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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

(CAHDI)

Meeting report

54th meeting
Strasbourg (France), 21-22 September 2017

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

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TABLE OF CONTENTS

I. INTRODUCTION

1. Opening of the meeting

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 54th meeting in Strasbourg (France) on 21-22 September 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 expressed, on behalf of the CAHDI and in her own name, her deep condolences to the victims of the heinous terrorist attacks that had again taken place in Europe - whether in London, Paris, Barcelona or Turku - and elsewhere since the last meeting of the CAHDI. Furthermore, she also expressed, on behalf of the CAHDI and in her own name, her deep condolences to the victims of the fierce earthquakes in southern Mexico since the beginning of September 2017 as well as to the victims of tropical storms, hurricanes and severe flooding have hit several areas in the Caribbean, South America, Gulf of Mexico, United States of America and Japan.

3. The Chair informed the CAHDI that Ms Anna Le Vallois left the CAHDI Secretariat in May 2017 following a promotion to another position within the Council of Europe after having performed the tasks of Administrative Assistant to the CAHDI for almost four years. She thanked Ms Le Vallois for all the excellent work that she carried out during her time at the CAHDI Secretariat and wished her all the possible success in her new position. The tasks of Ms Le Vallois were partially taken over by Ms Irene Melendro Martinez, who has been working in the CAHDI Secretariat since February 2017, first as a Trainee and - since June 2017 - as an Assistant Lawyer.

4. The Chair further introduced the new trainee within the Public International Law and Treaty Office Division, Mr Mathieu Berberat, a Swiss national, who holds a Bachelor in Law from the University of Neuchâtel, a *Master en Droit International et Européen* from the University of Geneva as well as another Master in International Law from the Graduate Institute of International and Development Studies (IHEID) in Geneva.

2. Adoption of the agenda

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

3. Adoption of the report of the 53rd meeting

6. The CAHDI adopted the report of its 53rd meeting (document *CAHDI (2017) 14 prov*) and instructed the Secretariat to publish it on the Committee's website.

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

7. The Director of Legal Advice and Public International Law of the Council of Europe, Mr Jörg Polakiewicz, informed the CAHDI of the latest developments within the Council of Europe since the last meeting of the CAHDI on 23-24 March 2017 in Strasbourg (France). In particular, he informed the CAHDI of legal issues concerning the introduction of a procedure allowing for the dismissal of holders of high elective offices of the Parliamentary Assembly of the Council of Europe, namely the President and Vice-Presidents of the Parliamentary Assembly, as well as the chairpersons and vice-chairpersons of the committees.[1] Furthermore, he informed the CAHDI of the setting up of a new independent external

[1] See, Resolution 2169(2017) of the Parliamentary Assembly, adopted on 27 June 2017: "Recognition and implementation of the principle of accountability in the Parliamentary Assembly".

investigation body[2] to carry out an inquiry into allegations of corruption against some members or former members of the Parliamentary Assembly[3]. Furthermore, the Director informed the CAHDI of recent developments concerning new or revised conventions and protocols prepared within the framework of the Council of Europe. In particular, he drew the attention of the delegations to:

- The status of the negotiations with regard to the draft *Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*
- The *Council of Europe Convention on Offences relating to Cultural Property* (CETS No. 221), opened for signature on 19 May 2017 in Nicosia (Cyprus) at the 127th Session of the Committee of Ministers, and,
- The *Protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons*, which will be opened for signature on 22 November 2017 in Strasbourg (France).

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

a. Draft Terms of Reference of the CAHDI for 2018-2019 and examination of the request submitted by the Asian-African Legal Consultative Organisation (AALCO) to be granted observer/participant status to the CAHDI

8. The CAHDI examined its draft Terms of Reference for 2018-2019 as contained in document *CAHDI (2017) 15 restricted* to be adopted by the Committee of Ministers on 21-23 November 2017 at the 1300th (Budget) meeting of the Ministers' Deputies. The Chair explained that the "Rapporteur Group on Legal Co-operation of the Committee of Ministers (GR-J)" had already examined these draft Terms of Reference on 14 September 2017 and no changes were made. She further underlined that apart from the former "Main Task 4"[4] related to the examination of those conventions and protocols for which the CAHDI was given responsibility which had been deleted, the content of these Terms of Reference remains identical to those from 2016-2017. Indeed this Convention Review Process, carried out by the CAHDI during 2014 and 2015, had already been completed. The main findings of the CAHDI concerning such Convention Review Process were presented to the Committee of Ministers at the GR-J meeting on 31 May 2016 and to the Ministers' Deputies on 15 June 2016 at their 1260th meeting[5].

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[2] The investigation body comprises three members, Sir Nicolas Bratza (United Kingdom), Mr Jean-Louis Bruguière (France) and Ms Elisabet Fura (Sweden), appointed by the Bureau of the Parliamentary Assembly of the Council of Europe on 29 May 2017 in Prague (Czech Republic). The appointment was ratified by the Parliamentary Assembly at its Plenary Session on 26 June 2017 in Strasbourg (France).

[3] See, the "Terms of reference of the independent external investigation body", as contained in the Appendix to Doc. 14289 Add. 3 Progress Report of 24 April 2017: "Activities of the Assembly's Bureau and Standing Committee".

[4] "Under the authority of the Committee of Ministers, the CAHDI is instructed to [...], in accordance with decisions CM/Del/Dec(2013)1168/10.2 of the Committee of Ministers, carry out, at regular intervals, within the limits of the available resources and bearing in mind its priorities, an examination of some or all of the conventions for which it has been given responsibility, in cooperation, where appropriate, with the relevant convention-based bodies, and report back to the Committee of Ministers."

[5] Document CM (2016)56.

9. The Chair further explained that the other “main and specific tasks” would remain the same as those that the CAHDI is performing at present: for instance, the CAHDI performs one of its main roles which is that of "legal adviser" to the Committee of Ministers. In accordance with the Terms of Reference it is instructed to provide opinions at the request of the Committee of Ministers or at the request of other Steering Committees or Ad hoc Committees, transmitted via the Committee of Ministers. The Chair recalled that another flagship activity of the CAHDI was the examination of reservations and declarations subject to objection in its capacity as the *European Observatory of Reservations to International Treaties*. The Chair underlined that this model was recognised both inside and outside the Council of Europe insofar as the CAHDI examines both the reservations and declarations made to the Council of Europe conventions as well as to the conventions of the United Nations. This function, which the CAHDI has now been operating for more than 17 years, has proved its effectiveness.

10. The Chair further recalled that the draft Terms of Reference also mentioned that, in September 2016, the CAHDI launched three new databases containing the national contributions gathered in the framework of major research projects undertaken by the CAHDI on “Immunities of States and International Organisations”, “Organisation and Functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs” and “United Nations Sanctions and Respect for Human Rights”. The setting up of these databases was carried out through voluntary contributions from Germany (40.000€) and the Netherlands (20.000€). The Chair thanked these two delegations for their generous voluntary contributions.

11. Finally, the Chair stated that no subordinate structures were required for the CAHDI during the biennium 2018-2019.

12. The CAHDI further examined, under the same agenda item, the request for “observer”/“participant” status to the CAHDI submitted by the Asian-African Legal Consultative Organisation (AALCO)[6] on 31 August 2017 as contained in document *CAHDI (2017) 19 restricted English only*.

13. In relation to the request by AALCO, the Chair pointed out that this was the first time that an international intergovernmental organisation from Asia and Africa requested for participant status to the CAHDI. The Chair further recalled that the last observers admitted to the CAHDI were Belarus[7] and OSCE[8] in 2013. The previous ones were, in 2004, the International Criminal Police Organisation (INTERPOL) and the European Organisation for

[6] AALCO is an international intergovernmental organisation constituted in 1956 as the Asian Legal Consultative Committee (ALCC) by seven Asian States (Burma - now Myanmar -, Ceylon - now Sri Lanka -, India, Indonesia, Iraq, Japan and the United Arab Republic - now Arab Republic of Egypt and Syrian Arab Republic). In 1958, the Statute of the Organisation was amended in order to include the participation of African nations. Membership of AALCO is open to all Asian and African States. Presently, AALCO is composed of the following 47 States as mentioned on its website (http://www.aalco.int): Arab Republic of Egypt, Bahrain, Bangladesh, Brunei Darussalam, Cameroon, Cyprus, Democratic People’s Republic of Korea, The Gambia, Ghana, India, Indonesia, Iraq, Islamic Republic of Iran, Japan, Jordan, Kenya, Kuwait, Lebanon, Libya, Malaysia, Mauritius, Mongolia, Myanmar, Nepal, Nigeria, Oman, Pakistan, People’s Republic of China, Qatar, Republic of Korea, Saudi Arabia, Senegal, Sierra Leone, Singapore, Somalia, South Africa, Sri Lanka, State of Palestine, Sudan, Syria, Tanzania, Thailand, Turkey, Uganda, United Arab Emirates, Socialist Republic of Vietnam and Republic of Yemen.

[7] Decision of the Committee of Ministers on 3 July 2013 at the 1175th meeting of the Ministers’ Deputies (CM/Del/Dec(2013)1175, Item 2.4).

[8] Approval of the draft Terms of Reference of the CAHDI for 2014-2015 by the Committee of Ministers on 19-20 November 2013 at the 1185th meeting of the Ministers’ Deputies (CM/Del/Dec(2013)1185, Item 11.1 Part 1).

Nuclear Research (CERN) for "specific items on the agenda at the CERN's request and with the agreement of the Chair". [9]

14. The Chair drew the attention of the CAHDI to the relevant rules governing the observer/participant status to the CAHDI contained in *Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods*[10]. She pointed out that the difference in terminology between "participants" and "observers" in this Resolution relates to differences in the procedure for being granted the status for these two categories. While the admission of "participants" is always carried out by virtue of a resolution or decision of the Committee of Ministers according to Article 7 (b) of the Resolution, an "observer" can – as a general rule under Article 8 (a) of the Resolution – be admitted on the basis of a unanimous decision by the respective steering or ad hoc committee. The Chair underlined that, despite these procedural differences, the rights and obligations pertaining to participants and observers are exactly the same. "Observers" and "participants" alike have the right to participate in all meetings and activities organised by the CAHDI, but they do not have the right to vote or defrayal of expenses. According to Article 7 (b) of the Resolution "intergovernmental organisations" are included under "participants" and are to be admitted as "participants" by virtue of a decision of the Committee of Ministers. The Chair explained that this procedure would thus also apply to AALCO but that before submitting such request to the Committee of Ministers, the CAHDI needed to hold an exchange of views on this request and agree/disagree to it.

15. Several delegations underlined that they had experience in working with AALCO as an intergovernmental organisation contributing to the development of international law in Asia and Africa and beyond. They underlined that the AALCO mandate had a clear link with the CAHDI mandate.

16. Following this exchange of views, the CAHDI unanimously agreed to the request for "participant" status to the CAHDI by AALCO and decided to transmit this request to the Committee of Ministers for decision.

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

17. The Chair presented a compilation of Committee of Ministers' decisions of relevance to the CAHDI's activities (documents *CAHDI (2017) 16 restricted* and *CAHDI (2017) 16 Addendum restricted*). In particular, the CAHDI noted that the Committee of Ministers examined on 14 June 2017 the Abridged Report of its 53rd meeting (Strasbourg, France, 23-24 March 2017). The CAHDI took also note of the decision of the Committee of Ministers on 5 July 2017 adopting the *Model Final Clauses for Conventions, Additional Protocols and Amending Protocols* as reproduced in document *CAHDI (2017) Inf 5*.

18. With regard to document *CAHDI (2017) 16 restricted*, the Chair further drew the attention of the CAHDI to Chapter 2 of the document taking stock of the Cypriot Chairmanship of the Committee of Ministers which took place from 22 November 2016 to 19 May 2017. Cyprus then handed over the Chairmanship of the Committee of Ministers to the current Chairmanship of the Czech Republic, the priorities of which are equally detailed in the document. The Chair recalled that most delegations participated in the seminar on *State*

[9] Decision of the CAHDI at its 27th meeting on 18-19 March 2004 (document CAHDI (2004) 11, para. 119); approval of the Revised specific terms of reference of the CAHDI by the Committee of Ministers on 5 May 2004 at the 883rd meeting of the Ministers' Deputies (CM/Del/Dec(2004)883, Item 10.1).
[10] Resolution CM/Res(2011)24 as adopted by the Committee of Ministers on 9 November 2011 at the 1125th meeting of the Ministers' Deputies.

Immunity under International Law and Current Challenges which was also organised in the framework of the Czech Chairmanship of the Committee of Ministers of the Council of Europe and on the occasion of the 54th meeting of the CAHDI. The Seminar took place in Strasbourg (France) on 20 September 2017.

19. The Chair further informed the CAHDI that, on 14 June 2017, she presented the work of the CAHDI to the Committee of Ministers and held an exchange of views with the Ministers' Deputies. The Chair reported to the Committee the high appreciation for the work of the CAHDI reflected in the comments made by the Ambassadors following her intervention. The Ministers' Deputies had praised, in particular, the significance of the CAHDI as a laboratory of ideas in the field of international law with a reach well beyond the framework of the Council of Europe. The *Declaration on Jurisdictional Immunities of State Owned Cultural Property* and the CAHDI's role as the *European Observatory of Reservations to International Treaties* were mentioned by many delegations as an example of the pioneer role of the CAHDI. Moreover, the Ministers' Deputies highlighted the need to secure staff for a stable and specialised Secretariat of the CAHDI for the biennium 2018-2019. Her statement is contained in document *CAHDI (2017) Inf 6 English only*.

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

20. 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 17 delegations (Albania, Andorra, Armenia, Austria, Belarus, Canada, the Czech Republic, Denmark, Germany, Greece, Hungary, Israel, Mexico, Serbia, 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 Serbia, had been submitted to the Secretariat. The Chair encouraged delegations which had not yet done so to submit their contributions.

21. The Chair recalled that, at the last CAHDI meeting, it was agreed that the delegation of the Netherlands would 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 Chair noted that this document *CAHDI (2017) 21 confidential* was sent by the Secretariat to all delegations and expressed her gratitude to the Dutch delegation for its work on this important issue.

22. The delegation of the Netherlands thanked the CAHDI and all the delegations for their comments in relation to the questions contained in the original document prepared by the Dutch delegation which triggered the discussion on this issue. The Dutch representative gave a brief overview of the new document (*CAHDI (2017) 21 confidential*) underlining that it summarised the main trends of the contributions of the CAHDI delegations as well as further examined the issue in the context of peacekeeping and police operations. The delegation of

the Netherlands pointed out that all CAHDI delegations contributions reflected that there has been, for a long period of time, a gap in the judicial protection of citizens in cases involving international organisations before national courts. The representative of the Dutch delegation pointed out that this issue had thus become more prominent, and exemplified this with the *Srebrenica* case[11] involving the Netherlands. The Dutch delegation observed that all contributions acknowledged that there was not one uniform solution for all international organisations and for all activities carried out by those organisations. Finally, the representative of the Netherlands pointed out that his country was considering drafting a UN General Assembly resolution on this issue in 2018, to be discussed with the UN Secretariat and UN member states.

23. Many delegations thanked the Dutch delegation for having prepared this Document summarising the main trends of the CAHDI contributions and praised this initiative. These delegations also agreed on the complexity and multidimensional nature of this topic, involving both the independence of international organisations as well as the accountability of international organisations. Therefore they pointed out the need to adopt a cautious approach in order to preserve the independence and effectiveness of international organisations. Furthermore, these delegations pointed out the need to preserve the fundamental rights of the individuals who have suffered personal injury or death and property loss or damage allegedly caused by an international organisation.

24. The delegation of Poland further pointed out that, despite the existing difficulties in the production of an encompassing solution, alternative remedies such as mediation, diplomatic protection, immunity waivers, bilateral agreements between States and international organisations as well as other procedures (such as arbitration) are already readily available under international law. A further report on the handling of claims and decisions would therefore be welcome at the United Nations level. Furthermore, the representative of Poland praised the appointment of the first *Victims' Rights Advocate for the United Nations*, Ms Jane Connors (Australia). As *Victims' Rights Advocate for the United Nations,* Ms Connors will support an integrated, strategic response to victim assistance in coordination with United Nations system actors with responsibility for assisting victims. She will work with government institutions, civil society, and national and legal and human rights organisations to build networks of support and to help ensure that the full effect of local laws, including remedies for victims, are brought to bear. Furthermore, a number of delegations underlined that traditional remedies to address these issues should not to be overlooked.

25. The delegation of the United States of America reminded the CAHDI of the case of *Georges v. United Nations*[12] in which the Court of Appeal of New York held that United Nations enjoyed immunity of jurisdiction regardless of whether the United Nations provided a remedy or settlement for claims made against it. Moreover, the attention of the CAHDI was drawn to the case of *LaVenture v. United Nations*[13] in which the District Court took the view that a statement by the United Nations Secretary General stating that the United Nations would be liable for its peacekeeping missions does not amount to a waiver of the United Nations immunity. The case has been appealed and this topic is therefore still being litigated before the courts of the United States of America.

[11] The Hague Court of Appeals (*Gerechtshof Den Haag*), *10 applicants and the "Mothers of Srebrenica" Foundation v. the Netherlands,* ECLI:NL:GHDHA:2017:1761, judgment of 27 June 2017. See, also, European Court of Human Rights, *Stichting Mothers of Srebrenica and Others v. the Netherlands*, no. 65542/12, Chamber decision of 11 June 2013.

[12] United States Court of Appeals for the Second Circuit, *Georges v. United Nations*, judgment of 18 August 2016, 834 F.3d 88 (2016).

[13] United States District Court, Eastern District of New York, *LaVenture et al. v. United Nations*, No. 14-CV-1611 (SLT) (RLM), 23 August 2017.

26. The delegation of Greece reminded the CAHDI of the proposal of Sir Michael Wood, member of the International Law Commission (ILC), to include the topic of *The settlement of international disputes to which international organisations are parties* in the future work of the ILC. As it has been presented by Sir Michael Wood in the Annexes to the Report on the work of the sixty-eighth session of the ILC[14], the proposed topic would for now include disputes between international organisations and States (both member and non-member States) and disputes between international organisations. It would not cover disputes to which international organisations are not parties, but are involved in some other way nor disputes in which an international organisation merely has an interest. However, Sir Michael Wood leaves open the question whether certain disputes of a private law character, such as those arising under a contract or out of a tortious act by or against an international organisation, might also be covered. In this regard, several delegations welcomed the proposal to include disputes of a private law character in the examination of the topic but also agreed that it was not for the CAHDI to give "recommendations or instructions" to the ILC. In this respect it was underlined that the introduction of this topic in the programme of work of the ILC has not yet been decided and might be discussed in the upcoming year.

27. In response to several questions concerning the possibility of drafting a Resolution to be tabled at the General Assembly of the United Nations in 2018 as mentioned in paragraph 32 of the document *CAHDI (2017) 21*, the representative of the Dutch delegation indicated that his country was still assessing in which manner such text could be presented. With regard to the delegations concerned about the inclusion of traditional remedies, the Dutch representative indicated that the classical ways of tackling this issue could be reflected upon in future documents.

28. The Chair welcomed further written contributions of CAHDI delegations on the five questions on this issue originally prepared by the Dutch delegation. The Chair also reminded the delegations that contributions remain confidential as the discussions are still at an embryonic stage and the replies are only 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

29. The Chair introduced the sub-theme concerning the *Immunity of state owned cultural property on loan* for which a Declaration and a questionnaire exist.

30. 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)* (2004 UN Convention). The *Declaration on Jurisdictional Immunities of State Owned Cultural Property* (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 kinds of State property (cultural property on exhibition) enjoyed jurisdictional immunity.

31. The Chair informed the delegations that, since the last CAHDI meeting, there was one new signature of the Declaration, by the Holy See on 22 May 2017. The Declaration had hence already been signed by the Ministers of Foreign Affairs of 20 States (Albania, Armenia, Austria, Belarus, Belgium, the Czech Republic, Estonia, Finland, France, Georgia,

[14] Annex of the Report of the International Law Commission, 68th Session (2016) A/71/10

Holy See, Hungary, Ireland, Latvia, Luxembourg, the Netherlands, Portugal, Romania, the Russian Federation and the Slovak Republic). The delegations of the Czech Republic and of Austria encouraged delegations which had not done so yet to sign the Declaration, and welcomed the signature of the Declaration by the Holy See.

32. The delegation of the Holy See thanked the sponsors of the Declaration for this initiative. Also, the representative of the Holy See pointed out that it would be positive to raise awareness of this Declaration among museum administrations. In this respect, the Chair underlined that it is indeed important to take into consideration that the Declaration is of relevance not only for Ministries of Foreign Affairs but also for other bodies, entities and organisations.

33. The Chair recalled that the delegations of the Czech Republic and Austria informed the CAHDI during its last meeting 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.

34. The delegation of the Russian Federation joined other delegations in expressing its gratitude to the sponsors of this initiative and thanked the CAHDI Secretariat for proposing, preparing and circulating the questionnaire. The Russian Federation stated that it had already signed and supported the Declaration and underlined that having the Declaration discussed at the United Nations would constitute a positive development. The Russian Federation was of the view that there was sufficient practice on the subject, affirming their understanding that the content of the Declaration constituted customary international law. The delegation of the Russian Federation encouraged other delegations to consider signing the Declaration.

35. The representative of the Czech Republic thanked the delegations supporting the Declaration but expressed some hesitance to promote further the Declaration beyond the Council of Europe before obtaining a greater number of signatures of the Council of Europe member and observers States as well as observers to the CAHDI.

36. One delegation expressed that it fully shared the objectives pursued by the Declaration. However, it expressed some reluctance to consider as customary international law the whole Convention as stated in the Preamble of the Declaration (“In accordance with customary international law as codified in the Convention”).

37. The representative of the Czech Republic confirmed that, the intention of the Preamble was to lay down that the Convention constituted customary international law. However, the Czech delegation stressed this was only contained in the Preamble and should not constitute a barrier to the signature of the Declaration by other delegations. Indeed, he explained that several signatories of the Declaration had not signed the Convention.

38. Three delegations expressed some reluctance to consider the Declaration as customary international law.

39. The Committee noted that the Secretariat of the CAHDI performed the functions of “depositary” of this Declaration and that the text of this Declaration was available in English and French on the website of the CAHDI.

40. The Chair reminded the CAHDI that the Declaration had also been one of the subjects of the Seminar on *State Immunity under International Law and Current Challenges* organised in the framework of the Czech Chairmanship of the Committee of Ministers of the Council of Europe and on the occasion of the 54th meeting of the CAHDI, which took place on 20 September 2017 in Strasbourg (France). The Chair thanked the delegation of the Czech Republic as well as the Czech Chairmanship for organising an event on this highly topical subject and congratulated them on the depth of the interventions and on the interesting discussions that followed. The Chair noted that the Seminar was an example of the contribution of the CAHDI to the development of international law in the field of immunities and confirmed the importance for the Committee to continue to examine immunities as one of the core themes on its agenda.

41. 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, no delegation had submitted a contribution to this questionnaire.

iii. Immunity of special missions

42. 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 provided a document in this regard (document *CAHDI (2013) 15 restricted*). Following this meeting, the Secretariat and the Chair drafted a questionnaire aimed at establishing an overview of the legislation and specific national practices in this field.

43. The Chair recalled that at its last meeting[15], 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[16] of the CAHDI.

44. In this respect, the Chair informed the CAHDI that Sir Michael Wood, member of the United Nations International Law Commission (ILC) and former Chair of the CAHDI, has agreed to prepare an analytical report on legislation and practice of member States of the Council of Europe and other States and international organisations participating in the CAHDI concerning "Immunities of Special Missions", including the main trends arising from the replies to the questionnaire prepared by the CAHDI on this matter. A contract between the Council of Europe and Brill-Nijhoff Publishers for the publication of this new CAHDI book had already been concluded by the Secretariat.

45. As agreed by the CAHDI at its last meeting[17], the CAHDI Secretariat contacted in June the 24 delegations (Albania, Andorra, Armenia, Austria, Belarus, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Ireland, Italy, Latvia, Mexico, the

[15] CAHDI (2017) 14, para. 29.
[16] *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.).
[17] CAHDI (2017) 14, para. 31.

Netherlands, Norway, Romania, Serbia, Sweden, Switzerland, the United Kingdom and the United States of America) that had already replied to the questionnaire inviting them to update, revise or complement their contributions as necessary and send them to the CAHDI Secretariat before this meeting. Up to this CAHDI meeting, 4 delegations (Germany, Italy, Belarus and Mexico) have revised their contributions and 6 delegations (the Czech Republic, Denmark, Ireland, Norway, Switzerland and the United States of America) have confirmed that no modification of their replies is necessary. Equally, the Secretariat of the CAHDI contacted in June the 32 remaining States represented at the CAHDI that had not yet replied to the questionnaire as well as the European Union and the United Nations, and invited them to submit their replies to the CAHDI Secretariat before the meeting. Up to this meeting, 6 of these delegations (Belgium, Bulgaria, Hungary, Israel, Malta and the Republic of Moldova) have submitted their contributions. All the 30 former, revised and new replies (Albania, Andorra, Armenia, Austria, Belarus, Belgium, Bulgaria, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Hungary, Ireland, Israel, Italy, Latvia, Malta, Mexico, the Republic of Moldova, the Netherlands, Norway, Romania, Serbia, Sweden, Switzerland, the United Kingdom and the United States of America) are contained in document *CAHDI (2017) 5 prov confidential bilingual*. The Chair invited all delegations which have not yet done so to inform the Secretariat of whether their contributions need to be updated. Furthermore, the Chair invited delegations which have not done so to submit their new contributions to the Secretariat as soon as possible.

46. The delegation of France transmitted its intention to revise its existing contribution and the delegation of Slovenia informed of its intention to prepare a new reply to the questionnaire.

47. The Secretariat reminded CAHDI delegations that following the CAHDI decision, all replies to the questionnaire on “Immunities of special missions” are public and will be included in the forthcoming CAHDI publication. Therefore, if the Secretariat does not receive any revised version of the existing replies, they will be published in their present form.

iv. Service of process on a foreign State

48. 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 were prepared to which 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 up to this CAHDI meeting. These contributions were reproduced in the document *CAHDI (2017) 6 prov confidential bilingual*. Since the last meeting, one new contribution from Andorra and one revised contribution from Mexico had been submitted to the CAHDI Secretariat.

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

50. The Chair invited delegations which had not yet done so to submit or update their replies to the questionnaire and recalled the CAHDI experts of the confidential character of the replies to this questionnaire.

51. The delegation of Belgium presented a judgment of the Court of Appeal of Liège dated 16 June 2016, in which the Court discussed the means of notification. The Court held that the Democratic Republic of Congo (DRC) had committed an abuse of process when it did not recognise a service of process by verbal note to the DRC's embassy in Brussels to amount to a valid notification. The court noted in particular that the mean of notification followed by Belgium in the present case constituted one of the two ways recognised under customary international law.

52. The Austrian delegation drew the attention of the CAHDI on the case of *Harrison v. Republic of Sudan* [18],currently under review before the Supreme Court of the United States. On 22 September 2016, the United States Court of Appeals for the Second Circuit had held that the *U.S. Foreign Sovereign Immunities Act (FSIA)* allowed service on a foreign State via the latter's embassy in the United States of America if the legal documents were addressed to the Foreign Minister. Stating its view that this interpretation was inconsistent with international law, the Embassy of the Republic of Austria in Washington addressed to the US Department of State a Note Verbale dated 11 April 2017, a copy of which was transmitted to the counsel of the petitioner in the case. In this Note Verbale, Austria noted in particular that, as a rule of customary international law, the service of foreign legal documents on a sovereign State has to be effected through diplomatic channels to the foreign ministry of the State concerned. This rule is reflected in Article 22 of the 2004 UN Convention. Furthermore, as envisaged by Article 22 of the *Vienna Convention on Diplomatic Relations (1961)*, neither judicial nor administrative acts of public authority by the receiving State are to be exercised on the premises of the diplomatic mission. In the view of Austria, this included service of foreign legal documents, both directed at the diplomatic mission itself or at the respective foreign State.

53. The delegation of the United States of America noted that, as its country is not a Party to the 2004 UN Convention, the FSIA constitutes the sole authority in relation to the service of process of a Foreign State procedure. In relation to the aforementioned case of *Harrison v. Republic of Sudan*[19], the representative clarified that, even though the United States had always affirmed the necessity for the notification to be made at the Foreign Ministry, the Court in this case held that the notification was valid. Sudan appealed to the Supreme Court.

54. The delegation of the Holy See brought to the attention of the CAHDI a judgment of the French Court of Appeal of Lyon (1e Chambre Civile, 1 juin 2017, n° 16/08388) concerning a notification addressed to the Nunciature in Paris. The Court held that the citation was null as the Nunciature claimed immunity pursuant to the 2004 UN Convention, even though the Holy See is a non-signatory.

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

55. The Chair reminded the Committee that the CAHDI followed the status of ratifications and signatures to the Convention since its 29th meeting in March 2009 and informed the CAHDI that, since the last meeting of the CAHDI, no State represented within the CAHDI had signed, ratified, accepted, approved or acceded to the 2004 UN Convention. She furthermore underlined that, up to this CAHDI meeting, 21 States had ratified, accepted, approved or acceded to the 2004 UN Convention and that in order for the Convention to enter into force, the deposit of 30 instruments of ratifications, acceptance, approval or accession with the Secretary General of the United Nations were needed.

[18] United States Court of Appeals for the Second Circuit, *Harrison v. Republic of Sudan*, judgement of 22 September 2016, 14-121-cv.
[19] *Ibidem.*

56. The representative of Hungary informed the CAHDI that her country currently examines the possibilities to become Party to this Convention.

57. The representative of Belgium informed the CAHDI that, following the signature of the Convention on 22 April 2005 by his country, the Belgian "Conseil d'Etat" had considered the 2004 UN Convention to amount to a "mixed" treaty for the purposes of Belgian domestic law, which would require the involvement of the federated entities. The government of Belgium is currently examining the opinion of the "Conseil d'Etat".

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

58. The CAHDI noted that, up to this meeting, 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 "The Immunities of States and International Organisations". The Chair invited delegations which had not yet done so to submit or update their contributions to the relevant database at their earliest convenience.

59. The delegation of the Russian Federation provided information to the CAHDI in relation to the seizure by United States authorities of Russian diplomatic and consular premises in Washington, New York and San Francisco. On 31 August 2017 the U.S. declared in a diplomatic note that in less than 48 hours the Russian Consulate General in San Francisco and the Chanceries in Washington and New York would cease to enjoy all diplomatic and consular privileges and immunities; demanded that all diplomatic and consular personnel and their family members immediately vacate the premises; and prohibited entry by all individuals to these premises. All premises, including residential areas, were searched. U.S. authorities refuse any access by the Russian side, effectively confiscating the property without any restitution. The Russian Federation believes that these actions are in violation of international law (in particular the principle of inviolability enshrined in the 1961 Vienna Convention on Diplomatic Relations and 1963 Vienna Convention on Consular Relations), as well as internal law of the United States, and bear substantial, serious implications well beyond bilateral relations between the two countries [20].

60. The delegation of the United States of America informed the CAHDI that the decision to close the Russian Consulate General in San Francisco, an embassy annex in Washington and a consular annex in New York City was taken in the spirit of parity, following the decision by the government of the Russian Federation to reduce the number of U.S. diplomatic and technical staff in Moscow and at the Consulates General in Russia. Furthermore, United States officials walked through the buildings only after their inviolability, where applicable, had ended. The United States denied that the properties were "seized", and further maintained that its actions were consistent with domestic and international law[21].

61. The delegation of Belgium informed the CAHDI of a judgment by the Belgian Constitutional Court on 27 April 2017 (case number 48/2017) where it rejected the allegations of two multinationals who contested the validity of a new Belgian law passed to adapt Belgian legislation with regards to the seizure of property of other States and diplomatic missions. The Court only upheld one of the plaintiff's claims, finding that specific

[20] Press Release from the Government of the Russian Federation.
[21] Press Release from the Government of the United States of America.

renunciation was only needed in relation to the property of embassies following the *Vienna Convention on Diplomatic Relations (1961)*.

62. The delegation of France informed the CAHDI of a similar bilateral dispute between France and Equatorial Guinea pending before the International Court of Justice (ICJ). On 13 June 2016, Equatorial Guinea instituted proceedings against France with regard to a dispute concerning the immunity from criminal jurisdiction of the Vice-President of the Republic of Equatorial Guinea and the legal status of the building which "houses the Embassy of Equatorial Guinea", located in Paris, and submitted, on 29 September 2016, a Request for the indication of provisional measures against France. In its Order[22] of 7 December 2016 the ICJ indicated, unanimously, that France shall, pending a final decision in the case, take all measures at its disposal to ensure that the premises presented as housing the diplomatic mission of Equatorial Guinea enjoy treatment equivalent to that required by Article 22 of the *Vienna Convention on Diplomatic Relations*, in order to ensure their inviolability. On 31 March 2017, France raised certain preliminary objections to the jurisdiction of the Court which the ICJ is yet to address.

63. The Chair presented the document on possibilities for the Ministry of Foreign Affairs to raise public international law issues in procedures pending before national tribunals and related to States' or international organisations' immunities (document *CAHDI (2017) 7 prov confidential bilingual*), and noted that up to this CAHDI meeting, 30 delegations (Albania, Austria, Belgium, Canada, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Israel, Italy, Japan, Latvia, Luxembourg, Mexico, Montenegro, the Netherlands, Norway, Portugal, Romania, the Russian Federation, the Slovak Republic, Slovenia, Spain, Sweden and the United States of America) had replied to the questionnaire on this matter. Since the last meeting, a new reply from Mexico has been submitted to the Secretariat. The Chair invited delegations which had not yet done so to submit or update their replies to the questionnaire.

d. OSCE Presentation on "Agreements concluded by the OSCE with subjects of international law"

64. The representative of the Organisation for Security and Co-operation in Europe (OSCE) provided information to the CAHDI in relation to two new agreements concluded in June 2017, the *Agreement between the Republic of Austria and the OSCE regarding the Headquarters of the OSCE* and the *Arrangement between the Republic of Poland and the OSCE regarding the Status of the OSCE in the Republic of Poland*.

65. The representative of the OSCE pointed out that the OSCE began as a political arrangement – the Conference for Security and Co-operation in Europe (CSCE) – not a treaty-based international organisation, as it emerged from the 1975 Helsinki Accords process. It was renamed OSCE – Organisation for Security and Co-operation in Europe – only 20 years later. The representative of the OSCE pointed out that the OSCE had evolved over these 40 years into its present 24 executive structures in 22 countries, some pursuing mandates under pressure in zones of armed conflict. Tragically the first loss of life occurred in April 2017 when a member of an OSCE mission was killed in Ukraine when a patrol vehicle was exploded by a landmine. Meanwhile, the debate continues in Vienna as to whether the OSCE has international legal personality and can accordingly be granted formal legal protection, privileges and immunities or not, depending upon whether a State's constitution allows legal recognition of the OSCE as an international organisation or not. She

[22] ICJ, Immunities and Criminal Proceedings *(Equatorial Guinea v. France)*, Request for Indication of Provisional Measures, Order of 7 December 2016.

further underlined that "*the ad hoc and fragmented legal arrangements to grant status to the OSCE are widely divergent and, in most of the OSCE 57 participating States, nonexistent. Absent any other legal basis, some have argued that the OSCE could be treated as a "special mission" under customary international law when present on a State's territory. However, the Secretariat is understandably uncomfortable with relying on that."*

66. The representative of the OSCE informed the CAHDI of the signature of two agreements concluded with Austria and Poland respectively: *Agreement between the Republic of Austria and the OSCE regarding the Headquarters of the OSCE* and *Arrangement between the Republic of Poland and the OSCE regarding the Status of the OSCE in the Republic of Poland.* The latter included provisions for hosting the headquarters of the OSCE Institution in Warsaw, the Office for Democratic lnstitutions and Human Rights (ODIHR). Both of those agreements are bilateral (i.e., between the OSCE and the State concerned) and concluded as treaties and are pending ratification in the respective parliaments, thus demonstrating that in the view of those two countries, OSCE is a subject of international law with treaty-making capacity. She expressed the OSCE Secretariat's gratitude to Ambassador Tichy and his colleagues in the Austrian Federal Ministry for European and lnternational Affairs and to Dr Rychlik and his colleagues in the Polish Ministry of Foreign Affairs and other ministries, for the concerted effort to reach the point of signature of the two agreements in June 2017 .

67. The representative of the OSCE further informed the CAHDI that in parallel, to demonstrate that he does not acquiesce to the prevailing situation of inadequate legal protection for the OSCE and its officials in many States of the region, the newly-elected (July 2017) Secretary General of the OSCE, Ambassador Thomas Greminger (Switzerland), is continuing to vigorously promote the "Secretary General's initiative to conclude a Standing Arrangement with each OSCE participating State", as an interim measure to gain legal capacity, privileges and immunities for the OSCE in each State until such time as there is a multilateral solution. The Arrangement with Poland is based on the model Standing Arrangement proposed to all OSCE participating States in 2015.

68. Lastly, the representative of the OSCE noted that the model Standing Arrangement is continuing to be discussed between the Secretariat and interested States and indicated that, in those discussions, some States expressed an interest in concluding an agreement as a group, the so-called "Option 4", a multilateral solution under consideration in the lnformal Working Group on Strengthening the Legal Framework of the OSCE.

69. The Chair thanked the OSCE representative for her presentation and the information provided to the CAHDI.

70. The representative of Austria confirmed that his country considered the OSCE as a full-fledged international organisation. Furthermore, he informed the CAHDI that the *Agreement between the Republic of Austria and United Nations regarding the Seat of the United Nations in Vienna (1995)* had been used as the basis for the elaboration of the Arrangement with the OSCE. Regarding the "Option 4" initiative, the delegation of Austria expressed its support towards such an initiative, highlighting in particular the importance attached to the recognition of the legal personality of the OSCE.The representative of Austria encouraged delegations to consider the possibility of drafting a Convention granting the OSCE privileges and immunities. This issue will be discussed at the next OSCE meeting.

71. The representative of Poland thanked the OSCE for the fruitful and friendly negotiations and expressed his wish that the OSCE legal status is recognised.

72. The Russian delegation stated that, a constituent treaty of OSCE must be adopted before a Convention granting privileges and immunities to the OSCE. This constituent treaty will create the legal personality of the Organisation and describe the purposes and functions of the Organisation, which are the basis for the privileges and immunities of the Organisation and its personnel.

73. The OSCE representative, in reply to a question in relation to the possibility of signing further agreements with States in which the organisation is not based, underlined that, pending the adoption of an overarching multilateral solution, the aim would be to adopt a bilateral agreement system in order to secure adequate protection for OSCE representatives and officials when visiting or implementing projects, or carrying out other official activities in different States across the OSCE region.

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

74. The Chair introduced the document *CAHDI (2017) 8 prov bilingual* on the "Organisation and functions of the Office of Legal Adviser of the Ministry of Foreign Affairs" and welcomed the replies of 38 States and Organisations (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, the Republic of Moldova, Montenegro, Norway, Romania, Serbia, Slovenia, Sweden, Switzerland, Turkey, the United Kingdom, the United States of America and NATO) to the revised questionnaire containing additional questions on gender equality in conformity with the *Council of Europe Gender Equality Strategy for 2014-2017*. Since the last meeting, one new contribution from the Republic of Moldova and revised ones from Denmark and Mexico had been submitted to the Secretariat.

75. The Chair reminded the delegations that the replies to this questionnaire can equally be found in the new database, in which delegations can update existing contributions, insert new ones as well as consult the replies from other delegations.

76. The Chair made a call to the 14 delegations (Azerbaijan, Bulgaria, Iceland, Ireland, Japan, the Netherlands, Poland, Portugal, the Russian Federation, the Slovak Republic, Spain, "The former Yugoslav Republic of Macedonia", Ukraine and Interpol) who replied to the original questionnaire on this issue but who have not replied to the revised one yet, to send the Secretariat the complementary information concerning gender equality in order to have a complete overview of the organisation and functions of the Offices of the Legal Adviser of the 52 States and Organisations which have replied so far.

77. The Chair pointed out that almost every delegation had replied to this questionnaire in its original or revised form and congratulated all the delegations for this comprehensive information about the Offices of the Legal Adviser.

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

78. The Chair introduced document *CAHDI (2017) 9 prov confidential bilingual* on *Cases that have been submitted to national tribunals by persons or entities included in or removed from the lists established by the UN Security Council Sanctions Committee*.

79. 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.

80. The delegation of Switzerland informed the CAHDI of the new developments in the case of *Al-Dulimi*[23]. Following the judgment of June 2016 where the European Court of Human Rights found a violation of several rights of the European Convention on Human Rights (ECHR) by Switzerland, the case was submitted to the Federal Tribunal for review in September 2016. The representative of Switzerland informed the CAHDI that the procedure is therefore on-going. Finally, the delegation of Switzerland pointed out that a solution should be found to address the violation of ECHR rights of those included in United Nations Sanctions lists, underlying that the most desirable way to approach this problem should be to adopt a uniform solution within the United Nations.

81. The delegation of the European Union drew the attention of the CAHDI to the recent ruling of the Grand Chamber of the Court of Justice of the European Union in the *Rosneft*[24] case validating the sanctions regimes imposed by the European Union against Russian Federation.

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

82. The Chair introduced the topic of the cases before the European Court of Human Rights involving issues of public international law. She recalled that at its 53rd meeting the CAHDI held an exchange of views with the President of the European Court of Human Rights, Mr Guido Raimondi, on the challenges currently faced by the Court as well as on the recent cases involving issues of public international law.

83. The delegation of Ukraine informed the CAHDI of the case of *Khlebik v. Ukraine*[25] concerning the complaint by an applicant of Ukrainian nationality who had been convicted and sentenced for several offences to eight years and nine months' imprisonment by a court in the Luhansk Region in 2013. When hostilities started in Eastern Ukraine in April 2014, his appeal against this conviction was pending before the Court of Appeal. The applicant remained detained in Starobilsk remand prison located in the part of the Luhansk Region controlled by the Ukrainian Government. His case file, however, remained with the Court of Appeal in Luhansk, which is not under Ukrainian Government control. The applicant was released in March 2016 but his appeal against his conviction is still pending before the Court of Appeal. Before the European Court of Human Rights, the applicant complained that the authorities' failure to retrieve his case file to allow for his appeal to be effectively examined constituted a violation of Article 6 (1) (right to a fair trial within a reasonable time) of the European Convention on Human Rights. The Court held that the Ukrainian authorities had done everything in their power, under the circumstances of the hostilities in Eastern Ukraine, to address the applicant's situation. Notably, they had duly examined the possibility of restoring his case file. The Court thus concluded that there had been no violation of Article 6 (1) of the ECHR.

84. The delegation of Belgium drew the attention of the CAHDI to two recent cases before the European Court of Human Rights. In the case of *Thimothawes v. Belgium*[26] the European Court of Human Rights held, by a majority, that there had been no violation of

[23] European Court of Human Rights, *Al-Dulimi and Montana Management Inc. v. Switzerland*, no. 5809/08, Grand Chamber judgment of 21 June 2016.
[24] Court of Justice of the European Union, Case C-72/15, *PJSC Rosneft Oil Company v Her Majesty's Treasury and Others* [2017], ECLI:EU:C:2017:236, judgment of the 28 March 2017.
[25] European Court of Human Rights, *Khlebik v. Ukraine*, no.2945/16, Chamber judgment of 25 July 2017.
[26] European Court of Human Rights, *Thimothawes v. Belgium*, no. 39061/11, Chamber judgment of 4 April 2017.

Article 5 (right to liberty and security) of the ECHR. The case concerned the five-month detention of an Egyptian asylum-seeker at the Belgian border. The Court found in particular that any measure depriving a person of his liberty had to be prescribed by law. Where the legal provision in question originated in international law, only the domestic courts, except in the case of an arbitrary or manifestly unreasonable interpretation, were empowered to interpret domestic law pursuant to the supranational provisions in question. The Court only scrutinised the conformity the interpretation's effects with the Convention. In the present case, the examination of lawfulness conducted by the domestic courts of the detention order had taken account of the case-law of the Court. Moreover, the issue of the applicant's mental health was not, on its own, sufficient for a finding that his detention had been arbitrary. Finally, the assessment of the facts of the case supported a finding that his period of detention had not been unreasonably long.

85. The delegation of Belgium further referred to a decision in the case of ***Belkacem v. Belgium***[27], concerning the conviction of the applicant, the leader and spokesperson of the organisation "Sharia4Belgium", which was dissolved in 2012, for incitement to discrimination, hatred and violence on account of remarks he made in YouTube videos concerning non-Muslim groups and Sharia. The European Court of Human Rights noted that in his remarks the applicant had called on viewers to overpower non-Muslims, teach them a lesson and fight them. The Court considered that the remarks in question had a markedly hateful content and that the applicant, through his recordings, had sought to stir up hatred, discrimination and violence towards all non-Muslims. In the Court's view, such a general and vehement attack was incompatible with the values of tolerance, social peace and non-discrimination underlying the ECHR. With reference to the applicant's remarks concerning Sharia, the Court observed that it had previously ruled that defending Sharia while calling for violence to establish it could be regarded as "hate speech", and that each Contracting State was entitled to oppose political movements based on religious fundamentalism. The Court therefore rejected the application, finding that it was incompatible with the provisions of the ECHR and that the applicant had attempted to deflect Article 10 (freedom of expression) of the ECHR from its real purpose by using his right to freedom of expression for ends which were manifestly contrary to the spirit of the Convention. Accordingly, the Court held that, in accordance with Article 17 (prohibition of abuse of rights) of the ECHR, the applicant could not claim the protection of Article 10 of the ECHR. The application was thus rejected as being incompatible *ratione materiae* with the provisions of the ECHR.

86. The delegation of Greece informed the CAHDI of the case of ***Chowdury and Others v. Greece***[28] concerning 42 Bangladeshi nationals who did not have work permits and were subjected to forced labour. Their employers had recruited them to pick strawberries on a farm in Manolada (Greece) but failed to pay the applicants' wages and obliged them to work in difficult physical conditions under the supervision of armed guards. The European Court of Human Rights held, unanimously, that there had been a violation of Article 4 (2) (prohibition of forced labour) of the ECHR. The Court found that the applicants' situation was one of human trafficking and forced labour, and specified that, according to Article 4 (a) of the *Council of Europe Convention on Action against Trafficking in Human Beings* (CETS No. 197), exploitation through labour was one aspect of trafficking in human beings. In the view of the Court the State had failed in its obligations to prevent the situation of human trafficking, to protect the victims, to conduct an effective investigation into the offences committed and to punish those responsible for the trafficking.

[27] European Court of Human Rights, *Belkacem v. Belgium*, no. 34367/14, Chamber decision of 27 June 2017.
[28] European Court of Human Rights, *Chowdury and Others v. Greece*, no. 21884/15, Chamber judgment of 30 March 2017.

87. Lastly, the delegation of the Russian Federation drew the attention of the CAHDI to the case of *Z.A. and Others v. Russia*[29], concerning complaints brought by four individuals from Iraq, the Palestinian territories, Somalia and Syria who were travelling via Moscow's Sheremetyevo Airport and denied entry into Russia. Three of the applicants ended up spending between five and eight months in the transit zone of the airport; one of the applicants, from Somalia, spent nearly two years in the transit zone. The European Court of Human Rights held, by six votes to one, that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) and Article 5 (1) (right to liberty and security) of the ECHR. The Court found in particular that the applicants' confinement in the transit zone, which had not been of their own choosing, had amounted to a deprivation of liberty and that there had been no legal basis for it under domestic law. Moreover, it found that the applicants had been detained for extended periods of time in unacceptable conditions, which had undermined the applicants' dignity, made them feel humiliated and debased, and therefore amounted to inhuman and degrading treatment. The Grand Chamber Panel decided to refer the case to the Grand Chamber on 18 September 2017.

10. Peaceful settlement of disputes

88. The Chair presented a document on the "Compulsory jurisdiction of the International Court of Justice" (document *CAHDI (2017) 10 rev 1*) containing the declarations recognising the jurisdiction of the International Court of Justice (ICJ) as compulsory by member States of the Council of Europe and from other States represented in the CAHDI. Up to this meeting, there are 27 declarations by member States of the Council of Europe represented in 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). The Chair informed the CAHDI that, since its last meeting, no notifications of new or modified declarations have been submitted by States represented in the CAHDI to the Secretary General of the United Nations and welcomed any delegations who would like to take the floor.

89. The representative of the United Kingdom drew the attention of the CAHDI on the Request for Advisory Opinion to the ICJ submitted by the General Assembly of the United Nations by virtue of Resolution 71/292 pursuant to Article 65 of the Statute of the Court on the "Legal consequences of the Separation of the Chagos Archipelago from Mauritius in 1965". He pointed out that while the bilateral disputes are submitted to the peaceful settlement of disputes through the ICJ on the basis of the consent of the States concerned, the Advisory Opinions are not based on such consent. In particular, he noted that this dispute was brought before the ICJ without the British consent and invited delegations to reflect how they could participate in the procedure following the Order issued by the ICJ on 14 July 2017[30]. Furthermore he invited delegations to reflect how international disputes should be adjudicated.

90. The representative of Ukraine informed the CAHDI on the recent developments in the proceedings instituted by his country before the ICJ on 16 January 2017 against the Russian Federation with regards to the alleged violations of the *International Convention for the Suppression of the Financing of Terrorism (1999*) (ICSFT) and the *International Convention on the Elimination of All Forms of Racial Discrimination (1965)* (CERD). Both

[29] European Court of Human Rights, *Z.A. and Others v. Russia*, nos. 61411/15, 61420/15, 61427/15 and 3028/16, Chamber judgment of 21 March 2017.
[30] ICJ, Request for Advisory Opinion on the Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 , Order of the 14 July 2017.

States are Parties to these two instruments. On 19 April this year the ICJ issued an Order on Provisional Measures[31]. The Court considers that, prima facie, it has jurisdiction pursuant to Article 24, paragraph 1, of the ICSFT and Article 22 of CERD to deal with the case to the extent that the dispute between the Parties relates to the "interpretation or application" of the respective Convention. Furthermore, the Court concluded that the conditions required by its Statute for it to indicate provisional measures in respect of CERD are met. On the issue of the admissibility of the claim, the ICJ found that, with regard to the alleged violations of the ICSFT there was, at this stage, not enough evidence to establish any violation of the Convention. The ICJ concluded that "*having considered all the circumstances, in addition to the specific measures it has decided to take, the Court deems it necessary to indicate an additional measure aimed at ensuring the non-aggravation of the dispute between the Parties*"[32]. Furthermore, he indicated that the ICJ adopted the three following provisional measures: the availability of education in Ukrainian language, the ability of Crimean Tatar community to conserve its representative institutions, and the third, to refrain from any action which might aggravate the dispute between the Parties.

91. The representative of the Russian Federation stated that the ICJ ruled, without a vote, that the claims made by Ukraine against Russia with regard to ICSFT are implausible and therefore there is no basis for indication of provisional measures. With regard to CERD, the Court did not uphold any of the provisional measures requested by Ukraine. The Court also found implausible the majority of the allegations of Ukraine and indicated two provisional measures to the Russian Federation and one both to the Russian Federation and Ukraine.

92. The representative of the Netherlands mentioned the Award on Compensation in the *Arctic Sunrise Arbitration*[33], underlining that this is one of the few decisions in inter-State cases in which an international judge or arbitral tribunal pronounces on the quantum of compensation (and interest) in relation to several different categories of heads of damage. The representative of the Russian Federation indicated that, with regard to the in *Arctic Sunrise* arbitration, the Russian Federation does not recognise the jurisdiction of the Arbitral Tribunal in this case and is therefore considering the legal consequences of this arbitral award.

93. The representative of France underlined the importance of holding an exchange of information beyond the declarations recognising the jurisdiction of the ICJ as compulsory and pointed out that he would be favourable to broaden this agenda item in the future in order to invite delegations to present useful information on any kind of peaceful settlement of disputes. Furthermore, the French delegation noted that the jurisdiction of the ICJ derived ultimately from the consent of the States and there are different forms of expressing such consent beyond the declarations recognising the compulsory jurisdiction of the ICJ pursuant Article 36 paragraph 2 of the ICJ Statute. In this respect, he pointed out that the jurisdiction of the ICJ could be established by other means as set out in Article 36 paragraph 1 of the Statute of the ICJ or in the case law of the Court:

[31] ICJ, Order of 19 April 2017 on the *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)* (Pending) [2017].
[32] *Ibid.* par.103
[33] PCA, *The Arctic Sunrise Arbitration (Netherlands v. Russia)*, Case Nº 2014-02.

- Firstly, the jurisdiction can be recognized through a general treaty of peaceful settlement, which is a multilateral treaty providing for several means of settlement for disputes arising between State Parties, including the ICJ[34].
- Secondly, a treaty may include a compromissory clause, enabling State Parties to the treaty to bring a dispute concerning the application or the interpretation of the said treaty to the ICJ[35].
- Thirdly, the parties to a dispute can agree, through a special agreement to submit their dispute to the Court[36].
- Fourthly, through the principle of *forum prorogatum* even if a State Party to the proceedings has not recognised the jurisdiction of the Court at the time when an application instituting proceedings is filed against it, that State has the possibility of subsequently accepting the ICJ jurisdiction for the case, either implicitly[37] or explicitly[38].

Moreover, the representative of France noted that other means of peaceful settlement of disputes such as mediation or arbitration could be included.

94. The representative of Belgium indicated that it would indeed be both useful and interesting to enlarge this item to allow delegations to address the case law of the International Tribunal for the Law of the Sea (ITLOS).

95. Many delegations expressed their agreement to enlarge in the future this item to any mean to reach a peaceful settlement of disputes between States. They also agreed that there is no need to change the title of this item of the agenda as “Peaceful settlement of disputes” is sufficiently broad and inclusive to cover all means of peaceful settlement of disputes.

96. The Chair thanked all delegations for this interesting and complete exchange of information on different means of peaceful settlement of disputes between States. Following the request of many delegations, the CAHDI agreed to enlarge the content of this item on “Peaceful Settlement of Disputes” and include in the future annotated agendas the other clauses of attribution of jurisdiction to the ICJ, the case law of the ITLOS, inter-States arbitration cases and any other relevant cases of peaceful settlement of disputes between States.

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*

97. In the framework of its activity as the *European Observatory of Reservations to International Treaties*, the CAHDI examined a list of outstanding reservations and

[34] For example, the 1948 *American Treaty on Pacific Settlement* (also known as the *Pact of Bogota)* or the 1957 *European Convention for the Peaceful Settlement of Disputes [ETS No.23]*. See the latter in ICJ, *Jurisdictional Immunities of the State (Germany v. Italy :Greece intervening) judgment* of 3 February 2012, Report 2012, p.99.
[35] For example Article I of the *Optional Protocol concerning Compulsory Settlement of Disputes to Vienna Convention on Consular Relations of 24 April 1963* which was used in ICJ, *LaGrand (Germany v. United States of America)),* Judgment, I. C. J. Reports 2001, p. 466.
[36] For example the Special Agreement concluded between Indonesia and Malaysia in the case ICJ, *Sovereignty over Pulau Ligitan and Pulau Sipadan (IndonesialMalaysia)* Judgment, I. C. J. Reports 2002, p. 625.
[37] For example the judgment of the Permanent Court of International Justice, *Rights of Minorities in Upper Silesia (Minority Schools) Serie A-n°15*.
[38] For example ICJ, *Corfu Channel case, Judgment on Preliminary Objection : I.C. J. Reports 1948, p. 15*.

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) 17 confidential* and *CAHDI (2017) 17 Addendum prov confidential bilingual*) and opened the discussion. The Chair also drew the attention of the delegations to document *CAHDI (2017) Inf 2* containing reactions to reservations and declarations to international treaties previously examined by the CAHDI and for which the deadline for objecting had already expired.

98. 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) 17 confidential* comprised 10 reservations and declarations. 4 of them were made with regard to treaties concluded outside the Council of Europe (Part I of the document) and 6 of them concerned treaties concluded within the Council of Europe (Part II of the document). No problematic partial withdrawals had been identified since the last meeting of the CAHDI. Therefore, no Part III was included in the document *CAHDI (2017) 17 confidential*. The Chair further noted that 6 of these reservations and declarations were already discussed at the 53rd CAHDI meeting in March 2017 and 4 had been newly added since then.

99. With regard to the **declaration made by Venezuela** to the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, one delegation indicated that it was considering objecting to the declaration. 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 **reservation made by Afghanistan** to the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational, Organized Crime*, seven delegations informed the CAHDI that they were considering objecting to the reservation in view of the fact that the reservation concerned a provision codifying a rule of customary international law or on the basis that the reservation was contrary to the object and purpose of the Protocol. Austria, the Czech Republic and Germany have already objected to this reservation.

101. With regard to the **late reservation made by Bhutan** to the *United Nations Convention against Corruption* the Chair informed the CAHDI that the Kingdom of Bhutan had ratified the Convention on 21 September 2016 but notified the reservation in question only on 25 April 2017. Four delegations stated that they were considering objecting to this late reservation, which is not problematic with regard to its content. Following the UN depositary practice in similar cases, the United Nations Secretary-General has proposed "to receive the reservation in question for deposit in the absence of any objection on the part of one of the Contracting States, either to the deposit itself or to the procedure envisaged, within a period of one year from the date of the […] notification. In the absence of any such objection, the said reservation will be accepted for deposit upon the expiration of the stipulated one year period."

102. With regard to the **reservation and declarations made by Singapore** to the *International Convention for the Suppression of Acts of Nuclear Terrorism* one delegation underlined that in its view this Declaration could amount to a reservation despite the fact it was difficult to understand the reasoning behind such Declaration. Singapore declares that according to its understanding Article 11 (1) of the Convention "includes the right of competent authorities to decide not to submit any particular case for prosecution before the judicial authorities if the alleged offender is dealt with under national security and preventive detention laws." Article 11 (1) of the Convention incorporates the general rule of "*aut dedere aut judicare*" common to all counter-terrorism conventions obliging "the State Party in the

territory of which the alleged offender is present, if it does not extradite that person, to submit the case, without exception whatsoever and whether or not the offence was committed in its territory, without undue delay to its competent authorities for the purpose of prosecution".

103. With regard to the **communication made by Spain** concerning the *Framework Convention for the Protection of National Minorities* (ETS No. 157) during the last CAHDI meeting 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 the communication therefore 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[39].

104. With regard to the **reservations made by Greece** to the *Convention on Cybercrime* (ETS No. 185), the delegation of Greece reiterated its position expressed during the last CAHDI meeting that it was its intention to stay within the confines of Article 29 of the Convention when declaring, in accordance with Article 29 (4) of the Convention, to "reserve the right to refuse a request for preservation under Article 29 in cases where the condition of dual criminality is not fulfilled". According to Article 29 (4) of the Convention the right to refuse a request for preservation cannot be extended to include requests in respect of offences established in accordance with Article 2 to 11 of the Convention.

105. Also the **reservations and declarations made by Chile** to the *Convention on Cybercrime* (ETS No. 185) contained a reservation with regard to Article 29 of the Convention without foreseeing a specification as to the scope *ratione materiae* of the reservation. The Chair noted that altogether 16 further States have notified reservations with regard to Article 29 (4) of the Convention. While 7 of them expressly rule out Articles 2-11 from the scope of the reservation, 9 of them do not make this specification.

106. With regard to the **reservations and declarations made by Azerbaijan** to the *Council of Europe Convention on Laundering Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism* (CETS No. 198) the delegation of Armenia indicated its intention to object to this declaration as it amounted to a reservation incompatible with the aim and purpose of the Convention.

107. With regard to the **declaration made by Azerbaijan** to the *Council of Europe Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events* (CETS No. 218) the delegation of Armenia stated that it has not yet signed the Convention and indicated its intention to object the declaration.

108. With regard to the **reservation made 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. 218), during the last CAHDI meeting 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

[39] 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 organisation, whereby that State or that organisation 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."

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.

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

12. The work of the International Law Commission (ILC)

- ***Presentation of the work of the International Law Commission (ILC) by Mr Georg NOLTE, Chairperson of the ILC***

109. The Chair welcomed and thanked Mr Georg Nolte, Chairperson of the International Law Commission (ILC), 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.

110. Mr Nolte expressed his highest appreciation for this CAHDI invitation and underlined that it is a great honour and pleasure to hold these exchanges of views with the CAHDI experts. Furthermore he expressed his and the ILC's appreciation for these annual exchanges of views and underlined the importance that both entities attached to them as well as to the close links developed between both entities in the field of public international law.

111. Mr Nolte provided the CAHDI with an overview of the recent activities of the ILC, in particular during its 69th Session which took place in Geneva from 1 May to 2 June 2017 and from 3 July to 4 August 2017. The presentation of Mr Nolte is reproduced in **Appendix III** to the present report.

112. In relation to the agenda of the ILC at its 69th Session, Mr Nolte reminded the delegations that this year the topics ***"Identification of customary international law"*** and **"Subsequent agreements and subsequent practice in relation to the interpretation of treaties"** were not debated by the Commission. Full sets of draft conclusions on those two topics were adopted on first reading during the 68th session of the ILC in 2016. The States now have the opportunity to submit written comments until 1 January 2018,[40] so that the second reading of these two topics may take place in the summer of 2018 during the 70th Session of the ILC. Mr Nolte encouraged all CAHDI members and observers to submit written comments by the deadline, given that these are important topics on core issues of international law, and given that the Commission greatly values comments from States.

113. Mr Nolte then presented the progress made with respect to a number of other topics during the 69th Session of the ILC. The first topic which the Commission addressed in plenary was **"Crimes against Humanity"**. The Special Rapporteur, Mr Sean Murphy, submitted his Third report on the subject which covered all remaining issues. This enabled the Commission to provisionally adopt, on first reading, a full set of Draft Articles on Crimes against Humanity.[41]

[40] See, Chapter II of the *Report of the International Law Commission*, 68th Session (2016), A/71/10, at paras. 15 and 17.
[41] See, Chapter IV of the *Report of the International Law Commission*, 69th Session (2017), A/72/10.

114. The second topic which the ILC addressed in plenary was **"Protection of the Atmosphere"**. The Special Rapporteur, Mr Shinya Murase, in his Fourth Report, had proposed four draft guidelines on the interrelationship of rules regarding the protection of the atmosphere and rules regarding other areas of international law, as well as several preambular paragraphs. The Commission ultimately decided to merge the proposed four draft guidelines into one single draft guideline, and to adopt three preambular paragraphs. With respect to the interrelationship of rules the Commission decided largely to follow the approach of its own Study Group in its 2006 report on "Fragmentation of international law: difficulties arising from the diversification and expansion of international law".[42]

115. The third topic which the ILC addressed in plenary was ***"Immunity of State Officials from Foreign Criminal Jurisdiction"***. The Commission continued the debate on the Fifth Report of the Special Rapporteur, Ms Concepción Escobar Hernández. In this report, the Special Rapporteur had proposed a Draft Article 7 on "limitations and exceptions" to such immunity. Mr Nolte recalled that the debate on the Fifth Report had already started in 2016, under exceptional circumstances, and that States have had a first opportunity to comment in the Sixth Committee in 2016. This year the debate in the plenary as well as in the Drafting Committee continued to be controversial and focused on whether an exception from immunity *ratione materiae* from foreign criminal jurisdiction was recognised under customary international law if it is alleged that a foreign State official has committed certain crimes (such as genocide, crimes against humanity, war crimes, torture or enforced disappearance), or whether there is at least a "trend" to that effect, and whether such an exception would be desirable. In the end, the Commission proceeded to adopt Draft Article 7, but did so by a recorded vote: 21 members in favour, 8 against, and one abstaining. A number of members have made statements in explanation of their votes, which can be found in the Summary Record of the 3378th meeting of 20 July 2017.[43]

116. Moving to the topic **"Provisional Application of Treaties"**, Mr Nolte explained that the Commission provisionally adopted, under the guidance of the Special Rapporteur, Mr Juan Manuel Gomez-Robledo, draft guidelines 1 to 11, with commentaries thereto.[44]

117. Regarding the topic **"Peremptory norms of general international law (Jus cogens)"**, the Commission had before it the second report of the Special Rapporteur, Mr Dire Tladi, which sought to set out the criteria for the identification of peremptory norms of general international law (*jus cogens*). On the basis of his analysis, the Special Rapporteur proposed six draft conclusions. After considering the report in plenary, the Commission referred the proposed draft conclusions to the Drafting Committee where, for lack of time, they could not be fully considered and remain pending. The Chairman of the Drafting Committee submitted an interim report to the plenary which is on the website of the ILC.[45]

118. During this past session, the ILC decided to include the topic **"Succession of States in respect of State responsibility"** in its programme of work and appointed Mr Pavel Šturma as Special Rapporteur.[46] Mr Šturma has already submitted a First Report which was largely introductory in nature and which proposed four draft articles. The Commission, after a debate in plenary, referred the proposed draft articles to the Drafting Committee which provisionally adopted, within the limited available time, two draft articles. The consideration of the draft articles remains pending in the Drafting Committee. The Chair

[42] See, Chapter VI of the *Report of the International Law Commission*, 69th Session (2017), A/72/10.
[43] See, Summary Record of the 3378th meeting of the ILC on 20 July 2017.
[44] See, Chapter V of the *Report of the International Law Commission*, 69th Session (2017), A/72/10.
[45] See, Statement of the Chairman of the Drafting Committee of the ILC Mr Aniruddha Rajput, "Peremptory Norms of General International Law (*Jus cogens*)", 26 July 2017.
[46] See, Chapter IX of the *Report of the International Law Commission*, 69th Session (2017), A/72/10.

of the Drafting Committee submitted an interim report to the plenary for information purposes only.[47]

119. Mr Nolte further informed the CAHDI, that the consideration of the topic **"Protection of the environment in relation to armed conflicts"** could not be pursued with the same speed at this year's session because the Special Rapporteur, Ms Marie Jacobsson, was no longer a member of the Commission, having not sought re-election. In order to maintain momentum, the Commission established a Working Group on the topic under the Chairmanship of Mr Marcelo Vazquez-Bermudez to propose a way forward. Upon the proposal of the Working Group, the Commission had decided to appoint Ms Marja Lehto as the new Special Rapporteur for the topic.

120. Moreover, Mr Nolte informed the CAHDI that the ILC had decided to put the topics **"General principles of law"** and **"Evidence before international courts and tribunals"** on its long-term programme of work. Mr Nolte emphasised that this decision does not mean that those topics are already on the active programme of work. Such a further decision would only be taken after States have had the occasion to comment on the advisability to put those topics on the active agenda of the ILC. The syllabuses of the two proposed new topics are annexed to this year's report of the ILC.[48]

121. Lastly, Mr Nolte reiterated that this year's session of the ILC had been very productive, but also very intense. In such a situation, it was particularly important that the ILC received thoroughly considered reactions from States. He therefore strongly encouraged States to express their thoughts on the ILC report in the upcoming debate in the Sixth Committee and to annex detailed comments to their speeches if appropriate. Mr Nolte concluded his intervention by recalling that next year's session of the ILC, in 2018, will mark the 70th anniversary of the Commission. The Commission has decided to hold two inter-related commemorative events on this occasion, in New York and Geneva, under one overarching theme "70 years of the International Law Commission – Drawing a Balance for the Future". Mr Nolte pointed out that the ILC would be happy if representatives of States and international organisations, in particular legal advisers, would follow the invitations to participate in these events.

122. The Chair of the CAHDI thanked Mr Nolte for his presentation and invited delegations which so wished to take the floor.

123. Several CAHDI delegations praised the ILC and its Chair for the rich load of work undertaken by the Commission again during the past year. The active role of the ILC and the fact that its work is generating debate was welcomed. Yet, some delegations recalled that the topics under discussion at the ILC were sensitive and potentially with significant diplomatic or economic consequences. Mr Nolte assured that the ILC members, most of which were not academics but practitioners, were aware of the fact that they deal with sensitive issues. All topics on the programme of the ILC had been entrusted with the Commission by the States themselves.

124. Furthermore, some delegations expressed concern on the adoption of some articles or conclusions by vote and they pointed out that it would be maybe advisable to continue to discuss the issue in question until a consensus could be reached. They mentioned in particular the case with regard to the provisional adoption of Draft Article 7, an annex to the Draft Articles and a footnote to two of its headings, together with commentaries

[47] See, Statement of the Chairman of the Drafting Committee of the ILC Mr Aniruddha Rajput, "Succession of States in respect of State Responsibility", 31 July 2017.
[48] See, Annexes A and B of the *Report of the International Law Commission*, 69th Session (2017), A/72/10.

thereto, pertaining to the topic of *Immunity of State officials from foreign criminal jurisdiction*. In the view of these delegations, there was a risk that the dividedness of the Commission expressed through a vote would have an impact on the future work of the ILC. Mr Nolte noted that it was certainly preferable that the Commission takes decisions by consensus. Indeed he mentioned that the authority of the Commission was increased when it operated by consensus but that this was not always possible.

125. Moreover, several delegations emphasised the importance for the ILC to distinguish whether a certain proposal adopted by the Commission represented a codification or a progressive development of customary international law. The differentiation between *lex lata* and *lex ferenda* was particularly essential with regard to delicate subjects. Mr Nolte noted that many members of the ILC seem to hold the view that the Commission does not place too much emphasis on the difference between progressive development and codification of customary international law. Another point of view is that such differentiation is not relevant with regard to texts for which it is up to States to decide whether they accept the Commission's text as compulsory to be included in a treaty or not. Mr Nolte agreed with the delegations that it was, however, important not to forget the role of national courts in this context which tend to treat the work of the ILC as a direct reflection of international law. Mr Nolte further noted that in his view it was possible to solve the debate on the differentiation between progressive development and codification of international customary law by looking carefully at the sources instead of concentrating on a politically preferable solution.

126. In reply to the question on whether the Commission should, when adapting to the new international priorities, also find new *modus operandi*, such as model laws, statements and explanations of State practice, as instruments to address new topics instead of focusing on draft treaties only, Mr Nolte noted that the ILC had applied different *modi operandi* at different stages of its history. In the 1960s, for instance, voting was more common than today. He advised states not to define the role of the ILC narrowly. The work of the ILC was related to practical and precise domains but also to more general topics. Different *modi operandi* were needed for different situations depending on the subject matter. For instance, certain provisions of the *Draft Articles on Crimes against Humanity* represented a model law.

127. In reply to questions addressing the work plan of the ILC with regard to the two new topics, Mr Nolte noted that the topic of *General principles of law* was a follow up of the approach of the ILC to the topics *Subsequent agreements and subsequent practice in relation to the interpretation of treaties* and *Identification of customary international law* already handled by the ILC. In the opinion of Mr Nolte general principles of international law were the least studied but potentially a most fruitful source of international law. The second proposed new topic *Evidence before international courts or tribunals* was in turn a topic which would contribute to the apprehension that international courts were not islands but part of a bigger environment, which needed a certain level of harmony.

128. In reply to the question on the possible impact of the current initiative to draft an universal *Multilateral Treaty for Mutual Legal Assistance and Extradition for Domestic Prosecution of the Most Serious International Crimes*, the so-called “MLA Initiative”, in the framework of the ILC project regarding *Crimes against Humanity*, Mr Nolte underlined that the initiative had not played a significant role as the scope of the topic “*Crimes against Humanity*” was narrower than the one of the MLA Initiative.

129. In reply to the question on the *Provisional application of treaties* Mr Nolte noted that if states agreed on provisional application, it created legal obligations. The legal obligation comes either from the treaty itself or from the agreement to provisionally apply it. In the opinion of Mr Nolte the latter approach should be given preference.

130. In reply to the question concerning the possible development of an illustrative list of *jus cogens* norms in the framework of the topic *Peremptory norms of general international law*, Mr Nolte noted that the Special Rapporteur for the topic, Mr Dire Tladi, had not yet revealed his future intentions on this matter. In practice, the drafting of such a list would mean a significant workload. In any case the Commission could agree on the methodology for the identification of *jus cogens* and the consequences[49]. Even though clarification with regard to the content of *jus cogens* norms would as such be a positive development, in the view of Mr Nolte there was also a risk that a list would create a presumption that something that is not in the list was not to be considered *jus cogens.*

131. In reply to the question on possible controversial issues debated with regard to the topic of *Crimes against humanity* Mr Nolte noted that the project had not provoked many difficulties in the discussions within the ILC. In general terms, when a topic aimed at the articulation of existing law, without involving the development of a treaty, stronger formulations had a higher chance of being proposed and raising controversy. The topic of *Crimes against Humanity* was handled so speedily because it was intended to amount to a draft treaty with a high level of participation and practical value.

132. The Chair of the CAHDI thanked Mr Nolte for the exchange of views and expressed her hope that similar discussions would take place in the upcoming Session of the Sixth Committee of the General Assembly of the United Nations in New York in October 2017. She further thanked Mr Nolte for the exchange of views that took place in Geneva on 6 July 2017 between the ILC and the Chair as well as the Secretary of the CAHDI.

- ***Exchange of views between the ILC, the Chair of the CAHDI and the Secretary of the CAHDI, Geneva (Switzerland), 6 July 2017***

133. The Chair informed the CAHDI on the exchange of views that took place on 6 July 2017 between the members of the ILC, the Chair of the CAHDI and the Secretary to the CAHDI (see documents *CAHDI (2017) Inf 3* and *CAHDI (2017) Inf 4*).

134. During this exchange of views, the Chair of the CAHDI presented and informed the ILC of the CAHDI's recent work. In particular, she drew the ILC's attention to the *Model Final Clauses for Conventions, Additional Protocols and Amending Protocols concluded within the Council of Europe* as adopted by the Committee of Ministers of the Council of Europe on 5 July 2017 at the 1291st meeting of the Ministers' Deputies, the work of the CAHDI as *"European Observatory of Reservations to International Treaties"* as well as the issue of settlement of disputes of a private character to which an international organisation is a party. On the contribution of the CAHDI to the work of the ILC, the Chair referred to the annual exchange of views between the CAHDI and the Chairperson of the ILC as well as the *Declaration on Jurisdictional Immunities of State Owned Cultural Property* elaborated within the framework of the CAHDI.

135. The Secretary to the CAHDI presented the recent developments which took place within the Council of Europe and notably the priorities of the Czech Chairmanship of the Committee of Ministers. She drew the ILC's attention to the work of the Organisation with regard to treaty law and in particular the derogations to the European Convention on Human Rights, supervision of the execution of European Court of Human Rights judgments by the Committee of Ministers as well as the news from the Treaty Office (opening for signature and entry into force, accession by non-member States to the Council of Europe conventions).

[49] See, *Report of the International Law Commission*, 69th Session (2017), A/72/10, p. 263.

13. Consideration of current issues of international humanitarian law

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

137. The representative of Hungary thanked the CAHDI Secretariat for circulating the document containing a summary of the Conference on *Victims of armed conflicts at the juncture of international humanitarian law and human rights law* organised in cooperation with the Swiss Federal Department of Foreign Affairs which took place on 11 May 2017 in Budapest (Hungary). Furthermore, the Hungarian delegation informed the CAHDI that the *International Humanitarian Fact-Finding Commission*, set up under Article 90 of the *First Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 8 June 1977*, has received its first mandate. The Commission presented, on 7 September 2017, to the OSCE members its *Report of the Independent Forensic Investigation in relation to the Incident affecting an OSCE Special Monitoring Mission to Ukraine (SMM) Patrol on 23 April 2017*. An executive summary is available online. She also referred to the compliance mechanism initiated by the ICRC and Switzerland and indicated their openness to discuss the modalities for its functioning in practice.

138. The representative of Switzerland pointed out that the next ICRC meeting will focus in particular on the reinforcement of the respect and implementation of IHL through international and regional forums. At the upcoming meeting, the organisation of periodic meetings as provided in Resolution 1 of the ICRC Conference and under Article 7 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II)* will also be discussed. The representative of Switzerland furthermore recalled the CAHDI that this year marks the 40th anniversary of the *Additional Protocols I and II*. The latter have to date not been universally ratified, and Switzerland is taking on this opportunity to appeal to countries that are not parties to these instruments to re-evaluate their position. The representative of Switzerland invited all CAHDI members to submit their proposals for the advancement of the respect and implementation of IHL by both forums and States. Lastly, the Swiss representative reminded the CAHDI experts of the importance of the *Montreux Document Forum*, a forum created for the facilitation of regular discussions by States aiming at creating a platform of exchange between practitioners in the area. He recalled that the forum has over 50 State Parties and 3 International Organisations, and encouraged States who have not done so yet to sign the document. In this regard, the Forum has recently resulted in the creation of a new *Working Group on the use of private military and security companies in maritime security*, the first of this kind.

139. The representative of the International Committee of the Red Cross (ICRC) informed the CAHDI of their continued following of the work of the Council of Europe Committee of Experts on Terrorism (CODEXTER) on an 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". The ICRC underlined the importance of including specific provisions governing the relationship with IHL in international instruments addressing terrorism, expressing its view that it would be favourable to do so in the form of a clause excluding lawful acts of war committed by any party to an armed conflict, to ensure that acts committed in armed conflicts that are not contrary to IHL are not considered acts of terrorism. The ICRC shared its concerns that a number of counter-terrorism measures criminalising support to non-State armed groups or individuals designated as terrorists have the potential to criminalise incidentally a range of actions by humanitarian actors and their

personnel. Hence, the ICRC called for the insertion of so-called "humanitarian exemptions" in order not to challenge principled humanitarian action.

140. The representative of the ICRC welcomed the adoption of the *Treaty on the Prohibition of Nuclear Weapons* which meets the ICRC's expectations of a clear prohibition and a framework for the future elimination of nuclear weapons. She pointed out that this represented a concrete step towards fulfilling existing commitments for nuclear disarmament, in particular those of Article VI of the *Treaty on the Non-Proliferation of Nuclear Weapons (1968).*

141. The ICRC expressed its concern about the gap between the duty to ensure respect for IHL in arms transfers and the actual transfer practices of many States.

142. The ICRC informed the CAHDI that, on 6-7 April 2017, the ICRC hosted the first formal meeting on the implementation of Resolution 1 on "Strengthening ILH Protecting Persons Deprived of their Liberty" adopted at the 32nd International Conference of the Red Cross and the Red Crescent in 2015. The objective of this meeting was to reach an agreement on the modalities for future work. Nevertheless such an agreement could not be reached due to divergences among States on the procedure for adopting decisions as well as on the respective roles of the ICRC and the States in the facilitation of the process. The ICRC has since then sent a letter to States seeking their views on whether this procedural impasse could be overcome and is currently considering the suggestions received and reflecting on the way to proceed.

143. Finally, the representative of the ICRC informed the CAHDI that the second instalment of the updated Commentary on the Second Geneva Convention was launched on 5 May 2017.

144. The delegation of Sweden informed the CAHDI on the latest developments in national case law. The delegation informed the CAHDI that Sweden exercises universal jurisdiction over serious international crimes including genocide, crimes against humanity and war crimes[50]. The public prosecutor and the National War Crimes Unit *(Gruppen för utredning av krigsbrott*) have strengthened their efforts to bring war criminals to justice before Swedish courts. Over the past year there have been three convictions for war crimes perpetrated in Syria[51] and one with regard to Iraq[52]. The delegation of Sweden further drew the attention of the CAHDI to a pending case[53] concerning charges for genocide and other serious international crimes in the context of the genocide in Rwanda in 1994.

145. The delegation of Romania informed the CAHDI of the organisation by the Romanian IHL Commission and ICRC of a Conference on IHL for Central and South Eastern European countries at the end of March 2018 in Bucharest.

146. The representative of Mexico expressed its commitment to the strengthening of the effective implementation of IHL. Therefore, his country fully supports and participates in the discussions facilitated by ICRC and Switzerland and in the creation of a framework for a

[50] See, Act on criminal responsibility for genocide, crimes against humanity and war crimes (SFS 2014:406) [*Lag 2014:406 om straff för folkmord, brott mot mänskligheten och krigsförbrytelser*].

[51] The Svea Court of Appeal (*Svea hovrätt*), in two separate cases, sentenced Syrian nationals respectively to eight years of imprisonment (case nr. B 4770-16, judgment of 5 August 2016) and to life imprisonment (case n°. B 2259-17, judgment of 31 May 2017) for, among others, "crimes against international law" (*folksrättsbrott*), and, most recently, the District Court of Södertörn (*Södertörns tingsrätt*), sentenced an accused to 8 months imprisonment for having committed war crimes in Syria while serving as a member of the Syrian Armed Forces (case n°. B 11191-17, judgment of 25 September 2017).

[52] Skåne and Blekinge Court of Appeal (*hovrätten över Skåne och Blekinge*), case n°. B 3187-16, judgment of 11 April 2017, sentencing the accused to nine months' imprisonment for war crimes.

[53] District Court of Stockholm (*Stockholms tingsrätt*), case n°. B 13688-16 (pending).

voluntary non-binding and State laid mechanism that will take into account Resolution 2 of the 32nd meeting of the international conference of the ICRC. Furthermore, noting that Mexico considers disarmament as a key component of IHL, he expressed the support of his country to the *Treaty on the Prohibition of Nuclear Weapons* and urged States to ratify the treaty.

147. The representative of Portugal informed the CAHDI that Portugal is currently in the process of creating a IHL National Commission which would probably meet for the first time before the end of the current year. The delegation furthermore informed the CAHDI that Portugal had been elected for the Chairmanship of the *Working Group on the use of private military and security companies in maritime security*.

148. The representative of Norway thanked the ICRC and Switzerland for their work with regard to the strengthening compliance with IHL Process. On this regard, he stated that a State-driven non-politicised, universal and non-contextualised forum, as provided for by Resolution 2 adopted at the *32nd International Conference of the Red Cross and the Red Crescent* in 2015, would benefit all States. However, he also underlined that no existing mechanism is able to provide a forum corresponding to these criteria and he regretted the lack of agreement on the establishment of a new mechanism. Norway would continue to participate constructively in these discussions on the way towards the "*33rd International Conference of the Red Cross and Red Crescent*" in 2019.

149. The representative of Finland thanked Switzerland and the ICRC for their work on the next steps in the intergovernmental process on strengthening respect for IHL and welcomed the consultations and the informal meeting scheduled. The delegation of Finland expressed its support for this work and commitment to continue exploring ways to enhance the implementation of international humanitarian law.

150. The representative of Ireland stated its pleasure to have cosponsored and signed the *Treaty on the Prohibition of Nuclear Weapons* which Ireland considers a crucial step toward achieving a nuclear free world.

151. The representative of the Holy See informed the CAHDI that it had recently ratified the *Treaty on the Prohibition of Nuclear Weapons*. Furthermore, he pointed out that it is essential to prevent the criminalisation of humanitarian assistance under financing of terrorism mechanisms and therefore underlined the importance of humanitarian exemptions. However, he underlined that the problem lies in the soft law standards established rather than in international law.

152. The representative of the United States of America pointed out that the *Treaty on the Prohibition of Nuclear Weapons* fails to acknowledge the current world security climate and disregard the real threats such as those from the North Korean nuclear programme. Moreover, this delegation welcomed the ICRC's initiative to strengthening compliance with IHL Process as an opportunity to engage with discussions on the implementation of IHL in a supportive and non-politicised forum. Lastly, concerning the "Strengthening ILH Protecting Persons Deprived of their Liberty" process the representative of the United States of America stressed the importance of sharing information and State practices to reach a meaningful agreement of the modalities to adopt.

153. The representative of Belgium thanked the ICRC and reiterated his active support and commitment for the strengthening compliance with the IHL Process. To this end, the Belgian delegation invited the CAHDI members to a "*Conference on the ICRC updated Commentary on the First Geneva Convention: Capturing 60 years of practice"* organised by the IHL National Commission in partnership with the ICRC, which will take place in Brussels on 29 September 2017.

154. The representative of the Russian Federation stated that, the Russian Federation does not support the adoption of the Treaty on the Prohibition of Nuclear Weapons («Treaty») and considers that the latter seriously threatens the current system of treaties and agreements in the field of non-proliferation of nuclear weapons and arms control. He pointed out that the Treaty does not correspond to the provisions of the Non-Proliferation Treaty (and, inter alia, its Article VI), according to which nuclear weapons are to be eliminated from national arsenals pursuant to the treaty on general and complete disarmament under strict and effective international control and the respective international efforts are to be furthered by the easing of international tension and the strengthening of trust between States. He also emphasized that the Treaty disregards the global and regional security context and, thus, cannot reach its goals. He stressed, as well as, that agreements reached within NPT provide for a step-by-step reduction of nuclear arsenals to be carried out in a way that shall promote the strategic stability and equal and undiminished security for all in accordance with the Charter of the United Nations.

155. The representative of France stated that his country has not participated in the negotiations and does not intend to become a party to the *Treaty on the Prohibition of Nuclear Weapons* due to the existing risks at an international level. He pointed out that this does not undermine the commitment of his country to a nuclear free world. Therefore, he underlined that France has reduced by half its nuclear weapons arsenal and is committed to a future disarmament as can been seen through several initiatives launched by France on this matter.

156. The representatives of the United Kingdom and France expressed their wish to study in more detail the statement and comments of the representative of the ICRC related to the *Treaty on the Prohibition of Nuclear Weapons.*

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

157. The Chair presented the document on the *Developments concerning the International Criminal Court and other international criminal tribunals* (document *CAHDI (2017) 12 rev 1*). Concerning the International Criminal Court (ICC), she drew the attention of the CAHDI to the decision of Burundi[54] to withdraw from the Rome Statute which would take effect on 27 October 2017.

158. Concerning the judicial activity at the International Criminal Court (ICC), the Chair highlighted the following recent developments. Firstly, on 15 June 2017, the Appeals Chamber had delivered its judgment[55] in the case of *The Prosecutor v. Bosco Ntaganda* rejecting unanimously the appeal of Mr Ntaganda, former alleged Deputy Chief of the General Staff of the Force Patriotiques pour la Libération du Congo (FPLC), who is accused of war crimes and crimes against humanity allegedly committed in Ituri, Democratic Republic of the Congo (DRC), in 2002-2003. In its appeal Mr Ntaganda had argued that the war crimes of rape and sexual slavery could not be committed by members of an armed group against other members of the same armed group.

159. Secondly, on 6 July 2017, the Pre-Trial Chamber II had delivered its decision[56] in the case of *The Prosecutor v. Omar Hassan Ahmad Al Bashir* in the situation of Darfur

[54] Notification of 27 October 2016.
[55] ICC, *The Prosecutor v. Bosco Ntaganda*, case no. ICC-01/04-02/06-1962, Judgment on the appeal of Mr Ntaganda against the "Second decision on the Defence's challenge to the jurisdiction of the Court in respect of Counts 6 and 9", 15 June 2017.
[56] ICC, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, case no. ICC-02/05-01/09, Decision on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, 6 July 2017.

(Sudan) finding that South Africa had failed to comply with its obligations by not arresting and surrendering Mr Al-Bashir to the ICC while he was on South African territory between 13 and 15 June 2015. However, the Chamber had considered that it was not warranted to refer South Africa's non-compliance to the Assembly of States Parties or the Security Council of the United Nations.

160. Thirdly, on 15 August 2017, the Pre-Trial Chamber I had issued a warrant of arrest[57] for Mr Al-Welfalli in the case of *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli* in the situation of Libya. The Prosecutor alleged that Mr Al-Werfalli had directly committed and ordered the commission of murder as a war crime in the context of seven incidents, involving 33 persons, which took place between June 2016 and July 2017 in Benghazi or surrounding areas in the context of the non-international armed conflict in Libya.

161. As regards the other international criminal tribunals the Chair drew the attention of the CAHDI to the retrial in the case of *The Prosecutor v. Jovica Stanišić and Franko Simatović*[58] that had commenced before the United Nations Mechanism for International Criminal Tribunals (MICT) on 13 June 2017 following the successful Prosecution appeal against the acquittals of the accused.

162. The delegation of the Netherlands informed the CAHDI of a preparatory Conference to be organised in the framework of the global initiative *Towards a Multilateral Treaty for Mutual Legal Assistance and Extradition for Domestic Prosecution of the Most Serious International Crimes*, the so-called “MLA Initiative”, on 16-19 October 2017 in Doorn (the Netherlands). The Conference, organised by the five co-sponsoring States of the initiative - Argentina, Belgium, the Netherlands, Senegal and Slovenia – shall feature interventions from experts from academia, legal practice as well as civil society. In the opinion of the delegation of the Netherlands this project aiming at the opening of negotiations for a new multilateral treaty for mutual legal assistance and extradition for domestic prosecution of atrocity crimes can co-exist with and complement the project concerning *Crimes against Humanity*. While the latter is limited to defining the scope and elements of crime for crimes against humanity, the former focuses on facilitating international co-operation with regard to penal procedures and mutual legal assistance for all atrocity crimes. A need to co-ordinate both projects remains nonetheless evident. The delegation of the Netherlands invited delegations from the co-sponsoring States to register for the Conference and encouraged other delegations to join the initiative which aims at concluding negotiations for the new treaty within the next few years.

15. Topical issues of international law

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

164. The delegation of Estonia informed the CAHDI about developments related to the discussions on the application of international law to cyberspace. The General Assembly of the United Nations has since 2003 mandated the Secretary General five times to form a Group of Governmental Experts (the so-called GGE) to report on developments in the field of information and communications (the ICTs) in the context of international security. The last session of the GGE, formed for the years 2016-2017, was held on 19-23 June 2017 in New York (United States of America). On this occasion, however, no agreement on a consensual report could be reached between the 25 experts representing all regional groups. The delegation of Estonia informed the CAHDI that the basis for the norms

[57] ICC, *The Prosecutor v. Mahmoud Mustafa Busayf Al-Werfalli*, case no. ICC-01/11-01/17-2, Warrant of arrest, 15 August 2017.
[58] MICT, *The Prosecutor v. Jovica Stanišić and Franko Simatović*, case no. MICT-15-96.

discussion has been the conclusion made by the UN GGE in 2013 that international law applies to the use of ICTs. However, there are old issues reappearing in the context of cyber security, e.g. the exercise of national sovereignty, the definition of "an armed attack or aggression", the concept of State responsibility, human rights and international humanitarian law. The future of the discussions in the framework of the United Nations is not clear. Whether a new GGE will be composed or not, remains to be decided. The Estonian delegation emphasised that the cyberspace is not a "lawless" domain and that States should speak out against violations of international law. More attention should also be paid to regional efforts related to the use of ICTs, including the *Convention on Cybercrime* (ETS No. 185) and the *Council of Europe Convention on the Prevention of Terrorism* (CETS No. 196). It requires continuous awareness-raising that these Conventions are open for accession by all States in the world or they can at least be used as a source for inspiration.

165. Furthermore, the Estonian delegation drew the attention of the CAHDI to numerous academic efforts made by different scholars and research institutions worldwide concerning the application of international law to cyberspace. One of the results of such academic efforts is the *Tallinn Manual on the International Law Applicable to Cyber Operations*. A second edition of the book[59] was published in February 2017. It is written at the invitation of the *NATO Cooperative Cyber Defence Centre of Excellence* located in Tallinn (Estonia) but it is not an official document but instead an expression of opinions of a group of independent experts acting solely in their personal capacity. The Tallinn Manual compiles some rules derived from existing international law and gives interpretations and examples how they could be applied. The Estonian delegation invited all colleagues to study it and to formulate and express their national positions in relevant fora.

IV. OTHER

16. Election of the Chair and Vice-Chair of the CAHDI

166. In accordance with *Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods*[60], the CAHDI re-elected Ms Päivi Kaukoranta (Finland) and Mr Petr Válek (Czech Republic), respectively as Chair and Vice-Chair of the Committee, for a term of one year, as from 1 January 2018.

17. Place, date and agenda of the 55th and 56th meeting of the CAHDI

167. The CAHDI decided to hold its 55th meeting in Strasbourg (France) on 22-23 March 2018. 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. In this respect it was recalled to include in the annotated agenda of the 55th meeting under item 10 "Peaceful settlement of disputes" a larger content than that of the compulsory jurisdiction of the ICJ as decided by the CAHDI at this meeting.

168. The CAHDI also decided to hold its 56th meeting in Finland on 20-21 September 2018. 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.

[59] See, Michael N. Schmitt and Liis Vihul, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Cambridge University Press, New York 2017).
[60] Resolution CM/Res(2011)24 as adopted by the Committee of Ministers on 9 November 2011 at the 1125th meeting of the Ministers' Deputies.

18. Any other business

- ***Invitation to CAHDI to be represented in meetings of the CDDH Drafting Group on the longer-term future of the European Convention on Human Rights (DH-SYSC-II)***

169. The CAHDI held an exchange of views concerning an invitation received by the Chair from the "*Council of Europe Steering Committee for Human Rights (CDDH) Drafting Group on the longer-term future of the European Convention on Human Rights (DH-SYSC-II)*" to be represented in meetings of the DH-SYSC-II. This invitation was sent by Ms Florence Merloz, Chair of the DH-SYSC-II. The invitation is contained in document *CAHDI (2017) 20 restricted*.

170. The Chair informed the CAHDI that, at their 1252nd meeting on 30 March 2016, the Ministers' Deputies instructed the CDDH to carry out a detailed analysis of all questions relating to the place of the *European Convention on Human Rights* (ECHR) in the European and international legal order and on the medium-term and longer-term prospects, in the light of the relevant paragraphs of the CDDH "*Report on the longer-term future of the system of the European Convention on Human Rights*" of 11 December 2015[61]. To carry out this work the CDDH set up the Drafting Group DH-SYSC-II.

171. Prior to the first meeting of DH-SYSC-II, on 29-30 March 2017, a brainstorming seminar titled "*The place of the Convention in the European and international legal order*" was held to launch the work of the Drafting Group. The Chair of the CAHDI chaired one of the sessions of this Seminar on "*General issues of treaty interpretation and the European Court of Human Rights*". The Chair emphasised that many speakers at the Seminar were judges at the European Court of Human Rights or academics specialised in the ECHR. In the opinion of the Chair the Seminar was thus of excellent quality and she has no doubt that the work of the Drafting Group will continue in the same vein.

172. The Chair further noted that the aim of the work of the Drafting Group is the preservation of the efficiency of the Convention system against risks of fragmentation of the European and international legal space in the field of human rights protection, stemming from diverging interpretations. At its 1st meeting (30-31 March 2017), the Group had determined the following three priority themes that needed to be examined in the context of their work:

- The challenge of the interaction between the Convention and other branches of international law, including international customary law (theme 1);
- The interaction between the Convention and other international human rights instruments to which the Council of Europe member States are parties (theme 2);
- The interaction between the Convention and the EU legal order, and other regional organisations (theme 3).[62]

These priority themes have subsequently been adopted by the DH-SYSC and the CDDH.

[61] Document CDDH(2015)R84 Addendum I. The Committee of Ministers of the Council of Europe examined the Report at the 1246th and 1252nd meeting of the Ministers' Deputies on 3 February and 30 March 2016 respectively.

[62] See, CDDH/DH-SYNC, Drafting Group II on the Follow-Up to the CDDH Report on the Longer-Term Future of the Convention (DH-SYSC-II). Context of the Work of the DH-SYSC-II on the Future Report of the CDDH, 31 July 2017, DH-SYSC-II(2017)002.

173. The Chair noted that according to the draft outline for the report of the working group theme 1 includes, *inter alia*, the relationship between the resolutions of the Security Council and the Council and the ECHR and international humanitarian law.

174. The Chair recalled that at its 40th meeting on 16-17 September 2010 in Tromsø (Norway) the CAHDI elected[63] Mr Erik Wennerström (Sweden) to serve as an observer on behalf of the CAHDI in the "*CDDH Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE)*". At the 44th meeting of the CAHDI on 19-20 September 2012 in Paris (France), the mandate of Mr Wennerström as representative of the CAHDI was renewed[64] and he continued to represent the Committee in the "*Negotiation meetings between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights (47+1)*" until the 5th and last of these negotiation meetings in April 2013. The participants of these meetings agreed on the draft revised instruments on the accession containing also the *Draft Agreement Providing for the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms*[65], which subsequently formed the object of the request for an Opinion submitted to the Court of Justice of the European Union (ECJ) by the European Commission. The ECJ rendered its famous "*Opinion 2/13*"[66] concerning the Draft Agreement Providing for the Accession on 18 December 2014. The Chair concluded that regardless of this process, the Council of Europe continues to be concerned with the interaction between the ECHR and the EU legal order, and other regional organisations as well as the longer-term future of the system of the ECHR.

175. The 2nd meeting of the Drafting Group took place simultaneously with the 54th meeting of the CAHDI (20-22 September 2017) and the next ones are scheduled to take place on 3-5 April 2018 and on 25-28 September 2018. Two more meetings are further expected to take place in 2019 before the Drafting Group is due to submit a draft report for the Committee of Ministers containing conclusions and possible proposals for action by the end of the year 2019.

176. The CAHDI agreed on the importance to follow-up the work of this Drafting Group and to participate in its work. Therefore, the CAHDI decided to appoint Mr Petr Válek (Czech Republic) to represent the CAHDI in the DH-SYSC-II and to consider inviting the Chair of the DH-SYSC-II to a forthcoming CAHDI meeting.

19. Adoption of the Abridged Report and closing of the 54th meeting

177. The CAHDI adopted the Abridged Report of its 54th meeting as contained in document *CAHDI (2017) 22 rev* and instructed the Secretariat to submit it to the Committee of Ministers for information.

[63] Document CAHDI (2010) 28, para. 61.
[64] Document CAHDI (2012) 20, para. 34.
[65] See, Fifth Negotiation Meeting between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights. Final Report to the CDDH, 10 June 2013, 47+1(2013)008rev2.
[66] Opinion 2/13 of the Court (Full Court), ECLI:EU:C:2014:2454, 18 December 2014,.

APPENDICES

APPENDIX I

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EUROPEAN ORGANISATION FOR NUCLEAR RESEARCH (CERN) / ORGANISATION EUROPEENNE POUR LA RECHERCHE NUCLEAIRE (CERN)

[Apologised / Excusé]

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INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) / COMITE INTERNATIONAL DE LA CROIX ROUGE (CICR)

Ms Lindsey CAMERON
Head of Unit of Thematic Legal Advisers
Legal Division

ORGANISATION FOR SECURITY AND CO-OPERATION IN EUROPE (OSCE) / ORGANISATION POUR LA SÉCURITÉ ET LA COOPÉRATION EN EUROPE (OSCE)

Ms Lisa TABASSI
Head of the Legal Services

SPECIAL GUESTS / INVITES SPECIAUX

M. Georg NOLTE
Chairperson of the International Law Commission (ILC) /
Président de la Commission du droit international (CDI)

SECRETARIAT GENERAL

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

Mr Jörg POLAKIEWICZ
Director / Directeur

Ms Julia KIRCHMAYR
Trainee / Stagiaire

CAHDI SECRETARIAT / SECRETARIAT DU CAHDI

Ms Marta REQUENA
Secretary to the CAHDI / Secrétaire du CAHDI
Head of Division / Chef de Division
Public International Law and Treaty Office
Division / Division du Droit international public
et du Bureau des Traités

Ms Irene SUOMINEN
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Division / Division du Droit international public
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Ms Irene MELENDRO MARTINEZ
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Public International Law and Treaty Office
Division / Division du Droit international public
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Mr Mathieu BERBERAT
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INTERPRETERS / INTERPRETES

Ms Amanda BEDDOWS
Ms Isabelle MARCHINI
Ms Julia TANNER

APPENDIX II

AGENDA

I. INTRODUCTION

1. Opening of the meeting by the Chair

2. Adoption of the agenda

3. Adoption of the report of the 53rd 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

a. Draft Terms of Reference of the CAHDI for 2018-2019 and examination of the request submitted by the Asian-African Legal Consultative Organisation (AALCO) to be granted observer/participant status to the CAHDI

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

6. Immunities of States and international organisations

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

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

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

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

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

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

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

10. Peaceful settlement of disputes

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

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

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

12. The work of the International Law Commission (ILC)

- Presentation of the work of the International Law Commission (ILC) by Mr Georg NOLTE, Chairperson of the ILC (Thursday, 21 September 2.30pm)

- Exchange of views between the ILC, the Chair of the CAHDI and the Secretary to the CAHDI, Geneva (Switzerland), 6 July 2017

13. Consideration of current issues of international humanitarian law

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

15. Topical issues of international law

IV. OTHER

16. Election of the Chair and Vice-Chair of the CAHDI

17. Place, date and agenda of the 55th and 56th meeting of the CAHDI

18. Any other business

- Invitation to CAHDI to be represented in meetings of the CDDH Drafting Group on the longer-term future of the European Convention on Human Rights (DH-SYSC-II)

19. Adoption of the Abridged Report and closing of the 54th meeting

APPENDIX III

PRESENTATION OF MR GEORG NOLTE

CHAIRPERSON OF THE INTERNATIONAL LAW COMMISSION (ILC)

English only

Dear Madam Chair, dear Colleagues,

It is a great honor, and a pleasure, for me to follow your invitation to report on the 69th session of the International Law Commission in 2017. I understand that you have invited me both in my capacity as the Chair of the Commission and in my personal capacity as a member of the Commission. I will make every effort to be transparent when saying something which does not reflect the position of the Commission as a whole.

This year's session was the first after the Commission's elections of last year. Regarding the newly elected members, it is my impression that they have all been quite active. They established and integrated themselves into the work of the Commission earlier than many previous newly-elected members, at least as I have witnessed at the beginning of the two prior quinquennia.

This year the topics "**Identification of customary international law**" and "**Subsequent agreements and subsequent practice in relation to the interpretation of treaties**" were not debated by the Commission. As you will recall, full sets of draft conclusions on those two topics were adopted on first reading during last year's session. As is the established practice, the Commission suspends the consideration of topics after the first reading to give States an opportunity to carefully review the outcome and to give in-depth comments for the second reading. Written comments are requested by 1 January 2018[1], so that the second reading of these two topics may take place in the summer of 2018. I encourage all CAHDI members and observers to submit written comments by the deadline, given that these are important topics on core issues of international law, and given that the Commission greatly values comments from States. I can assure you that we examine all comments most carefully; they are a very important part of our work.

Madam Chair!

The Commission has made progress with respect to a number of other topics. I will present them briefly in the order they were taken up this past summer:

The first topic which the Commission addressed in plenary was "**Crimes against Humanity**". The Special Rapporteur, Mr. Sean Murphy, made a special effort by submitting a lengthy Third report which covered all remaining issues. This enabled the Commission to provisionally adopt, on first reading, a full set of Draft Articles on Crimes against Humanity. [2] I think that this is an extraordinary achievement of the Commission for at least two reasons:

- First, it is generally recognized that, among the three core international crimes, only crimes against humanity lack a treaty focused on building up national laws, national jurisdiction and inter-State cooperation in the fight against impunity. The ILC Draft

[1] See Chapter II of the Report of the Commission on the work of the sixty-eighth session (2016), A/71/10, at paras. 15 and 17, available at: http://legal.un.org/docs/?path=../ilc/reports/2016/english/chp2.pdf&lang=EFSRAC.
[2] See Chapter IV of the Report of the Commission on the work of the sixty-ninth session (2017), A/72/10, available at: http://legal.un.org/docs/?path=../ilc/reports/2017/english/chp4.pdf&lang=EFSRAC.

Articles on Crimes against Humanity, if ultimately adopted on second reading, would provide a model for States to fill this lacuna through a new treaty, if they so wish.

- Second, and more generally, by provisionally adopting these draft articles on first reading, the Commission has shown that it continues to work in the most classical part of its mandate, which is to prepare texts which have the capacity to become treaties.

Regarding the substance of the Draft Articles on Crimes against Humanity, I would like to direct your attention to the following points which have been subject to some debate among the members of the Commission:

- Draft Article 12 on victims, witnesses and others: paragraph (3) of this Draft Article provides that "Each State shall take the necessary measures to ensure in its legal system that the victims of a crime against humanity have the right to obtain reparation for material and moral damages, on an individual or collective basis, consisting, as appropriate, of one or more of the following or other forms: restitution; compensation; satisfaction; rehabilitation; cessation and guarantees of non-repetition." This paragraph has been intensely debated and it has been very carefully formulated together with its commentary.[3]

- Draft Articles 13 and 14 on Extradition and Mutual Legal Assistance, as well as the Annex, have been drafted on the basis of texts which are well-established in State practice, in particular following the 2003 United Nations Convention against Corruption.

- Draft Article 15 on Settlement of Disputes would establish jurisdiction of the ICJ over disputes concerning interpretation or application, but provides for the possibility of a State to opt-out of such jurisdiction.

- As is often the case, it is not only important what is contained in a set of Draft Articles, but also what is <u>not</u> addressed. It is noteworthy that the following two matters are not addressed in the text of the Draft Articles on Crimes against humanity:

    - First, the issue of amnesty is not addressed in the text of the draft articles; the matter is, however, raised in connection with Draft Article 10 and discussed in the commentary to Draft Article 10 on *aut dedere aut judicare*, at paras. 8-11.[4]

    - Second, the issue of immunity of State officials from foreign criminal jurisdiction is also not addressed in the text of the draft articles. Draft Article 6, para. (5) provides, along the lines of Article 27 (1) of the Statute of the International Criminal Court, that "the holding of an official position is not a ground for excluding criminal responsibility". The commentary to this provision, however, notes at para. 31 that "paragraph 5 has no effect on any procedural immunity that a foreign State official may enjoy before a national criminal jurisdiction, which continues to be governed by conventional and customary international law". It also notes that "paragraph 5 is without prejudice to the Commission's work on the topic "Immunity of State officials from foreign criminal jurisdiction." The Draft Articles on Crimes against

[3] Chapter IV of the Report of the Commission on the work of the sixty-ninth session (2017), A/72/10, pp. 96-98, at paras. 14-21, available at: http://legal.un.org/docs/?path=../ilc/reports/2017/english/chp4.pdf&lang=EFSRAC.
[4] Chapter IV, ibid., pp. 86-87, at paras. 8-11.

Humanity thus do not contain a provision on immunity along the lines of Article 27 paragraph (2) of the ICC Statute[5].

The second topic which the Commission addressed in plenary was "**Protection of the Atmosphere**". The Special Rapporteur, Mr. Shinya Murase, in his Fourth Report, had proposed four draft guidelines on the interrelationship of rules regarding the protection of the atmosphere and rules regarding other areas of international law, as well as several preambular paragraphs. The Commission ultimately decided to merge the proposed four draft guidelines into one single draft guideline, and to adopt three preambular paragraphs. With respect to the interrelationship of rules the Commission decided largely to follow the approach of its own Study Group in its 2006 report on "Fragmentation of international law: difficulties arising from the diversification and expansion of international law". The Commission did not include in the text of the draft guideline a reference to a "principle of mutual supportiveness", and explains in the commentary that the preponderance of support for this principle originates from WTO law.[6]

Madam Chair!

The third topic which the Commission addressed in plenary was "**Immunity of State Officials from Foreign Criminal Jurisdiction**". The Commission continued the debate on the Fifth Report of the Special Rapporteur, Ms. Concepción Escobar Hernández. In this report, the Special Rapporteur had proposed a Draft Article 7 on "limitations and exceptions" to such immunity. It will be recalled that the debate on the Fifth Report had already started in 2016, under exceptional circumstances, and that States have had a first opportunity to comment in the Sixth Committee in 2016.

The debate this year continued to be controversial and focused on whether an exception from immunity *ratione materiae* from foreign criminal jurisdiction was recognized under customary international law if it is alleged that a foreign State official has committed certain crimes (such as genocide, crimes against humanity, war crimes, torture or enforced disappearance), or whether there is at least a "trend" to that effect, and whether such an exception would be desirable. This is not the place to enter into the substance of this debate. Given the importance of the question, States are advised, and encouraged, to study closely the pertinent Chapter VII in the report of the Commission, which sets out in some detail the different positions within the Commission.[7]
At the end of the plenary debate, the Commission decided, after a vote to end the discussion,[8] to refer Draft Article 7 to the Drafting Committee "taking into account all the comments made in the debate on the topic". Whereas the Drafting Committee arrived at a decision to propose Draft Article 7 with some amendments, some members of the Drafting Committee were opposed to sending the draft article back to the Plenary for adoption at that stage, as recorded in the report of the Chair of the Drafting Committee of 20 July 2017.[9]

When Draft Article 7, as amended and proposed by the Drafting Committee, came back to the plenary for consideration, the Commission proceeded to adopt the Draft Article, but did so by a recorded vote: 21 members in favor, 8 against, and one abstaining. Since the

[5] Chapter IV, ibid., p. 69, at para. 31.
[6] See Chapter VI of the Report of the Commission on the work of the sixty-ninth session (2017), A/72/10, available at: http://legal.un.org/docs/?path=../ilc/reports/2017/english/chp6.pdf&lang=EFSRAC.
[7] Chapter VII of the Report of the Commission on the work of the sixty-ninth session (2017), A/72/10, Available at: http://legal.un.org/docs/?path=../ilc/reports/2017/english/chp7.pdf&lang=EFSRAC.
[8] See Summary Record of the 3365th meeting on 30 May 2017, pp. 16-18, available at: http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr3365.pdf&lang=E.
[9] Report of the Chairman of the Drafting Committee of 20 July 2017, available at: http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2017_dc_chairman_statement_iso.pdf&lang=E.

Commission almost always adopts its texts by consensus, the way in which Draft Article 7 was adopted was, say, unusual. It is therefore not surprising that a number of members have made statements in explanation of their votes, which can be found in the Summary Record of the 3378th meeting of 20 July 2017.[10]

Those members who voted against the adoption of Draft Article 7 spoke first and mainly emphasized that Draft Article 7 did not reflect existing law (*lex lata*) nor expressed a desirable progressive development of the law (*lex ferenda*), except possibly in relations between those States which were prepared to conclude a treaty to that effect. Those members also expressed their view that Draft Article 7 should not have been adopted without also adopting procedural safeguards against possible abuse in national criminal proceedings. Some members who voted in favor of the adoption of Draft Article 7 mainly criticized that the list of international crimes to which the exception would apply should have included the crime of aggression; some other members who voted in favour would have also included other crimes, such as the crimes of slavery, corruption, human trafficking, piracy and international terrorism. The Special Rapporteur said that she had voted in favour of the adoption of draft article 7, convinced that it reflected the position of the Commission and that both the Commission and the Drafting Committee had acted entirely within the Commission's mandate, namely to promote the codification and progressive development of international law. She asserted that the Commission's own procedure for dealing with proposals for draft articles had been strictly followed.[11] For the sake of transparency, I should mention at this point that, in my personal capacity as a member of the Commission, I was one of those who voted against the adoption of Draft Article 7.

Regarding the issue of procedural safeguards, the Commission decided to insert a footnote in the text of the Draft Articles according to which "The Commission will consider procedural provisions and safeguards applicable to the present draft articles at its seventieth session."

Madam Chair!

The question of possible exceptions from immunity from foreign criminal jurisdiction is one of the most important questions of general international law. The Commission has conducted a thorough debate on the matter and submits this debate and the provisional result of its work to the consideration of States. The reaction of States is now very important for the continuation of the work on this fundamental question. I would encourage CAHDI members and observers to address this issue in the Sixth Committee debate next month.

Moving to the topic "**Provisional Application of Treaties**", the Commission provisionally adopted, under the guidance of the Special Rapporteur, Mr. Juan Manuel Gomez-Robledo, draft guidelines 1 to 11, with commentaries thereto.[12] I commend to your particular attention draft guidelines 6, 10, and 11.

Regarding the topic "**Jus Cogens**", the Commission had before it the second report of the Special Rapporteur, Mr. Dire Tladi, which sought to set out the criteria for the identification of peremptory norms of general international law (jus cogens), On the basis of his analysis, the Special Rapporteur proposed six draft conclusions. After considering the report in plenary, the Commission referred the proposed draft conclusions to the Drafting Committee where, for lack of time, they could not be fully considered and remain pending. The Chairman of the Drafting Committee submitted an interim report to the plenary which is on the website of the

[10] Summary Record of the 3378th meeting on 20 July 2017, available at: http://legal.un.org/docs/?path=../ilc/documentation/english/summary_records/a_cn4_sr3378.pdf&lang=EF.
[11] Ibid.
[12] See Chapter V of the Report of the Commission on the work of the sixty-ninth session (2017), A/72/10, available at: http://legal.un.org/docs/?path=../ilc/reports/2017/english/chp5.pdf&lang=EFSRAC.

Commission.[13] On the proposal of the Special Rapporteur, the Commission decided to change the title of the topic from "Jus cogens" to "Peremptory norms of general international law (jus cogens)".[14]

During this past session, the Commission decided to include the topic "**Succession of States in respect of State responsibility**" in its programme of work and appointed Mr. Pavel Šturma as Special Rapporteur.[15] Mr. Sturma was able to very quickly submit a First Report which was largely introductory in nature and which proposed four draft articles. The Commission, after a debate in plenary, referred the proposed draft articles to the Drafting Committee which provisionally adopted, within the limited available time, two draft articles. The consideration of the draft articles remains pending in the Drafting Committee. The Chair of the Drafting Committee submitted an interim report to the plenary for information purposes only.[16]

The consideration of the topic "**Protection of the environment in relation to armed conflicts**" could not be pursued with the same speed at this year's session because the Special Rapporteur, Ms. Marie Jacobsson, was no longer a member of the Commission, having not sought re-election. In order to maintain momentum, the Commission established a Working Group on the topic, under the Chairmanship of Mr. Marcelo Vazquez-Bermudez, to propose a way forward. Upon the proposal of the Working Group, the Commission decided to appoint Ms. Marja Lehto as the new Special Rapporteur for the topic.

Regarding "**Other decisions**", the Commission has taken the decision to put the topics "General principles of law" and "Evidence before international courts and tribunals" on its long-term programme of work. This decision does not mean that those topics are already on the active programme of work. Such a further decision would only be taken after States have had the occasion to comment on the advisability to put those topics on the active agenda of the Commission. The syllabuses of the two proposed new topics are annexed to this year's report of the Commission.[17]

Madame Chair,

I would like to conclude my intervention by making three short points:

First, I would like to take the opportunity to thank States for contributing to the **ILC seminar** and encourage them to continue doing so.

Second, next year's session, in 2018, will mark the **70th anniversary of the Commission**. The Commission has decided to hold two inter-related commemorative events on this occasion, in New York and Geneva, under one overarching theme, namely: "70 years of the International Law Commission – Drawing a Balance for the Future". The Commission would be happy if representatives of States and international organisations, in particular legal advisers, would follow the invitations to participate.

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[13] Available at: http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2017_dc_chairman_statement_jc.pdf&lang=E.
[14] Chapter VIII of the Report of the Commission on the work of the sixty-ninth session (2017), A/72/10, available at: http://legal.un.org/docs/?path=../ilc/reports/2017/english/chp8.pdf&lang=EFSRAC.
[15] See Chapter IX of the Report of the Commission on the work of the sixty-ninth session (2017), A/72/10, available at: http://legal.un.org/docs/?path=../ilc/reports/2017/english/chp9.pdf&lang=EFSRAC.
[16] Available at: http://legal.un.org/docs/?path=../ilc/documentation/english/statements/2017_dc_chairman_statement_ssrsr.pdf&lang=E.
[17] Available at: http://legal.un.org/docs/?path=../ilc/reports/2017/english/annex.pdf&lang=EFSRAC.

Finally, and most importantly: this year's session of the Commission has been very productive, but also very intense. In such a situation, it is particularly important that the Commission receive thoroughly considered reactions from States – which are its addressees and its principals. I therefore strongly **encourage States to speak in the debate in the Sixth Committee** in October on the ILC report, particularly on difficult points, and to annex detailed comments to their speeches if appropriate.

Thank you very much for your attention!