Human Rights* and that, under Article 13, he had had no effective domestic remedy at his disposal to challenge the decision to discontinue the investigation.

68. The delegation of Germany further informed the CAHDI of the case of *Coisson v. Germany*[30] concerning a decision of the European Patent Office not to recruit the applicant, an Italian national, as a patent examiner after he had successfully passed the professional tests as he was considered unfit for service because of his heart condition. The applicant complained he had been discriminated against on grounds of his disability and that he had not had access to any court thus breaching his rights under Articles 6 and 13 of the *European Convention on Human Rights*.

69. The delegation of the United Kingdom informed the CAHDI of the Grand Chamber judgment of 13 September 2016 in the case of *Ibrahim and Others v. the United Kingdom*[31]. In its judgment, the ECHR found that there had been a violation of the right to a fair trial and right to legal assistance (Article 6 (1) and (3)(c)). The case concerned the circumstances under which the applicants' "safety interviews" had been conducted following the 21 July 2005 bombings in the

[28] ECHR, *B.A.C. v. Greece*, no. 11981/15, Chamber judgment of 13 October 2016.
[29] ECHR, *Hanan v. Germany*, no. 4871/16, application lodged on 13 January 2016 and communicated to the Government on 2 September 2016.
[30] ECHR, *Coisson v. Germany*, no. 19555/10, application lodged on 9 April 2010 and communicated to the Government on 22 September 2016.
[31] ECHR, *Ibrahim and Others v. the United Kingdom*, nos. 50541/08, 50571/08, 50573/08 and 40351/09, Grand Chamber judgment of 13 September 2016.

London transport system. Under the Terrorism Act 2000 temporary restrictions on the right to legal advice can be imposed, thereby allowing "safety interviews" when an urgent need to avert a serious adverse consequences for the life and physical integrity of the public, in this case suicide attacks, is found. They complained before the Court about the temporary delay in providing them with access to a lawyer and the admission at their subsequent trials of statements made in the absence of lawyers. With respect to the first three applicants (Mr Ibrahim, Mr Mohammed and Mr Omar) the ECHR was convinced that the circumstances and urgent need to avert another suicide attack constituted compelling reasons for the temporary restrictions on their right to legal advice. The Court was also satisfied that the proceedings as a whole in respect of each of the first three applicants had been fair. The ECHR however considered the fourth applicant's case to be different; Mr Abdurahman, initially interviewed as a witness, had become a suspect during the interview when it emerged that he had assisted the fourth bomber. At that point, according to the applicable code of practice, he should have been cautioned and offered legal advice. However, this was not done. After he had made a written witness statement, he was arrested, charged with and subsequently convicted of assisting the fourth bomber and failing to disclose information after the attacks. In his case, the Court noted that it was significant that there was no basis in domestic law for the police to choose not to caution Mr Abdurahman at the point at which he had started to incriminate himself. The consequence was that Mr Abdurahman had been misled as to his procedural rights. Further, the police decision could not subsequently be reviewed as it had not been recorded and no evidence had been heard as to the reasons behind it. As there were no compelling reasons, it fell to the Government to show that the proceedings were nonetheless fair. In the Court's view the Government failed to do so and it accordingly concluded that the overall fairness of Mr Abdurahman's trial had been prejudiced by the decision not to caution him and to restrict his access to legal advice. However, the Court concluded that it did not follow that Mr Abdurahman had been wrongly convicted, it being impossible to speculate as to the outcome of the proceedings had there been no breach of the Convention.

70. The delegation of Italy informed the CAHDI of the case of *Khlaifia and Others v. Italy*[32] concerning the holding, first in a reception centre on the island of Lampedusa then on ships in Palermo harbour (Sicily), of irregular migrants who arrived in Italy in 2011 following the "Arab Spring" events in their country, and their subsequent removal to Tunisia. The ECHR found that their deprivation of liberty without any clear and accessible basis did not satisfy the general principle of legal certainty and was incompatible with the need to protect the individual against arbitrariness. The refusal-of-entry orders issued by the Italian authorities had made no reference to the legal and factual reasons for the applicants' detention and they had not been notified of them "promptly". The Court lastly noted that the Italian legal system had not provided them with any remedy by which they could have obtained a judicial decision on the lawfulness of their detention. However, due to the particular circumstances of the case, the ECHR rejected the claim that they had been subject to inhuman or degrading treatment. The Court, however, upheld the claim regarding a violation of Article 13 in conjunction with Article 3, the Court upheld this claim, observing that the Government had not indicated any remedies by which the applicants could have complained about the conditions in which they were held. As to the prohibition of the collective expulsion of aliens, the Court found that Article 4 of Protocol No. 4 did not guarantee the right to an individual interview in all circumstances. The requirements of that provision were satisfied where each alien had the possibility of raising arguments against his or her expulsion and where those arguments had been examined by the authorities of the respondent State. Also, the applicants' complain whereby Article 13 (right to an effective remedy) taken together with Article 4 of Protocol No.4 had been breached was rejected by the ECHR.

71. The delegation of Austria drew the CAHDI's attention to the case of *J. and Others v. Austria*[33]. In this case, the applicants, three Filipino nationals, living in Austria and Switzerland respectively at the time of their application to the ECHR, went to work as maids or au pairs in Dubai for the same family or relatives of the same family between 2006 and 2009. They alleged

[32] ECHR, *Khlaifia and Others v. Italy*, no. 16483/12, Grand Chamber judgment of15 December 2016.
[33] ECHR, *J. and Others v. Austria*, no. 58216/12, Chamber judgment of 17 January 2017.

that their employers had taken their passports away from them and exploited them. This treatment continued during a short stay with their employers in Vienna where they eventually managed to escape. They subsequently filed a criminal complaint against their employers in Austria, however, the authorities found that they did not have jurisdiction over the alleged offences committed abroad and decided to discontinue the investigation into the applicants' case concerning the events in Austria. In their complaint before the ECHR, they argued in particular that what had happened to them in Austria could not be viewed in isolation, and that the Austrian authorities had a duty under international law to investigate also those events which had occurred abroad. The ECHR noted that the Convention does not require States to exercise universal jurisdiction over trafficking offences committed abroad (Article 4 of the Convention) thus not imposing an obligation to investigate the applicants' recruitment in the Philippines or their alleged exploitation in the United Arab Emirates. Turning to the events in Austria, the ECHR concluded that the authorities had taken all steps which could have reasonably been expected in the situation; the applicants, supported by a government funded NGO, had been interviewed by specially trained police officers, granted residence and work permits to regularise their stay in Austria, and a personal data disclosure ban had been imposed for their protection. Moreover, the Court found the investigation into their stay in Vienna had been sufficient and the authorities' resulting assessment, given the facts of the case and the evidence available, reasonable considering that any further steps – such as confronting the applicants' employers – would not have had any reasonable prospect of success, as no mutual legal assistance agreement existed between Austria and the United Arab Emirates, and due to the fact that the applicants had turned to the police approximately one year after the events in question, after their employers had long left the country.

72. The delegation of Belgium informed the CAHDI of the Grand Chamber judgment in the case of *Paposhvili v. Belgium*[34] concerning the applicant's deportation order to Georgia issued with a ban on re-entering Belgium. The applicant successfully argued that the Belgian authorities had violated his rights protected under Article 3 and 8 of the *European Convention on Human Rights* when they failed to take into account the specific circumstances of his case before ordering his deportation to be carried out. In particular, the ECHR found that the failure to take into account his life-threatening condition in the proceedings for his regularisation on medical grounds would have constituted a violation of the prohibition of torture and inhuman or degrading treatment in so far as the Alien's Office medical adviser had issued several opinions stating the fact that the applicant's condition was stable as a result of his treatment in Belgium and that, if discontinued, could lead to a premature death, reducing his life expectancy to less than 3 months. Therefore, in the absence of any assessment by the domestic authorities of the risk facing in the light of his health and existence of appropriate treatment in Georgia, the information had been insufficient to conclude that, were the applicant to be returned to Georgia, he would not have run a real and concrete risk of treatment contrary to Article 3 of the *European Convention on Human Rights*. In the same vein, the Court found that an assessment of the impact of his removal on his family life in the light of his health should have been conducted. There was a procedural obligation with which the authorities had to comply in order to ensure effectiveness of the right to respect for family life. The Belgian authorities' failure to assess the degree to which the applicant had been dependent on his family as a result of his health problems and to examine the specific situation, taking into account whether the family could reasonably have been expected to follow him to Georgia or, if not, whether observance of his right under Article 8 required that he be granted leave to remain in Belgium, would have given rise to a violation of Article 8 had he been removed without these factors being take into account.

73. The delegation of Ukraine drew the CAHDI's attention on the case of *Kebe v. Ukraine*[35] concerning two nationals of the State of Eritrea and one national of Ethiopia, having arrived in the port of Mykolayiv/Ukraine on board of a commercial vessel flying the Maltese flag in February 2012. They claimed that border guards had prevented them from entering Ukraine, stopped them from lodging claims for asylum, and exposed them to the risk of ill-treatment in their countries of

[34] ECHR, *Paposhvili v. Belgium*, no. 41738/10, Grand Chamber judgment of 13 December 2016.
[35] ECHR, *Kebe and Others v. Ukraine*, no. 12552/12, Chamber judgment of 12 January 2017.

origin by ensuring that they remained on the vessel which was headed to Saudi Arabia. They also complained that they had had no opportunity to use a domestic legal procedure to address these actions. The ECHR struck out the application in so far as it concerned two of the applicants (one had died and one had ended contact with his lawyer) and continued to consider the case only with regard to the third applicant. The Government argued that the applicant had not been within Ukraine's jurisdiction at the relevant time, because he had been on board a vessel flying the flag of Malta. The ECHR dismissed this objection holding that the applicant was within Ukraine's jurisdiction for the purposes of Article 1 of the European Convention as he was subjected to border control measures carried out by the Ukrainian authorities and the matter concerned his possible entry to Ukraine and the exercise of Convention rights. Dismissing the applicant's claim relating to ill-treatment under Article 3 of the *European Convention on Human Rights*, the ECHR held that, after it had indicated an interim measure in March 2012, the applicant had been allowed to leave the ship and make an asylum application in Ukraine. He was therefore no longer at immediate risk of ill-treatment in his country of origin. The ECHR, however, held that there had been a violation of the applicant's right to an effective remedy under Article 13 on the basis that the border guards had prevented him from disembarking and made him liable to be removed from Ukraine at any time without having his claim against refoulement being examined by the authorities.

74. The representative of the European Union informed the CAHDI on the judgment of 14 March 2017 rendered by the Grand Chamber of the European Court of Justice (ECJ) in the case of *A and Others v. Minister van Buitenlandse Zaken*[36] concerning a request for a preliminary ruling from the Dutch Council of State (*Raad van State*) relating to the inclusion of the 'Liberation Tigers of Tamil Eelam (LTTE)' on the list of persons, groups and entities involved in terrorist acts established under *Council Regulation (EC) No. 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism*[37] implementing UN Security Council Resolution 1373 (2001), and subsequently, on the list appended to Council Implementing Regulation No. 610/2010[38] of those whose funds were to be frozen as a preventive measure to help combat terrorism. The case before the referring court originated in the adoption by the Netherlands Minister for Foreign Affairs of designation orders under national law resulting in the freezing of the financial assets of the four applicants. The applicants were believed to be involved in raising funds for the LTTE and thus to belong to the circle of persons and organisations targeted by UNSC Resolution 1373 (2001). The referring court addressed the ECJ, inter alia, with the question whether it is possible to regard the activities of the LTTE as terrorist activities for the purposes of Regulation No. 2580/2001 when those acts should be read in conjunction with Framework Decision 2002/475[39] on combatting terrorism, recital 11 of which specifies that it does not govern actions by armed forces during periods of armed conflict. The ECJ answered this question in the affirmative holding that a difference in object and purpose between the Framework Decision 2002/475 and Regulation No. 2580/2001 could be made. The purpose of Framework Decision 2002/475 was to approximate the definition of terrorist offences in all member States, to lay down penalties and sanctions reflecting the seriousness of such offences, and, to establish jurisdictional rules to ensure that terrorist offences may be effectively prosecuted. By contrast, the purpose of Regulation No. 2580/2001 was the implementation of Resolution 1373 (2001) and it mainly concerned the prevention of terrorist acts by means of adoption of measures for the freezing of funds in order to hinder acts preparatory to such acts. Moreover, the ECJ found that no international convention in the field of international humanitarian law prevented actions by armed forces during periods of armed conflict from constituting "terrorist acts" for the purposes of Regulation No. 2580/2001. Although some of the international conventions excluded from their scope actions by armed forces during armed conflicts within the meaning of international

[36] Case C-158/14, *A and Others v. Minister van Buitenlandse Zaken* [2017], ECLI:EU:2017:202.
[37] European Council Regulation (EC) 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism of 27 December 2001.
[38] European Council Implementing Regulation (EU) 610/2010 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Implementing Regulation (EU) No 1285/2009 of 12 July 2010.
[39] Council Framework Decision 2002/475/JHA on combating terrorism of 13 June 2002 as amended by Council Framework Decision 2008/919/JHA of 28 November 2008.

humanitarian law, they neither prohibited the State Parties from classifying some of those actions as 'terrorist acts' nor precluded them from taking steps to prevent the commission of such acts.

75. The Secretariat presented to the CAHDI the revised updated document on the "Case law of the European Court of Human Rights related to Public International Law" (document *PIL (2017) Case Law rev*) containing those judgments and decisions related to public international law up to 31 December 2016 for which official press releases and legal summaries were available. Since the last meeting, the French version of the document had also been prepared. The compilation in its two linguistic versions was made available in the CAHDI intranet website among the other documents for this meeting. The Secretariat informed the CAHDI that this compilation will be updated on a regular basis and published on the CAHDI website in order to facilitate access to it and make it readily available. Several delegations took the floor to welcome the revised and updated publication containing the jurisprudence of the ECHR related to public international law. The CAHDI welcomed this document and thanked the Secretariat.

10. Peaceful settlement of disputes: The International Court of Justice (ICJ)

- *Exchange of views with Mr Ronny Abraham, President of the International Court of Justice (ICJ)*

76. The Chair welcomed to the CAHDI Mr Ronny Abraham, President of the International Court of Justice (ICJ), and thanked him for having accepted the invitation of the Committee. The Chair underlined that it was a privilege for the Council of Europe and the CAHDI to count with his presence.

77. Mr Abraham thanked the CAHDI for this invitation and pointed out that taking into account that most of the CAHDI experts already attended his presentation of the *Report of the International Court of Justice*[40] at the United Nations General Assembly on 27 October 2016[41] he would focus on some of the main challenges currently faced by the ICJ.

78. Mr Abraham underlined that during the second half of 2015 and 2016 the ICJ experienced a high level of judicial activity, delivering seven judgments; one of these Judgments deal with the merits of the joined cases concerning *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)* [42], while the other six settled preliminary questions relating to the jurisdiction of the Court and the admissibility of certain claims. He also underlined that the ICJ also decided, for the first time in many years, to arrange for an expert opinion in one of the cases pending before it: the case between Costa Rica and Nicaragua concerning *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean*. It did so by an Order dated 31 May 2016[43].

79. From the above-mentioned brief overview of the judicial work of the ICJ, Mr Abraham concluded that it is obvious that most of this judicial work related, during the period under consideration, to preliminary objections[44] concerning either jurisdiction or admissibility of certain

[40] Report of the International Court of Justice, 1 August 2015-31 July 2016, A/71/4.
[41] Speech by H.E. Mr. Ronny Abraham, President of the International Court of Justice, on the occasion of the Seventy-first Session of the United Nations General Assembly on 27 October 2016.
[42] ICJ, Certain Activities Carried Out by Nicaragua in the Border Area (*Costa Rica v. Nicaragua*) and Construction of a Road in Costa Rica Along the San Juan River (*Nicaragua v. Costa Rica*), judgment of 16 December 2015, I.C.J. Reports 2013, p. 354.
[43] ICJ, Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (*Costa Rica v. Nicaragua*), order of 31 May 2016.
[44] See, e.g., ICJ, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (*Marshall Islands v. India*) Jurisdiction of the Court and Admissibility of the Application, judgment of 5 October 2016; ICJ, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (*Marshall Islands v. Pakistan*) Jurisdiction of the Court and Admissibility of the Application, judgment of 5 October 2016; ICJ, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (*Marshall Islands v. the United Kingdom*) Preliminary Objections, judgment of 5 October 2016; ICJ,

claims. Furthermore, the adoption of provisional measures[45] pursuant to Article 41(1) of the ICJ Statute had become increasingly frequent. The ICJ had clarified the binding character of provisional measures already in 2000. Before ordering on the indication of provisional measures the Parties were heard by the Plenary Court. This additional procedural step prolonged the procedure as a whole. By the same token, as the proceedings in contentious cases could easily take up to three years in total, the length of the proceedings could be counterbalanced through such provisional measures.

80. Mr Abraham then focused on the essential question of the jurisdiction of the ICJ. In this respect, he reminded the delegations that the jurisdiction of the ICJ derived ultimately from the consent of the States although different forms for expressing this consent existed. Jurisdiction would be less frequently based on declarations recognising the jurisdiction of the ICJ as compulsory pursuant to Article 36 of the ICJ Statute than on jurisdictional clauses, so-called compromissory clauses, contained in multilateral treaties concerning a specific subject matter. Moreover, some multilateral treaties were purely judicial in character. In fact, the *American Treaty on Pacific Settlement*, also known as the *Pact of Bogota*, represented one of the instruments most frequently invoked for establishing ICJ jurisdiction.[46] This multilateral treaty concluded between 17 American States[47] aimed at settling their disputes through peaceful means by conferring jurisdiction to the ICJ. In Europe, a similar treaty, the *European Convention for the Peaceful Settlement of Disputes [ETS No.23]*, prepared in the framework of the Council of Europe in 1957 invoked for instance in the case of *Germany v. Italy*[48], exists and has been ratified by 14 Council of Europe member States and signed by 6.

81. The Chair of the CAHDI thanked Mr Abraham for his presentation and invited delegations to take the floor.

82. In reply to questions on the interaction between international courts, Mr Abraham drew the attention of the CAHDI to the importance for international law to remain unique and interpreted in the same manner so as not to lose or lessen its power. He indicated that the different international jurisdictions had increasingly made efforts to ensure the coherent interpretation of the jurisprudence of international law. Concerning the ICJ in particular, Mr Abraham stated that whenever the ICJ was faced with a question of law it thrived to adjudicate in accordance with the rest of the existing international law jurisprudence.

83. Concerning this issue related to the need for a unique and coherent interpretation of international law, the representative of the European Union drew the attention of the CAHDI to the judgment of 21 December 2016 of the Court of Justice of the European Union (ECJ) in the case of *Council of the European Union v. Front Polisario*[49] concerning the Association and Liberalisation Agreements concluded between the EU and Morocco. Finding that the said agreements were not applicable to Western Sahara, the ECJ expressly followed the interpretation of the ICJ in the

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Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (*Nicaragua v. Colombia*), Preliminary Objections, judgment of 17 March 2016; ICJ, Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*), Preliminary Objections, judgment of 17 March 2016; ICJ, Maritime Delimitation in the Indian Ocean (*Somalia v. Kenya*), Preliminary Objections, judgment of 2 February 2017.

[45] See in particular Immunities and Criminal Proceedings (*Equatorial Guinea v. France*), order of 7 December 2016.

[46] ICJ, Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (*Nicaragua v. Colombia*), Preliminary Objections, judgment of 17 March 2016; ICJ, Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (*Nicaragua v. Colombia*), Preliminary Objections, judgment of 17 March 2016.

[47] The *Pact of Bogota* has been ratified by Bolivia, Brazil, Chile, Costa Rica, Dominican Republic, Ecuador, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru and Uruguay, and, signed but not ratified by Argentina, Cuba, Guatemala, the United States of America and Venezuela.

[48] ICJ, Jurisdictional Immunities of the State (*Germany v. Italy: Greece intervening*), judgment of 3 February 2012, I.C.J. Reports 2012, p. 99

[49] Case C-104/16 P, *Council of the European Union v. Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)* [2016] ECR ECLI:EU:C:2016:973.

Advisory Opinion on Western Sahara[50] concerning the status of Western Sahara under international law.

84. Concerning the key issue of the jurisdiction of the ICJ, it was recalled that during the last CAHDI meeting[51] some delegations suggested that the CAHDI should not focus solely on the acceptance by a State of the compulsory jurisdiction of the ICJ, since there were other legal means through which the ICJ's jurisdiction could be seized as mentioned by the President of the ICJ. In this respect, one delegation pointed out that indeed it might be interesting for the CAHDI to examine other ways of acceding to the jurisdiction of the ICJ more in depth. In this respect, he drew the CAHDI's attention to other clauses of attribution of jurisdiction such as *forum prorogatum*, meaning that if a State has not recognised the jurisdiction of the ICJ at the time when an application instituting proceedings is filed against it, that State has the possibility of subsequently accepting such jurisdiction to enable the ICJ to entertain the case. Therefore in such cases the Court has jurisdiction as of the date of acceptance in virtue of the rule of *forum prorogatum*[52].

85. In response to the question regarding the ICJ's working methods on what tools the Court possesses to deal with the more technical issues, Mr Abraham confirmed this tendency and proceeded to an explanation of the increasing need of technical experts. In most cases, he explained, the parties would themselves provide expert reports on the issue at hand. These were normally very complete and detailed but the ICJ would also sometimes request an additional report if there was a need to clarify the matter further. To illustrate this point, Mr Abraham referred to the recent case of *Costa Rica v. Nicaragua*[53] where expert reports of geographers and geologists are to be submitted. To conclude, Mr Abraham added that the ICJ had the means to obtain the information considered necessary to decide a case.

86. On the question on the working methods regarding the casting vote, Mr Abraham explained that the casting vote of the President of the Court would only be necessary in cases where there was an even number of judges. This specific situation was extremely rare and did not signify that the President could choose but that, if the vote was divided in the Court with an even number of judges, the 'group' of votes in which the President was found would be the one to constitute the decision of the Court. Mr Abraham pointed out that, even though it was always preferable to have a clear majority, sometimes this was not possible and the casting vote, as an objective rule to reach a decision, was needed.

87. On the issue of length of proceedings, Mr Abraham expressed the ICJ's wish and desire to shorten delays as much as possible. To this end, the ICJ had started to deliver, on certain occasions, its decisions in a short time. Mr Abraham noted that sometimes the parties themselves wished to reduce the duration of the proceedings and, to that end, did not ask for a second round of written pleadings.

88. In connection to the closed sessions with the United Nations Security Council, Mr Abraham explained to the members of the CAHDI that, unlike the annual session with the United Nations General Assembly, this practice was relatively recent, having been introduced on the initiative of one of his predecessor. Moreover, he noted that, although this meeting occurred behind closed doors, the matters discussed did not entail secret information. Instead, this practice merely lent itself to a more informal session, allowing the members of the Security Council to ask questions. Mr Abraham concluded that this was in his view a positive development and practice and hoped it would remain in place and eventually encourage the Security Council to ask for opinions of the ICJ.

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[50] ICJ, *Advisory Opinion on Western Sahara* of 16 October 1975.
[51] See doc. CAHDI (2016)3, para.59
[52] See Article 36 (5) of the ICJ Statute: "*Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms".*
[53] *Supra* footnote 42.

89. The Chair thanked President Abraham once again for having accepted the invitation of the CAHDI and for having taken the time to address the CAHDI.

- ***International Court of Justice (ICJ): Jurisdiction and Cases***

90. The Chair presented document *CAHDI (2017) 10 rev 1* containing the declarations of acceptance of the ICJ's jurisdiction by the member States of the Council of Europe and the other States represented in the CAHDI. She noted that, to date, 27 declarations by the member States of the CAHDI (Austria, Belgium, Bulgaria, Cyprus, Denmark, Estonia, Finland, Georgia, Germany, Greece, Hungary, Ireland, Italy, Liechtenstein, Lithuania, Luxembourg, Malta, the Netherlands, Norway, Poland, Portugal, Romania, the Slovak Republic, Spain, Sweden, Switzerland and the United Kingdom) and 5 declarations from other States represented in the CAHDI (Australia, Canada, Japan, Mexico and New Zealand) had been received and welcomed any delegations who would like to take the floor.

91. The delegation of the Netherlands indicated that its new declaration concerning the compulsory jurisdiction of the ICJ was broader in scope than the previous one. It now encompassed all disputes arising out of situations or facts that took place no earlier than one hundred years before the dispute was brought before the ICJ. The delegation of the Netherlands pointed out that its country was advocating for more adherence to the ICJ in general. This included the regular re-examination of its declarations recognising the ICJ's jurisdiction as compulsory. She called on other States to do the same as some declarations might have been construed in a restrictive manner in the past for reasons which were no longer relevant today.

92. The delegation of the United Kingdom informed the CAHDI of their update to the declaration noting that their revision now required States to send their requests to the United Kingdom 6 months before in order to allow for diplomatic means prior to the engagement of the ICJ's jurisdiction. Moreover, they noted that in relation to nuclear disarmament and/or nuclear weapons the United Kingdom had declared that it would only accept the ICJ's jurisdiction in so far as the other nuclear-weapon States Party to the Treaty on the Non-Proliferation of Nuclear Weapons had also consented to the jurisdiction of the Court and would be party to the proceedings in question.

93. The representative of Ukraine informed the CAHDI that his country had instituted proceedings before the ICJ on 16 January 2017 against the Russian Federation with regard to alleged violations of the *International Convention for the Suppression of the Financing of Terrorism* of 9 December 1999 and the *International Convention on the Elimination of All Forms of Racial Discrimination* of 21 December 1965[54]. Both States are Parties to these two instruments. Furthermore, he informed the CAHDI that Ukraine also filed on 16 January 2017 a Request for the indication of provisional measures.[55] In this respect, he underlined that the public hearings on this Request took place in The Hague (The Netherlands) from 6-9 March 2017. Following the conclusion of these public hearings the ICJ began its deliberation. The ICJ's decision on this Request for the indication of provisional measures will be delivered at a public sitting, the date of which will be announced in due course.

94. The representative of the Russian Federation recalled to the CAHDI that the above-mentioned case is pending before the ICJ. Therefore, he underlined that the determination of the

[54] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* (Pending) [2017]

[55] ICJ, *Request for the Indication of Provisional Measures of Protection Submitted by Ukraine* in the case concerning *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* 16 January 2017.

merits of the case is still pending. In this respect, he invited the CAHDI experts to read the pleadings of the Russian Federation in this case.[56]

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*

95. 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 which are subject to objections (documents *CAHDI (2017) 11 rev confidential* and *CAHDI (2017) 11 Addendum prov confidential bilingual*) and opened the discussion. The Chair also drew the attention of the delegations to document *CAHDI (2017) Inf 1 rev 1* containing reactions to reservations and declarations to international treaties previously examined by the CAHDI and for which the deadline for objecting had already expired.

96. The Chair underlined that the reservations and declarations to international treaties still subject to objection contained in the list prepared by the CAHDI Secretariat in the document *CAHDI (2017) 11 rev confidential* contains 22 reservations and declarations, 8 of which were made with regard to treaties concluded outside the Council of Europe (Part I of the document) and 13 of them concerned treaties concluded within the Council of Europe (Part II of the document). Part III, with only one item, involved the partial withdrawal of a reservation. She further underlined that 11 of these reservations and declarations were already discussed at the last CAHDI meeting in September 2016 and 11 have been newly added since then.

97. With regard to the **reservation of Kyrgyzstan** to the Convention on the Privileges and Immunities of the Specialized Agencies, one delegation indicated that they are still examining the possibility to object as they noted that privileges and immunities are always functional and not based on nationality.

98. With regard to the **modification of reservation of Bahrain** to the Convention on the Elimination of All Forms of Discrimination against Women, four delegations indicated that they were still considering objecting. Several delegations informed the CAHDI that they had already objected to the original reservation. Consequently, the question remained whether or not they should make a new objection or if their existing objection was enough to react to this modification. The key question is therefore whether a new objection was needed when the modification of a reservation resulted in broadening the scope of the original reservation.

99. With regard to the **declaration of Venezuela** to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, no comments were made by the delegations. The declaration in question excludes the family members of migrant workers as beneficiaries of the right to join and seek the assistance of trade unions under Article 26 of the Convention.

100. With regard to the **reservations of the Democratic People's Republic of Korea** to the United Nations Convention against Transnational Organized Crime, during the last CAHDI meeting some delegations considered these reservations unacceptable as the establishment of criminal liability of legal persons was an obligation imposed by the Convention. One delegation indicated

[56] ICJ, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Oral Proceedings, CR 2017/2 and CR 2017/4.

that some legal systems provided for civil or administrative liability of legal persons and not for criminal liability.

101. With regard to the **reservation of Afghanistan** to the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational, Organized Crime, six delegations informed the CAHDI that they were considering to object to the reservation and one delegation noted that it had already done so (Germany) in view of the fact that the reservation concerned a provision codifying a rule of customary international law.

102. With regard to the **reservations and declarations of the Holy See** to the United Nations Convention against Corruption, the delegation of the Holy See noted that this reservation had been made concerning a possible future implementation mechanism. The Holy See was not against implementation mechanisms in general but that due to its size and complexity as a micro-entity these proceedings could be extremely demanding.

103. With regard to the **reservation of Brunei Darussalam** to the Convention on the Rights of Persons with Disabilities, the CAHDI noted that seven delegations (Austria, the Czech Republic, Poland, Portugal, Romania, Switzerland and Sweden) have already objected to this reservation. Furthermore, eight other delegations informed the CAHDI that were considering objecting to this reservation.

104. With regard to the **declaration of France** to the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity, the delegation of France explained to the CAHDI that this declaration recalled the wording of an earlier decision of the United Nations Environment Programme concerning the terminology “indigenous people and local communities”. Furthermore, the French delegation drew the attention of the CAHDI to the fact that his country made the same Declaration to the mother Convention of the Nagoya Protocol.

105. With regard to the **reservation and declaration of the Republic of Moldova** to the Third Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (ETS No. 28), the delegation of the Republic Moldova stated that his country reserves the right not to guarantee the exemption from taxes on income derived from interest on bonds issued or loans contracted by the Council of Europe Development Bank as his country could not guarantee such exemption from the taxes foreseen by the provision in question.

106. With regard to the **declaration of Turkey** to the Additional Protocol to the European Convention on Extradition (ETS No. 086), one delegation (Cyprus) stated that it had already objected to this and all the other similar declarations made by Turkey concerning the recognition of Cyprus. Several delegations informed the CAHDI that they were considering objecting to this Declaration for legal and political reasons as some of them had already done in the past with regard to other similar declarations made by Turkey. One delegation specifically underlined that calling a full-fledged member State of the Council of Europe and the United Nations a “defunct” entity was politically troubling. Furthermore, it was mentioned that excluding a State party to a convention from treaty relations was legally problematic.

107. In relation to the above-mentioned Declaration and all similar declarations below in relation to other Council of Europe conventions and protocols, the **delegation of Turkey** made the following statement: “According to international law, diplomatic relations could be established by mutual consent of the States (Article 2 of the Vienna Convention on Diplomatic Relations). Every sovereign State has the power and discretion as to the recognition of a State and establishing diplomatic relations with other States. As a consequence of this order, a State Party to an international legal instrument may deem it necessary and useful to inform other State Parties by means of a declaration on the scope of implementation of such instrument. Hence, Turkey’s declaration regarding the implementation of the Conventions only to the State Parties with which it

has diplomatic relations does not amount to a reservation and should be considered in this context."

108. With regard to the **declarations of Turkey** to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), the Chair informed the CAHDI that three delegations (Cyprus, Greece and Portugal) had already objected to the declaration concerning Cyprus.

The Secretariat, also in the name of the Council of Europe Treaty Office, apologised to Turkey for a factual mistake in an earlier version *of document CAHDI (2017) 11 rev confidential* which referred to the last Declaration of Turkey as a Reservation in both the text and title. This factual mistake has now been corrected on the website of the Council of Europe Treaty Office and notified with a corrigendum on 17 March 2017 to the Parties containing only declarations as intended by Turkey.

109. With regard to the **communication of Spain** concerning the Framework Convention for the Protection of National Minorities (ETS No. 157) the delegation of Spain explained that the communication of her country did not seek to limit or restrict the content of its treaty obligations but was made for constitutional reasons as the Spanish Constitution does not refer to national minorities and therefore it represented a simple interpretative declaration which, following the *International Law Commission (ILC) Guide to Practice on Reservations to Treaties*, did not constitute reservations, and, were in general admissible at any moment.[57]

110. With regard to the **declaration of Turkey** to the Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding Supervisory Authorities and Transborder Data Flows (ETS No. 181) one delegation (Cyprus) informed the CAHDI that her country has already objected to this Declaration.

111. With regard to the **reservations and declarations of Turkey** to the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 182), the Chair informed the members of the CAHDI that one delegation (Cyprus) had objected to the Declaration concerning the recognition of Cyprus.

112. With regard to the **reservations of Greece** to the Convention on Cybercrime (ETS No. 185), the delegation of Greece clarified that it was its intention to stay within the confines of Article 29 of the Convention and that other European States had made similar reservations in the past.

113. With regard to the **declaration of Turkey** to the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197), the Chair informed the CAHDI that three delegations (Cyprus, Greece and Portugal) had already objected to this declaration.

114. With regard to the **reservations and declaration of Turkey** to the Third Additional Protocol to the European Convention on Extradition (CETS No. 209), the Chair noted that one delegation (Cyprus) had already objected to the declaration concerning Cyprus.

[57] See, ILC, *International Law Commission (ILC) Guide to Practice on Reservations to Treaties* (annexed to UN General Assembly Resolution A/RES/68/111 of 19 December 2013; or, as an addendum to the Report of the ILC on the Work of its 63rd session (2011), A/66/10/Add. 1), Guideline 1.2., which reads: "'Interpretative declaration' means a unilateral statement, however phrased or named, made by a State or an international organization, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions", and, Guideline 2.4.4., which reads: "Without prejudice to the provisions of guidelines 1.4 and 2.4.7, an interpretative declaration may be formulated at any time."

115. With regard to the **reservation and declaration made upon signature of Latvia** to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (CETS No. 210), the delegation of Latvia informed the CAHDI that the internal debate on the issue was still on-going and the question was to be dealt by the national Parliament in autumn 2017. The ratification of the Convention was therefore expected to take place soon.

116. With regard to the **reservations and declarations by Turkey** to the Fourth Additional Protocol to the European Convention on Extradition (CETS No. 212), the Chair indicated that one delegation (Cyprus) had already objected to the declaration concerning Cyprus.

117. With regard to the **declaration by Azerbaijan** to the Council of Europe Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events (CETS No. 218), the delegation of Azerbaijan indicated that the declaration purported to the current conflict which made it for the moment impossible to establish any contact with Armenia. The declaration did not limit the scope of the Convention and was done only due to technical impossibility to fulfil their obligations under the Convention.

118. With regard to the **reservation by Poland** to the Council of Europe Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events (CETS No. 212), the delegation of Poland explained that in the course of the negotiations of the Convention Poland had consequently underlined that the Polish system of providing security during mass events was based on different principles than foreseen by the Convention: not on general licensing but on a case-by-case risk assessment. In the spirit of compromise, Poland had not opposed to the adoption of Article 5(2), but indicated early on that it would choose to submit a reservation instead. During more than seven years of operation, the Polish system had proved very effective for stadium-based mass events, including the EURO Cup 2012. The current procedures regarding stadium security allowed for flexible and relatively rapid response and offered sufficient guarantees to ensure security and public order during these events in an optimum way. Lastly, the delegation of Poland underlined, that it applies a higher standard than that envisaged in the Convention.

119. With regard to the **partial withdrawal of reservation of Kuwait** to the International Covenant on Civil and Political Rights, no comments were made by the delegations. During the last CAHDI meeting some delegations welcomed this partial withdrawal and informed the Committee that the reservations which remained were still covered by earlier objections. Some questions arose, however, as to whether it could be necessary to reiterate that earlier objections had been made.

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

12. Consideration of current issues of international humanitarian law

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

121. The representative of the International Committee of the Red Cross (ICRC) informed the CAHDI that, in accordance with the information they have received, the Council of Europe Committee of Experts on Terrorism (CODEXTER) will be working this year on the relationship between IHL and international human rights law in relation to acts of terrorism during their assessment of “*possible gaps in the legal framework provided by Council of Europe international legal instruments in the area of the prevention and suppression of terrorism, more particularly the relationship between IHL and criminal law in relation to acts of terrorism*”. In this respect, he expressed the concern of the ICRC that, when addressing this issue, the CODEXTER would preserve the integrity and rationale of IHL. In particular, the ICRC considers it important that

international instruments addressing terrorism include a specific provision governing their relationship with IHL. In this regard, the ICRC would favour a clause that excludes from instruments dealing with terrorism lawful acts of war committed by any party to an armed conflict, States and non-State alike. The ICRC stated their readiness to share its expertise on the matter. The ICRC had in particular regularly expressed its view that the counter-terrorism legal frameworks must not challenge principled humanitarian action and called in particular for the insertion of so-called “humanitarian exemptions” in such frameworks. In this regard, the ICRC welcomed the adoption of the UN General Assembly resolution on the UN Global Counter Terrorism Strategy in July 2016 which "*urges States to ensure (…) that counter-terrorism legislation and measures do not impede humanitarian and medical activities or engagement with all relevant actors as foreseen by international humanitarian law*"[58]. The ICRC also welcomed the adoption on 7 March 2017 of the EU Directive on Combating Terrorism which excluded humanitarian activities carried out by impartial humanitarian organisations, such as the ICRC, from the scope of terrorist offences.

122. Furthermore, the representative of the ICRC informed the CAHDI of the upcoming conference organised under the auspices of the UN to negotiate a treaty prohibiting nuclear weapons. In this regard, the ICRC, and the International Red Cross and Red Crescent Movement more broadly, had called for the prohibition and elimination of nuclear weapons since 1945. As a consequence of this long-standing position, the Movement welcomed the convening of these negotiations and applauded the fact that they were taking place in the framework of the UN, which should be an all-inclusive framework. In the view of the ICRC, such a ban treaty would be a positive and concrete step towards fulfilling existing commitments for nuclear disarmament, notably those of Article VI of the Non-Proliferation Treaty — a treaty that, in the view of the ICRC, remained crucially important for global disarmament efforts.

123. Moreover, the representative of the ICRC informed the CAHDI on its work updating the Commentaries to the four Geneva Conventions of 1949 and their 1977 Additional Protocols. The on-line version of the updated commentary on the Second Convention dealing with the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea will be launched at an event in Geneva on 4 May 2017.

124. Finally, the representative of the ICRC reminded the CAHDI of three important meetings coming up in Geneva in April. Firstly, on 6-7 April, the ICRC is hosting the first formal meeting of all States on the implementation of Resolution 1 adopted at the 32nd International Conference on “Strengthening IHL Protecting Persons Deprived of their Liberty”. Secondly, on 10-12 April there will be the second Formal meeting of all States for the intergovernmental process on strengthening respect for IHL, co-facilitated by Switzerland and the ICRC. And thirdly, the next Montreux Document Forum plenary meeting will take place on 27-28 April.

125. The delegation of Australia expressed their support for the proposed model put forward by the ICRC.

126. The delegation of Denmark informed the CAHDI that the first Danish Military Manual had now been finalised. The manual contains reflections on all obligations under international law. He highlighted the fact that the Manual not only covers IHL obligations, but also obligations under international human rights law, including the European Convention on Human Rights, the protection of children in armed conflict, state responsibility in detention cases, extraterritorial application and questions on the interplay between IHL and human rights law. The Manual, currently only available in Danish, is being translated into English and will soon be made available.

127. The delegation of Portugal informed the CAHDI of the organisation of a conference on current challenges to IHL including humanitarian intervention to be held on 6 April 2017. The conference aims to promote the newly launched “Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict”.

[58] UNGA Res 291 (19 July 2016), UN Doc A/RES/70/291, para. 22

128. The representative of the European Union confirmed that the EU Directive states that "the provision of humanitarian activities by impartial humanitarian organisations recognised by international law, including international humanitarian law, do not fall within the scope of this Directive, while taking into account the case-law of the Court of Justice of the European Union"[59].

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

129. The Chair presented the document on the Developments concerning the International Criminal Court and other international tribunals (document *CAHDI (2017) 12 rev*). Concerning the International Criminal Court (hereinafter: "ICC"), she mentioned that the Governments of South Africa,[60] Burundi[61] and The Gambia[62] have recently notified the Secretary-General of the United Nations of their decision to withdraw from the Rome Statute. Two of these withdrawals, with regard to The Gambia[63] and South Africa[64], had been rescinded since.

130. Concerning recent developments in the case-law of the ICC, two interesting judgments had been rendered. Firstly, on 27 September 2016, Trial Chamber VIII found the defendant in the case of *Prosecutor v. Ahmad Al Faqi Al Mahdi*[65] in the situation of Mali guilty, as a co-perpetrator, of the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu, in June and July 2012. The defendant was sentenced to 9 years of imprisonment. The Chamber indicated that the targeted buildings were protected as a significant part of the cultural heritage of Timbuktu and of Mali and did not constitute military objectives. They were specifically identified, chosen and targeted precisely in light and because of their religious and historical character. As a consequence of the attack, they were either completely destroyed or severely damaged.

131. Secondly, on 19 October 2016, Trial Chamber VII found the five accused in the case of *Prosecutor v. Jean-Pierre Bemba Gombo and Others*[66] in the situation of the Central African Republic guilty of various offences against the administration of justice related to false testimonies of defence witnesses in the main case against Bemba Gombo before the ICC. On 22 March 2017, the Chamber delivered its decision on sentencing in the case. Mr Bemba Gombo was sentenced to one additional year imprisonment and fined EUR 300,000, to be transferred by the Court to the Trust Fund for Victims.

132. With regard to the ICC, the Chair noted lastly that a Pre-Trial Chamber of the Court would hold a public hearing on 7 April 2017 for the purposes of determining the compliance by South Africa with the Court's request for arrest and surrender of Mr. Omar Al Bashir to the Court.

133. With regard to the other international criminal tribunals, the Chair informed the CAHDI of the appeal hearing in the case of *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić*[67], the last and biggest-ever case before the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), which was taking place these very days.

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[59] European Parliament and Council Directive 2015/0281 (COD) of 23 February 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, para. 38.
[60] Notification of withdrawal on 19 October 2016.
[61] Notification of withdrawal on 27 October 2016.
[62] Notification of withdrawal on 10 November 2016.
[63] Notification of revocation of withdrawal on 10 February 2017.
[64] Notification of revocation of withdrawal on 7 March 2017.
[65] *Prosecutor v. Ahmad Al Faqi Al Mahdi* (Judgment), ICC-01/12-01/15-171, 27 September 2016.
[66] *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangeda Kabongo, Fidèle Babala Wandu and Narcisse Arido* (Judgment), ICC-01/05-01/13-1989-Red, 19 October 2016.
[67] *Prosecutor v. Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić*, IT-04-74.

134. The delegation of the Russian Federation indicated that its Government had, in a communication received on 30 November 2016, informed the Secretary-General of the United Nations of the intention of the Russian Federation not to become a party to the Rome Statute, which it had signed on 13 September 2000.

14. Topical issues of international law

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

136. The delegation of Belgium informed the CAHDI of the latest developments concerning the case of *Touax & Touax Rom v. Belgium*[68] where TOUAX SA, a French enterprise, and TOUAX Rom, a Romanian enterprise specialised in equipment management for the Danube water transport, claimed compensation for damages allegedly suffered during the 1999 and 2000 NATO led bombings in Kosovo. The claimants considered that Belgium had violated Article 2(4) of the Charter of the United Nations by participating in the decision that led to the bombings, especially since such an undertaking had not been authorised by the United Nations Security Council. Even though they recognised this provision did not have direct effect in Belgian law, they estimated that it was nevertheless contravening Article 1382 of the Belgian civil code as well as the North Atlantic Treaty. In its 16 May 2013 decision the Court had ruled the action as unfounded. Concerning the violation of the North Atlantic Treaty, the Court concluded that no violation of the provision could be found due to its lack of direct effect in the Belgian legal system and that, consequently, the claimants could not on the basis of Article 1382 rely on the provisions of the North Atlantic Treaty. The claimants appealed this decision but the Belgian Court of Cassation (*Cour de Cassation*) rejected the appeal, upholding the previous Court's reasoning and ruling.

IV. OTHER

15. Place, date and agenda of the 54th meeting of the CAHDI: Strasbourg, 21-22 September 2017

137. The CAHDI decided to hold its 54th meeting in Strasbourg (France) on 21-22 September 2017. The CAHDI instructed the Secretariat, in consultation with the Chair and the Vice-Chair of the CAHDI, to prepare and communicate the agenda of this meeting.

16. Other business

a. *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*

138. The Chair drew the attention of the Committee to document *CAHDI (2017) 1 restricted* on the "*Revised 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 and revised following the proposals submitted by the CAHDI delegations.

139. The Chair also recalled that the CAHDI held a first exchange of views on these draft model final clauses during its 51st meeting (Strasbourg, France, 3-4 March 2016) and requested delegations to submit written comments on these draft model final clauses. The CAHDI re-examined these draft model final clauses at its 52nd meeting (Brussels, Belgium, 15-16 September 2016) in the light of the written comments submitted by some delegations [document *CAHDI (2016) 8 Addendum prov 1 restricted bilingual*] and written observations provided by the Secretariat of the Treaty Office of the Council of Europe [document *CAHDI (2016) 8 Addendum II prov restricted bilingual*]. Following the meeting in Brussels, the CAHDI entrusted the Secretariat

[68] Judgment of the Court of Cassation (*Cour de Cassation*) of 9 February 2017, C.13.0528.F/1.

with the preparation of a consolidated revised version containing the alternative wording proposed and confirmed by delegations. This consolidated revised version was sent to all CAHDI delegations on 24 February 2017 requesting them to send to the Secretariat any further alternative wording that they would like to include before 7 March 2017. The Secretariat has not received any further proposals than those contained in the document *CAHDI (2017) 1 restricted*.

140. Therefore, the CAHDI re-examined the *"Revised 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 in the light of the alternative proposals submitted by CAHDI delegations as contained in the document *CAHDI (2017) 1 restricted*.

141. Following this exchange of views, the CAHDI agreed on a revised version of the draft model clauses as contained in the document *CAHDI (2017) 1 rev restricted*. These revised draft model final clauses will be submitted to the Committee of Ministers for adoption as it was the case of 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.[69]

b. *OECD presentation on the "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS)" and on the OECD Report on "International Regulatory Cooperation: the Role of International Organisations in Fostering Better Rules of Globalisation"*

142. The representative of the OECD provided the CAHDI experts with information concerning the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS).* In particular, the OECD representative indicated that the BEPS refers to tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no activity, resulting in little or no corporate tax being paid. The OECD noted that they had introduced in 2013 an Action Plan and in 2015 a Package which had resulted in an agreement on a set of measures to address BEPS, with over 90 jurisdictions having already committed to the Package and becoming members of the Inclusive Framework on BEPS Implementation.

143. The representative of the OECD further indicated that the Multilateral Convention (also known as "Multilateral Instrument" or "MLI") was developed in order to implement these modifications which allows countries to simultaneously modify their network of bilateral treaties without having to individually renegotiate them and to only have to perform one ratification procedure. She noted that the MLI offers significant flexibility regarding defined reservations, alternative and optional provisions which are made by means of a notification.

144. She also indicated that the MLI was negotiated by an ad hoc Group currently composed of 103 States including countries from all regions and levels of development. The ad hoc Group was convened under the aegis of the OECD and G20 and was served by the OECD Secretariat. The text of the MLI and an accompanying Explanatory Statement were adopted by the Group on 24 November 2016 and was opened for signature as of 31 December 2016. The Depositary of the MLI is the Secretary-General of the OECD. There will be a a high-level signing ceremony on 7 June 2017 at the OECD in Paris. Finally, the OECD offered their assistance to any state wishing to receive assistance in their preparations for signature.

145. Another OECD representative also provided the CAHDI with an overview of their Report on *"International Regulatory Cooperation: the Role of International Organisations in Fostering Better Rules of Globalisation",* emphasising the importance of international organisations (IOs) in fostering a coordinated approach in response to the challenges faced by globalisation in order to develop global standards addressing issues of global reach. However, despite their increasing role

[69] Document CM/Del/DEC(80)315/9.

played through their global standard-setting and rule-making activities, it was noted that they are rarely involved in the rule-making process.

146. The OECD proceeded to set out the different approaches to IO rule-making, pointing out in particular that documents often vary from one IO to another and with few of them systematically tracking their instruments' implementation, essential to the evaluation of IOs influence and relevance of their instruments. The most common approach is thus voluntary reporting by IOs but there are some conventions imposing mandatory mechanisms. They stressed the importance of greater *ex ante* and *ex post* evaluation in order to ensure consistency of IOs norms with domestic regulatory frameworks.

147. In connection to the difficulties lying ahead, the OECD acknowledged the fact that a fragmented approach may lead to overlapping constituencies and mandates, inconsistencies and wasted resources. It is for this reason that the OECD encourages efforts to facilitate the understanding of the regulatory landscape and early and more systematic exchange of information among IOs to create a development instrument.

148. The Chair of the CAHDI thanked the OECD representatives for their presentations and gave the floor free for comments from interested delegations.

149. One delegation pointed out that it should be of utmost importance to clarify, before the entering into force of the new MLI, the legal effects and relationship between this new Convention and the already existing bilateral agreements. The representative of the OECD replied that they are currently preparing an information note where this issue will be addressed.

150. Another delegation underlined that for the legal advisers it is very important to clarify the legal status of the instruments drafted within the framework of the OECD as sometimes they are qualified as non-legally binding instruments -soft law- and on other occasions they are qualified as treaties.

APPENDICES

APPENDIX I

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APPENDIX II

AGENDA

I. INTRODUCTION

1. Opening of the meeting by the Chair, Ms Päivi Kaukoranta

2. Adoption of the agenda

3. Adoption of the report of the 52nd 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

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

   - Exchange of views with Mr Guido Raimondi, President of the European Court of Human Rights (ECHR) (Thursday, 23 March 2017 at 2.30 pm)

10. Peaceful settlement of disputes: the International Court of Justice (ICJ)

   - Exchange of views with Mr Ronny Abraham, President of the International Court of Justice (ICJ) (Friday, 24 March 2017 at 9.30 am)

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

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

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

12. Consideration of current issues of international humanitarian law

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

14. Topical issues of international law

IV. OTHER

15. Place, date and agenda of the 54th meeting of the CAHDI: Strasbourg (France), 21-22 September 2017

16. Other business

a. 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

b. OECD presentation on the "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS)" and on the OECD Report on International Regulatory Cooperation: the Role of International Organisations in Fostering Better Rules of Globalisation

APPENDIX III

PRESENTATION OF MR GUIDO RAIMONDI

PRESIDENT OF THE EUROPEAN COURT OF HUMAN RIGHTS (ECHR)

French only

Madame la Présidente,
Mesdames et Messieurs,

Je souhaite, pour commencer, vous remercier de m'avoir invité à m'exprimer aujourd'hui devant vous. Je mesure l'importance de votre Comité et le rôle éminent que ses membres jouent dans leurs capitales respectives.

Votre ordre du jour témoigne également de ce que les sujets d'intérêt commun entre la Cour européenne des droits de l'homme et le CAHDI sont nombreux, pour ne citer que la question de l'immunité des États et des organisations internationales ou encore celle relative aux mesures nationales d'application des sanctions des Nations Unies.

Je sais aussi que votre composition est variée. Il y a en effet parmi vous des spécialistes du mécanisme de la Convention européenne des droits de l'homme (je pense aux agents des gouvernements que j'ai plaisir à revoir aujourd'hui), mais vous comptez également des internationalistes de grand renom qui sont moins familiers de nos procédures et de notre actualité.

C'est la raison pour laquelle, si vous me le permettez, je vais commencer par vous présenter, en quelques mots, la situation de la Cour européenne des droits de l'homme. Puis, dans un second temps, j'évoquerai, comme cela figure à votre agenda, les affaires devant la Cour européenne des droits de l'homme qui impliquent des questions de Droit international public.

S'agissant de la première partie de mon intervention, je prie ceux qui, parmi vous, sont également agents de leur gouvernement devant la Cour de m'excuser si un certain nombre d'informations que je vais vous donner sont déjà connues d'eux.

Notre Cour, contrairement à la Cour internationale de Justice qui vous est très familière et qui jouit d'une compétence matérielle générale, a une vocation régionale. Alors que toutes les affaires portées devant la C.I.J. sont des affaires interétatiques, notre juridiction traite principalement de requêtes individuelles, même si les affaires interétatiques sont prévues par l'article 33 de la Convention. Notre mission est donc, principalement, la protection des droits individuels. Les requêtes qui nous parviennent sont excessivement nombreuses et, il y a quelques années, les affaires pendantes devant nous avaient atteint le chiffre considérable de 160 000. L'entrée en vigueur du Protocole n° 14 et les nouvelles méthodes de travail introduites au sein de la Cour ont permis de faire baisser ce nombre dans des proportions considérables et de le ramener à 65 000 à la fin de l'année 2015. Toutefois, cette embellie a été de courte durée.

En effet, en 2016, des évènements graves se sont produits en Europe, qui ont inévitablement eu un impact sur notre activité.

Le nombre d'affaires pendantes a donc considérablement augmenté l'an dernier (32 % d'affaires entrantes supplémentaires en 2016) et s'élève, au 1er mars, à environ 88 000.

Il y a plusieurs enseignements à tirer de ces chiffres. D'abord, 78 % de nos affaires sont en provenance de six pays seulement. Pour deux d'entre eux, la Hongrie et la Roumanie, la progression en 2016 a été plus que considérable. En effet, le nombre d'affaires en provenance de ces deux pays a respectivement augmenté de 95 % et de 108 % en une année. Dans les deux

cas, ces affaires concernent essentiellement des questions relatives aux conditions de détention. Certes, il s'agit là d'affaires prioritaires, puisqu'elles relèvent de l'article 3 de la Convention, lequel interdit les traitements inhumains et dégradants, mais ce sont en réalité des affaires répétitives, qui reflètent des difficultés de nature systémique ou structurelle et exigent que des solutions globales soient trouvées au niveau interne. Cela implique des efforts politiques et budgétaires importants, comme le reconnaissent les responsables politiques de ces pays, que j'ai rencontrés.

Ensuite, vient le cas de la Turquie. Depuis la dramatique tentative de coup d'État de juillet dernier, la Turquie est remontée en première/deuxième position avec une augmentation très significative du nombre d'affaires.

Personne ne doit sous-estimer l'impact de cet évènement tragique sur le peuple turc et sur son gouvernement et je tiens à saluer le rôle très important joué dans ce contexte par le Secrétaire Général du Conseil de l'Europe qui a maintenu le dialogue avec les autorités turques.

À la date du 1er mars, nous avions reçu 11 232 nouvelles requêtes relatives aux événements post-15 juillet, dont près de 5 000 en janvier et février de cette année. Parmi ces requêtes, 695 ont été déclarées irrecevables par un juge unique (il s'agissait principalement de requêtes concernant la détention provisoire) ; 3 ont été déclarées irrecevables par une décision de chambre pour non-épuisement des voies de recours internes (ce sont les affaires Mercan, Zihni et Çatal).

Dans la décision Mercan, la requête portait sur la régularité de la détention provisoire d'une magistrate ; dans la décision Zihni, il s'agissait du cas d'un enseignant révoqué et, enfin, dans la décision Çatal, il s'agissait de la requête d'une juge révoquée après la tentative de coup d'État. Cette dernière requête a été jugée irrecevable car la législation nationale prévoit une nouvelle voie de recours interne pour contester une telle révocation.

Ces trois décisions sont très importantes. Elles rappellent que, de notre point de vue, dans ce moment de crise très grave, même si l'accès à la Cour reste ouvert, le principe de subsidiarité doit s'appliquer pleinement.

Cela signifie que ces requérants, comme tous les autres, doivent épuiser les voies de recours internes avant d'introduire une requête devant notre Cour, pour autant que ces recours existent et soient considérés comme efficaces.

Jusqu'à présent, notre Cour a considéré le recours devant la Cour constitutionnelle turque comme un recours efficace et conforme à notre jurisprudence. Cependant, cette logique de subsidiarité ne pourra pas perdurer si la Cour constitutionnelle se déclare incompétente. Dans cette éventualité, la Cour de Strasbourg serait submergée par des dizaines de milliers d'affaires. C'est pourquoi il est essentiel pour nous, mais surtout pour la démocratie et l'État de droit en Turquie, que la voie judiciaire nationale reste ouverte aux personnes affectées par les mesures d'urgence.

Je fonde d'ailleurs beaucoup d'espoir dans la Commission qui a été créée par le décret-loi du 23 janvier 2017 pour examiner les recours contre les décisions prises à la suite de la tentative de coup d'État. Le fait qu'un recours juridictionnel ait été prévu me semble évidemment très important. Il est essentiel qu'un tel mécanisme puisse fonctionner. Cette position ne préjuge en rien, évidemment, d'un éventuel examen de la question de l'effectivité du recours en question, et notamment de la capacité des juridictions nationales à établir une jurisprudence uniforme et compatible avec les exigences de la Convention.

Quelques mots de la crise des migrants qui a commencé à partir de l'été 2015 et s'est poursuivie en 2016. Cette crise n'a pas eu un impact significatif sur notre activité. Cela étant, il

n'est pas exclu qu'une fois les demandes d'asile examinées et en cas de rejet, des affaires soient introduites devant notre Cour. En tout état de cause, cela ne s'est pas produit pour l'instant.

J'évoquais au début de mon intervention les requêtes étatiques. Elles sont, comme vous le savez, peu nombreuses devant notre Cour. Toutefois, les conflits récents sur notre continent ont eu une incidence sur notre activité et sont à l'origine de plusieurs requêtes entre des États membres du Conseil de l'Europe. Des requêtes, certes peu nombreuses, mais qui sont très complexes et délicates.

J'aimerais vous en dire quelques mots brièvement. Pour mémoire, dans une première affaire Géorgie c. Russie, la Cour a conclu, dans un arrêt rendu le 3 juillet 2014, à la violation de plusieurs dispositions de la Convention et elle a estimé, en particulier, qu'à l'automne 2006, les autorités russes avaient mené une politique coordonnée d'arrestation, de détention et d'expulsion de ressortissants géorgiens qui s'analysait en une pratique administrative contraire à la Convention.

La deuxième requête Géorgie c. Russie (II), toujours en cours d'examen, concerne le conflit armé qui a éclaté entre la Géorgie et la Fédération de Russie en août 2008. L'affaire a été déclarée recevable et la Grande Chambre est saisie. Des auditions de témoins, cités par les deux parties, ont eu lieu dans cette affaire, ce qui est une procédure lourde et exceptionnelle.

Actuellement, cinq requêtes interétatiques introduites par l'Ukraine contre la Russie sont en cours d'examen par la Cour. Dans un souci d'efficacité, la Cour a décidé de diviser en deux ces affaires interétatiques, selon un critère géographique : d'une part les griefs relatifs aux événements survenus en Crimée, d'autre part, les griefs relatifs aux événements survenus dans l'Est de l'Ukraine.

Enfin, le 15 septembre 2016, la Slovénie a saisi la Cour d'une requête contre la Croatie. Cette requête concerne les mesures prises par les autorités croates concernant des actifs et créances d'une banque slovène, et de sa filiale basée à Zagreb, dans le contexte de l'éclatement de l'ancienne République fédérative socialiste de Yougoslavie. Cela concerne, principalement, le recouvrement de créances contractées à l'époque de l'ancienne Yougoslavie.

J'en viens maintenant à notre jurisprudence en matière de droit international. Je ne vous surprendrai pas en vous disant que l'année écoulée a été essentiellement marquée, dans ce domaine, par l'arrêt Al Dulimi c. Suisse du 21 juin 2016, dont tous les commentateurs ont souligné l'importance dans l'articulation normative des obligations internationales. Cette affaire concerne l'imputabilité des actes adoptés dans le cadre de l'activité du Conseil de sécurité des Nations Unies.

À ce stade, il me semble utile de rappeler que, dans le célèbre arrêt Bosphorus, la Cour a élaboré un dispositif jurisprudentiel qui peut se résumer ainsi : les États demeurent responsables au regard de la Convention des mesures qu'ils prennent en exécution d'obligations juridiques internationales, y compris lorsque ces obligations découlent de leur appartenance à une organisation internationale à laquelle ils ont transféré une partie de leur souveraineté. Toutefois, une mesure prise en exécution de telles obligations doit être réputée justifiée dès lors que l'organisation en question accorde aux droits fondamentaux une protection au moins équivalente – c'est à dire comparable – à celle assurée par la Convention.

Ce dispositif comprend des exceptions, lorsque les actes litigieux ne relèvent pas strictement des obligations juridiques internationales de l'État défendeur, notamment lorsqu'il a exercé un pouvoir d'appréciation ou encore lorsque la protection des droits en cause, garantis par la Convention, est entachée d'une insuffisance manifeste.

Pour ce qui est plus spécifiquement de l'ONU, il convient de distinguer deux hypothèses : les opérations militaires internationales et les sanctions internationales décidées par le Conseil de sécurité.

Tout d'abord, en ce qui concerne les opérations militaires internationales, la Cour a surtout cherché à déterminer l'entité responsable de l'opération ou de l'action militaire en cause, c'est-à-dire l'entité qui disposait de l'autorité et du pouvoir de contrôle ultimes.

Sur la base de ce critère, la Cour a pu juger soit que le Conseil de sécurité avait gardé « l'autorité et le contrôle globaux » sur les forces armées, auquel cas les requêtes contre un État ont été déclarées irrecevables, soit qu'il n'exerçait ni un contrôle effectif ni l'autorité et le contrôle ultimes sur les actions et omissions des soldats de la force multinationale et, dès lors, les faits reprochés n'ont pas été jugés imputables à l'ONU.

Ensuite, les sanctions internationales. Elles se trouvaient au cœur de l'affaire Al-Dulimi. En 2003, le Conseil de sécurité adopta la Résolution 1483 (2003), ordonnant le gel immédiat des avoirs financiers des ex-hauts responsables de l'ancien régime irakien. À la suite de cette résolution, en 2004, des listes furent établies comprenant les noms des requérants. Le gouvernement suisse ayant ordonné la confiscation de leurs avoirs, ils introduisirent des recours qui furent rejetés par le Tribunal fédéral suisse au motif que la Suisse n'avait aucun moyen d'échapper aux obligations résultant de la Charte de l'ONU. Pour le Tribunal fédéral, ces obligations primaient sur toutes les autres obligations internationales, y compris sur la Convention européenne des droits de l'homme.

La question des sanctions décidées par le Conseil de sécurité avait déjà été abordée dans l'affaire Nada c. Suisse qui concernait l'interdiction pour le requérant de transiter par le territoire helvétique, seule voie lui permettant de sortir de l'enclave italienne exiguë où il résidait. Cette restriction lui était imposée par les autorités suisses, déjà en exécution des résolutions adoptées par le Conseil de sécurité dans le cadre de la lutte contre le terrorisme.
La Cour n'a pas contesté la force contraignante de la résolution du Conseil de sécurité ; elle a toutefois constaté que la Suisse jouissait d'une latitude – certes restreinte, mais néanmoins réelle – dans la mise en œuvre de cette résolution. Elle a donc constaté la violation de l'article 8 de la Convention.

La question posée l'affaire Al-Dulimi n'était donc pas inédite. Il s'agissait de savoir si un État qui se conforme aux obligations nées de la Charte des Nations Unies peut voir sa responsabilité internationale engagée sur la base de la Convention européenne des droits de l'homme. On comprend les enjeux de cette question pour les États qui appartiennent aux deux organisations internationales concernées et doivent respecter les obligations nées de cette double appartenance. Dans le cas d'espèce, se posait aussi d'une part, la question de l'effectivité des décisions du Conseil de sécurité dans la lutte contre le terrorisme et, d'autre part, la question du respect de la protection des droits de l'homme.

Cette affaire présentait des similitudes avec l'affaire Bosphorus puisqu'elle concernait la mise en œuvre de sanctions décidées par le Conseil de sécurité. Il existait toutefois une différence de taille, dans la mesure où l'application dans le cas d'espèce était assurée par un État non membre de l'Union Européenne, à savoir la Suisse. Aucun règlement de l'Union européenne ne constituait la base juridique de la saisie des avoirs, contrairement à l'affaire Bosphorus où le règlement communautaire fonctionnait comme un écran entre la décision du Conseil de sécurité et celle des autorités nationales.
Dans l'affaire Al-Dulimi, pas d'écran donc, mais une application directe par la Suisse des résolutions du Conseil de sécurité.

La démarche que nous avons suivie en l'espèce n'est pas nouvelle et elle s'apparente à celle contenue dans les affaires Al-Jedda et Nada. Nous partons du principe que le système des

Nations Unies repose sur le respect des droits de l'homme ; la Déclaration universelle des droits de l'homme étant d'ailleurs l'une des sources d'inspiration de notre convention. Déjà, dans l'affaire Al-Jedda, nous sommes partis du principe que, dans le cadre de ses résolutions, le Conseil de sécurité n'entend pas imposer aux États des obligations contraires à leurs engagements en matière de droits de l'homme, notamment celles qui découlent d'autres engagements internationaux. Nous avions donc affirmé dans Al-Jedda que, s'agissant des mesures prises dans le contexte de l'exécution des sanctions, la Cour présumerait toujours « la compatibilité de ces mesures avec la Convention ». Nous nous trouvons ici en présence d'une présomption forte, dont le but est évidemment d'éviter les conflits d'obligations pour les États qui mettent en œuvre les résolutions du Conseil de sécurité et tout particulièrement celles qui comportent des sanctions économiques. Ces résolutions laissent toutefois une certaine latitude aux États quant à leurs modalités de mise en œuvre, de façon à leur permettre d'harmoniser leurs obligations. Il nous est ainsi apparu que les résolutions ayant créé le comité des sanctions compétent n'interdisaient pas aux juridictions nationales de vérifier si les mesures prises au niveau national en application de la résolution du Conseil de sécurité respectaient les droits de l'homme, ce qui signifie concrètement permettre de contester une mesure devant un tribunal.

Certes, et notre jurisprudence est constante en la matière, le droit d'accès à un tribunal n'est pas absolu et les États peuvent toujours y apporter des limitations. Toutefois, la Cour doit vérifier que ces limitations ne restreignent pas l'accès de l'individu à un tribunal au point tel que le droit s'en trouve atteint dans sa substance même. En effet, dans une société démocratique, une mesure du type de celle subie par les requérants doit toujours pouvoir être contestée devant une juridiction. Notre Cour est parfaitement consciente de la nature et du but légitime des mesures litigieuses, mais nous avons estimé dans Al-Dulimi que les juridictions suisses auraient dû effectuer « un contrôle suffisant pour permettre d'éviter l'arbitraire », lequel est la négation de l'État de droit.

Ce qu'il aurait fallu et qui a fait défaut en l'espèce, c'est la possibilité pour les requérants de disposer « au moins d'une possibilité réelle de présenter et de faire examiner au fond, par un tribunal, des éléments de preuve adéquats pour tenter de démontrer que leur inscription sur les listes litigieuses était entachée d'arbitraire ».

Cette décision me semble à la fois respectueuse des décisions prises par le Conseil de sécurité des Nations Unies et des principes dégagés par notre jurisprudence. Contrairement à la chambre qui parvint à un constat de violation par la voie de la théorie de la présomption équivalente, la Grande Chambre parvient à la même solution en privilégiant une harmonisation systémique.

L'arrêt Al-Dulimi est d'ailleurs le premier qui parle explicitement d' « harmonisation systémique » au § 140 que je me permets de citer : « lorsqu'une résolution du Conseil de sécurité ne contient pas une formule claire et explicite excluant ou limitant le respect des droits de l'homme dans le cadre de la mise en œuvre de sanctions visant des particuliers ou des entités au niveau national, la Cour présumera toujours la compatibilité de ces mesures avec la Convention. En d'autres termes, en pareil cas, dans un esprit d'harmonisation systémique, elle conclura en principe à l'absence d'un conflit d'obligations susceptible d'entraîner la mise en œuvre de la règle de primauté contenue dans l'article 103 de la Charte des Nations unies ».

En définitive, le but recherché est de favoriser l'harmonisation des systèmes de protection, en n'oubliant jamais que la Charte des Nations Unies et la Convention européenne des droits de l'homme portent les mêmes valeurs.

Je crois que c'est ce que l'on doit retenir de l'arrêt Al-Dulimi, qui est capital dans l'histoire de l'articulation des obligations internationales.

Pour conclure, je mentionnerai une affaire à venir, qui touche à des questions de droit international : il s'agit de l'affaire Naït-Liman c. Suisse, qui fera l'objet d'une audience le 14 juin prochain. M. Naït-Liman se plaint de ce que les tribunaux suisses ne se sont pas estimés compétents pour traiter le fond de son action en dommages-intérêts à raison des actes de torture qui lui auraient été infligés en Tunisie.

Dans son arrêt de chambre, la Cour a estimé que que le rejet des tribunaux suisses de leur compétence pour juger l'action civile de M. Naït-Liman, en dépit de la prohibition absolue de la torture en droit international, n'avait pas violé son droit d'accès à un tribunal. Cette affaire, qui soulève la question de la compétence universelle, est évidemment tout à fait intéressante.

Mesdames et Messieurs,

Nous savons tous que le droit international est fondé sur la souveraineté des États. C'est dire à quel point la Convention européenne des droits de l'homme a constitué, pour reprendre l'expression du grand internationaliste Wolfgang Friedmann, « une avancée révolutionnaire ».

Elle est devenue, au fil des ans et pour citer la formule contenue dans notre affaire Loizidou c. Turquie, un « instrument constitutionnel de l'ordre public européen ». Toutefois, son caractère autonome ne signifie nullement que la Cour ne tienne pas compte des règles du droit international classique. Nous sommes attentifs à éviter tout ce qui pourrait conduire à une fragmentation du droit international, pour reprendre une crainte parfois exprimée par certains. Au contraire, nous veillons à l'harmonie entre notre jurisprudence et le droit international au développement duquel, je crois, nous contribuons. C'est le message que je souhaitais porter aujourd'hui devant vous.

Je vous remercie de votre attention.