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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

(CAHDI)

Meeting report

55th meeting
Strasbourg (France), 22-23 March 2018

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

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I. INTRODUCTION

1. Opening of the meeting

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 55th meeting in Strasbourg (France) on 22-23 March 2018 with Ms Päivi Kaukoranta (Finland) in the Chair. The list of participants is set out in **Appendix I** to this report.

2. The Chair welcomed the experts who were attending the CAHDI for the first time, some of them recently appointed as new Legal Advisers in their respective countries. She particularly welcomed the Secretary General of the **Asian African Legal Consultative Organisation (AALCO)**, Mr Kennedy GASTORN, as the representative of the new observer/participant Organisation to the CAHDI. In this respect, she underlined that this new development in the membership of the CAHDI is highly important as for the first time the CAHDI is counting among its experts with a representative of an Organisation comprising states from Asia and Africa.

3. The Chair introduced the new member of the CAHDI Secretariat, Ms Eleana KYPRIOTAKI, from Greece, who joined the CAHDI Secretariat as Assistant Lawyer in January 2018. Ms Kypriotaki is a qualified lawyer in Greece and holds a Bachelor in Law from Democritus University of Thrace (Greece), an LL.M in Public International Law from the University of Nottingham (United Kingdom) and an LL.M in European Law from Leiden University (the Netherlands).

4. The Chair also introduced another new member of the CAHDI Secretariat, Ms Daria CHEREPANOVA, from the Russian Federation, who joined the CAHDI Secretariat as Administrative Assistant in January 2018. Ms Cherepanova is holding a Master Degree in Public Relations from Saint Petersburg State University. She has been working in different departments of the Council of Europe for the past ten years.

5. The Chair finally introduced the new trainee within the Public International Law and Treaty Office Division, Mr Mathieu DUMONT, a national of France, who holds a Bachelor in Law and a Master in International and European Law from the University Robert Schuman of Strasbourg (France).

2. Adoption of the agenda

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

3. Examination and adoption of the report of the 54th meeting

7. The CAHDI examined the report of its 54th meeting (document *CAHDI (2017) 23 prov*). Taking into account that more time would be needed for revising paragraphs 106 and 107 of this draft Report, the CAHDI agreed to postpone its adoption until an agreement will be reached on the specific wording of these paragraphs. The CAHDI further instructed the Secretariat to publish the 54th Meeting Report on the Committee's website once the agreement has been reached.

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

8. The Director of Legal Advice and Public International Law of the Council of Europe, Mr Jörg Polakiewicz, informed the CAHDI on the latest developments within the Council of Europe since the last meeting of the CAHDI on 21-22 September 2017 in Strasbourg (France). In particular, he provided information to the CAHDI in relation to the application, for the first time, of the procedure of Article 46 (4) of the European Convention on Human Rights (ECHR). He furthermore provided the CAHDI with an update on the current preparation of the "Draft *Copenhagen Declaration*" in relation to the reform of the ECHR. He also informed the CAHDI on the adoption of the new *Council of Europe Gender Equality Strategy for 2018-2023*. Moreover, the Director informed the CAHDI of new developments in treaty law within the framework of the Council of Europe. In

particular, he drew the attention of the CAHDI experts in relation to the current stage of the negotiations of the draft *Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* as well as in relation to the derogations from the ECHR under its Article 15, and in particular he pointed out the withdrawal of the derogation of the ECHR by France.

9. The representative of Ukraine informed the CAHDI that in relation to the derogation from the ECHR made by his country, a new Ukrainian legislation *"On the specific features of the national policy aiming to ensure the sovereignty of Ukraine on the temporarily occupied territories of the regions of Donetsk and Lougansk"*[1] was adopted on 18 January 2018 by the Verkhovna Rada of Ukraine and enacted by President Porochenko on 20 February 2018. He finally informed the CAHDI that his country has already started the procedure to revise the legal content of the Ukrainian derogation to the ECHR and that the new text of the derogation will be notified to the Secretary General of the Council of Europe in conformity with the paragraph 3 of Article 15 of the ECHR.

10. The representative of Denmark provided to the CAHDI further information on the "Draft *Copenhagen Declaration*" that was tabled by the Danish chairmanship in February 2018. He pointed out that a Task Force was set up under the Danish Ministry of Justice which was in charge of negotiating this draft Declaration which is part of the "Interlaken process" and that the negotiations were currently taking place on this draft Declaration in Strasbourg. He further underlined that their ambition was to adopt a political declaration that takes stock of the current reform process, proposes new measures to strengthen the ECHR system and provides guidance for further reform work. As to the current reform process, the mission was set out in Brighton of a more effective and focused balance system. The focus of the Danish Chairmanship is to ensure that the reforms already agreed upon are being put into effect. This requires, among other things, that Member States ratify Protocol 15 amending the ECHR. The Danish representative expressed his hope that this Declaration will be adopted during the Danish Chairmanship of the Committee of Ministers[2].

11. The representative of Belarus thanked the organisers of the Conference on "*The Council of Europe Conventional Framework*" which took place in Minsk on 13-14 December 2017. He underlined that this conference allowed states and non-states agencies to strengthen their capacity to protect human rights and freedoms, which is their obligation according to the Constitution and international treaties to which Belarus is a Party. He further confirmed his government's commitment to continue to implement the Joint Plan of Action of Belarus and the Council of Europe to cooperate in this field.

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. Terms of Reference of the CAHDI for 2018-2019

12. The CAHDI took note of the adoption of its Terms of Reference for 2018-2019 (document *CAHDI (2018) 2*), by the Committee of Ministers during its 1300th (Budget) Meeting on 21-23 November 2017. The Chair drew the attention of the Committee to the adoption by the Committee

[1] The English version of the title of this new Ukrainien Law is an unofficial translation from the French version provided by the Ukrainien representative to the CAHDI: *«Sur les particularités de la politique nationale visant à assurer la souveraineté d'Ukraine dans les territoires temporairement occupés des régions de Donetsk et de Lougansk», cette loi* dite *«Loi sur la réintégration du Donbass»*.

[2] The *Copenhagen Declaration on the reform of the European Convention on Human Rights system* has been formally adopted by all 47 member states of the Council of Europe following a high-level conference in Copenhagen attended by more than 20 Ministers of Justice.

of Ministers of the CAHDI's proposal to grant "Participant Status" to the **Asian African Legal Consultative Organisation (AALCO)** as mentioned above.

13. The Secretary General of AALCO, Mr Kennedy Gastorn, mentioned that AALCO is an international intergovernmental organisation, based in New Delhi, established 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. At present, 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. Furthermore, Mr Gastorn recalled that this is the second time that his Organisation had an opportunity to collaborate with the Council of Europe, since the Asian-African Legal Consultative Committee and the Directorate of Legal Affairs of the Council of Europe exchanged "Letters of Cooperation" in 1976. Finally, he emphasised the importance that AALCO attaches to collaborating with CAHDI and underlined that indeed it will be an enriching experience for AALCO to work with this Committee on areas of mutual concern. Therefore, he expressed the gratitude of his Organisation for granting AALCO this "Participant Status" and welcomed the opportunity to participate in the CAHDI meetings.

b. Opinion of the CAHDI on PACE Recommendation 2122 (2018)

14. The Chair recalled that on 7 February 2018, the Committee of Ministers communicated to the CAHDI Recommendation 2122 (2018) of the Parliamentary Assembly of the Council of Europe (PACE) on "J*urisdictional Immunity of International Organisations and Rights of their Staff*" for information and possible comments by the end of March 2018. A preliminary draft Opinion prepared by the Chair and Vice-Chair, in cooperation with the Secretariat, was circulated by email on 1 March 2018 (document *CAHDI (2018) 14 prov restricted*), inviting the CAHDI experts to submit their comments on this document before 14 March 2018. The Secretariat has received written comments from few delegations as contained in document *CAHDI (2018) 14 Addendum restricted bilingual* dated 16 March 2018. During the meeting, a few further comments were presented by some delegations (document *CAHDI (2018) Misc1 rev restricted* dated 22 March 2018).

15. The CAHDI examined the draft opinion as contained in the document *CAHDI (2018) 14 prov restricted* in light of the comments submitted by delegations. Following an exchange of views, the CAHDI adopted its Opinion on PACE Recommendation 2122 (2018) as contained in **Appendix III** to the present report. The CAHDI entrusted the Secretariat to transmit this Opinion to the Committee of Ministers.

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

16. The Chair presented a compilation of the Committee of Ministers' decisions of relevance to the CAHDI's activities (documents *CAHDI (2018) 3 restricted* and *CAHDI (2018) 3 Addendum restricted*). In particular, the CAHDI noted that the Committee of Ministers examined on 13 December 2017 the Abridged Report of its 54th meeting (Strasbourg, France, 21-22 September 2017).

17. With regard to document *CAHDI (2018) 3 restricted*, the Chair further drew the attention of the CAHDI to Chapter 3 of the document taking stock of the Czech Chairmanship of the Committee

of Ministers which took place from 19 May 2017 to 15 November 2017. The Czech Republic then handed over the Chairmanship of the Committee of Ministers to the current Chairmanship of Denmark, the priorities of which are equally detailed in the document.

18. The representative of Denmark informed the CAHDI that the Danish chairmanship of the Committee of Ministers (15 November 2017-18 May 2018) aims to support the Council of Europe in continuing to be an organisation with strong political values and clear legal standards that defends and protects human rights, democracy, gender equality and the rule of law. The question is how best to fulfil this ambition? The answer involves governments, national parliaments, regional and local authorities, civil society and the private sector. He pointed out that Democracy based on the rule of law and with respect for human rights must not and cannot be taken for granted. Nor is it a static concept. It develops continuously and adapts to the times and changing circumstances. This is why the main priority of the Danish chairmanship is to maintain a strong human rights system that is also focused and balanced. It is necessary to continue the current reform process if the system is to remain effective and to retain broad support for its work and role as guardian of human rights in Europe. Therefore, he informed the CAHDI experts that the five priorities of the Danish Chairmanship of the Council of Europe are as follows:

(1) The European human rights system in a future Europe
(2) Equal opportunities
(3) Involvement of children and young people in democracy
(4) Changing attitudes and prejudices about persons with disabilities
(5) Combating torture

19. The Chair also pointed out that Chapter 6 of this document reproduces the decisions of the Committee of Ministers with regard to the accession of non-member States to the conventions prepared in the framework of the Council of Europe as well as the accession to existing Partial Agreements. Furthermore, it reproduces decisions concerning issues related to the monitoring and implementation of these conventions.

20. The Chair finally invited the CAHDI experts to consult this document in detail as it contains information which could be of interest for legal advisers.

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*

21. 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 claims by third-party for bodily injury or death and for loss of property or damage allegedly caused by an international organisation and the effective remedies available to claimants in these situations. The document contains five questions addressed to members of the CAHDI. The contributions of 18 delegations (Albania, Andorra, Armenia, Austria, Belarus, Canada, the Czech Republic, Denmark, Germany, Greece, Hungary, Israel, Mexico, Serbia, Slovenia, Spain, Switzerland and the United Kingdom) could be consulted in document *CAHDI (2018) 4 prov confidential bilingual*. Since the last meeting, only one new contribution, from Spain, had been submitted to the Secretariat. The Chair encouraged delegations which had not yet done so to submit their contributions.

22. The Chair recalled that, at the last CAHDI meeting, the representative of the Netherlands presented a document (*CAHDI (2017) 21 confidential*) summarising the main trends of the replies

already received from States and further examining this issue in the context of peacekeeping and police operations.

23. The representative of the Netherlands thanked the delegations who had provided new contributions and noted that, in relation to the possibility of drafting a resolution on this issue for the consideration of the UN General Assembly, they are still considering the most desirable manner of taking this issue forward.

24. The representative of Belgium expressed the intention of its delegation to submit a reply to the questions on this issue before the 2018 September CAHDI meeting. Furthermore, he provided information to the CAHDI concerning the Belgian case law on this matter. In this respect, he underlined that this is a sensitive issue related to the scope of the immunities of international organisations allowing them to fulfil their missions but that cases related to trade and labour disputes would in principle not raise many problems if an internal mechanism exists providing a remedy for an effective protection of individual victims of a damage allegedly caused by the organisation as guaranteed in the ECHR. He explained that the Belgian *Cour de Cassation* in three labour disputes judgements of 21 December 2009 decided that the jurisdictional immunity of an international organisation can be set aside if the international organisation does not establish an effective remedy and the civil servant of the international organisation is therefore deprived of the right to access to a court. It is therefore important to examine whether the remedies of the international organisation effectively protect the rights guaranteed by the ECHR, in particular its Article 6 paragraph 1. The Belgian representative, however, pointed out that claims based on the operational activities of international organisations such as military or peacekeeping operations are a more delicate matter in which the principle of proportionality should be applied. In this respect, he noted that, in a recent case opposing relatives of victims who died during air strikes conducted under the NATO coordination in June 2011 before the Appeals Court of Brussels, the Court based itself on the jurisprudence of the European Court of Human Rights (ECtHR) in *Stichting Mothers of Srebrenica*[3] and decided that the right of access to a court of the claimants cannot justify waiving the immunity of the NATO in that context and taking into account the three following principles: NATO is a military alliance which, in line with the purposes and principles of the UN, pursues international peace and security. NATO's interventions, particularly those carried in the framework of Security Council Resolutions, are crucial for the realisation of the objective of maintenance of international peace and security. To subject the NATO missions to the jurisdiction of national courts will allow states, through their courts, to interfere in the realisation by NATO of its fundamental mission in this field including in the effective implementation of these operations. These interferences are precisely those which NATO's immunity legitimately seeks to prevent so that it can act independently.

25. Several delegations expressed their intentions to submit a reply to the questions on these issues in the near future.

26. 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

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

- Declaration on Jurisdictional Immunities of State Owned cultural Property

[3] ECtHR, *Stichting Mothers of Srebrenica and others v. the Netherlands,* no. 65542/12, decision of 11 June 2013.

28. The Chair recalled that at the 45th meeting of the CAHDI (Strasbourg, France, 25-26 March 2013), the delegations of the Czech Republic and Austria presented an initiative 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) in order to guarantee the immunity of State cultural property on loan. This Declaration on Jurisdictional Immunities of State Owned Cultural Property was presented at the 46th meeting of the CAHDI (Strasbourg, France, 16-17 September 2013). On this occasion, it was recalled that this Declaration had been elaborated as a legally non-binding document expressing a common understanding of *opinio juris* on the basic rule that certain kind of State property (cultural property on exhibition) enjoyed jurisdictional immunity.

29. The Chair informed the delegations that, since the last CAHDI meeting, there had been no new signatures of the Declaration. 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, Holy See, Hungary, Ireland, Latvia, Luxembourg, the Netherlands, Portugal, Romania, the Russian Federation and the Slovak Republic). The delegations of the Czech Republic and Austria encouraged delegations which had not done so yet to sign the Declaration.

30. The Chair further 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.

- Questionnaire on the Immunity of State Owned Cultural Property on Loan

31. The Chair recalled that, beside the Declaration, this issue is mirrored in the CAHDI activities in the form of a questionnaire on national laws and practices concerning the topic of "*Immunity of State Owned Cultural Property on Loan*", drafted by the Secretariat and the Presidency of the 47th CAHDI meeting in March 2014.

32. 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 (2018) 5 prov confidential bilingual*). Since the last meeting, no delegation had submitted a contribution to this questionnaire

iii. Immunities of special missions

33. Delegations were reminded that the topic of "*Immunities 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.

34. The Chair recalled that, considering the topicality and importance of this issue, the CAHDI agreed at its 54th meeting[4] that Sir Michael Wood, member of the United Nations International Law Commission (ILC) and former Chair of the CAHDI, will 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. This analytical study will become a book similar to previous CAHDI publications[5]. A contract

[4] See document *CAHDI (2017) 23 prov restricted until approval* paragraphs 42-47.
[5] *State practice regarding State Immunities* (2006, ISBN-13 9789004150737, xxviii, 1043 pp.); *Treaty Making - Expression of Consent by States to be Bound by a Treaty* (2001, ISBN-13 9789041116925, 720 pp.); *State Practice regarding State Succession and Issues of Recognition* (1999, ISBN-13 9789041112033, 528 pp.).

between the Council of Europe and Brill-Nijhoff Publishers for the publication of this new CAHDI book has already been concluded by the Secretariat.

35. The Chair further recalled that 31 Member States of the Council of Europe and five non Member States of the Council of Europe participating in the CAHDI have replied to the questionnaire on "Immunities of Special Missions", as contained in document *CAHDI (2018) 6 prov bilingual*. Since the Secretariat contacted all delegations in June 2017 in view of this new publication most of them have confirmed that no modification in their replies was necessary. Furthermore, 9 delegations (Belarus, Estonia, Finland, France, Germany, Italy, Mexico, the Netherlands and Sweden) have revised their replies. Lastly, 12 delegations (Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Hungary, Israel, Japan, Malta, Republic of Moldova, Slovenia, Spain and Ukraine) have prepared new replies to the questionnaire. Israel revised its reply on 11 April 2018. In short the following 36 States have already replied to the questionnaire: Albania, Andorra, Armenia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Hungary, Ireland, Israel, Italy, Japan, Latvia, Malta, Mexico, the Netherlands, Norway, Republic of Moldova, Romania, Serbia, Slovenia, Spain, Sweden, Switzerland, Ukraine, the United Kingdom and the United States of America.

36. The representative of Canada informed the CAHDI that his delegation will shortly submit a reply to this questionnaire.

37. As agreed during the last CAHDI meeting, all replies contained in document *CAHDI (2018) 6 prov bilingual* are at present public replies and will be included, in their present form, in the forthcoming CAHDI publication.

iv. Service of process on a foreign state

38. 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 was prepared to which 30 delegations (Albania, Andorra, Austria, Belarus, Belgium, Bosnia and Herzegovina, Canada, Cyprus, the Czech Republic, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Latvia, Mexico, the Netherlands, Norway, Portugal, Romania, Serbia, Slovenia, Spain, 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 (2018) 7 prov confidential bilingual*. Since the last meeting, two new contributions from Bosnia and Herzegovina and Spain had been submitted to the CAHDI Secretariat.

39. 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.

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

41. The representative of Belgium provided information to the CAHDI in relation to a recent case before the Belgian courts concerning the means of notification of a judgment of the *Court of Appeal of Kinshasa* in 2009 condemning Belgium to compensation to two Congolese nationals. In 2016, the *First Instance Tribunal of Brussels* issued an exequatur order authorising the execution of this judgement of the *Court of Appeal of Kinshasa* in Belgium. He noted that the Belgian State instituted third party proceedings to this *exequatur* order, requesting its retraction and for the request for *exequatur* to be revoked on the grounds that the service of process of the third party proceedings leading to the judgment by the *Court of Appeal of Kinshasa* had not been duly served,

preventing thus the Belgian state from appearing in court and from developing a substantive defence. The French-speaking *First Instance Tribunal of Brussels* ruled, on 28 February 2018, that, unlike a service of process in Belgium, when the proceedings take place in a foreign State, the 1961 *Vienna Convention on Diplomatic Relations* must be applied. Under Article 22 of the Convention, inviolability of the premises of a diplomatic mission is guaranteed and bailiffs prevented from entering the premises. The Tribunal noted that customary law would have required the bailiff to file a notification at the Congolese Ministry of Foreign Affairs, which would have also been transmitted to the Embassy in Brussels, which would have in turn transmitted it by way of a *note verbale* to the Belgian Ministry of Foreign Affairs. Therefore, from the point of view of state immunity rules and procedures, the Tribunal considered this customary law to be of public order, and that a judgment rendered by a court seized with disregard of customary law cannot be executed in Belgium. In short, the Belgian Tribunal concluded that the judgement rendered by the *Court of Appeal of Kinshasa* had been inappropriately notified and decided that the judgement cannot be enforced in Belgium.

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

42. The Chair reminded the Committee that the CAHDI followed the status of ratifications and signatures to the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (2004) (henceforth the 2004 UN Convention) since its 29th meeting in March 2009. In this respect, she informed the Committee that, since its last meeting, 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. Finally she pointed out that in order for the 2004 UN Convention to enter into force, the deposit of 30 instruments of ratification, acceptance, approval or accession with the Secretary General of the United Nations were needed.

43. The representative of Canada informed the CAHDI that the Canadian *Justice for Victims of Terrorism Act,* which removes the immunity from jurisdiction of States designated by the Canadian government as sponsors of terrorism, effectively prevented Canada from becoming a Party to this 2004 UN Convention.

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

44. 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.

45. The representative of the Netherlands informed the CAHDI of a decision of the Dutch Supreme Court of 1 December 2017 relating to immunity of foreign states and international organisations. Following this decision, as of 1 January 2018 Dutch courts are required to examine the immunity of a foreign state or international organisation irrespective of whether they appear before the Court to invoke such immunity. Prior to this decision, Dutch Courts were not required to examine whether foreign states or international organisations could invoke immunity and it was left to the foreign state or international organisation concerned to appear before the court to invoke immunity.

46. The representative of Hungary provided the CAHDI with information on their practice with regards to immunities. She indicated that, Hungary being a host State to a number of international

organisations, it has come to their attention that some international organisations apply for European Union or other funds, sometimes without the knowledge of its Member State. She pointed out that this practice raises several questions since, in order to receive these funds there are conditions such as giving rights of access to bank accounts. She underlined that these questions are not only of a legal nature such as whether they possess immunity, but also of operational nature since the accountability of the organisation vis-à-vis the Member State is unclear. She stated that the potential challenges and issues this question raises call for careful examination. Furthermore, she explained that it has become common practice for the Department of Public International Law of the Hungarian Ministry of Foreign Affairs to contribute to the training of judges by giving judges of the national office for the judiciary (an administrative body also responsible for the training of judges) lectures on immunities under International Law. She stated that these occasions have proved very beneficial as they constitute an invaluable opportunity for exchange of views, and that they are envisaging the possibility of establishing a similar cooperation with regard to the training of prosecutors.

47. The representative of France provided information on the evolution of the jurisprudence of the French *Cour de Cassation* regarding diplomatic immunity. The representative of France explained that the Court had in the past had an inconsistent approach to the question of whether, a contract containing a general clause whereby a State accepts a waiver of immunities can be used by its creditors to request enforcement measures against properties of diplomatic missions belonging to this State. In the past, the French Court had considered that state immunity could only be waived in France following a specific renunciation from the foreign State involved, but in 2015 it changed its position ruling that a general renunciation sufficed[6]. Since then, a Law[7] was adopted at the end of 2016, listing the immunities from which foreign States benefit and introducing an authorisation procedure under the control of a judge before immunities can be waived. Furthermore, following this new law, immunity of properties belonging to diplomatic missions can only be waived following a specific renunciation, position to which the French *Cour de Cassation* reverted in a judgement of 10 January 2018. Finally, he noted that this was a prime example of how the interplay between the Government, the Parliament and the judiciary enable the enforcement and application of international law.

48. The representative of Canada informed the CAHDI of recent developments in the case of *World Bank Group v. Wallace*[8] in which a Canadian company sought to enforce an arbitral award against Lybia through the garnishment of the Libyan embassy bank account. Due to the non-specification of the immunity of embassies bank accounts in the 1961*Vienna Convention on Diplomatic Relations* the Ontario Superior Court of Justice found that the diplomatic immunity of the bank account was a question of customary international law. This Court decision was later appealed but in late September 2015 it was adjourned concluding that it was premature to hear the appeal on its merits at the time.Bbut in November 2015 the Supreme Court heard an appeal of the Ontario Superior Court decision requiring the World Bank to produce third party records with respect to criminal proceedings before the court in another matter. In April 2016 the Supreme Court ruled that the appeal should be allowed and the production order set aside, stating that the trial judge had erred in narrowly construing the World Bank's immunity and determining that there had been a waiver on inviolability.

49. The representative of Greece informed the CAHDI of a case on the question of bank accounts of the Libyan embassy in Greece before the Greek Supreme Court. The *Supreme Court* in this case upheld the previous decision of the lower court, considering that, based on Article 22(3) of the 1961 *Vienna Convention on Diplomatic Relations* and stemming from the purpose of privileges and immunities enshrined in its Preamble, property of a foreign state in Greece in use or intended to be used in the exercise of public powers of that state is immune from execution. In its

[6] Cour de cassation, civile, Chambre civile 1, 13 mai 2015, 13-17.751, Publié au bulletin.
[7] Loi n° 2016-1691 du 9 décembre 2016 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique dite « loi Sapin II ».
[8] Supreme Court of Canada, *World Bank Group v. Wallace*, judgment of 29 April 2016, [2016] 1 R.C.S.; See, also, CAHDI (2016) 23, para. 130.

judgement, the Court also made reference to the 1954 *Resolution of the Institute of International Law on immunity of foreign states from jurisdiction and measures of executions* and recalled the rule of limited sovereign immunity as consolidated by the 2004 *United Nations Convention on Jurisdictional Immunities of States and their Property*, stating that the Convention codifies existing customary law. The Court ultimately found that whether bank accounts of a sovereign state serve sovereign purposes and thus enjoy immunity from execution has to be assessed on an ad hoc basis and *in concreto*. The Court in the present case held that the bank account in question partly served functional needs of the Libyan diplomatic mission and was partly intended for the construction of the new Libyan embassy, therefore concluding that the bank account enjoyed immunity.

50. The representative of the Czech Republic presented the CAHDI with another case relating to the execution against a bank account of the Indian embassy in Prague. The dispute originated as a labour dispute with the locally hired staff but in the appeal the Court found in favour of the Government and ordered the execution to be stopped. The Czech Court did not find the bank account to be covered by the provisions of the 1961*Vienna Convention on Diplomatic Relations.* However, the Court did agree on the second line of argument regarding the customary law status of Article 21 of the 2004 *United Nations Convention on Jurisdictional Immunities of States and Their Property*. The case has now been appealed to the Supreme Court.

51. 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 (2018) 8 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, one new contribution 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.

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

52. The Chair introduced the document *CAHDI (2018) 9 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, Montenegro, Norway, Republic of Moldova, 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, four revised contributions from Austria, Belarus, Denmark and Mexico had been submitted to the Secretariat.

53. 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.

54. 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.

55. The representative of Romania informed the CAHDI that following an internal reorganisation within the Office of the Legal Adviser of the Ministry of Foreign Affairs, her delegation would send a revised contribution to this questionnaire before the next CAHDI meeting.

56. 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

57. The Chair introduced document *CAHDI (2018) 10 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 Committees"*.

58. The Chair 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. She pointed out that so far the Secretariat has received contributions from 37 States and one Organisation (the European Union) to this database.

59. The representative of Switzerland underlined the importance of determining what effective legal actions are available to people who have been included in a list of sanctions. Referring to the case of *Al-Dulimi*[9] in which the ECtHR ruled that States had the obligation to ensure a minimum standard of treatment when enforcing UN sanctions, the Swiss representative stated that a solution at the UN level would be the most effective way of ensuring the respect of human rights and international peace and security. Furthermore, the representative of Switzerland presented "*Fairly Clear Risks: protecting UN sanctions legitimacy and effectiveness through fair and clear procedures*"[10], a 2018 study financed by Switzerland and published by the United Nations University. Highlighting the fact that non-compliance of sanctions with human rights can lead to States being unable of implementing them and consequently creating a risk of fragmentation of the UN sanctions system, the study makes a number of recommendations not only to UN organs but also to its Member States. Finally, the delegation of Switzerland stressed its perseverance in pursuing a better inclusion of human rights in the UN sanctions system.

9. European Convention on Human Rights

- **Exchange of views with Ms Florence MERLOZ, Chair of the Drafting Group on the place of the European Convention on Human Rights in the European and International Legal Order (DH-SYSC-II)**

60. The Chair welcomed and thanked Ms Florence Merloz, Chair of the *Drafting Group on the place of the European Convention on Human Rights in the European and International Legal Order* (DH-SYSC-II) for having accepted the invitation of the CAHDI. The Chair further pointed out that Ms Merloz is Deputy Director for Human Rights at the Directorate of Legal Affairs of the French Ministry for Europe and Foreign Affairs (France) where she was seconded from the judiciary.

61. The Chair also drew the attention of the CAHDI experts to the document *DH-SYSC-II (2018) Info1* prepared by the Secretariat of the Steering Committee for Human Rights (CDDH),

[9] ECtHR, Al-Dulimi and Montana Management Inc. v Switzerland, case no. 5809/08, Grand Chamber judgment of 21 June 2016.
[10] This Study can be found at the following link.

which contains extensive information on the terms of reference, context of the work and working methods of this Drafting Group.

62. Ms Merloz expressed her highest appreciation for this CAHDI invitation and underlined that it is a great privilege and pleasure to have the opportunity to present the work of the DH-SYSC-II and to hold this exchange of views with the CAHDI experts. She further pointed out the importance of the work of the CAHDI for the DH-SYSC-II as many of the issues examined by the DH-SYSC-II were part of the permanent agenda of the CAHDI. She also thanked the CAHDI for having already appointed its Vice-Chair, Mr Petr Válek (Czech Republic), to represent the CAHDI in the DH-SYSC-II.

63. Ms Merloz provided the CAHDI with an overview of the terms of reference of the DH-SYSC-II, the context of its work as well as the working methods of the Drafting Group.

64. She informed the CAHDI that at their 1252nd meeting on 30 March 2016, the Ministers' Deputies welcomed the report of the Steering Committee for Human Rights (CDDH) on the longer-term future of the system of the *European Convention on Human Rights*, took note of the Court's comments on the Report, and agreed on its follow-up. The Deputies notably "*instructed the CDDH to carry out a detailed analysis of all questions relating to the place of the Convention 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 report (conclusion § 203 iii)*". Therefore, the DH-SYSC (Committee of Experts on the System of the European Convention on Human Rights) is entrusted by the CDDH to "prepare a draft report for the Committee of Ministers containing conclusions and possible proposals for action (deadline: 31 December 2019)". The preparatory work was entrusted to the DH-SYSC-II.

65. She underlined that the DH-SYSC-II is therefore invited to work consecutively, and in the following order, on each one of the three themes to be examined in the context of its work, as they emerge from the CDDH Report on the longer-term future of the system of the European Convention on Human Rights:

(i) the challenge of the interaction between the Convention and other branches of international law, including international customary law;
(ii) the challenge of the interaction between the Convention and other international human rights instruments to which the Council of Europe member States are parties;
(iii) the challenge of the interaction between the Convention and the legal order of the EU and other regional organisations.

66. The future Report on the place of the *European Convention on Human Rights* in the European and International legal order will accordingly consist of three main chapters, one for each of the said three themes. Each challenge identified in the CDDH Report will be subject to stocktaking followed by an analysis identifying the underlying risks that it entails, as well as the concrete and pragmatic responses thereto, from the perspective of the system of the Convention. As regards the mid and longer-term responses, the focus is on the follow-up actions of the Council of Europe bodies. The aim of the work 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 by diverging interpretations.

67. Ms Merloz stressed that the goal of the DH-SYSC-II is not to produce an academic work but make an effort to provide realistic advice with an added value. This will be facilitated through the appointment of specific rapporteurs and contributors for each theme and the participation of experts in its meetings. Adding to this, due to their complexity, the main themes mentioned before are separated into subthemes in order to enable the simultaneous progress of work in all three of them.

68. The Chair thanked Ms Merloz for her insightful and interesting presentation and invited delegations which so wished to take the floor.

69. In reply to the question regarding the practical use of the Report, Ms Merloz clarified that this Report, like the Report on the future of the ECHR in 2015, will be brought to the Committee of Ministers for adoption. Moreover, responding to the question of whether findings of the Report can contribute to the prevention of fragmentation of international law in the case law of the ECtHR, she clarified that the primary goal of the DH-SYSC-II is to identify whether there is a risk of fragmentation and, in such a case, propose certain solutions for its prevention. She stressed that the role of the DH-SYSC-II is not to indicate to the ECtHR which methodology of interpretation to use or how to apply the ECHR but to engage with it in a constructive dialogue. Ms Merloz indicated that it was possible that the report could benefit from a follow-up work like its 2015 predecessor did.

70. To a question on the work plan of the DH-SYSC-II, Ms Merloz gave an indicative timeline of its work, mentioning that six meetings have been planned with the possibility of having an additional one should the work not have been concluded. She specified that the drafting work is planned to proceed mainly through the written comments prepared by the delegations and written exchange of views, allowing for more substantive discussions during the meetings. She further informed the CAHDI that in the upcoming meeting in April 2018, the DH-SYSC-II will discuss the draft chapter on *"State responsibility and extraterritorial application of the ECHR*"; and the draft report on the *"Interaction between the resolutions of the Security Council and the ECHR*", together with the written comments prepared by the delegations, and hold a first brainstorming discussion on the topic of *"Methodology of interpretation by the ECtHR and its approach to international law*" as well as on the topic of the "*Interaction between international humanitarian law and the ECHR*".

71. Lastly, in response to a question regarding the nature of the rights examined by the DH-SYSC-II and whether social and economic rights outside the provisions of the ECHR will be included in its analyses, Ms Merloz indicated that this possibility had not yet been explored. She stressed that a comparison of the methods of interpretation of human rights texts by different organs would be certainly included in the Report but that it remained to be determined whether and how economic and social rights could be part of this comparison.

72. The chair thanked Ms Merloz for this interesting and fruitful exchange of views and expressed the CAHDI's wish to continue to cooperate in the future with the DH-SYSC-II. In this respect, the Chair underlined that in accordance with its Terms of Reference, the CAHDI can only "*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*". Therefore, any formal CAHDI opinion should be requested by the Committee of Ministers following the prior request of the CDDH to the Committee of Ministers. Nevertheless, she mentioned the possibility of an informal exchange of views via the representative of the CAHDI, Mr Petr Válek, to the DH-SYSC-II.

- **Cases before the European Court of Human Rights involving issues of public international law**

73. The Chair introduced the topic of the cases before the European Court of Human Rights (ECtHR) involving issues of public international law and invited delegations to inform the CAHDI about any judgments, decisions or resolutions regarding cases before the ECtHR concerning their countries issued since the last CAHDI meeting.

74. The representative of Ukraine drew the attention of the CAHDI to the case of *Tsezar and Others v. Ukraine*[11] concerning a complaint by seven retired residents of Donetsk who had not

[11] ECtHR, *Tsezar and Others v. Ukraine*, nos. 73590/14, 73593/14, 73820/14, 4635/15, 5200/15, 5206/15, and 7289/15, Chamber judgment of 13 February 2018.

been able to bring cases challenging a suspension of pension payments and other social benefits before a court in Donetsk as, due to the conflict in eastern Ukraine, the authorities had transferred the Donetsk courts to neighbouring regions which were under Government control. The applicants invoked Article 6, Article 14 and Article 1 of Protocol No. 1 of the *European Convention on Human Rights*. The Court, following its previous judgment in case *Khlebik v. Ukraine*[12], ruled that Ukraine had taken appropriate measures to organise its judicial system in a way that is in compliance with Article 6 in the situation of an ongoing conflict. There was no evidence that the applicants' personal circumstances had prevented them from travelling to the area where the courts were now located to file their claims, and the Government's actions had not impaired the very essence of their right of access to a court. Limitations to the rights of the applicants were found to be proportionate given the situation. Regarding Article 1 of Protocol no. 1, the applicants' complaint was found to be inadmissible because domestic remedies had not been exhausted.

75. The representative of Austria informed the CAHDI of the case *D.L. v. Austria*[13]. The applicant, Mr D.L., is a Serbian national living in Austria since 2001, currently in detention at Vienna-Josefstadt Prison (Austria) pending his extradition to Kosovo*. Suspected of aggravated murder, he was arrested and taken into detention pending extradition in January 2016 on the basis of an international arrest warrant issued by the Kosovo* authorities. The applicant had allegedly ordered the murder of his former brother-in-law but one of the latter's cousins has been killed by mistake. The applicant stated that due to the influence of his brother-in-law's clan in Kosovo*, his life would be threatened if he was extradited there, and also that detention conditions in Kosovo* were deplorable, and amounted to inhuman and degrading treatment. However, the ECtHR found that the extradition was permissible due to the fact that his brother in law's clan was not as powerful as described by the applicant and some of its members were imprisoned in Kosovo*. The applicant was not extradited on the basis of an interim measure granted by the ECtHR under *Rule 39 of the Rules of Court*, which indicated to the Austrian Government that he should not be extradited for the duration of the proceedings before it. The ECtHR found that in the event of Mr D.L.'s extradition to Kosovo*, there would be no violation of *Article 2* (right to life) and *Article 3* (prohibition of inhuman or degrading treatment) and that the interim measure not to extradite Mr D.L. would still be in force until the judgment becomes final or until further order.

76. The representative of Italy referred to the judgment in case *V.C. v. Italy*[14].The case concerned a minor suffering from alcohol and drug addiction who had been the victim of a child prostitution ring and gang rape. The applicant complained that the Italian authorities had not taken all the necessary steps to protect her as a minor and victim of a prostitution ring, and that she had not had a remedy in domestic law by which to complain of the alleged violations. The ECtHR found that the national authorities had been aware of the applicant's vulnerable situation and had not acted with the necessary diligence and had not taken all timely reasonable measures to prevent the real and immediate risk she faced. Indeed, although the criminal courts had acted promptly, the Youth Court and the social services had not taken any immediate protective measures, even though the applicant's vulnerable position was known and proceedings concerning her sexual exploitation and an investigation into the gang rape were on-going. Therefore, the ECtHR found a violation of Article 3 (prohibition of torture and inhuman or degrading treatment) and Article 8 (right to respect for private and family life) of the ECHR due to the lack of necessary diligence on the part of the authorities and breach of the positive obligations of the State.

77. Lastly, the representative of Switzerland informed the CAHDI of the case of *Nait-Liman v. Switzerland*[15]. The case concerned the refusal by Swiss courts to examine Mr Naït-Liman's civil claim for compensation for the non-pecuniary damage arising from acts of torture allegedly inflicted

[12] ECtHR, *Khlebik v. Ukraine*, no.2945/16, Chamber judgment of 25 July 2017.
[13] ECtHR, *D.L. v. Austria*, no. 34999/16, Chamber judgment of 7 December 2017.

[*] *All references to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.*

[14] ECtHR, *V.C. v. Italy*, no. 54227/14, Chamber judgment of 1 February 2018.
[15] ECtHR, *Nait-Liman v. Switzerland*, no. 51357/07, Grand Chamber judgment of 15 March 2018.

on him in Tunisia. The ECtHR considered, on the basis of a comparative legal study, that neither universal civil jurisdiction in respect of acts of torture nor a forum of necessity under international law imposed an obligation on the Swiss authorities to open their forum with a view to ruling on the merits of Mr Naït-Liman's compensation claim. With regard to the criteria laid down by the legislation, the ECtHR concluded that by introducing a forum of necessity with the criteria established in section 3 of the *Federal Law on Private International Law*, the Swiss legislation had not exceeded its margin of appreciation. As to the margin of appreciation of the domestic courts, the ECtHR could perceive no arbitrary or manifestly unreasonable elements in the *Federal Supreme Court*'s interpretation in its judgment of 22 May 2007. Indeed in the latter judgment Mr Naït-Liman's appeal was dismissed on the basis that the Swiss courts did not have territorial jurisdiction. The ECtHR reiterated however, that this conclusion did not call into question the broad consensus within the international community on the existence of a right for victims of acts of torture to obtain appropriate and effective redress, nor the fact that the States were encouraged to give effect to this right. Based on the above, the ECtHR held that there had been no violation of Article 6, paragaph1 (right to access to a court) of the ECHR.

78. Finally, the Chair drew the attention of the CAHDI experts on the revision and updated – until 31 December 2017- by the Secretariat of the document on the *Case Law of the European Court of Human Rights related to Public International Law* (document *PIL (2018) Case Law*) which it is available at the CAHDI website. In relation to this document, she further pointed out that taking into account that this is becoming a very voluminous document due to the increased number of cases, the Secretariat will prepare in the future only annual appendices to this document with the new cases.

10. Peaceful settlement of disputes

79. The Chair recalled that the CAHDI decided, during its 54th meeting, to enlarge the content to be examined in the framework of the item on "Peaceful Settlement of Disputes", which was so far focused on the clauses of acceptance of the compulsory jurisdiction of the International Court of Justice (ICJ), in order to include, in the future annotated agendas, the other clauses of attribution of jurisdiction to the ICJ, the case law of the International Tribunal of the Law of the Sea (ITLOS), inter-States arbitration cases and any other relevant cases of peaceful settlement of disputes between States.

80. The Chair further recalled that following this decision, the delegation of France, together with the Secretariat, have prepared a working document on "*The Means of Peaceful Settlement of Disputes"* (document *CAHDI (2018) 1 restricted*) in order to provide to CAHDI delegations with an overview of the different means of peaceful settlement of disputes, including the different instruments by which a State can accede to them or recognise their jurisdiction.

81. The delegation of France provided an overview to the CAHDI on the main trends and the aim of this new document *(CAHDI (2018) 1 restricted)* in particular

- on the background of the work of the CAHDI in this matter;
- the bases for the jurisdiction of the ICJ (special agreements, compromissory clauses, declarations of acceptance of the compulsory jurisdiction, *forum prorrogatum*);
- the other jurisdictional means of peaceful settlement of disputes (the International Tribunal for the Law of the Sea (ITLOS), arbitral tribunals, the dispute settlement body of the World Trade Organisation and the international tribunals and courts);
- the non-jurisdictional means of peaceful settlement of disputes (negotiations, mediation, conciliation).

82. The representative of France finally stressed that this document does not aim to be exhaustive but to provide a framework within which the CAHDI can have thematic discussions and present useful information.

83. Many delegations thanked France for this initiative and for having prepared this Document setting out the different means for the peaceful settlement of disputes. These delegations agreed on the importance of including in this agenda item the different bases for the jurisdiction of the ICJ besides declarations of acceptance of the compulsory jurisdiction. Concerning this matter one delegation recalled the 1992 United Nations *Handbook on the Peaceful Settlement of Disputes between States*[16]. Another delegation pointed out that the enlargement of the scope of this item should not be used for promoting any national political agenda. In this respect, it was underlined that the aim of this enlargement is to provide the CAHDI experts with an adequate forum for presenting the legal and factual background of the relevant cases.

84. The delegation of Ukraine informed the CAHDI that on 16 September 2016, Ukraine served on the Russian Federation a Notification and Statement of Claim under Annex VII to the 1982 *United Nations Convention on the Law of the Sea* (UNCLOS) referring to a dispute concerning coastal state rights in the Black Sea, Sea of Azov, and Kerch Strait. The *Permanent Court of Arbitration* acts as Registry in this arbitration. On 19 February 2018, Ukraine filed its Memorial in this arbitration proceeding. The representative of Ukraine gave a brief summary of claims made by Ukraine in its written pleadings[17] **.**The Russian Federation should file its Counter-Memorial on or before 19 November 2018 and if it would like to raise jurisdictional objections it should do so within three months by 19 May 2018. The representative of the Russian Federation stated that pending cases before international courts and tribunals are not to be substantively discussed in a politicized manner in CAHDI in particular since the other party in the proceedings is limited in presenting its position regarding the matter.

85. The French delegation provided the CAHDI with information on the recent developments regarding a dispute brought against France by Equatorial Guinea before the ICJ[18] on 13 June 2016 arising from certain on-going criminal proceedings in France, concerning the immunity from criminal jurisdiction of the Second Vice-President of the Republic of Equatorial Guinea in charge of Defence and State Security, and the legal status of the building which houses the Embassy of Equatorial Guinea, both as premises of the diplomatic mission and as State property. Equatorial Guinea brought the case before the ICJ invoking three bases of jurisdiction: the *Vienna Convention on Diplomatic Relations* of 18 April 1961 regarding the legal status of the building which Equatorial Guinea claims to house its Embassy, the *United Nations Convention against Transnational Organized Crime* of 15 November 2000 regarding the criminal proceedings against the Second-Vice President as they claim to be in breach of his personal immunity, and also on the basis of general international law. In December 2016, the ICJ issued its Order[19] regarding the request of Equatorial Guinea for provisional measures and indicated 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 February 2018, a hearing[20] on the preliminary objections on the jurisdiction of the ICJ raised by France[21] took place and the ICJ began its deliberation.

86. The representative of Canada pointed out that a declaration recognising the compulsory jurisdiction of the ICJ does not necessarily mean the complete acceptance of its jurisdiction. Each State can indicate exceptions and thus exclude certain disputes from the ICJ jurisdiction, such in

[16] Handbook on the peaceful settlement of disputes between states, UN Office of Legal Affairs, Codification Division, 1992.
[17] Statement of Ukraine's Foreign Ministry on the Filing of its Memorial in Arbitration Proceedings against the Russian Federation under the UN Convention on the Law of the Sea, available at: https://mfa.gov.ua/en/press-center/comments/8479-zajava-mzs-ukrajini-shhodo-podachi-ukrajinoju-memorandumu-v-arbitrazhnomu-provadzhenni-proti-rf-za-konvencijeju-oon-z-morsykogo-prava
[18] Immunities and Criminal Proceedings (Equatorial Guinea v. France), Application instituting proceedings, 13 June 2016.
[19] Immunities and Criminal Proceedings (Equatorial Guinea v. France), Order of 7 December 2016 regarding the request for the indication of provisional measures.
[20] Immunities and Criminal Proceedings (Equatorial Guinea v. France), Conclusion of the public hearings, 23 February 2018.
[21] Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary objections of France, 30 March 2017.

the case of *Spain v. Canada*[22] concerning fisheries and *Serbia and Montenegro v. Canada*[23] concerning the use of force.

87. The Chair furthermore presented the document on the "*Compulsory jurisdiction of the International Court of Justice*" (document *CAHDI (2018) 11*) containing the declarations recognising the compulsory jurisdiction of the ICJ by 27 member States of the Council of Europe[24] and from other five States[25] represented within the CAHDI. The Chair informed the CAHDI that, since its last meeting, no delegation has notified a new declaration concerning the compulsory jurisdiction of the ICJ under Article 36 of the Statute of the ICJ.

88. The Chair thanked all delegations for this interesting and comprehensive exchange of information on different means of peaceful settlement of disputes between States.

89. The Chair concluded the discussions on this item by reiterating that delegations should abstain, in the future discussions, from making political statements under this item and restrict themselves to the legal and factual backgrounds of the relevant cases. Furthermore, she noted that the CAHDI agreed to merge the current two documents related to the peaceful settlement of disputes (documents *CAHDI (2018) 1 restricted* and *CAHDI (2018)* 11) and entrusted the Secretariat to prepare a new CAHDI document containing the information presented in both documents.

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

90. In the framework of its activity as the *European Observatory of Reservations to International Treaties*, the CAHDI examined a list of outstanding reservations and declarations to international treaties. The Chair presented the documents updated by the Secretariat containing these reservations and declarations which are subject to objections (documents *CAHDI (2018) 12 revised confidential* and *CAHDI (2018) 12 Addendum prov confidential bilingual*) and opened the discussion. The Chair also drew the attention of the delegations to document *CAHDI (2018) Inf 1* containing reactions to reservations and declarations to international treaties previously examined by the CAHDI and for which the deadline for objecting had already expired.

91. 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 (2018) 12 confidential* comprised 19 reservations and declarations. 14 of them were made with regard to treaties concluded outside the Council of Europe (Part I of the document) and five 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 (2018) 12 rev confidential)*. The Chair further noted that four of these reservations and declarations were already discussed at the 54th CAHDI meeting in September 2017 and 15 had been newly added since then.

92. With regard to the **interpretative declaration made by Kazakhstan** to the *Arms Trade Treaty* in which it is specified that under Article 28 Kazakhstan will interpret "diversion" as "illegal diversion" no comments were made by delegations.

[22] Fisheries Jurisdiction (Spain v. Canada), Judgment on questions of jurisdiction and/or admissibility, 4 December 1998
[23] Legality of Use of Force (Serbia and Montenegro v. Canada), Judgment on preliminary objections, 15 December 2004.
[24] 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.
[25] Australia, Canada, Japan, Mexico and New Zealand.

93. With regard to the **declaration made by Venezuela** to the *Doha Amendment to the Kyoto Protocol*, the representative of Mexico informed the CAHDI that his delegation was still examining the possibility to object to this Declaration due to Venezuela's exclusion from the commitments of the Kyoto Protocol and of any future arrangements that they have agreed to comply with in order to tackle down the issue of climate change.

94. With regard to the **declaration made by Turkey** concerning the *Optional Protocol to the Convention on the Rights of the Child on a Communication Procedure* the representative of Cyprus informed the CAHDI that her delegation is closely examining this Declaration and that her Country would in its response take into account the objections and declarations already filed to the reservations and declarations mentioned in the present Declaration, particularly Cyprus' reaction to Turkey's Declaration to the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* and to the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*.

95. With regard to the **reservation and declaration made by Monaco** to the *Convention on the Rights of Persons with Disabilities* the Austrian and German representatives expressed their concern, underlining that it was difficult to understand the reasoning behind such a reservation. They pointed out that the features of the state of Monaco warranting the replacement of the obligation to adopt "appropriate measures" by a reference to "individual measures" were unclear. Furthermore, they highlighted that Monaco in its Declaration states that the "*Convention does not imply that persons with disabilities should be afforded rights superior to those afforded to persons without disabilities*" despite the fact that one of the main elements of this Convention is to grant special rights to persons with disabilities.

96. With regard to the **declaration made by Libya** to the *Convention on the Rights of Persons with Disabilities*, the Chair informed the members of the CAHDI that the delegation of Germany had already objected to the Declaration on 20 March 2018. Eight delegations, namely Austria, Ireland, Finland, France, the Netherlands, Norway, Portugal and Sweden, informed the CAHDI that they were considering objecting to this Declaration, underlining that this Declaration, by subjecting provisions of the Convention to the Islamic Sharia and its national legislation, seems in fact to amount to a reservation.

97. The representative of Ireland informed the CAHDI that his country deposited the instrument of ratification to the *Convention on the Rights of Persons with Disabilities* on 20 March 2018 and that his country has already made a small number of objections to reservations of this type.

98. With regard to the **reservations and declarations made by Suriname** to the *Convention on the Rights of Persons with Disabilities*, the representative of Mexico informed the CAHDI that his delegation was considering objecting to these declarations and reservations as they considered that Suriname is putting preconditions to their compliance with the Convention and discriminating persons with disabilities based on the financial implications of the measures to be adopted.

99. With regard to the **reservation and declarations made by Singapore** to the *International Convention for the Suppression of Acts of Nuclear Terrorism*, no comments were made by delegations. 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.

100. With regard to the **late reservation made by Bhutan** to the *United Nations Convention against Corruption*, the delegations of Finland, France and the Netherlands stated that they were considering objecting to this late reservation. The Chair recalled that 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."

101. With regard to the **reservation made by Fiji** concerning the *United Nations Convention Against Organized Crime* no comments were made by delegations. In this Reservation, Fiji reserves waiving its sovereign rights and states that it does not consider itself bound by the referral to dispute settlement mechanism provision.

102. With regard to the **reservation made by Fiji** concerning the *Protocol to Prevent, Supress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Organized Crime* no comments were made by delegations. In this Reservation, Fiji reserves waiving its sovereign rights and states that it does not consider itself bound by the referral to dispute settlement mechanism provision.

103. With regard to the **reservation made by Fiji** concerning the *Protocol Against the Smuggling of Migrants by Land, Sea and Air; Supplementing the United Nations Convention Against Organized Crime* no comments were made by delegations. In this Reservation, Fiji reserves waiving its sovereign rights and states that it does not consider itself bound by the referral to dispute settlement mechanism provision.

104. With regard to the **reservation made by Fiji** concerning the *Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention Against Organized Crime* no comments were made by delegations. In this Reservation, Fiji reserves waiving its sovereign rights and declares that it does not consider itself bound by the referral to dispute settlement mechanism provision.

105. With regard to the **reservations made by Jordan** to the *Protocol on the Privileged and Immunities of the International Seabed Authority*, no comments were made by delegations. Jordan made reservations in relation to Article 14 of the Protocol concerning the established compulsory mechanism of settlement of disputes.

106. With regard to the **declaration made by Myanmar** to the *International Covenant on Economic, Social and Cultural Rights*, seven delegations -namely Austria, Ireland, Finland, France, Germany, the Netherlands and Portugal- stated that they were considering objecting to this Declaration which could amount to a reservation. In this respect, they underlined the following two problematic issues of this Declaration: the narrow interpretation of the right to self-determination and the reference to the interpretation of the Covenant in accordance with the national Constitution.

107. With regard to the **reservation made by Poland upon ratification** to the *Council of Europe Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events* (CETS No. 218), confirming the reservation made at the time of signature in which Poland reserves the right to apply article 5 paragraph 2 of the Convention no comments were made by delegations. The Chair recalled that the CAHDI already examined this Reservation, which was made at the time of signature, in its previous two meetings.

108. With regard to the **declaration made by Turkey** to the *Council of Europe Convention on the Counterfeiting of Medical Products and Similar Crimes Involving Threats to Public Health* (CETS No. 211), the representative of Cyprus informed the CAHDI that her country already objected to this Declaration on 17 October 2017, registered at the Treaty Office on 7 November 2017.

109. In relation to the above-mentioned declarations made by Turkey, the **representative of Turkey** made the following statement: "The Declaration made by Turkey regarding the *Optional Protocol to the Convention on the Rights of the Child on Communication Procedure* is in

accordance with the said Protocol. It is about the competence of the *Committee on the Rights of the Child* as provided by the Protocol. It should also be noted that there are a number of other declarations regarding the competence of the Committee yet not mentioned in the working paper. As to the other aspect of the Declaration, I would like to recall that, according to international law, diplomatic relations can be established by mutual consent of the state. This fundamental principle is also enshrined in Article 2 of the *Vienna Convention on Diplomatic Relations*: every sovereign state has the sovereign power and discretion as to the recognition of a state and establishing diplomatic relations with other states. As a consequence of this order, a state party to an international legal instrument may deem it necessary and useful to inform other parties by means of a declaration on the scope of implementation of such instrument. Moreover, it could inform other parties that its participation in any Convention does not imply recognition of an entity which it does not recognise. Hence Turkey's declaration made in this regard does not amount to a reservation and should be considered in this context."

110. 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 representative of Azerbaijan underlined that he would like to make the following clarification: "the said Declaration concerns the territorial application of the Convention which demonstrates the actual situation and does not intend to purport the object and purpose of the Convention. Bearing in mind the substantive content of the Declaration which does not purport to exclude or to modify the legal effects of certain provisions of the Convention, it does not amount to a reservation". The representative of Armenia informed the CAHDI that, as indicated during the last meeting, her country had objected on 20 February 2018, registered at the Treaty Office on 26 February 2018, to the Declaration made by the Republic of Azerbaijan in respect of this Convention in its instrument of ratification deposited on 9 August 2017.

111. With regard to the **reservations and declarations made by Greece** 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 representative of Greece clarified that the intention was to stay within the confines of Article 29 of the Convention and that the Greek competent authorities assured her that these reservations and declarations are compatible with the Convention.

112. Concerning the **reservations and declarations made by Chile** to the *Convention on Cybercrime* (ETS No. 185) which contain a Reservation in respect of Article 29 paragraph 4 of the Convention, reserving the right to refuse the request for international assistance in cases where the conduct is not defined under Chilean law at the time of the request, no comments were made by delegations.

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

12. Exchange of views with Mr Allan Rosas, Judge at the Court of Justice of the European Union (CJEU)

113. The Chair welcomed and thanked Mr Allan Rosas, Judge at the Court of Justice of the European Union (CJEU), for having accepted the invitation of the CAHDI. She underlined that it was a pleasure and privilege for the Council of Europe and the CAHDI to count with his presence.

114. Mr Rosas expressed his highest appreciation for the CAHDI invitation and underlined that it was a great pleasure for him to participate in the CAHDI for the second time in his capacity as Judge of the CJEU.

115. Mr Rosas provided the CAHDI experts with an overview on "*The European Court of Justice and Public International Law*" and in particular on the European Union as an external actor and subject of international law; the conclusion of international agreements; the status of international law in European Union law; the avoidance of material breach and the dispute settlement mechanisms. The presentation of Mr Rosas is reproduced in **Appendix IV** to the present report.

116. The Chair thanked Mr Rosas for his insightful presentation and invited delegations which so wished to take the floor.

117. Many CAHDI delegations thanked Mr Rosas for the enlightening and interesting presentation. Following a question on the issue of the autonomy of the European Union law and whether the European Court of Justice (ECJ) is prepared to accept the jurisdiction of other international courts or tribunals which often have to interpret European law as part of the of the case before them, Mr Rosas underlined that the European Union, as a subject of international law, can conclude international agreements and therefore can incur international responsibility and accept the jurisdiction of international courts. Nevertheless, he stressed that there can be a problematic situation in the case of mixed agreements, where the competence of the European Union is not exclusive but shared with some or all of its Member States.

118. Furthermore, some delegations mentioned the recent ECJ judgment in the *Achmea* case[26] which concerned precisely the issue of the competence of *ad hoc* arbitration tribunals to send to ECJ a preliminary reference concerning the interpretation of the European law. Mr Rosas stressed that the *Achmea* case is not the first one to raise such issues. Indeed in the *Opinion 1/09 on the creation of a unified patent litigation system*[27], the *Opinion 2/13 on the accession of the European Union to the ECHR*[28] and the *Opinion 2/15 on the competence of the European Union regarding the conclusion of the Singapore Agreement*[29] the ECJ dealt with the issue of external competence of the European Union and court jurisdiction, although each one in a different light. Furthermore, Mr Rosas highlighted that according to the *Treaty on the Functioning of the European Union* (TFEU), which constitutes primary legislation of the European Union, the ECJ has the monopoly to decide on issues related to the European law[30] despite the fact that European law can be involved in cases brought before other international courts or tribunals (eg. World Trade Organisation (WTO) panels or in the new judicial provisions of the *Comprehensive Economic and Trade Agreement* (CETA) between Canada and the European Union).

119. In reply to the question on whether there is a potential risk of fragmentation or conflict when examining the nexus between the ECHR, Public International and European law, Mr Rosas

[26] Case C-284/16 , *Slowakische Republik v Achmea BV*, Judgment of the Court (Grand Chamber) of 6 March 2018, ECLI:EU:C:2018:158.
[27] *Opinion 1/09 on the creation of a unified patent litigation system*, 8 March 2011, ECLI:EU:C:2011:123.
[28] *Opinion 2/13 on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 18 December 2014, ECLI:EU:C:2014:2454.
[29] Opinion 2/15, on the Free Trade Agreement with Singapore, 16 May 2017, ECLI:EU:C:2017:376.
[30] Case C-459/03, *Commission of the European Communities v Ireland*, Judgment of the Court (Grand Chamber) of 30 March 2006, ECLI:EU:C:2006:345.

underlined that, because of the existence of many different judicial systems, the various international courts and tribunals and the national constitutional courts, the possibility of forum shopping in the area of settlement of disputes is indeed present. He further gave as an example the case of ITLOS and the ECJ which are both competent to decide on cases concerning the law of the sea but within different judicial systems.

120. In reply to a question regarding the disconnection clauses contained in certain Council of Europe conventions and their relation to dispute resolution mechanisms and the ECJ, Mr Rosas stressed that the disconnection clauses are different in every case and therefore it is difficult to provide a reply applicable to all of them. He further pointed out that the principle of mutual recognition and mutual trust which exists within the European law, obliging the Member States to recognise automatically criminal and civil law judgments of another Member State is essential in the European Union law system. This was also one of the main points in the *Opinion 2/13 regarding the accession of the European Union to the ECHR*. Lastly, Mr Rosas reiterated the willingness of the ECJ to take into consideration the decisions of international courts and tribunals, even in judicial systems where the European Union cannot participate, for instance the ICJ.

121. In reply to the question concerning the interconnection and possible tensions between the *Common European Asylum System* and Public International Law, more precisely the *Convention Relating to the Status of Refugees*[31] (Geneva Convention), Mr Rosas reminded that the Geneva Convention is present not only in primary[32] and secondary[33] European legislation but also in the case law of the ECJ. He further stressed that possible tensions are always present between internal and external law, even outside the framework of the European Union. Therefore, although the Geneva Convention is always relevant to the work of the ECJ, its application in concrete cases may differ due to some uncertainty regarding its interpretation.

122. Lastly, in relation to a question regarding the issue of "*mixity*" in the signature and ratification of Council of Europe conventions, Mr Rosas stressed that such cases, where both the European Union and its Member States are Parties, are extremely complex because it is very difficult to define where the competence of the European Union ends and where the Member States' competence begins. This can often result in cases of "*incomplete mixity*", where the European Union and some of the Member States ratify or accede to an international convention but some others do not although they are all considered to be bound through the European Union accession. Although this issue has not yet been examined by the ECJ in its jurisprudence, there have been some efforts to find a solution. For example, when the European Union concluded the *United Nations Convention on the Law of the Sea*[34], the relevant Council Decision[35] specified that it would come into force for the European Union when a majority of the "Community's Member States are parties to them, whereas the ratification process is under way in the other Member States" without, however, clarifying what would be the status of the Convention for the other Member States which had not yet ratified. Lastly, he expressed his personal opinion that the European Union and its Member States should adhere jointly to international conventions in order to provide for legal security.

123. The Chair of the CAHDI thanked Mr Rosas for the interesting and fruitful exchange of views.

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[31] UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

[32] Article 78(1) of the *Treaty on the Functioning of the European Union* (TFEU) and attached *Protocol No. 24 on Asylum for Nationals of Member States of the European Union*.

[33]For instance *Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person* (the Dublin Regulation) *OJ L 180,* 29.6.2013, p. 31–59 and *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection OJ L 180,* 29.6.2013, p. 60–95.

[34] UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982.

[35] Council Decision of 23 March 1998 concerning the conclusion by the European Community of the United Nations Convention of 10 December 1982 on the Law of the Sea and the Agreement of 28 July 1994 relating to the implementation of Part XI thereof; OJ L179 of 23/06/1998, p.1.

13. Consideration of current issues of International Humanitarian Law

124. 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.

125. The representative of the International Committee of the Red Cross (ICRC) took the floor and provided the CAHDI with updated information on the intergovernmental process on "*Strengthening Respect for International Humanitarian law*" which is jointly facilitated by the ICRC and Switzerland. In this context, he announced that the ICRC would host in May 2018 its fourth Formal Meeting since the 32nd International Conference of the Red Cross and the Red Crescent in 2015. In accordance with the work plan agreed upon at the end of 2017, the aim of this meeting is for the participating states to identify the converging elements underlying an outcome of the intergovernmental process, providing thus the parameters that any future proposals should meet. In preparation of this meeting, the ICRC and Switzerland organised an open-ended consultation on 8 February 2018 and another informal meeting on 27 March 2018 to continue the discussion on the identification of converging elements. He further mentioned that the second half of the year will be devoted to the development of concrete proposals for strengthening respect for IHL based on the converging elements and discussions held. The representative of the ICRC stressed the importance given to the International Conference of the Red Cross and Red Crescent in discussions to date. An outcome should aim to enable a space for dialogue on IHL both between all members of the International Conference and among States, using the overall framework of the international conference. He further referred to three proposals made by the participating States in relation to strengthening IHL at the Conference, namely to introduce a high level segment at the Conference, to have augmented IHL sessions in the general debate or to provide for a dedicated IHL commission at the Conference. In complement, a State-only dialogue on IHL could be anchored to the Conference.

126. He also announced that a two days expert meeting would be organised on 9-10 July 2018 in Geneva focusing on "*Challenges and Practices for Ensuring Humane Conditions of Detention during Armed Conflict*". The objective is to provide States' legal and military experts with an opportunity for substantive discussions on the challenges they face in detention operations and the practices they follow to overcome them. The focus of the meeting will be on ways to secure humane conditions of detention in often complex conflict environments, in particular close to the battlefield. He also mentioned that the ICRC would be delighted to welcome experts from CAHDI participating States at the expert meeting. The representative of the ICRC made clear that this meeting is not related to the work on the implementation of Resolution 1 on "Strengthening IHL Protecting Persons Deprived of their Liberty" adopted at the 32nd International Conference of the Red Cross and the Red Crescent, as no agreement has been reached on organisational questions. Lastly, he invited the CAHDI to take note of a new publication, a thematic issue of the International Review of the Red Cross entitled "*Detention: Addressing the human cost*".

127. Lastly, the representative of the ICRC provided updated information on the Montreux Document *on pertinent legal obligations and good practices for States related to operations of private military and security companies (PMSCs) during armed conflict* adopted in 2008 and on the Montreux Document Forum. He informed the CAHDI about the last regional meeting of the latter in Costa Rica in February 2018 during which Panama expressed its intention to join the Montreux Document. He also invited the CAHDI participating States to take part in the next plenary meeting of the Montreux Document Forum which would take place on 6-7 June 2018 in Geneva.

128. The representative of Portugal provided the CAHDI with further information on the Working Group on the use of private military and security companies in maritime security (Maritime Working Group) which had its first meeting in January 2018 in Geneva under the Portuguese Chairmanship. She informed the CAHDI on the priorities and outputs of this Maritime Working Group for 2018-2019. She finally announced that the next formal meeting of the Working Group will take place in September or October 2018. An additional discussion may be scheduled on the side-lines of the

Montreux Document Forum Plenary meeting. The format and modalities of this will be announced.

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

129. The Chair presented the document on the "*Developments concerning the International Criminal Court and other International Criminal Tribunals"* (document *CAHDI (2018) 13 prov*).

130. Concerning the International Criminal Court (ICC), she drew the attention of the CAHDI to important developments which took place since the last CAHDI meeting. On 27 October 2017, the decision of Burundi to withdraw from the Rome Statute became effective after its notification[36] one year ago. In relation to this, the Pre-Trial Chamber III issued on 9 November 2017 a Decision authorising an investigation of crimes within the jurisdiction of the ICC allegedly committed in Burundi or by nationals of Burundi outside the state from 26 April 2015 until 26 October 2017. Moreover, the Chair informed the CAHDI on the decision of the Philippines to withdraw from the Rome Statute[37]. The Chair also informed the CAHDI that Panama ratified on 6 December 2017 the "Kampala amendments" to the *Rome Statute*[38] raising the number of ratifications and acceptances to a total of 35.

131. The Chair also pointed out that following the adoption of *Resolution ICC-ASP/16/Res.5* during the *16th Session of the Assembly of States Parties* (ASP) to the *Rome Statute* in New York last December the jurisdiction of the ICC has been activated over the crime of aggression[39]. Furthermore, she mentioned that during this 16th Session six new judges[40] were elected by the ASP to replace those whose mandate came to an end in 2018. On 11 March 2018, the judges of the International Criminal Court sitting in a plenary session elected Judge Chile Eboe-Osuji (Nigeria) as President of the Court for a three-year term with immediate effect. Judge Robert Fremr (Czech Republic) was elected First Vice-President and Judge Marc Perrin de Brichambaut (France) Second Vice-President.

132. Concerning the judicial activity at the ICC and other international criminal tribunals, the Chair highlighted a few recent developments as contained in the document *CAHDI (2018) 13 prov*. In particular, she drew the attention of the CAHDI to the formal closing of the International Criminal Tribunal for the former Yugoslavia (ICTY) after 24 years of activities. On 31 December 2017, the ICTY handed over all remaining functions to the United Nations Mechanism for International Criminal Tribunals as per its founding 1993 UN Security Council Resolution[41]. Finally, the Chair highlighted the addition in this document of the *Kosovo* Specialist Chambers and Specialist Prosecutor's Office*. She stressed that although there has been no indictment procedure yet, it will be interesting to follow the activity of these newly established judicial chambers.

133. The Chair proceeded to give the floor to any delegation who wished to comment on this item. The representative of Austria, joined by other delegations, expressed his satisfaction regarding the adoption by consensus of the Resolution on the activation of the ICC jurisdiction on the crime of aggression by the ASP to the *Rome Statute*. He further underlined that this was a very important development for his country Austria who had the role of the facilitator in the process and thanked all those who positively contributed to this outcome. The representative of Belgium noted with satisfaction also the adoption of amendments to Article 8 of the *Rome Statute*.

134. In relation to the Philippines' withdrawal from the *Rome Statute*, the representative of Liechtenstein urged the delegations to engage with the Philippines in an effort to concede from this

[36] Notification of 27 October 2016, C.N.805.2016.TREATIES-XVIII.10, Depositary Notification.
[37] Notification of 19 March 2018, C.N.138.2018.TREATIES-XVIII.10, Depositary Notification.
[38] Notification of 6 December 2017, C.N.753.2017.TREATIES-XVIII.10.b (Depositary Notification)
[39] Resolution ICC-ASP/16/Res.5 on *The Activation of the Jurisdiction of the Court over the Crime of Aggression,* 14 December 2017.
[40] Judges Luz del Carmen Ibañez Carranza (Peru), Solomy Balungi Bossa (Uganda), Tomoko Akane (Japan), Reine Alapini-Gansou (Benin), Kimberly Prost (Canada) and Rosario Salvatore Aitala (Italy).
[41] United Nations Security Council Resolution 827 (1993).

decision before it becomes effective after one year. He mentioned that the Minister of Foreign Affairs of Liechtenstein had already contacted the ministers of the informal ministerial network of the ICC, in an effort to convince them to use all available channels to engage with the Philippines on this issue. Moreover, he informed the CAHDI about an upcoming high level event which will take place in Liechtenstein on 17 July 2018 on the occasion of the 20th anniversary of the *Rome Statute* and for the activation of the ICC jurisdiction on the crime of aggression with the participation of Ministers of Foreign Affairs. The event will mainly focus on the universality of the *Rome Statute*.

135. The representative of Ireland provided the CAHDI with information on the Side Event to the 16th Session of the ASP in December 2017 organised by Finland, Uruguay and Ireland concerning the ICC Trust Fund for Victims (henceforth "Trust Fund") and the work carried out on reparations to victims. As a follow-up to this Side Event, Ireland organised in cooperation with the Trust Fund a visit to Kampala and Northern Uganda on 19-23 February 2018 to assess the work of the Trust Fund in the region. He further noted that it was a valuable opportunity for the participating states to engage with the implementing partners of the Trust Fund and inform the local people of the positive work of the ICC through the Trust Fund. Moreover, following an Irish donation, information material analysing the work of the Trust Fund will be prepared and possibly presented at the 2018 ASP.

136. The representative of Finland provided the CAHDI with additional information concerning the participation of her country in the above-mentioned visit to Kampala and Northern Uganda. She explained that this visit was an opportunity for her country as a donor of the Trust Fund to gain knowledge on the work done by the Trust Fund on the ground, its implementing partners, the challenges they face as well as a better understanding of the impact of the armed conflicts in the region. Further goals of the visit were to raise awareness amongst the local population and to engage with the government of Uganda. Furthermore, she informed the CAHDI that a report of the visit, including recommendations to the Trust Fund, to the ICC and to the government of Uganda had been prepared. Lastly, the representative of Finland underlined that this visit was under the assistance mandate of the Trust Fund but also referred to the importance that the reparations mandate of the Trust Fund is recently acquiring.

137. The representative of Portugal informed the CAHDI of another event organised on the occasion of the 20th anniversary of the *Rome Statute*. A Conference on the crime of aggression and the ICC will be held in Lisbon on 19 April 2018. She further reminded the delegations that Portugal has ratified the "Kampala amendments" to the *Rome Statute* and integrated the provisions regarding the crime of aggression in its national legislation.

138. The representative of Ukraine reminded the CAHDI that, despite the fact that Ukraine is not a State Party to the *Rome Statute*, its government has deposited two declarations under Article 12 paragraph 3 of the Statute on 17 April 2014 and 8 September 2015, enabling the ICC to exercise its jurisdiction over alleged crimes relevant of the *Rome Statute* committed on the territory of Ukraine since 21 November 2013. Moreover, he drew the attention of the CAHDI to the Report on Preliminary Examination Activities 2017[42] where the situation in Ukraine has been under preliminary examination since 25 April 2014. The Office of the Prosecutor has received a total of 70 communications under Article 15 of the Statute in relation to crimes alleged to have been committed since 21 November 2013. The representative of Ukraine invited the CAHDI experts to consult the abovementioned Report, in particular, paragraphs 88 and 95 of this document.

139. The representative of Canada expressed the regrets of his country regarding the withdrawal of Burundi, South Africa and Philippines from the *Rome Statute* and informed the CAHDI that a report has been requested from the mission of Canada in Philippines regarding this situation and possible future actions. He also made reference to the *Special Tribunal for Lebanon*

[42] See Report on Preliminary Examination Activities (2017), International Criminal Court, The Office of the Prosecutor, 4 December 2017, pp. 19-27.

and to the complexity of its mandate, expressing at the same time his expectation for maximised efficiency and eventual conclusion of its proceedings. Furthermore, he expressed his hope that some sustainable funding solution for the *Special Court for Sierra Leone* could be found in order to continue its work.

140. The representative of the Russian Federation reminded the CAHDI that the Russian Federation withdrew its signature from the *Rome Statute* in 2016. He underlined that it is not surprising that other States have decided to take similar steps. Furthermore, he pointed out that the position of the ICC regarding the preliminary examination of the situation in Ukraine by the Office of the Prosecutor confirmed the concerns of his country. Finally, he indicated that from the Russian perspective these developments demonstrate the serious crisis of the ICC.

15. Topical issues of international law

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

142. The delegation of Belgium informed the CAHDI that on 13 February 2018, the *Cour de Cassation* delivered its judgment in the "*Ariadne*" case[43] against 40 individuals and 2 companies active in the distribution of magazines and broadcasting of radio and television programmes supporting the Kurdistan Workers' Party (PKK). In its judgment of 14 September 2017, the Indictments Chamber of the Brussels Court of Appeal upheld the judgment of 3 November 2016 of the Brussels First Instance Tribunal, holding with regard to charges of leading and participating in a terrorist group that, the PKK must be considered as an "*armed force in times of armed conflict, as defined and governed by international humanitarian law*" and as such, to benefit from the exception provided by Article 141bis of the Criminal Code, according to which Title I of Book II of the Criminal Code devoted to terrorist offenses does not apply, inter alia, "*to the activities of the armed forces in period of armed conflict, as defined and governed by international humanitarian law*". In relation to the charges related to resorting to means of telecommunication to cause harm, the Court held that the radio and television programs in this case cannot fall within the scope of the law of 13 June 2005 on electronic communications. Furthermore, the Court dismissed the claims against some of the defendants on the basis that there were insufficient grounds to establish that there had been forced removal and illegal and arbitrary detention. The Belgian Federal Prosecution Service and the Turkish State lodged an appeal against this decision and, on 13 February 2018, the *Cour de Cassation* delivered its judgment partially overturning the previous judgment, considering that there had been breach of the adversarial principle as the Indictments Chamber did not respond to the argument raised by the Public Prosecutor's Office that, as a non-state actor, the PKK would not be subject to international humanitarian law. The case is consequently remitted back to the Court of Appeal under a different composition who is still to determine the date of the hearing. The Indictment Chamber will have to answer the question whether the PKK may or may not benefit from the exception provided for in Article 141bis of the Criminal Code or whether to refer the case to the Criminal Court in order to prosecute PKK members on the basis of Title I of Book II of the Penal Code devoted to terrorist offenses. In addition, the Indictment Chamber will also have to determine whether the radio and television programs used by PKK members are likely to fall within the scope of the Act of 13 June 2005 on electronic communications and whether their use may, where appropriate, give rise to the application of the criminal sanctions provided for by this law.

143. The representative of the European Union presented to the CAHDI a recent judgment[44] of the ECJ regarding the legal status of Western Sahara in the context of an a partnership agreement

[43] Case P.17.1023. N, Cour de Cassation of Brussels, 18 February 2018.
[44] Case C-266/16, *Western Sahara Campaign UK v Commissioners for Her Majesty's Revenue and Customs and Secretary of State for Environment, Food and Rural Affairs*, ECLI:EU:C:2018:118, Grand Chamber judgment of 27 February 2018.

in the fisheries sector ("the Fisheries Agreement")[45] concluded between Morocco and the EU in 2006. In its judgement, the ECJ held, in the first place, that it had jurisdiction to assess the validity of acts approving the conclusion of international agreements concluded by the EU and, in that context, to assess whether such agreements are compatible with the treaties and rules of international law binding on the EU. The Court based its judgment on its previous judgment in the case of *Front Polisario*[46] in order to conclude that, to include the territory of Western Sahara within the scope of the Fisheries Agreement would be contrary to the principle of self-determination, applicable in relations between the EU and Morocco. Moreover, the Court clarified that, Morocco having categorically denied being an occupying power or administrative power[47] with respect to the territory of Western Sahara, it would not conduct any such consideration. Lastly, the Court rejected the possibility of the geographical coordinates affecting the maritime zones under Moroccan jurisdiction resulting in the Western Sahara being included in them. The Court therefore held that, since neither the Fisheries Agreement nor its Protocol were applicable to the waters adjacent of the Western Sahara territory, the EU acts relating to their conclusion and implementation remain valid. The representative of the EU noted that the effects of this judgment will be further examined by the EU in order to clarify if the judgment suffices for the determination of the legal status of Western Sahara as it is for the purposes of the Fisheries Agreement or whether there should be a more general determination outside the provisions of the Fisheries Agreement.

IV. OTHER

16. Place, date and agenda of the 56th meeting of the CAHDI: Helsinki (Finland)

144. The CAHDI decided to hold its 56th meeting in Helsinki (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 the draft agenda of this meeting and to send it to all CAHDI experts in due time.

145. The Chair indicated that all CAHDI experts are warmly welcome to her home country and she expressed her wishes that it will be a fruitful and pleasant meeting. The Chair further informed that the meeting will take place in Helsinki at *Finlandia Hall* which is a masterpiece by the renowned Finnish architect Alvar Aalto and with a location in a park by a sea bay in the centre of the city. She reminded that it was the location of the 1975 CSCE Conference. Further logistical information will be provided in due course.

17. Any other business

146. The Chair pointed out that no delegation has requested to include a topic under this item. No delegation made any comment or declaration under this item.

18. Adoption of the Abridged Report and closing of the 55th meeting

147. The CAHDI adopted the Abridged Report of its 55th meeting as contained in document *CAHDI (2018) 15 prov* and instructed the Secretariat to submit it to the Committee of Ministers for information

[45] The conclusion of the Fisheries Agreement was approved by Council Regulation (EC) No 764/2006 of 22 May 2006 (JO 2006, L 141, p. 1) and is supplemented by a protocol setting out the fishing opportunities which it lays down, and it expires in July 2018. The conclusion of that protocol was approved by Council Decision 2013/785/EU of 16 December 2013 (JO 2013, L 349, p. 1).

[46] Case C-104/16 P, *Council of the European Union v Front populaire pour la libération de la saguia-el-hamra et du rio de oro* (Front Polisario), ECLI:EU:C:2016:973, Grand Chamber judgment of 21 December 2016.

[47] Article 73 of the UN Charter.

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APPENDICES

APPENDIX I

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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 54th meeting

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

II. ONGOING ACTIVITIES OF THE CAHDI

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

6. Immunities of States and international organisations

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

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

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

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

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

8. National implementation measures of UN sanctions and respect for Human Rights

9. European Convention on Human Rights

   - Exchange of views with Ms Florence MERLOZ, Chair of the *Drafting Group on the place of the European Convention on Human Rights in the European and International Legal Order* (DH-SYSC-II)

   - 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. Exchange of views with Mr Allan ROSAS, Judge of the Court of Justice of the European Union (CJEU)

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. Place, date and agenda of the 56th meeting of the CAHDI: Finland, 20-21 September 2018

17. Any other business

18. Adoption of the Abridged Report and closing of the 55th meeting

APPENDIX III

OPINION OF THE CAHDI

on Recommendation 2122 (2018) of the Parliamentary Assembly of the Council of Europe – "Jurisdictional Immunity of International Organisations and Rights of their Staff"

1. On 7 February 2018, the Ministers' Deputies at their 1306th meeting agreed to communicate *Recommendation 2122 (2018) of the Parliamentary Assembly of the Council of Europe* (PACE) on "*Jurisdictional Immunity of International Organisations and Rights of their Staff*" to the Committee of Legal Advisers on Public International Law (CAHDI), for information and possible comments by the end of March 2018[1].

2. The CAHDI examined the above-mentioned Recommendation at its 55th meeting (Strasbourg, France, 22-23 March 2018) and made the following comments concerning those aspects of Recommendation 2122 (2018) of particular relevance to the Terms of Reference of the CAHDI.

3. From the outset, the CAHDI thanked the PACE for acknowledging its work in relation to the subject of the "Jurisdictional immunity of international organisations". In this respect, the CAHDI pointed out that the theme of "Immunity of States and International Organisations" is currently on the agenda of all its meetings as a permanent item. Indeed, the issue of State immunity – sometimes also known as "jurisdictional immunity"[2]- has been examined by the CAHDI from very early on of its existence in 1991 through its assessments of the implementation of the 1972 *European Convention on State Immunity* (ETS No.74) and afterwards through its Pilot Project regarding State Immunities which led to the CAHDI publication on "*State Practice Regarding State Immunities*" by Martinus Nijhoff in 2006.

4. During its 37th meeting in 2009, the CAHDI agreed to enlarge this topic to international organisations in order to discuss and examine the activities and actions of international organisations covered by jurisdictional immunity. The question of the **settlement of disputes of a private character to which an international organisation is a party** was later included in the agenda of the CAHDI at its 47th meeting in March 2014 at the request of the Dutch delegation. When examining this issue, the CAHDI points out that indeed the privileges and immunities of international organisations serve the legitimate purpose of protecting the independence of international organisations, which is crucial for the effective performance of their functions. In general terms, the European Court of Human Rights (ECtHR) stated that "it does not follow, however, that in the absence of an alternative remedy the recognition of immunity is ipso facto constitutive of a violation of the right of access to a court"[3]. The immunity of international organisations may prevent individuals who have suffered harm (third-party claims for personal injury or death or property loss or damage) because of the conduct of an international organisation from bringing a successful claim before a domestic court. Furthermore, the CAHDI noted that this immunity has been increasingly challenged based on an alleged incompatibility of upholding immunity with the right of access to court. The existence of an alternative remedy provided to the claimant by the international organisation is important in this context.

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[1] The Ministers' Deputies specifically indicated in their decision that they "agreed to communicate it [Recommendation 2122 (2018)] to the Committee of Legal Advisers on Public International Law (CAHDI), for information and possible comments by 21 March 2018. However, taking into account that the 55th meeting of the CAHDI took place on 22 and 23 March, it was agreed to send the CAHDI opinion to the Secretariat of the Committee of Ministers on 26 March 2018.
This PACE Recommendation 2122 has also been communicated to the Steering Committee for Human Rights (CDDH) for information and possible comments and to the Administrative Tribunal for opinion.

[2] See explanations on this terminology made by Mr Peter Tomka in his paper "Pilot Project of the Council of Europe on State Practice Regarding State Immunities" in *The CAHDI Contribution to the Development of Public International Law* (Brill Nijhoff 2016), Edited by the Council of Europe, pp.23-39.

[3] ECtHR, *Stichting Mothers of Srebrenica and others v. the Netherlands,* no. 65542/12, decision of 11 June 2013, para. 164.

5. Concerning the issue of the settlement of third-parties claims, the CAHDI pointed out – for illustrative purposes – some recent events mainly in relation to peacekeeping operations of the United Nations (UN)[4] and some case-law of the ECtHR involving international organisations where their immunity from the civil jurisdiction of domestic courts had been upheld. Some CAHDI delegations acknowledged that there has been, for a long period, a gap in the judicial protection of the rights of individuals in some cases involving international organisations before national courts. Nevertheless, they also pointed out that progress has been achieved and that there is not one uniform solution for all international organisations and for all activities carried out by those organisations[5].

6. The CAHDI underlines that the legal issues arising from the PACE **Recommendation 2122,** and PACE **Resolution 2206** associated with it, are very similar to those described above. Nevertheless, the CAHDI points out that while in both cases the immunity of international organisations before domestic courts may have an impact on the judicial protection of the rights of the individuals concerned , the legal position of the latter is not always the same, since, the staff of international organisations usually have access to an internal dispute settlement procedure developed by the international organisation as an alternative means of judicial protection while third parties who have suffered harm as a result of an unlawful conduct of the organisation involved do not have any judicial protection if the immunity of the international organisation is not waived. As mentioned by the PACE, the CAHDI points out that indeed due to the privileges and immunities of international organisations, international civil servants normally have no recourse to national courts regarding employment related matters. Furthermore, the CAHDI agrees with the PACE that against the background of the Council of Europe's responsibility for setting international human rights standards and promoting the rule of law at all levels, the Organisation has a special duty to offer its staff timely, effective and fair justice. Nevertheless, the CAHDI underlines that in conformity with the **case law of the ECtHR** the key factor in determining whether granting international organisations immunity from jurisdiction of the national courts is permissible under the *European Convention on Human Rights* (ECHR) is whether the applicants concerned had available to them **"reasonable alternative means"** to effectively protect their rights under the ECHR[6]. An increasing number of agreements on privileges and immunities contain an explicit obligation for international organisations to provide alternative means of private dispute settlement. The PACE in paragraph 1.1.1 of its Recommendation 2122 made reference indeed to these "reasonable alternative means of legal protection" which should be accessible in the event of disputes between international organisations and their staff.

7. In the framework of the **Council of Europe**[7], the CAHDI notes that the rights, obligations and alternative means – to access to national courts – for the legal protection of the staff of the Organisation are set out in the *Council of Europe Staff Regulations*[8]. As it is mentioned in the Preamble of the *Staff Regulations* "*The Council of Europe, in its day-to-day functioning, shall respect all the principles and ideals which the Organisation defends. In particular, in the administration of the Secretariat, the Secretary General shall endeavour to realise the conditions*

[4] In October 2013, Haiti Cholera victims filed a class action lawsuit in the Southern District of New York against the UN. The judgment of the Southern District Court of New York handed down on 9 January 2015 concluded that the UN was immune from the plaintiffs' suit. An appeal was lodged on 12 February 2015 before the United States Court of Appeals for the Second Circuit. The oral arguments were heard on 1 March 2016. In its judgment of 18 August 2016, the United States Court of Appeals for the Second Circuit upheld the immunity of the United Nations.

[5] See CAHDI Meeting Reports from the 52nd, 53rd and 54th meetings (docs. CAHDI (2016)23; CAHDI (2017)14 and CAHDI (2017) 23).

[6] ECtHR, *Beer and Regan v. Germany*, no. 28934/95, Grand Chamber judgment of 18 February 1999; ECHR, *Waite and Kennedy v. Germany,* no. 26083/94, Grand Chamber judgment of 18 February 1999; ECHR, *Chapman v. Belgium,* no. 39619/06, decision of 5 March 2013; ECHR, *Stichting Mothers of Srebrenica and others v. the Netherlands,* no. 65542/12, decision of 11 June 2013.

[7] The privileges and immunities enjoyed by the Council of Europe are governed by Article 40 of the *Statute of the Council of Europe*, as further elaborated under the *General Agreement on Privileges and Immunities of the Council of Europe* (GAPI) and its *Protocol.*

[8] The *Staff Regulations and its Appendices* were adopted by Resolution Res(81)20 of the Committee of Ministers on 25 September 1981, with the exception of Appendix VIII, which was adopted by Resolution Res(83)12 of 15 September 1983. The Committee of Ministers regularly updates the St*aff Regulations*.

which will ensure the effective application of the rights and principles set out in the revised European Social Charter, in so far as these are applicable to an international organisation". The CAHDI further notes that the settlement of disputes which may arise between the Council of Europe and its staff is governed by "*PART VII: Disputes*" of the *Staff Regulations*. The Council of Europe has the following system for resolving employment disputes: a "Complaints procedure" (Article 59[9] of *Staff Regulations*) and an "Appeals procedure" (Article 60[10] of *Staff Regulations*). The administrative complaint is submitted to the Secretary General through the Director of Human Resources and it may be referred to an "Advisory Committee on Disputes"[11]. In the event of either explicit rejection in whole or in part, or implicit rejection of this complaint, the complainant may appeal, under Article 60 of the *Staff Regulations*, to the Administrative Tribunal set up by the Committee of Ministers. The *Statute of the Administrative Tribunal* is contained in *Appendix XI* of the *Staff Regulations*.

8. The CAHDI also notes that **the jurisdiction of the Administrative Tribunal of the Council of Europe** was extended to officials of the *Central Commission for the Navigation of the Rhine* (CCNR) by Agreement on 16 December 2014 as well as to officials of *The Hague Conference on Private International Law* by Agreement on 24 November 2017 and to officials of the *Intergovernmental Organisation for International carriage by Rail* (OTIF) by Agreement on 8 December 2017.

9. As mentioned in the Explanatory Memorandum prepared by the PACE Rapporteur Mr Volker Ullrich[12] for the elaboration of Recommendation 2122 and Resolution 2206, there is a large variety and types of competent bodies for labour disputes within international organisations. The CAHDI recalls that the United Nations, for instance, has a two tier system for resolving employment disputes: the UN Disputes Tribunal (UNDT) and the UN Appeals Tribunal (UNAT). International institutions such as the Organisation for Economic Co-operation and Development (OECD) and the North Atlantic Treaty Organisation (NATO) have set up their own administrative tribunals. Others administrative tribunals have competence to hear complaints from other organisations as it is the case of the International Labour Organisation (ILO) Administrative Tribunal whose jurisdiction has been recognised by over 60 organisations and entities. In this respect, the CAHDI recalls that the International Labour Organisation Administrative Tribunal (ILOAT) in its Judgment No. 3127 stated that "The right to an internal appeal is a safeguard which international civil servants enjoy in addition to their right of appeal to a judicial authority. Thus, except in cases where the staff member concerned forgoes the lodging of an internal appeal, an official should not in principle be denied the possibility of having the decision which he or she challenges effectively reviewed by the competent appeal body"[13]. As mentioned in the previous paragraph, the Administrative Tribunal of the Council of Europe has also extended its jurisdiction to officials from other international organisations.

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[9] **Article 59 of Staff Regulations:** ***"****1. Staff members may submit to the Secretary General a request inviting him or her to take a decision or measure which s/he is required to take relating to them. If the Secretary General has not replied within sixty days to the staff member's request, such silence shall be deemed an implicit decision rejecting the request. The request must be made in writing and lodged via the Director of Human Resources. The sixty-day period shall run from the date of receipt of the request by the Secretariat, which shall acknowledge receipt thereof.*
2. Staff members who have a direct and existing interest in so doing may submit to the Secretary General a complaint against an administrative act adversely affecting them, other than a matter relating to an external recruitment procedure. The expression "administrative act" shall mean any individual or general decision or measure taken by the Secretary General or any official acting by delegation from the Secretary General." […].

[10] **Article 60 of the *Staff Regulations***: *"In the event of either explicit rejection, in whole or part, or implicit rejection of a complaint lodged under Article 59, the complainant may appeal to the Administrative Tribunal set up by the Committee of Ministers".*

[11] **Article 59 paragraph 6 of the *Staff Regulations*:** ***"****The Advisory Committee on Disputes shall comprise four staff members, two of whom shall be appointed by the Secretary General and two elected by the staff under the same conditions as those for the election of the Staff Committee. The committee shall be completely independent in the discharge of its duties. It shall formulate an opinion based on considerations of law and any other relevant matters after consulting the persons concerned where necessary. The Secretary General shall, by means of a rule, lay down the rules of procedure of the committee."*

[12] Report by the PACE Committee on Legal Affairs and Human Rights on "Jurisdictional immunity of international organisations and rights of their staff", Doc 14443, 29 November 2017.

[13] ILOAT, Judgment No. 3127, 113th Session, 2012, *V.C. v.Centre for the Development of Enterprise*, para. 13.

10. Concerning the reference contained in paragraph 1.4.1 of the PACE Recommendation 2122 on the **right of access of trade unions** to administrative tribunals of international organisations, the CAHDI refers to the case of *SUEPO and Others v. the European Patent Organisation "EPO"*[14], where the Dutch Supreme Court held in its judgement of 20 January 2017, quashing the previous judgments in the case by the interim relief judge and The Hague Appeal Court, that EPO was entitled to invoke its immunity from jurisdiction in a dispute with two trade unions. The Dutch Supreme Court applied the test developed by the ECtHR in its jurisprudence (on the acceptability of granting jurisdictional immunity to international organisations thus limiting the right of access to a court under Article 6 of the ECHR provided that litigants had a reasonable alternative means of protecting their rights) concluding that litigants had a reasonable alternative means of protecting their rights effectively; trade unions were sufficiently protected by the internal dispute settlement procedure provided for by EPO under which individual employees and staff representatives could ultimately take their complaint to the ILO Administrative Tribunal. According to the Dutch Supreme Court, this meant that the essence of their right of access to a court had not been impaired.

11. Concerning points 1.4.1 and 1.4.2 of the Recommendation and with reference to what has been said in paragraphs 7, 9 and 10 above and, without wanting to comment on the rightness of these recommendations, the CAHDI draws the attention of the Committee of Ministers to the fact that, should it deem appropriate to start a reflection on this subject, this would imply changes to the Statute of the Administrative Tribunal Council of Europe (in particular to articles 10 and 12) and would have budgetary and administrative consequences.

12. The CAHDI has further examined, during its meetings, the issue of striking a balance between upholding the immunity of international organisations and the rights of their staff when a labour or employment dispute arises. For instance, in a case involving the immunity of EPO[15], the ECtHR held that, with regards to the complaint about the lack of access to courts and the allegedly deficient procedures within the EPO and the Administrative Tribunal of the ILO, the availability of an arbitration procedure constituted a reasonable alternative means to have the complaint examined in substance and consequently the applicant's protection of fundamental rights had not been manifestly deficient. Similarly, in another case examined by the CAHDI[16], the Court of Appeals of Brussels held that an arbitration clause contained in a service contract between the claimant and NATO guaranteed the right of access to a court pursuant to Article 6 of the ECHR.

13. Taking into account the above mentioned considerations, the CAHDI reiterates that in general in accordance with national and international case law, the immunity of international organisations is consistent with the right to a fair trial (Article 6 ECHR) but the protection awarded to the individuals is to be proportional and to constitute a "reasonable alternative means" of dispute settlement. Furthermore, the existence of administrative tribunals has been found in principle to meet the human rights standards established under the ECHR[17] and the reason not to insist on the review by national courts of decisions by administrative tribunals.

14. The CAHDI further reiterates that the issue of privileges and immunities of international organisations and the rights of their staff is of high complexity and multidimensional nature, involving both the independence of international organisations as well as the accountability of international organisations. This topic indeed raises not only legal questions but also many political ones. Therefore, the CAHDI considers that the preservation of the independence and effectiveness of international organisations speaks in favour of a cautious approach.

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[14] Hoge Raad, *SUEPO and Others v. the European Patent Organisation ("EPO")*, judgment of 20 January 2017, ECLI:NL:HR:2017:57.
[15] ECtHR, *Klausecker v. Germany,* Application No. 415/07, *Decision* of 6 January 2015.
[16] Cour d'appel de Bruxelles, *Etat belge (SPF Affaires étrangères) c. Michel Poortmans*, n° 2014/AR/2570, decision of 11 January 2016
[17] See footnote 6,ECtHR, *Waite and Kennedy v. Germany,* no. 26083/94, Grand Chamber judgment of 18 February 1999, paras 50-74.

15. The CAHDI consequently considers that the proposal of the PACE concerning the possibility "*to carry out a comparative study of the extent to which the internal remedy systems in international organisations are compatible with Article 6 of the European Convention on Human Rights (ETS No. 5) and with other relevant human rights (including social rights) […]*" would at present be premature as different international organisations are examining the introduction of new alternative means of staff dispute settlement. Furthermore, the vast differences existing between the various types of international organisations would render a comparative study very difficult. In addition, considering that there is no uniform solution for all international organisations and for all activities they carry out the difficulties reaching an encompassing solution should be highlighted. Finally the CAHDI pointed out that the existing case law of the European Court of Human Rights addresses the question of the compatibility of the internal remedy systems in international organisations with Article 6 of the ECHR.

16. Concerning paragraph 2 of the PACE Recommendation 2122, the CAHDI underlines that, as mentioned above, the Committee is regularly examining the issue of jurisdictional immunity of international organisations under all its different angles.

APPENDIX IV

Presentation by Mr Allan Rosas∗ Judge at the Court of Justice of the European Union (CJEU) to the 55th meeting of the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe

(Strasbourg, 23 March 2018)

THE EUROPEAN COURT OF JUSTICE AND PUBLIC INTERNATIONAL LAW∗∗

1. The EU as an external actor and subject of international law

Whilst not being recognised as a State, the EU has developed into a far-reaching regional integration organisation endowed with a constitutional order. The EU legal order is based on a clear distinction between external relations, on the one hand, and the internal market and the (internal) area of freedom, security and justice, on the other. External borders should be effectively controlled while internal borders gradually dismantled. There is a marked difference between the status of Union citizens and that of third country nationals.[1] As will be further explained below, there is also a clear difference between the relations between the EU Member States inter se, on the one hand, and the relations between them and third countries, on the other.

Concerning specifically the external dimension, the EU has become an increasingly active player, which seeks to develop relations and build partnerships with third countries and international intergovernmental and non-governmental organisations.[2] These activities span across a broad spectrum including trade, transport, development, environmental protection and international peace and security. According to Article 3(5) of the Treaty on European Union (hereinafter TEU), the EU, while upholding and promoting its values and interests and contributing to the protection of its citizens, shall contribute to these and other objectives and also to 'the strict observance and the development of international law, including respect for the principles of the United Nations'.

The EU, of course, has legal personality and, as has been confirmed in the case law of the European Court of Justice (hereinafter the ECJ), the Union is, as a subject of public international law, bound to respect international law, whether treaty law or general international law.[3] Internationally wrongful acts may entail the international responsibility of the Union.[4] The Union has

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∗∗ Disclaimer: The observations and views put forward in this paper are strictly personal and do not express the position of the European Court of Justice.

[1] See, eg A Rosas and L Armati, *EU Constitutional Law: An Introduction*, 3rd rev edn (Oxford, Hart Publishing, 2018) forthcoming.

[2] See, eg P Eeckhout, *EU External Relations Law*, 2nd edn (Oxford, Oxford University Press, 2011); I Govaere et al (eds), *The European Union in the World* (Leiden, Martinus Nijhoff, 2014); P Koutrakos, *EU International Relations Law* (Oxford, Hart Publishing, 2015); J Czuczai and F Naert (eds), *The EU as a Global Actor Bridging Legal Theory and Practice* (Leiden, Brill/Nijhoff, 2017).

[3] See, eg Case C-286/90 *Poulsen and Diva Navigation* EU:C:1992:453, paras 9-10; Case C-162/96 *Racke* EU:C:1998:293, paras 45-46; Case C-366/10 *The Air Transport Association of America* EU:C:2011:864, paras 101 and 123; Case C-266/16 *Western Sahara Campaign UK* EU:C:2018:118, para 47. See also J Wouters, A Nollkaemper and E de Wet (eds), *The Europeanisation of International Law: The Status of International Law in the EU and its Member States* (The Hague, Asser Press, 2008); E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* (Leiden, Martinus Nijhoff, 2012).

[4] See, in particular, M Evans and P Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Oxford, Hart Publishing, 2013).

become an important treaty-making power and is a Contracting Party to a great number of bilateral agreements as well as multilateral conventions.

2. The conclusion of international agreements

Article 216(1) of the Treaty on the Functioning of the European Union (hereinafter TFEU), providing for broad powers of the EU to conclude international agreements, confirms a development which had to a large extent already been recognised in the case law of the ECJ. Article 216(2) spells out that agreements concluded by the Union are binding both on its institutions and on its Member States. The procedures for negotiating, signing, concluding and suspending international agreements are laid down in Article 218 TFEU.[5] These provisions do not, however, regulate the question as to the nature of the competence conferred upon the Union – whether it is exclusive, shared, parallel or complementary.

In areas where there is an exclusive rather than shared Union competence, the agreements should, in principle be concluded by the Union alone. Some areas of exclusive competence, such as the common commercial policy, are explicitly listed in Article 3(1) TFEU, while according to Article 3(2) TFEU, the Union shall also have exclusive competence if one of three general criteria are fulfilled. The Treaty of Lisbon, and more specifically Article 207 TFEU on the common commercial policy and the codification of the so-called AETR/ERTA principle in Article 3(2) TFEU, as interpreted in ECJ case law, has contributed to a widening of the scope of exclusive competence.[6] Recent case law, including a judgment concerning a then envisaged Council of Europe convention relating to the protection of the neighbouring rights of broadcasting organizations,[7] demonstrates that the AETR/ERTA principle, according to which there is exclusive competence if the conclusion of an agreement 'may affect common rules or alter their scope'[8], may be applicable in a wide variety of situations, thus reducing the scope for non-exclusive (shared or otherwise) competence.[9]

Especially if it is an area of shared competence, the agreement is likely to be concluded not by the Union alone but together with some or all of its Member States. These so-called mixed agreements pose a number of legal and institutional problems relating to their negotiation, conclusion and application as well as issues of responsibility (who is responsible for what?) which cannot be analysed in detail here.[10] These problems may come before the ECJ, including the question as to the extent of the Court's jurisdiction over such agreements. It is in many cases difficult, if not impossible, to identify provisions of the agreement which would unquestionably and exclusively fall under Member States' competence so that the Court's jurisdiction over the agreement would be excluded.[11]

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[5] A Rosas, 'Recent Case Law of the European Court of Justice Relating to Article 218 TFEU' in Czuczai and Naert, n 2 above, 365-379.

[6] A Rosas, 'EU External Relations: Exclusive Competence Revisited' 38 (2015) *Fordham International Law Journal* 1073-1096; A Rosas, ' The EU as a Global Trade Actor: The Scope of Its Common Commercial Policy' in M Pavliha et al (eds), *Challenges of Law in Life Reality: Liber Amicorum Marko Ilešič* (Ljublijana, Univerza v Ljubljani, Pravna fakulteta, 2017) 429-447.

[7] Case C-114/12 *Commission v Council* EU:C:2014:2151.

[8] By 'common rules' is meant Union legislative and other acts of so-called secondary law but not rules of primary law, Opinion 2/15 (Free trade agreement with Singapore) EU:C:2017:376, paras 233-235.

[9] Apart from Case C-114/12, n 7 above, Opinion 1/03 EU C:2006:81; Opinion 1/13 EU:C:2014:2303; Case C-66/13 *Green Network* EU:C:2014:2399; Opinion 3/15 EU:C:2017:114; Opinion 2/15, n 8 above.

[10] See, eg A Rosas, 'The European Union and Mixed Agreements' in A Dashwood and C Hillion (eds), *The General Law of E.C. External Relations* (London, Sweet & Maxwell, 2000) 200-220; J Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (The Hague, Kluwer Law International, 2001); C Hillion and P Koutrakos (eds), *Mixed Agreements Revisited: The EU and its Member States in the World* (Oxford, Hart Publishing, 2010).

[11] Some mixed agreements are accompanied by declarations of competence purporting to establish a distinction between Union and Member States' competence but such declarations often leave many questions unanswered and some of them are obsolete in view of the development of EU legislation subsequent to the drafting of the declaration, see, eg Case C-240/09 *Lesoochanárske zoskupenie* EU:C:2011:125, paras 28-43 (concerning a declaration of competence, paras 39-40). See also Case C-239/03 *Commission v France* EU:C:2004:598; Case C-459/03 *Commission v Ireland* EU:C:2006:345.

There are also a number of multilateral agreements which, while covering areas falling within EU competence, the Union has not been able to conclude in its own name, in most cases because the convention in question contains an adherence clause which limits participation to States. Such agreements concluded by the Member States are, from the point of view of Union law, in principle seen as part of the national law of the Member States which have concluded them. Some of these agreements, however, may become relevant also for Union law purposes. This is so, for instance, 1) if Union legal acts contain explicit references to them, 2) if the Union, despite the fact that the agreement belongs to an area of Union exclusive competence, has authorised Member States to conclude it in the interest of the Union[12] or, 3) by virtue of Article 351(1) TFEU, if the agreement has been concluded by a Member States before its accession to the EU.[13] In the latter case, the derogation from the principle of the primacy of Union law over the national law of Member States, including agreements concluded by them, only applies if the agreement concluded by a Member State before its EU membership establishes an obligation which the Member State is bound to honour vis-à-vis a third country.[14] Agreements concluded by the Member States *inter se* cannot escape the principle of primacy of Union law even if they have been concluded before their accession to the Union. This, once again, illustrates the difference between the external and the internal in the EU constitutional order.

3. The status of international law in EU law

According to settled case law, international agreements concluded by the EU become an integral part of the EU legal order.[15] The conclusion of the agreement (usually by a Council decision) makes it directly applicable. In this sense, the EU may be said to adhere to a 'monist' approach. Direct applicability, however, should not be confounded with direct effect.[16] If an agreement is deemed to have direct effect, it can be invoked directly by individuals before Union and EU national courts. There is an abundance of case law on the presence or absence of direct effect.

While many agreements of a bilateral nature (often trade and cooperation agreements) have been found to contain provisions having direct effect,[17] the contrary is true of a number of multilateral conventions. The ECJ has, in this respect, established a two-pronged requirement for direct effect: The 'nature and the broad logic' of the agreement does not preclude direct effect and the provisions relied upon appear, as to their content, to be 'unconditional and sufficiently precise'.[18] Multilateral conventions found to lack direct effect on the basis of the 'nature and broad logic' of the agreement include the GATT and other World Trade Organization (hereinafter WTO) agreements,[19] the UN Convention on the Law of the Sea[20] and the Kyoto Protocol to the UN Framework Convention on Climate Change. Examples of conventions which contain provisions which have not been deemed to be unconditional and sufficiently precise include the European Convention on the Protection of Animals Kept for Farming Purposes[21] and the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.[22] Multilateral treaties found to have direct effect include the

[12] The possibility of such authorisation is explicitly foreseen in Article 2(1) TFEU. See A Rosas, 'Exclusive, Shared and National Competence in the Context of EU External Relations: Do Such distinctions Matter?' in Govaere et al, n 2 above, 17-43 at 32-33.
[13] A Rosas, 'The Status in EU Law of International Agreements Concluded by EU Member States' 34 (2011) *Fordham International Law Journal* 1304-1345. According to Article 351(1) TFEU, the rights and obligations arising from agreements concluded before accession, between Member States and third countries, 'shall not be affected by the provisions of the Treaties'.
[14] Ibid, 1321-1324.
[15] Case 181/73 *Haegeman* EU:C:1974:41 is often cited as the first case to confirm this principle. For examples of recent cases see Case C-224/16 *Aebtri* EU:C:2017:880, para 50; Case C-266/16 *Western Sahara Campaign*, n 3 above, paras 45-46. See also Wouters et al, n 3 above; Cannizzaro, Palchetti and Wessels, n 3 above.
[16] Rosas and Armati, n 1 above, 72, 77-80.
[17] To give but one example, Case C-265/03 *Simutenkov* EU:C:2005:213, para 21.
[18] See, eg Joined Cases C-659/13 and C-34/14 *C & J Clark International* EU:C:2016:74, para 84, and case law cited.
[19] See, eg Case C-149/96 *Portugal v Council* EU:C:1999:574, para 47; Joined Cases C-659/13 and C-34/14 *C & J Clark International*, n 18 above, para 85.
[20] Case C-308/06 *Intertanko* EU:C:2008:312, paras 53-65.
[21] Case C-1/96 *Compassion in World Farming* EU:C:1998:113, paras 32-34.
[22] Case C-240/09 *Lesoochranárske zoskupenie*, n 11 above, paras 44-45.

Yaounde/Lomé/Cotonou agreements between the EU and African, Caribbean and Pacific countries[23] and the Montreal Convention for the Unification of Certain Rules for International Carriage by Air.[24]

According to the Union Courts' case law, the absence of direct effect prevents not only an individual from invoking an agreement before a Union or national court in general but also individuals, EU institutions and Member States from invoking the invalidity of a Union legal act because of incompatibility with the agreement.[25] In the EU internal hierarchy of norms, however, international agreements binding on the Union are, in principle, situated above internal legislation and other legal acts of secondary law. This means that even in the case of an agreement which lacks direct effect, the acts of secondary law must be interpreted as far as possible in keeping with the terms of the agreement (consistent interpretation).[26]

While international agreements, and especially those having direct effect, thus prevail over acts of secondary law, the same is not true with respect to the founding Treaties and other parts of primary law. In the well-known *Kadi I* case, relating to the implementation of UN Security Council sanctions decisions, the ECJ held that, in the EU constitutional order, the primacy of international agreements over acts of secondary law does not extend to primary law, 'in particular to the general principles of which fundamental rights form part' and that international agreements 'cannot have the effect of prejudicing the constitutional principles of the [Union Treaties], which include the principle that all [Union] acts must respect fundamental rights'.[27] The Court did recognise that, in implementing UN sanctions, the Union is required to 'take due account' of the terms and objectives of the resolution concerned and of the relevant obligations under the UN Charter (despite the fact that the EU is not a member of the UN)[28] but could not accept that the internal Union acts implementing UN sanctions would fall outside judicial review, taking into account that such review did and still does not exist at UN level and that EU national courts are precluded from reviewing the validity of Union acts.[29]

The Union Courts have since long considered that the EU is bound to respect not only international agreements concluded by it but also customary and other unwritten general international law.[30] While the exact status of general international law in the Union legal order remained somewhat unclear, an ECJ judgment of 2011[31] brought further clarification in this regard. The Court formulated two basic conditions for the control of validity of Union acts: first, the relevant principles of customary law should be 'capable of calling into question the competence of the [EU] to adopt that act' and, second, the act in question should be 'liable to affect rights which individuals derive from [Union] law or to create obligations under [Union] law in this regard'. A further reserve was added with respect to the intensity of judicial control: since, according to the Court, a principle of customary law does not have the same degree of precision as a provision of an international agreement, judicial review must be limited to the question whether, in adopting the act in question, 'the institutions of the EU made manifest errors of assessment concerning the conditions for applying those principles'.[32]

[23] See, eg Case C-469/93 *Chiquita Italia* EU:C:1995:435.
[24] See, eg Case C-344/04 *IATA and ELFAA* EU:C:2006:10, para 39.
[25] See, eg the case law referred to in nn 18-21.
[26] Rosas and Armati, n 1 above, 50 et seq, 70-71.
[27] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* ("Kadi I") EU:C:2008:461, paras 285, 308.
[28] Ibid, para 296.
[29] A Rosas, 'Counter-Terrorism and the Rule of Law: Issues of Judicial Control' in AM Salinas de Frás, KLH Samule and ND White (eds), *Counter-Terrorism: International Law and Practice* (Oxford, Oxford University Press, 2012) 83-110 at 105-110.
[30] See, eg, the judgments referred to in n 3 above.
[31] Case C-366/10 *The Air Transport Association of America*, n 3 above.
[32] Ibid, paras 107-110.

4. Avoidance of material breach

Whilst the ECJ has insisted on the respect for the fundamental principles of the EU constitutional order even in the implementation of international obligations, the Union, of course, remains bound, vis-à-vis third countries and international organisations, of these obligations and may incur responsibility for internationally wrongful acts. The Court has held that the EU Member States, which, under Article 216(2) TFEU, are bound by agreements concluded by the Union, fulfil in this respect an obligation in relation to the Union, 'which has assumed responsibility for the due performance of the agreement'.[33]

With the broadening of the scope of the EU's international action, issues relating to its international responsibility may arise in a wide variety of situations. This reality is also reflected in the case law of the Union Courts. To provide some examples of public international law issues which have come before these courts, they include various questions relating to international treaty law and the principles recognised in the Vienna Convention of 1969,[34] questions concerning borders, territory, sovereignty and recognition,[35] the principle of the right of peoples to self-determination,[36] various matters relating to the law of the sea,[37] the relation between anti-terrorism law and international humanitarian law applicable in armed conflicts,[38] international human rights law,[39] issues of UN law,[40] international environmental law,[41] international transport agreements[42] and, of course, international trade law.[43]

There are some mechanisms in the EU legal order which may have a direct or indirect bearing on the objective of ensuring compliance by the Union of its international obligations. The judicial control of the validity of Union legal acts with regard to international agreements binding upon the Union constitutes one relevant device. True, the lack of direct effect of a particular agreement may be an obstacle to such review. On the other hand, the principle of consistent interpretation will often be enough to guarantee the fulfilment of international obligations. It should also be noted that lack of direct effect could in some instances enhance rather than hamper the achievement of this objective. WTO law comes readily in mind, since because of its complexity, there is a risk that decisions of lower national courts in particular would not be based on a proper understanding of

[33] Case 104/81 *Kupferberg* EU:C:1982:362, para 13. See also Case 12/86 *Demirel* EU:C:1987:400, para 11; Case C-13/00 *Commission v Ireland* EU:C:2002:184, para 15; Case C-239/03 *Commission v France,* n 11 above, para 26. It is not possible here to go into the complex question of international responsibility for breach of mixed agreements, see the literature referred to in n 10 above.

[34] To mention but a few examples, see Case C-162/96 *Racke*, n 3 above; Case C-386/08 *Brita* EU:C:2010:91, paras 41 and 42; Case C-104/16 P *Council v Front Polisario* EU:C:2016:973. See also D Verwey, *The European Community, the European Union and the International Law of Treaties* (The Hague, TMC Asser Press, 2004).

[35] Case C-432/92 *Anastasiou* EU:C:1994:277 (Northern Cyprus); Case C-386/08 *Brita*, n 34 above (territories of the West Bank and the Gaza Strip); Case C-104/16 P *Council v Front Polisario,* n 34 above (Western Sahara).

[36] Case C-104/16 P *Council v Front Polisario,* n 34 above*,* paras 88-93.

[37] See, eg Case C-146/89 *Commission v United Kingdom* EU:C:1991:294; Case C-286/90 *Poulsen*, n 3 above; Case C-405/92 *Mondiet* EU:C:1993:906; Case C-37/00 *Weber* EU:C:2002:122; Case C-299/02 *Commission v Netherlands* EU:C:2004:620; Case C-308/06 *Intertanko*, n 20 above; Case C-347/10 *Salemink* EU:C:2012:17; Case C-106/11 *Bakker* EU:C:2012:328.

[38] Case C-158/14 *A and Others* EU:C:2017:202.

[39] Apart from The European Convention on Human Rights, which enjoys 'special status', universal human rights instruments sometimes become relevant in cases before the ECJ, see, eg A Rosas, 'The Charter and Universal Human Rights Conventions' in S Peers et al (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford, Hart Publishing, 2014) 1685-1701.

[40] See notably Joined Cases C-402/05 and C-415/05 P "*Kadi I*", n 27 above.

[41] There is fairly extensive case law relating to the application or interpretation of international environmental conventions, for examples, see Case C-240/09 *Lesoochranárske zoskupenie*, n 11 above; Case C-366/10 *The Air Transport Association of America*, n 3 above.

[42] See, eg Case C-439/01 *Cipra and Kvasnicka* EU:C:2003:31; Case C-224/16 *Aebtri*, n 15 above.

[43] There is an abundance of case law relating to international trade law, whether in the context of WTO law or bilateral trade agreements. Concerning the WTO, see at n 57 below, where examples are given of references to WTO dispute settlement decisions in judgments of the ECJ.

the various numerous WTO agreements and the extensive case law of the WTO dispute settlement bodies.[44]

It should be underlined that the great bulk of the Union Courts' activities concern a wide range of Union law issues which have very little or nothing to do with public international law. The Union Courts are neither international courts nor human rights courts[45] in the strict sense of these notions and the expertise of their members is mainly in the areas of Union law and/or national law. It is thus natural that in their search for the appropriate interpretation of public international law rules, the Union Courts turn to guidance which may be provided by the case law of international courts proper.[46] It should be noted that the Union Courts may for this purpose refer to decisions of such bodies even if the latter are not part of a dispute settlement system contained in a convention to which the Union itself has adhered.

The European Convention on Human Rights (hereinafter ECHR) and the case law of the European Court of Human Rights is a special case in point in view of the close links which exist between Union law and the European human rights system.[47] As is well-known, the Union, despite the fact that Article 6(2) TEU provides that the Union 'shall accede' to the ECHR, is not a Contracting Party to this Convention.[48] Already since the 1990s, the ECJ nevertheless started to refer not only to the provisions of the ECHR but also to individual decisions of the Strasbourg Court. While since the entry into force of the Lisbon Treaty (2009), the EU Charter of Fundamental Rights has become the main source for the Union Courts in applying or interpreting fundamental rights, the ECJ, in particular, still refers fairly frequently to Strasbourg case law. That this practice is likely to continue is underscored by the fact that according to Article 52(3) of the Charter, the rights contained in it which correspond to rights recognised under the ECHR should be given the same meaning and scope as those laid down by the Convention. According to the Explanations to the Charter, attention should be paid not only to the text of the ECHR but also to the case law of the Strasbourg Court and the Union Courts.[49]

A somewhat similar situation has arisen with respect to the EFTA Court, which functions as a dispute settlement body for the Agreement on a European Economic Area (hereinafter EEA), binding, apart from the Union and its 28 Member States, on three non-EU States (Iceland Liechtenstein and Norway). As EEA law should be closely aligned with Union law (principle of homogeneity), it is understandable that the EFTA Court regularly makes references to ECJ case law. In some instances, however, it is the other way around: the latter has cited EFTA Court judgments.[50]

As to universal dispute settlement bodies, the ECJ from time to time refers to judgments or advisory opinions of the International Court of Justice (hereinafter ICJ) as an indication of the state of public international law (often in the form of customary law) on a certain subject. This is so

[44] See A Rosas, 'International Responsibility of the EU and the European Court of Justice' in Evans and Koutrakos, n 4 above, 139-159 at 147. See, more generally, A Rosas, 'Implementation and Enforcement of WTO Dispute Settlement Findings: An EU Perspective' 4 (2011) *Journal of International Trade Law* 131-144.

[45] A Rosas, 'Is the EU a Human Rights Organization?' *CLEER Working Papers* 2011/1 (The Hague, Centre for the Law of EU External Relations, 2011); A Rosas, 'The European Union and Fundamental Rights/Human Rights: Vanguard or Villain?' 7 (2017) *Adam Mickiewitcz University Law Review* 7-24.

[46] A Rosas, 'With a Little Help from My Friends: International Case-Law as a Source of Reference for the EU Courts', 5 (2005) *The Global Community Yearbook of International Law and Jurisprudence* (Oceana Publications, 2006) 203-230; A Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue', 1 (2007) *European Journal of Legal Studies*.

[47] See the Article 6 TEU and the Preamble and Articles 52(3) and 53 of the EU Charter of Fundamental Rights. There is an abundance of literature relating to the relation between the two systems, see, eg A Rosas, 'Fundamental Rights in the Luxembourg and Strasbourg Courts' in C Baudenbacher, P Tresselt and T Örlygsson (eds), *The EFTA Court: Ten Years On* (Oxford, Hart Publishing, 2005) 163-175; H Senden, *Interpretation of Fundamental Rights in a Multilevel Legal System: An Analysis of the European Court of Human Rights and the Court of Justice of the European Union* (Cambridge, Intersentia, 2011).

[48] A draft accession agreements was declared incompatible with Union law in Opinion 2/13 EU:C:2014:2454.

[49] [2007] OJ C303/17.

[50] Baudenbacher et al, n 46 above; EFTA Court (ed), *The EEA and the EFTA Court: Decentred Integration* (Oxford, Hart Publishing, 2014).

despite the fact that the EU cannot be a party in proceedings before the ICJ.[51] Subjects on which guidance from ICJ case law have been sought include the international law of treaties, as codified in the Vienna Convention of 1969,[52] the law of the sea, as codified in the UN Convention on the Law of the Sea,[53] and issues of borders, territory, sovereignty and recognition.[54] To my knowledge, the ECJ has not so far had occasion to cite the International Tribunal for the Law of the Sea, despite the fact that the EU is a Contracting Party to the Convention (although the Union has not in advance accepted the compulsory jurisdiction of the Tribunal) and has once also been a party before the Tribunal.[55] The ECJ, on the other hand, has cited once the Human Rights Committee acting under the International Covenant on Civil and Political Rights of 1966 (but the Court did not follow the position taken by the Committee, noting that its decisions are not legally binding).[56]

Finally, there are several cases in which the ECJ has cited decisions of the WTO dispute settlement bodies (panels and the Appellate Body).[57] This is natural given that fact that the EU is a Contracting Party to the WTO Agreements including their compulsory dispute settlement system and that there is a close relation between WTO law and some parts of EU law mainly in the area of the Union's common commercial policy. While the WTO rules are not deemed to have direct effect in Union law contexts, the principle of consistent interpretation and the risk that violations of WTO law incur the international responsibility of the Union have in some instances prompted the ECJ to look at WTO case law, as interpreted by the dispute settlement bodies, for guidance.

5. Dispute settlement mechanisms

The ECJ has constantly held that the EU, as a subject of international law, may, in principle, become bound by clauses on third-party dispute settlement contained in international agreements concluded by the Union.[58] On the other hand, the Court has circumscribed this possibility with some conditions and has in some instances found that a specific dispute settlement mechanism contained in a draft agreement was incompatible with the Union legal order. Negative opinions in this respect have been rendered with regard to the judicial organ envisaged for an agreement establishing a European laying-up fund for inland waterway vessels, the first (hybrid) version of the judicial system envisaged for the EEA Agreement, the international judicial body envisaged for the unified patent regime and the draft agreement providing for the accession of the EU to the ECHR.[59]

Among the dispute settlement mechanisms to which the EU has adhered, the WTO system is by far the most important one.[60] To date, the EU has been a party, either as a claimant or a respondent, to close to 200 cases which have come before a WTO panel, and in most cases, also the Appellate Body. Apart from the WTO system, the EU is bound by a considerable number of compulsory arbitration clauses contained mostly in bilateral trade and agreements with third countries but also in the Energy Charter Treaty and the UN Convention on the Law of the Sea.[61]

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[51] Rosas, Global Community Yearbook, n 46 above, at 222-226.
[52] See, eg Case C-162/96 *Racke*, n 3 above, paras 24, 50.
[53] See, eg Case C-286/90 *Poulsen and Diva Navigation*, n 3 above, para 10; Case C-37/00 *Weber*, n 37 above, para 34.
[54] Case C-104/16 P *Council v Front Polisario,* n 34 above, paras 28, 88, 91.
[55] *Chile v European Community* (the Swordfish Case), see n 62 below. See moreover Case C-73/14 *Council v Commission* EU:C:2015:663, which concerned a statement made to the International Tribunal by the European Commission on behalf of the EU and relating to the request for an advisory opinion.
[56] Case C-249/96 *Grant* EU:C:1998:63, paras 43-47.
[57] See, eg Case C-245/02 *Anheuser Busch* EU:C:2004:717, paras 49 and 67; Case C-260/08 *HEKO Industrieerzeugnisse* EU:C:2009:768, para 22. See also Rosas, International Responsibility, n 44 above at 148.
[58] See, eg Opinion 1/91 (EEA Agreement), EU:C:1991:490, paras 39-40, 70; Opinion 2/13, n 48 above, paras 182-183. See more generally A Rosas, 'International Dispute Settlement: EU Practices and Procedures' 46 (2003) *German Yearbook of International Law* 284-322; A Rosas, 'The EU and International Dispute Settlement' 1 (2017) *Europe and the World: A Law Review* 7-35; M Cremona, A Thies and RA Wessel (eds), *The European Union and International Dispute Settlement* (Oxford, Hart Publishing, 2017).
[59] Opinion 1/76, EU:C:1977:83; Opinion 1/91, n 58 above; Opinion 1/09, EU:C:2011:123 and Opinion 2/13, n 48 above. See also Rosas, n 58 above, at 12-18.
[60] On the Union's participation in the WTO dispute settlement system see, eg Rosas, Journal of International Trade Law, n 44 above; G Marín Durán, 'The EU and Its Member States in WTO Dispute Settlement: A "Competence Model" or a Case Apart for Managing International Responsibility?' in Cremona et al, n 58 above, 237-273.
[61] Rosas, in Europe and the World, n 58 above, at 18-26.

These clauses have so far triggered only a few cases of concrete litigation. In the *Swordfish Case* between Chile and the EU,[62] the parties, despite the fact that the EU has not accepted the compulsory jurisdiction of the International Tribunal of the Law of the Sea, submitted the case to a chamber of this Tribunal. The case was later settled out of court, however, and two other cases have had the same outcome, namely a fisheries case between the Faero Islands and the EU and an arbitration procedure under the EU-US Open Skies aviation agreement (concerning the access of a European airline to the US market).[63]

Finally, it should be noted that the question of investor-to-state dispute settlement mechanisms (ISDS) poses some particular problems in relation to the application of Union law.[64] Suffice it to recall in this context that, with respect to an ISDS clause in a trade agreement with a third country, the ECJ held in a recent Opinion that such a clause, which can be triggered by a private investor, is susceptible to remove investment disputes from the jurisdiction of the courts of the EU Member States in favour of an international arbitral body and cannot therefore be established without the Member States' consent.[65] At the time of writing, a request for another Opinion is pending before the Court, this time on the compatibility of the ISDS mechanism contained in an agreement with Canada (CETA) with Union law.[66] While these cases concern ISDS mechanisms agreed with third countries, a very recent judgment deals with the legality, under Union law, of ISDS clauses contained in investment agreements concluded by the EU Member States inter se. The Court concluded that Union law precludes such clauses, as they imply that, unlike what is the case with commercial arbitration, where two private parties have agreed to submit their dispute to arbitration, a Member State has agreed to remove from the jurisdiction of its own courts (which constitute a crucial component of the EU judicial system) disputes which may concern the application or interpretation of Union law.[67]

[62] *Chile v European Community*, ITLOS Case No 7. See, eg Rosas, in German Yearbook, n 58 above, at 301-302; E Paasivirta, 'The European Union and the United Nations Convention on the Law of the Sea' 38 (2015) *Fordham International Law Journal* 1045-1071 at 1056-1057.
[63] Rosas, in Europe and the World, 9-10.
[64] See, eg ibid, 23-26.
[65] Opinion 2/15, n 8 above, paras 291-293.
[66] Opinion 1/17 (request made by Belgium in September 2017).
[67] Case C-284/16 *Achmea* EU:C:2018:158.