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Meeting report

59th meeting
Prague (Czech Republic), 24-25 September 2020

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

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I. INTRODUCTION 3
1. Opening of the meeting 3
2. Adoption of the agenda 3
3. Adoption of the report of the 58th meeting 3
4. Information provided by the Secretariat of the Council of Europe 3
II. ONGOING ACTIVITIES OF THE CAHDI 4
5. Committee of Ministers' decisions of relevance to CAHDI's activities, including requests for CAHDI's opinions 4
6. Immunities of States and international organisations 5
7. Organisation and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs 9
8. National implementation measures of UN sanctions and respect for human rights 10
9. Cases before the European Court of Human Rights (ECHR) involving issues of public international law 10
10. Peaceful settlement of disputes 13
11. Law and practice relating to reservations and interpretative declarations concerning international treaties: European Observatory of Reservations to International Treaties 14
III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW 15
12. Consideration of current issues of international humanitarian law 15
13. Developments concerning the International Criminal Court (ICC) and other international criminal tribunals 17
14. Topical issues of public international law 20
IV. OTHER 22
15. Election of the Chair and Vice-Chair of the CAHDI 22
16. Place, date and agenda of the 60th meeting of the CAHDI 22
17. Any other business 22
18. Adoption of the Abridged Report and closing of the 59th meeting 22
APPENDICES 24
Appendix I 25
Appendix II 35
Appendix III 37

I. INTRODUCTION

1. Opening of the meeting

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 59th meeting in Prague (Czech Republic) on 24-25 September 2020, with Mr Petr Válek (Czech Republic) as the Chair. Due to the COVID-19 pandemic, the meeting was held as a hybrid meeting (i.e. with delegates participating both in the meeting room and via videoconference). The list of participants is set out in **Appendix I** to this report.

2. The Chair opened the meeting by presenting Mr Martin Smolek, Deputy Minister for Legal and Consular Section at the Ministry of Foreign Affairs of the Czech Republic. Mr Smolek welcomed all participants to the meeting. He noted that the Council of Europe has always played an important role in the Czech foreign policy, since the respect for the rule of law and human rights has been one of its key pillars. He stated that the Czech Republic became the 30th member state of the Council of Europe in 1993 following the dissolution of Czechoslovakia and that, even before, Czechoslovakia had participated in the first meeting of CAHDI in 1991 as an observer. As such, Legal Advisers from his country had played an active role in the activities of the CAHDI for almost thirty years. He recalled, in particular, the joint initiative by the Czech Republic and Austria which led to the elaboration of the Declaration on Jurisdictional Immunities of State Owned Cultural Property. Deputy Minister Smolek praised the CAHDI as a pan-European forum for discussion and exchange of ideas in the field of public international law. He further stressed the importance of such a committee in the context of a COVID-19 pandemic which had critical impact on the activities and functioning of all international organisations. He noted that the current situation caused by the COVID-19 has raised new questions for international lawyers regarding, *inter alia*, protection of human rights and their possible derogations, diplomatic law and the limits to the diplomatic immunities. Finally, he thanked Mr Petr Válek for his role in the organisation of the meeting and expressed his hopes that the next meeting of the CAHDI would be held in a physical format.

3. The Chair welcomed the experts who were attending the CAHDI for the first time. Subsequently, he informed on the seminar on “The Contribution of the European Court of Human Rights to the Development of Public International Law”, organized on the margins of the CAHDI meeting in Prague on 23 September 2020, and promised that the compilation of statements made at the Seminar will be prepared by the CAHDI Secretariat and soon published in an online compilation on the website of the CAHDI. He then introduced the changes in the CAHDI Secretariat. He announced the departure of Ms Marta Requena and Ms Carolina Lasen Diaz. He introduced Ms Ana Gomez, the new Secretary of the CAHDI, as well as Ms Irene Suominen, Legal Adviser, the new CAHDI assistant Ms Isabelle Koenig and Mr Mathieu Dumont, a newly recruited Assistant Lawyer.

2. Adoption of the agenda

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

3. Adoption of the report of the 58th meeting

5. The CAHDI examined and adopted the report of its 58th meeting (document CAHDI (2019) 20 prov), held in Strasbourg (France) on 26-27 September 2019, and instructed the Secretariat to publish it on the website of the CAHDI.

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

6. Mr Jörg Polakiewicz, Director of Legal Advice and Public International Law of the Council of Europe, informed the CAHDI of the latest developments within the Council of Europe since the last meeting of the CAHDI in September 2019. In particular, he provided information on the new complementary procedure between the Committee of Ministers and the Parliamentary Assembly of the Council of Europe in case of serious violations by a member state of its statutory obligations. This mechanism, first formulated by the Committee of Ministers during its 129th Session in Helsinki on 17 May 2019, will address only the most serious violations of fundamental principles and values enshrined

in the Statute of the Council of Europe. Its primary aim is to bring a member state, through constructive dialogue and co-operation, to comply with the obligations and principles of the Organisation, hence as far as possible to avoid imposing sanctions. The procedure may, however, also ultimately lead to a decision of the Committee of Ministers to act under Article 8 of the Statute, i.e. to suspend the member state in question from its rights of representation, to request it to withdraw from the Council of Europe, and, upon non-compliance with such a request, to exclude the member state from the Organisation.

7. The Director also drew the CAHDI's attention to the protection of human rights during the COVID-19 pandemic, noting that 8 of the 10 member states that had invoked Article 15 of the European Convention on Human Rights (ECHR) had withdrawn their derogations. He brought attention to the toolkit issued by the Secretary General on '*Respecting democracy, the rule of law and human rights in the framework of the COVID-19 sanitary crisis*'. Mr Polakiewicz further informed the CAHDI members on the resumption of the negotiations between the European Union and the Council of Europe regarding the EU's accession to the ECHR in the framework of the intergovernmental ad hoc negotiation group ("47+1"), within which the CAHDI is entitled to act as an observer. Finally, he presented the latest document issued by the Treaty Office of the Council of Europe, a practical guide detailing the depositary practice within the Council of Europe. The document exists in printed form and is also available in the website of the Treaty Office (www.coe.int/conventions).

8. The Chair praised the usefulness of this practical guide for the CAHDI members. The CAHDI took note of the information provided by the Director of Legal Advice and Public International Law.

II. ONGOING ACTIVITIES OF THE CAHDI

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

a. Terms of Reference of the CAHDI for 2020-2021 and related matters

9. The Chair introduced the Terms of Reference of the CAHDI for 2020-2021, as contained in document CAHDI (2020) 1, and drew the experts' attention to the changes to the main tasks of the CAHDI, including an obligation to evaluate their tasks and organisation. In order to start a discussion, the Chair proposed that he, together with the current Vice-Chair and with those elected for 2021 will reflect on this question and prepare a non-paper that will serve as a basis for the exchange of views at the next CAHDI meeting. The CAHDI agreed with his proposal.

10. The Chair then presented the Council of Europe's working methods during the COVID-19 pandemic. He noted that the Secretary General had sent a circular letter to all steering and ad hoc committees, reminding them that Resolution CM/Res (2011)24 and its Appendix 1 on "*Rules of procedure for Council of Europe intergovernmental committees*" allows for flexibility in the working methods of committees, as they can adapt their working methods, including through the use of information technologies and interactive technologies for networks and meetings. Moreover, all committees are encouraged to use environmentally sound working methods, such as virtual meetings.

11. The Russian representative expressed his support for the use of information technologies in these unusual circumstances but regretted the limitations of a largely virtual meeting and the absence of human contact necessary for diplomacy.

12. The CAHDI further examined, under the same agenda item, the request for "observer" status to the CAHDI submitted by the Republic of Korea on 17 January 2020 as contained in document CAHDI (2020) 14 Restricted, dated 30 January 2020.

13. The representatives of Germany, Portugal, Australia, Armenia, Romania and Mexico all intervened to support the request, emphasising the Republic of Korea's commitment to human rights and the rule of law, as well as its involvement in the promotion of public international law.

14. Following this exchange of views, the CAHDI unanimously agreed to the request for "observer" status to the CAHDI by the Republic of Korea and decided to transmit this request to the Committee of Ministers for decision.

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

15. The Chair presented a compilation of the Committee of Ministers' decisions of relevance to CAHDI's activities (document CAHDI (2020) 2 *Restricted*).

16. The Committee of Ministers had approved[1] the continuation of negotiations towards accession of the EU to the ECHR. In this context, the ministers' deputies had further decided that both the Registrar of the European Court of Human Rights (ECtHR) and the CAHDI were entitled to participate as observers in the meetings of the ad hoc negotiation group "47+1". The CAHDI appointed Ms Alina Orosan as its representative in the meetings of the negotiation group on behalf of the CAHDI. The Chair reminded the CAHDI members that the two next sessions of the "47+1" group would take place from 29 September to 2 October 2020 in Strasbourg and from 14 to 27 November 2020.

17. The Chair asked the delegations for comments regarding their country's presidency of the Committee of Ministers. The Greek representative stated that his country had put a great amount of effort and thought in their presidency and that they hoped that they would be able to hold all of the meetings, initiatives and other side events they had planned, even under these special circumstances. The German representative stated that his delegation looked forward to the upcoming German presidency. He also stated his country's intention to hold an expert workshop on 26 March 2021 on the topic of non-legally binding agreements in international law.

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*

18. The Chair presented the topic "*Settlement of disputes of a private character to which an international organisation is a party*" which had been included in 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 at facilitating an exchange on topical issues related to the settlement of third-party claims 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 such situations. The document contains five questions addressed to members of the CAHDI.

19. The written comments to these questions submitted by 20 delegations (Albania, Andorra, Armenia, Austria, Belarus, Belgium, Canada, Czech Republic, Denmark, Estonia, Germany, Greece, Hungary, Israel, Mexico, Serbia, Slovenia, Spain, Switzerland and the United Kingdom) are contained in document CAHDI (2020) 3 prov *Confidential Bilingual*. There have been no new contributions submitted to the Secretariat since the last CAHDI meeting. The Chair invited further written contributions of CAHDI delegations on the five questions on this issue.

20. The Chair recalled that, at the 54th CAHDI meeting in September 2017, the representative of the Netherlands had presented a document (CAHDI (2017) 21 *Confidential*) summarising the main trends of the replies from states and further examining this issue in the context of peacekeeping and police operations.

21. The Secretariat presented the document (CAHDI (2020) 12 prov *Confidential*) containing the experience of the Council of Europe and contributions from Austria, Belgium and the Netherlands as host countries of international organisations as well as NATO – all regarding the settlement of disputes of a private character involving an international organisation, in particular through relevant case law from domestic courts. The delegation of the Netherlands had invited the Secretariat, at the 58th CAHDI meeting in September 2019, to prepare such a document covering both labour disputes and civil liability, in order to facilitate the discussion on the subject within the CAHDI.

[1] Decision of the Committee of Ministers adopted on 15 January 2020 at the 1364th meeting of the Ministers' Deputies.

22. Based on the newly compiled document, the Secretary of the CAHDI provided a short overview of the experience of the Council of Europe relating to the settlement of disputes of private character to which the Council of Europe is a party.

23. The Council of Europe has an internal Administrative Tribunal for labour disputes. Private claims against the Council of Europe in national courts have not been numerous. They concern mostly issues related to tax-exemption and immunity from jurisdiction. On tax-exemptions, there are recent cases brought before German and French national courts that have reached different conclusions related to freelance interpreters having worked for the Council of Europe on the question whether the exoneration of income tax should be applied to them. As for the immunity of jurisdiction, an example of relevant case law comes from the Appeal Court of Colmar (France), that in a judgment of 2017 upheld the decision of a French court for labour disputes to declare itself incompetent to examine claims against the Council of Europe on the basis of the Organisation's immunity from jurisdiction. In other cases, national courts have addressed and recognised the jurisdictional immunity of the Council of Europe, while considering that it is not absolute.

24. The Secretary of the CAHDI referred further to case law from the European Court of Human Rights (ECtHR) reflecting general principles on the responsibility of Parties to the European Convention on Human Rights (ECHR) in relation to their membership in an international organisation. In a general manner, the ECtHR has ruled that it lacks jurisdiction when the plaintiff complains about a specific decision taken by an international organisation, with no direct or indirect intervention of the state party to the ECHR. However, the ECtHR can determine if the Parties to the Convention had intended that the rights guaranteed by the Convention be equally protected by the international organisation to which they had transferred part of their sovereign powers. The Court has also set out the criteria of "equivalent protection".

25. In the same vein, as regards the United Nations, the ECtHR has considered that the responsibility of Parties to the Convention cannot be triggered by acts or omissions of multinational peace-keeping forces created or authorised by the UN Security Council. These are directly attributable to the United Nations as an international organisation. By contrast, the responsibility of State Parties can be determined in relation to their actions or omissions concerning national measures taken by Parties for the implementation of sanctions imposed by the UN Security Council.

26. The representative of the Netherlands expressed his gratitude for the written comments provided so far as well as to the Secretariat who had compiled the working document which gave an informative overview of the experience of the States and international organisations and amply illustrated that the experience was not the same for the different organisations. The delegation of the Netherlands is currently considering to propose, in the context of the negotiations in the Sixth Committee of the UN General Assembly on the resolution concerning the rule of law at the national and international level, that the UN Secretary General, in his next report, would address the issue of implementation of rule of law principles by the international organisation itself, including with regard to the settlement of disputes of a private law character to which the United Nations is a party. The delegation of the Netherlands remains available for bilateral discussions on the issue with any other interested delegation.

- *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

28. The Chair recalled that this topic was included in CAHDI's agenda at its 45th meeting, in March 2013, following a joint initiative by the delegations of the Czech Republic and Austria to prepare a Declaration in support of the recognition of the customary nature of the relevant provisions of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property (henceforth the 2004 UN Convention), in order to guarantee the immunity of State cultural property on loan. The Declaration on Jurisdictional Immunities of State Owned Cultural Property was 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) enjoys 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 been signed by the Ministers of Foreign Affairs of 20 States (Albania, Armenia, Austria, Belarus, Belgium, Czech Republic, Estonia, Finland, France, Georgia, Holy See, Hungary, Ireland, Latvia, Luxembourg, the Netherlands, Portugal, Romania, Russian Federation and Slovak Republic). The Committee noted that the Secretariat of the CAHDI performed the functions of "depositary" of this Declaration and that the text of this Declaration was available in English and French on the website of the CAHDI.

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

30. The Chair recalled that, besides 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.

31. The CAHDI welcomed the replies submitted by 27 delegations (Albania, Andorra, Armenia, Austria, Belarus, Belgium, Canada, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Mexico, the Netherlands, Norway, Romania, Spain, Switzerland, Ukraine, the United Kingdom and the United States of America) to this questionnaire (document CAHDI (2020) 4 prov *Confidential Bilingual*). There have been no new contributions to this questionnaire since the last CAHDI meeting.

- *Immunities of special missions*

32. Delegations were reminded that the topic of "*Immunities of special missions*" was included in the agenda of the CAHDI in September 2013, at 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.

33. In September 2017, the CAHDI agreed that Sir Michael Wood, member of the United Nations International Law Commission (ILC) and former Chair of the CAHDI, and Mr Andrew Sanger, Lecturer at the Faculty of Law of the University of Cambridge would prepare an analytical report on the legislation and practice of member states of the Council of Europe, as well as 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. The analytical report, together with the replies to the questionnaire in its Appendix, was presented by Sir Michael Wood and Mr Andrew Sanger at the 58th CAHDI meeting in September 2019, and copies of this latest CAHDI book, published by Brill-Nijhoff Publishers, were distributed to all delegations. The 38 replies to the questionnaire (Albania, Andorra, Armenia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Hungary, Ireland, Israel, Italy, Japan, Latvia, Malta, Mexico, Republic of Moldova, the Netherlands, Norway, Romania, Russian Federation, Serbia, Slovenia, Spain, Sweden, Switzerland, Ukraine, the United Kingdom and the United States of America) are also included in document CAHDI (2020) 5 prov *Bilingual*.

- *Service of process on a foreign state*

34. 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, following which a questionnaire on this topic had been prepared. Up to this meeting, 31 delegations (Albania, Andorra, Austria, Belarus, Belgium, Bosnia and Herzegovina, Canada, Cyprus, Czech Republic, Estonia, 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) have submitted their replies. These contributions were reproduced in document CAHDI (2020) 6 prov *Confidential Bilingual*.

35. The Chair noted that there have been no new replies since the last CAHDI meeting and he encouraged delegations which had not yet done so, to submit or update their contributions to the questionnaire, which are treated as confidential.

36. 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.

37. The representative of Austria informed the delegations that his country had now ratified the 1965 *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. Upon ratification, Austria made a reservation with regard to the service on documents on Austria requiring that such service was to be carried out via diplomatic channels.

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

38. The Chair reminded the Committee that the CAHDI followed the status of ratifications and signatures to the 2004 *United Nations Convention on Jurisdictional Immunities of States and Their Property* since its 29th meeting in March 2005. In this respect, he 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. He further underlined that, up to this CAHDI meeting, 22 States had ratified, accepted, approved or acceded to the 2004 UN Convention. Finally, he 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 is needed.

39. The representative of Mexico stated that his country was a party to the 2004 UN Convention since 2015. He urged those States that have not yet done so, to ratify or accede to the Convention. Mexico considers that some provisions of the Convention are part of customary international law. Mexico acknowledges that the provisions of the "Declaration on Jurisdictional Immunities of State Owned Cultural Property" are codified in the referred UN Convention and that some of them are part of customary international law. The Declaration is complementary to the Convention and confirms the purpose of this instrument regarding immunities of execution of State property. Mexico considers that each State has the exclusive competence to determine which of its property should be treated as national property enjoying jurisdictional and executional immunities. Mexico carries out continuous efforts for the recovery of its cultural heritage which has been unlawfully removed from Mexican territory through legal, administrative and diplomatic means, according to the specific circumstances of each case.

40. The representative of Austria noted that his country had recently supported Germany and Hungary in their respective cases[2] before the United States Supreme Court by submitting its legal views and positions via verbal note to the Solicitor of the State via the Department of State. These invited the court to recognise the immunity of the respondent states based on the view that the content of the 2004 UN Convention reflected customary international law and that, in particular, the expropriation exception of the United States Foreign Sovereign Immunities Act must be understood and interpreted in the light of the recognized rules of international law, and that the United States courts should abstain from adjudicating the present cases based on the rules of international comity. The representative of Austria expressed his delegation's gratitude to the United States of America for their assistance in making the use of a simplified *amicus curiae* procedure possible in this respect.

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

41. The CAHDI noted that, up to this meeting, 35 States (Andorra, Armenia, Austria, Belgium, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Mexico, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, 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"*.

42. The Chair invited delegations to submit or update their contributions to the relevant database so that it provides a picture as accurate and varied as possible of the current State practice regarding State immunities.

[2] *Federal Republic of Germany, et al., Petitioners v. Alan Philipp, et al.*, No. 19-351, and, *Republic of Hungary, et al., Petitioners v. Rosalie Simon, et al.*, No. 18-1447.

43. The Chair referred to the document on "*Exchange of national practices on possibilities for the Ministry of Foreign Affairs to raise Public International Law issues in procedures pending before national tribunals and related to States' or international organisations' immunities*" (document CAHDI (2020) 7 prov *Confidential Bilingual*), and noted that, up to this CAHDI meeting, 30 delegations (Albania, Austria, Belgium, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Israel, Italy, Japan, Latvia, Luxembourg, Mexico, Montenegro, the Netherlands, Norway, Portugal, Romania, Russian Federation, Slovak Republic, Slovenia, Spain, Sweden and the United States of America) had replied to the questionnaire on this matter. Since the last meeting, no new contributions have been sent to the Secretariat.

44. The Chair reported of several instances concerning restrictive measures imposed due to the COVID-19 pandemic against members of Czech diplomatic missions. While some of these measures were understandable and could be accepted, others, e.g. the forced quarantine of diplomats in special state centres, clearly violated the 1961 *Vienna Convention on Diplomatic Relations*.

45. The representative of Sweden indicated that his country had encountered similar problems. It was important to guarantee that diplomats could continue their work by assuring the full applicability of the 1961 *Vienna Convention on Diplomatic Relations* throughout the crisis.

46. The Representative of Belgium informed the CAHDI members of a recent case[3] of the Belgian *Cour de Cassation* related to immunities of states and of international organisations. Confirming its ruling in *Fortis*[4], the *Cour de Cassation* recalled in its judgment that State immunity from jurisdiction can be subject to exceptions in the context of commercial activities by state authorities. In order to determine whether an act performed by a state has been performed in the exercise of public authority and can thus entail jurisdictional immunity of the state, it is necessary to have regard to the nature of that act and the capacity in which that state intervened, taking into account the context in which the act in question was performed.

47. The representative of the United States of America provided the CAHDI members with further information on two related Holocaust era claim cases currently pending before the United States Supreme Court and to which the representative of Austria had referred to earlier during the meeting. Both cases raise the question whether United States courts can decline to exercise jurisdiction under the United States Foreign Sovereign Immunities Act (FSIA) based on international comity considerations. The cases have proved to be of considerable interest for a variety of CAHDI members who have filed diplomatic notes expressing their governments' views. Recently also the United States filed a brief arguing that United States courts should be able to take account of international comity considerations when deciding whether to exercise jurisdiction. After oral arguments have been heard in the cases on 7 December 2020, the Supreme Court is estimated to render its decisions in the spring of 2021.

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

48. The Chair introduced the document CAHDI (2020) 8 prov *Bilingual* on the "*Organisation and functions of the Office of Legal Adviser of the Ministry of Foreign Affairs"* and welcomed the replies of 40 States and one Organisation (Albania, Andorra, Armenia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Israel, Italy, Latvia, Lithuania, Luxembourg, Malta, Mexico, Republic of Moldova, Montenegro, the Netherlands, Norway, Romania, Serbia, Slovenia, Spain, 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*. Since the last meeting, no delegation had submitted a new or revised contribution to the questionnaire.

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

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[3] C.18.0282.F, judgment of 6 December 2019.
[4] C.14.0322.F, judgment of 23 October 2015.

50. The representatives of Slovenia, Japan and Armenia informed the CAHDI members of organisational and structural changes in the Office of the Legal Adviser in their respective Ministries of Foreign Affairs.

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

51. The Chair introduced document CAHDI (2020) 9 prov Confidential Bilingual on "Cases that have been submitted to national tribunals by persons or entities included in or removed from the lists established by the UN Security Council Sanctions Committees". Up to this meeting, 37 States and one Organisation have sent contributions to the database (Albania, Armenia, Austria, Azerbaijan, Belgium, Bulgaria, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, Mexico, the Netherlands, North Macedonia, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom, the United States of America and the European Union). The Chair further encouraged CAHDI experts to insert new contributions or update existing ones.

52. The Chair informed the delegations that on the day before, at the Seminar organised on the margins of the CAHDI meeting by the Ministry of Foreign Affairs of the Czech Republic, the Vice-Chair of the CAHDI had given a presentation on the topic *"The UNSC Sanctions vs. the European Convention on Human Rights"*. All the contributions of the seminar were soon to be published in an online compilation on the website of the CAHDI.

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

53. The Chair invited the members of CAHDI to discuss the derogations under Article 15 of the European Convention on Human Rights which were made by 10 member States of the Council of Europe. He also reminded them of the legal opinion that had been adopted by the CAHDI in September 2018 regarding Recommendation 2125 (2018) of the Parliamentary Assembly of the Council of Europe, titled "*State of Emergency: Proportionality Issues concerning Derogations under Article 15 of the European Convention on Human Rights*". The Chair then invited the Secretariat to make an overview of the situation concerning derogations under Article 15 of the Convention.

54. The Director of Legal Advice and Public International Law of the Council of Europe stressed that the point of this item was to discuss the practice and the difficulties of states, in particular when faced with the question of whether or not to derogate from rights and freedoms under the Convention. He drew the attention of the CAHDI members to the academic debates this question had caused in many member states. He also remarked that the Court had not yet had to deal with cases linked to derogations made due to the current pandemic.

55. The Chair noted that this debate had also taken place in the Czech Republic with the majority opinion being that such derogations were not necessary.

56. The representative of Austria indicated that his country had not deemed derogations necessary. He reminded the members of CAHDI that the Convention had constitutional status in Austria. He stated that several cases before Austrian courts concerning government measures in response to the pandemic were ongoing.

57. The representative of Finland stated that, according to her government, such derogations were not necessary, as they were reserved for cases such as military emergencies. Her government's position is that the margin of manoeuvre granted by the Convention was sufficient to manage the current situation. She underlined the fact that those measures had to be proportionate, and therefore limited in time and scope, as well as justified by strict necessity.

58. The representative of Germany stated that his country had also debated the question and decided not to derogate to the Convention. Their opinion was that the flexibility granted in the human rights instruments was enough to take the necessary measures. He also agreed with other delegations that restrictions must be proportionate, non-discriminatory, transparent and time bound. He stated that some of the measures taken in Germany are and might further be challenged before German courts.

59. The representative of Slovenia stated that his country had followed the same approach of non-derogation. He also informed the CAHDI members that Slovenian constitutional courts had rejected some early governmental measures due to them not being based on strictly verified scientific information.

60. The representative of Romania stated that her country had used derogations under Article 15 of the ECHR when the World Health Organisation declared the pandemic. The decision to declare a state of emergency was taken. Since the effects of this state of emergency included a restriction of civil rights on a large territorial and personal scope, it was deemed necessary to make a derogation. The derogation was strictly limited in time, and when the state of emergency was over, Romania informed, in line with the requirements of art. 15 of the Convention, that they were no longer derogating from the ECHR. Romania has transitioned towards a state of alert, under which some restrictions still exist. However, these measures do not require a derogation to the ECHR as the situation is not perceived any longer as an emergency within the meaning of the Convention (the level of alert was downgraded from the state of emergency to the state of alert) and the measures undertaken are proportionate and necessary according to the terms of the Convention and within the limitations permitted.

61. The representative of France stated that his country had introduced a series of emergency measures in response to the pandemic, and that they had also discussed whether a derogation from the Convention was necessary or not. France had previously used a derogation following the 2015 terrorist attacks when a state of emergency had been declared. In the current situation, however, a derogation was not deemed necessary. The representative of France underlined that this was due to the specific conditions in his country at the time, and that other member states, faced with other conditions, might have been right to make derogations. He also stated that derogating from the Convention did not mean violating it, but following it, as these derogations were provided for by the text of the Convention itself. Moreover, he indicated that French judges had been examining French measures taken in response to the pandemic by applying strictly the provisions of the ECHR in order to protect human rights.

62. The representative of Italy stated that his opinion was very much in line with the statements made by the French and German representatives. He informed the CAHDI that when his country was the first in Europe to be hit by the pandemic, a series of decrees had been taken to tackle it. These measures were geographically limited at first, but they were then extended to cover the entire territory of Italy. However, since they did not conflict with the Convention, no derogation under the Convention was made. As the situation improved, these measures were also gradually withdrawn. The representative of Italy stated that, like his French colleague, he was convinced that the ECHR allowed the use of such protective measures.

63. The representative of Andorra informed the CAHDI that his country had never faced a state of sanitary emergency before. Andorra did not have a law allowing a state of emergency to be enacted. Sanitary emergency was declared, but no confinement policy was enforced. He praised the compliance of Andorran citizens, who followed the recommendations of the government. In this context, Andorra did not feel a derogation was necessary. The representative of Andorra further stated that a great degree of attention had been given to the respect of civil liberties, and that the parliament had controlled the decisions of the government.

64. The Chair thanked the representatives for this information and stated that the ECtHR had taken decisions to facilitate teleworking and electronic communication in order to remain fully functional during the pandemic.

65. The CAHDI took note of the annual Appendix to the document with the case law of the ECtHR related to public international law. A revised version of document PIL (2019) Case Law Appendix I was published on the CAHDI website. Moreover, document PIL (2020) Case Law Appendix II prepared by the Secretariat, which contains press releases and legal summaries of relevant judgments and decisions of the ECtHR from 1 January to 31 December 2019, was now available on the CAHDI website.

66. The Chair also informed the members of the CAHDI that Protocol No. 16 to the ECHR, which entered into force on 1 August 2018, now had 16 ratifications and that 2 advisory opinions had been delivered by the Grand Chamber so far. The first request was made by the French *Cour de Cassation*, with regards to the legal parentage of children born to a surrogate mother. The Court gave its opinion

on 10 April 2019, establishing that in a situation where a child is born abroad through a gestational surrogacy arrangement, the child's right to respect for private life requires domestic law to provide a possibility of recognition of a legal parent-child relationship with the intended mother, designated in the birth certificate as the "legal mother". However, states are not required to register the details of the birth certificate in order to establish the legal parent-child relationship with the intended mother. Another means, such as adoption of the child by the intended mother, may also be used.

67. On 29 May 2020, the Grand Chamber of the ECtHR delivered its second advisory opinion in reply to a request from the Armenian Constitutional Court. The case concerned the interpretation of an article of the Armenian Penal Code making it a criminal offence to overthrow the constitutional order and its application under Article 7 of the ECHR in the context of proceedings against the former President of the country.

68. In December 2019, the ECtHR further received, for the first time, a request for an advisory opinion from the Council of Europe's Committee on Bioethics (DH-BIO) under Article 29 of the *Convention on Human Rights and Biomedicine* (ETS No. 164, "the Oviedo Convention"). The questions posed by the DH-BIO are intended to obtain legal clarity as regards the interpretation of Article 7 of the Oviedo Convention as to the minimum protection afforded by the Convention, including in cases of mental health patients receiving treatment without their consent.

69. The representative of Spain drew the attention of the CAHDI members to the Grand Chamber judgment of 13 February 2020 in the case of *N.D. and N.T. v. Spain*[5]. The case concerned the immediate return to Morocco of two nationals of Mali and Côte d'Ivoire who on 13 August 2014 attempted to enter Spanish territory in an unauthorised manner by climbing the fences surrounding the Spanish enclave of Melilla on the North African coast. The Court considered that the applicants had in fact placed themselves in an unlawful situation when they had deliberately attempted to enter Spain by crossing the Melilla border protection structures as part of a large group and at an unauthorised location, taking advantage of the group's large numbers and using force. They had thus chosen not to use the legal procedures which existed in order to enter Spanish territory lawfully. Consequently, the Court considered that the lack of individual removal decisions could be attributed to the fact that the applicants – assuming that they had wished to assert rights under the Convention – had not made use of the official entry procedures existing for that purpose, and that it had thus been a consequence of their own conduct. The Court hence concluded that it could not hold the respondent state responsible for the lack of a legal remedy in Melilla enabling them to challenge that removal. The Court held, unanimously, that there had been neither a violation of Article 4 of Protocol No. 4 to the ECHR nor a violation of Article 13 of the Convention taken in conjunction with Article 4 of Protocol No. 4.

70. The representative of Belgium informed the CAHDI about the case *M.N. and Others v. Belgium*[6]. The case concerned a couple of Syrian nationality and their two children who were refused short-stay visas that they had applied for at the Belgian Embassy in Beirut in order to seek asylum in Belgium. The applicants considered that the persistent refusal by the Belgian authorities to issue them with a 'humanitarian' visa exposed them to a situation contrary to Article 3 of the ECHR without the possibility of effectively remedying the situation in accordance with Article 13 and Article 6.1 of the ECHR. Several States, such as Croatia, the Czech Republic, Denmark, France, Germany, Hungary, Latvia, the Netherlands, Norway, Slovakia and the United Kingdom, intervened during the written procedure. In its judgment delivered on 5 May 2020, the Grand Chamber of the ECtHR declared, by a majority, the application inadmissible. The Court recalls that Article 1 of the ECHR limits the Convention's scope to persons within the jurisdiction of the States Parties to the Convention. In the Court's view, in ruling on the visa applications, the Belgian authorities had taken decisions relating to the conditions of entry into Belgian territory and had exercised a prerogative of public authority. However, this alone was not sufficient to bring the applicants under the "territorial" jurisdiction of Belgium within the meaning of Article 1 of the ECHR. In order to determine whether the Convention applied in the instant case, the Court also considered whether there were exceptional circumstances such as to justify a finding that Belgium had exercised extraterritorial jurisdiction over the applicants. In the Court's view this was not the case since the applicants had never been on Belgian territory, they claimed no pre-existing family or private life in Belgium, they were not Belgian nationals seeking the

[5] ECtHR, *N.D. and N.T. v. Spain* [GC], nos 8675/15 and 8697/15, 13 February 2020.
[6] ECtHR, *M.N. and Others v. Belgium* [GC], no. 3599/18, 5 May 2020.

protection of their embassies; and that diplomatic agents had at no time exercised *de facto* control over the applicants, who freely chose to report to the Belgian Embassy in Beirut. Lastly, the Court considered whether the fact that proceedings were instituted at national level may constitute an exceptional circumstance sufficient to trigger, unilaterally, an extraterritorial jurisdictional link between the applicants and Belgium within the meaning of Article 1 of the Convention. Previously, in the case of *Abdul Wahab Khan*[7], the Court had held that the mere fact that an applicant brought proceedings in a state party with which he had no connecting tie could not suffice to establish that state's jurisdiction over him. The Court considered that to find otherwise would amount to enshrining a near-universal application of the Convention on the basis of the unilateral choices of any individual, irrespective of where in the world they found themselves, and therefore to create an unlimited obligation on the contracting states to allow entry to an individual who might be at risk of ill-treatment contrary to the Convention outside their jurisdiction. In the Court's opinion, such an extension of the Convention's scope of application would also have the effect of negating the well-established principle of public international law, recognised by the Court, according to which the States Parties, subject to their treaty obligations, including the Convention, had the right to control the entry, residence and expulsion of aliens. In consequence, the Court considered that the applicants had not been within Belgium's jurisdiction as regards the circumstances in respect of which they complained under Articles 3 and 13 of the ECHR.

71. The representative of Finland informed the CAHDI that on 17 September 2020, the ECtHR had issued a judgment in the case of *Kotilainen and Others v. Finland*[8]. She stated that this judgment was interesting from the point of view of international law as it concerned the state's duty of due diligence regarding the control of firearms. Finnish authorities had not observed their duty of due diligence and the Court had found a violation of Article 2 of the ECHR. Finnish authorities were still examining the judgment and contemplating whether to request the referral of the case to the Grand Chamber.

72. The representative of France, while noting that he had no particular case to inform the CAHDI about, emphasised the importance of third party interventions for the states and the Court in cases raising questions related to public international law, such as the extraterritorial application of the Convention.

73. The representative of Austria brought the attention of the CAHDI to the case of *Lewit v. Austria*[9]. In its judgment of 10 October 2019, the ECtHR had unanimously held that there had been a violation of Article 8 of the ECHR due to the fact that the national courts had failed to protect the right to reputation of the applicant with regard to his complaints, as a Holocaust survivor, that he had been defamed by an article in a right-wing periodical which had used terms like "mass murderers", "criminals" and "a plague" to describe people like him liberated from the Mauthausen concentration camp complex in 1945. The representative of Austria welcomed the judgment and noted that his country was currently working hard towards its execution, including looking into the possibilities to facilitate judicial recourse in similar cases in the future.

74. The representative of Portugal informed the CAHDI that a group of 6 young Portuguese nationals had lodged an application before the ECtHR accusing 33 states of violation of their right to life for not having sufficiently reduced their CO^2 emissions. This is the first case brought before the Court where the claimed damage is due to climate change, and it will be a very important case if the Court rules that it is admissible.

10. Peaceful settlement of disputes

75. The Chair reminded the CAHDI members that the scope of this item had been expanded in 2017 at the request of France, and that document CAHDI (2018) 1 *Restricted* had been produced to give an overview of the more diverse means of settlement now covered by this item. The Chair also recalled how, at the 55th CAHDI meeting, documents CAHDI (2018) 1 *Restricted* and CAHDI (2018) 11 were merged into document CAHDI (2018) 20, which was then revised to take into account the comments made at the 57th and 58th meetings, and is now available as document CAHDI (2019) 14 *Restricted*. The Chair noted that no new notifications or modified declarations had

[7] ECtHR, *Abdul Wahab Khan v. the UK* (dec.), no. 11987/11, 28 January 2014.
[8] ECtHR, *Kotilainen and Others v. Finland*, no. 62439/12, 17 September 2020.
[9] ECtHR, *Lewit v. Austria*, No. 4782/18, 10 October 2019.

been made by CAHDI member states to the Secretary General of the United Nations since the last meeting. However, India had submitted a new Declaration in September 2019, replacing the one they had submitted in 1974.

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*

76. 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 containing these reservations and declarations which are subject to objections (documents CAHDI (2020) 10 prov *Confidential* and CAHDI (2020) 10 Addendum prov *Confidential Bilingual*) and opened the discussion. The Chair also drew the attention of the delegations to document CAHDI (2020) 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.

77. The Chair underlined that the reservations and declarations to international treaties still subject to objection are contained in the document CAHDI (2020) 10 prov *Confidential*, which includes 13 reservations and declarations. Eight 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). Moreover, one partial withdrawal had been identified since the last CAHDI meeting (Part III of the document).

78. With regard to **the declaration made by Myanmar** concerning the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, the representative of Germany indicated that his country considered this reservation to be incompatible with the object and purpose of the protocol. The representative of the Netherlands stated that his country considered this declaration as a reservation and intended to object. The representative of the United Kingdom declared his country was also considering objecting, for similar reasons.

79. With regard to **the declaration made by the Russian Federation** concerning the *Paris Agreements*, no comments were made by delegations.

80. With regard to **the declaration made by Georgia** to the *International Agreement on Olive Oil and Table Olives*, the representative of Russia expressed his opinion that this declaration was based on a misinterpretation of facts and law, and that his country reserved the right to express their detailed opinion at a later date.

81. With regard to **the late reservations and declaration made by Honduras** to the *Convention on Road Traffic*, the representative of Austria considered that since the reservations were only three days late, they would – as an exception – not object. The representative of Germany stated that they shared Austria's position on the matter.

82. With regard to **the declarations made by Chile** concerning the *Optional Protocol of the Convention on the Elimination of All Forms of Discrimination against Women*, the representative of the United Kingdom expressed the opinion that some elements of the declarations were unnecessary, and that his country reserved their right to object.

83. With regard to **the reservation made by Brunei Darussalam** concerning the *Convention on Road Traffic*, no comments were made by delegations.

84. With regard to **the declaration made by Azerbaijan** to the *Intergovernmental Agreement on Dry Ports*, the representative of Armenia stated that his country would make its position clear in due time.

85. With regard to **reservations made by Oman** to the *International Convention for the Protection of All Persons from Enforced Disappearance*, the representative of Germany indicated that its country was considering to object. The representative of Austria noted that his country did not think this reservation was prohibited and was hence not going to object to it.

86. With regard to **the declaration of Azerbaijan** concerning the *Fourth Additional Protocol to the European Convention on Extradition* (CETS No. 212), the representative of Austria stated that this declaration looked like a reservation, reminding the CAHDI members that reservations were prohibited under Article 13.3 of the Protocol and that his country was hence considering to object. Moreover, the representative of Austria raised the question of whether such a reservation, even if reservations were allowed by the Protocol, was permissible since it was not stating that becoming party to the treaty wouldn't imply the recognition of another party to said treaty, but aimed at generally excluding the application of the treaty in relation to another state which it recognises as such. The representative of Germany shared his Austrian colleague's concerns and expressed the wish to have a discussion on the issue. The representative of Romania stated that she did not think the Azerbaijani reservation implied a non-recognition of the state of Armenia. She also stated that her country had experience with similar cases, as they did not recognise the statehood of Kosovo*. When they participate in a treaty to which Kosovo* is also a party, they issue a declaration clarifying that Romanian participation in the respective treaty alongside Kosovo* did not imply a recognition of Kosovo* as a State. The representative of Armenia stated that Armenia and Azerbaijan both recognized each other, and that the present matter was only to know whether this declaration constituted a reservation. The representative of Austria expressed his doubts at the possibility for a party to a multilateral convention to exclude the application of the convention in relation to another state participating in the convention. The Chair stated that this issue could potentially be debated during the next meeting of the CAHDI.

87. With regard to **the declaration made by Georgia** concerning the *Additional Protocol to the European Charter of Local Self-Government on the Right to Participate in the Affairs of a Local Authority* (CETS No. 207), no comments were made by delegations.

88. With regard to **the declaration made by Azerbaijan** to the *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* (CETS No. 201), the representative of Austria indicated that his country intended to object, quoting article 48 of the Convention, which prohibits reservations. His country regards the declaration as a reservation and intends to object.

89. With regard to **the declaration made by Armenia** concerning the *Convention on Mutual Administrative Assistance in Tax Matters as Amended by the 2010 Protocol* (ETS No. 127), no comments were made by delegations.

90. With regard to **the declaration made by Turkey** to the *Council of Europe Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events* (CETS No. 218), the representative of Turkey reminded the members of the CAHDI that international law allowed all states to recognize other states and establish mutual diplomatic relations, and that as a consequence a state party to an international convention could use a declaration to inform other parties of the scope of the implementation of this legal instrument. The representative of Cyprus informed the CAHDI that they had already deposited an objection to this declaration. The representative of Greece stated that this declaration, like others of the same type, were in her opinion legally ad politically problematic. She stated that her country intended to object to this declaration when they ratify it.

91. With regard to **the partial withdrawal made by Maldives** to the *Convention on the Elimination of All Forms of Discrimination against Women*, the representative of Austria stated that his country had already objected to the whole reservation in the past, and that their objection remained. The representative of Germany stated that he considered this partial withdrawal, which amounted to a new reservation, as invalid and was therefore opposed to it. The representative of Portugal stated that her country had objected to the initial reservation, but that the remaining reservation was also incompatible with the purpose of the convention. The representative of the Czech Republic indicated that her country had not objected to the initial reservation but was studying the remaining reservation as to its compatibility with the purpose of the convention and considering an objection.

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

12. Consideration of current issues of international humanitarian law

92. The Chair invited the delegations to take the floor on current issues concerning International Humanitarian Law (IHL) and to present any relevant information on this topic, including forthcoming events.

93. The representative of the International Committee of the Red Cross (ICRC) took the floor to inform the CAHDI members of the work of the ICRC and the challenges it was currently facing. Despite the call by the Secretary-General for a global ceasefire, armed conflicts had not stopped because of the COVID-19 pandemic and in many places, they had become more violent. The pandemic was at least as much an economic crisis as it was a health crisis and public health measures needed to contain exemptions for humanitarian organisations to be able to reach the most vulnerable.

94. Concerning the situation in North-East Syria, the representative of the ICRC informed the CAHDI that more than 100,000 people remained in camps in northern Syria, including 40,000 children. Thousands more, mostly men but also women and children, were held in placed of detention. The representative urged the states to consider the repatriation of their nationals, starting with the most vulnerable among them, and in respect in respect of the family unit and of the principle of non-refoulement.

95. Furthermore, the representative of the ICRC provided information on issues concerning weapons and IHL. With regard to cyber warfare, the main area of concern for the ICRC is the threat that cyber operations pose to critical civilian infrastructure. She stated that while most current cyber operations did not have an apparent link to conflict, there was a concern that cyber capabilities used in future conflicts might cause grave consequences. The representative of the ICRC also encouraged states to share how, through their interpretations of IHL, and through their domestic legal frameworks, they limit the use of cyber tools to protect civilians and civilian infrastructures.

96. On the topic of explosive weapons in populated areas, the representative of the ICRC stressed how the wide area effects of some weapons meant that their destructive force may be significantly wider than the military target they are directed at. From a legal perspective, their use therefore raises questions as to whether it is possible to direct such weapons on a specific military target and whether their effects are limited as far as possible to the target as is required by IHL. The ICRC is looking forward to contributing to a strong Political Declaration committing States to take concrete action to reduce the human cost of heavy explosive weapons in populated areas by avoiding their use or taking effective mitigating measures to limit their effects.

97. Concerning the use of autonomous weapons systems, the representative of the ICRC welcomed the fact that there appeared to be a convergence on the need to maintain human control, involvement or judgement of such systems, and on the rationale behind that need to reduce the risk of harming civilians, the legal obligations and the ethical principles, as well as to ensur human responsibility and accountability. Specific measures to ensure human control pertained to weapon parameters, the environment of use and human-machine interaction. Further, internationally agreed limits on autonomous weapon systems were needed. She also referred to a June 2020 joint ICRC-SIPRI report entitled “Limits on Autonomy in Weapon Systems: Identifying Practical Elements of Human Control”, which sets out five recommendations for a way forward.

98. Lastly, the representative of the ICRC provided an update on recent ICRC publications on IHL. The updated *Commentary on the Third Geneva Convention for the Protection of Prisoners of War*, had been released in June 2020. The updated *Guidelines on the Protection of the Natural Environment in Armed Conflict* had been released in September 2020 and were to be considered as a tool to facilitate the adoption and implementation of concrete measures on this subject. These guidelines would further hopefully prove to be useful for the ongoing dialogue between states and the ILC on the Draft Principles on the Protection of the Environment in relation to Armed Conflicts.

99. The representative of Austria gave an update on the pledge the Austrian government has made to organise a European conference of national IHL committees. Due to the COVID-19 pandemic it will not be possible to organise the conference still this year, but the government is in constant contact with the ICRC to find a suitable date for the conference in the course of 2021.

100. The representative of Romania noted that the Romanian National Commission on IHL was currently working on its first voluntary report on the implementation of IHL at the domestic level. She further informed the CAHDI members that her government had analysed the position paper produced

by the ICRC on *IHL and Cyber Operations during Armed Conflicts.* The Romanian government shared the position of the ICRC and supported the application of IHL to cyber operations.

101. The representative of Switzerland reported that on 12 August 2020 his government had adopted its first voluntary report on the implementation of IHL at the domestic level. Moreover, Switzerland will organise a meeting of governmental experts on IHL in November 2020 on the best practices in the medical field during armed conflict, the aim of this meeting being to allow an exchange of views and good practices in order to make progress in the implementation of IHL on the domestic level.

102. The representative of Cyprus informed the CAHDI of the establishment of the National Committee on IHL in the Republic of Cyprus on 7 May 2020, pursuant to decision of the Council of Ministers. The role of the committee is advisory and its mandate includes, inter alia, the dissemination and promotion of IHL instruments, making recommendations for enhancing compliance by Cyprus with IHL instruments and the harmonisation of the national legislation with such instruments, making recommendations on the implementation of pledges co-sponsored by Cyprus during the International Red Cross and Red Crescent Conference, contributing to the organisation of training on IHL for public officers, members of the armed forces, law enforcement authorities and the public in general as well as cooperating with IHL committees of other states and the ICRC. The first priority of the Committee will be to conduct a compatibility study on national legislation of Cyprus with IHL instruments.

103. The representative of Sweden drew the attention of the CAHDI members to two publications co-funded by his country: a report on *Limits on Autonomy in Weapon systems: Identifying Practical Elements of Human Control* and a guidance document entitled *Health Care in Danger: The Responsibilities of Health-Care Personnel Working in Armed Conflicts and Other Emergencies* .

104. The representative of Slovenia welcomed the promotion, respect and implementation of IHL through international cooperation of national committees. The purpose of such consultations among these committees was to exchange good practices and to compare national legislations on IHL implementation.

105. The representative of France drew the attention of the CAHDI members to the issue of the coherence and links between IHL and other aspects of international law, in particular the fight against terrorism. A number of NGOs had raised concerns on the difficulties they were facing in the framework of their activities, in particular concerning access to certain areas under the control of terrorist organisations; as well as the difficulties NGOs were facing to continue to benefit from some financial services, e.g. banks, as a result of rules and measures taken in the context of the fight against terrorism. This subject was currently being analysed by the French government. The representative of France noted that it could be interesting to deal with this matter during the next CAHDI meeting.

106. The representative of Finland informed the CAHDI that during the last ICRC conference, the government had pledged to translate the *Guidelines on the Protection of the Natural Environment in Armed Conflict* into Finnish in order to facilitate the dissemination and promotion of IHL in this field. The delegate also informed the CAHDI about their national paper on cyber warfare and how international law applied to cyber space. The paper had been sent to the Finnish Parliament for debate. The delegate further informed the CAHDI members of recent and upcoming trainings organised by the national prosecution authority for prosecutors responsible for terrorist offences, as well as war crimes.

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

107. The Chair welcomed and thanked Judge Ekaterina Trendafilova, President of the Kosovo* Specialist Chambers (KSC), for having accepted the invitation of the CAHDI. He underlined that it was a pleasure and a privilege for the Council of Europe and the CAHDI to count with her presence and have an exchange of views on the work and activities of the KSC.

108. Judge Trendafilova presented the KSC, in particular with regard to their distinctive background and mandate, given that the KSC were established following the report on “Inhuman treatment of

people and illicit trafficking in human organs in Kosovo*[10]" of the Committee of Legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly which made allegations that, unlike other crimes that had been tried by the International Criminal Tribunal for the former Yugoslavia (ICTY), serious crimes in the context of the Kosovo* conflict had not been investigated and prosecuted. The same year, the European Union (EU) established the Special Investigative Task Force under the Chapeau of the EULEX mandate, in order to conduct an independent investigation into the allegations contained in the report. In 2014, the High Representative of the European Union for Foreign Affairs and Security Policy and the President of Kosovo* reached an agreement, through an exchange of letters, for the establishment of separate and independent judicial chambers to adjudicate the crimes arising from the Task Force's investigations. The Kosovo* Specialist Chambers and Specialist Prosecutor's Office were formally established in August 2015 and the KSC became judicially operational in July 2017. The KSC will operate until such time as the Council of the European Union notifies the Government of Kosovo* of completion of their mandates.

109. In her presentation, Judge Trendafilova focused on several specific features of the KSC. The KSC follow the structure of the Kosovo* judicial system. However, they operate according to their own statute, enact their own rules of procedure and evidence, have a seat in a third state, are staffed exclusively with international staff members and have only international Judges on their roster. Any sentence imposed by the KSC will be served outside of Kosovo*. Furthermore, Judge Trendafilova updated the CAHDI on the work of the KSC, especially on the indictments of 24 June 2020 charging President Hashim Thaçi and Mr Kadri Veseli with a range of crimes against humanity and war crimes. With the arrest of Mr Salih Mustafa for war crimes on 24 September 2020 the KSC had made its first arrest. The full speech of Judge Ekaterina Trendafilova appears in **Appendix III** to this Report.

110. The Chair thanked Judge Ekaterina Trendafilova for her insightful presentation and invited delegations which so wished to take the floor.

111. In reply to a question concerning the support states could provide to the KSC, Judge Trendafilova stated that the common understanding of the KSC was to do their outmost to be able to resolve their problematic matters themselves. Yet assistance of states had been extremely relevant in the context of expeditious lifting of the confidentiality level of evidence in their possession or releasing evidence held by international organisations such as the UN or the NATO upon respective request by the Specialist Prosecutor. She added, however, that due to the pandemic the relocation of witnesses had been hampered and that in this respect further support from states was crucial.

112. In response to a comment regarding the qualification of prosecutors and judges, Judge Trendafilova pointed out that it was of utmost importance to get excellent professionals on the bench of the judges of the KSC as well as in the Office of the Prosecutor. Within the KSC there was no limitation on the number of nominees by one state party, the recommendation of the judges being made on the merit. She further added that the KSC staff had done excellent preparatory work and that she hoped that their work would be translated into practice.

113. In reply to a question concerning the outreach activities of the KSC, Judge Trendafilova underlined the ground work the KSC were doing (informal exchanges with affected communities in remote areas in Kosovo* advising them, *inter alia*, on victim participation scheme of the KSC, informal meetings with civil society livestreamed with live interpretation, annual workshops with journalists).

114. The Chair of the CAHDI thanked Judge Trendafilova for the interesting and fruitful exchange of views.

115. The Chair drew the attention of the member of the CAHDI to the document on the "Developments concerning the International Criminal Court and other International Criminal Tribunals" (document CAHDI (2020) 11 prov), containing recent developments concerning the International Criminal Court (ICC) and other international criminal tribunals. With the accession of Kiribati in November 2019 the Rome Statute of the ICC currently has 123 state parties. Since the last meeting of the CAHDI, there has been one new ratification of the Kampala amendments on the crime of aggression by Ecuador raising the total number of ratifications of these amendments to 39. The amendments to Article 8 of the Rome Statute concerning "weapons which use microbial or other biological agents, or toxins", "weapons the primary effect of which is to injure by fragments undetectable

[10] Doc. 12462, 7 January 2011.

by x-rays in the human body", and, "blinding laser weapons", entered into force on 2 April 2020. The Czech Republic, Latvia, Luxembourg, the Netherlands, the Slovak Republic and Switzerland have ratified these three amendments. Since the last CAHDI meeting, there has further been one new ratification by Latvia of the amendment to Article 124 of the Rome Statute (a transitional provision regarding ICC's jurisdiction over war crimes). This amendment, not yet in force, has been so far ratified by 14 states parties.

116. The representative of Mexico expressed his country's concern over the sanctions imposed by the United States of America against the Prosecutor of the ICC, Ms Fatou Bensouda. He regretted that these measures were not questioned by more State Parties to the Rome Statute. In fact, the joined efforts against such measures witnessed a decreasing number of participating states. The representative of Mexico further reiterated the support of Mexico to the ICC, its Prosecutor and her staff and invited States to explore possibilities for bilateral and joint action to question such sanctions.

117. The representative of Sweden underlined the need to defend the independence and impartiality of the ICC while still insisting on increased efficiency and performance of the Court. In this regard, the measures announced by the United States of America on 2 September 2020 were of great concern to his delegation. Moreover, to find consensus on the candidates for the office of the Prosecutor was of pertinent importance for the well-functioning and credibility of the ICC. Sweden was currently in the process of reviewing the candidates for the upcoming election of ICC judges. It was hereby vital that the most competent and qualified candidates where elected while respecting a fair gender balance.

118. The representative of Germany emphasised that the international criminal justice system needed continuous and active engagement. Strong support of the ICC was a key element in this respect as well as in the common fight against impunity. Any outside pressure could endanger the independence and impartiality of the ICC. States Parties to the Rome Statute should work together concerning the review and reform of the ICC as well as to ensure that the upcoming elections at the forthcoming Assembly of States are held in a timely manner.

119. Equally, the representatives of Belgium, the Czech Republic, Finland, France, Slovenia and Switzerland reiterated the support of their respective countries to the ICC emphasising the need to fight impunity and any unilateral measures that would endanger the mandate of the court.

120. The Representative of the Czech Republic also informed the CAHDI members that its instrument of ratification of amendment regarding Article 8 of the Rome Statute was received by the depositary on 10 July 2020. She further stressed that the Czech Republic has always cared about the fate of victims of core international crimes and, therefore, the Czech Republic, as every year, contributed to the Trust Funds for Victims approximately 25 000 euros.

121. The representative of Switzerland further informed the CAHDI members that on 6 December 2019 the Assembly of State Parties to the Rome Statute had adopted by consensus the Swiss proposal for a further amendment to Article 8 of the Rome Statute seeking to make the starvation of civilians a war crime punishable before the ICC when committed in a non-international armed conflict. He invited members to initiate the ratification of this amendment. According to its representative Spain had already launched their internal procedures to ratify this amendment.

122. The representative of the United States of America noted that the United States has always been a proud, strong supporter of a variety of international justice initiatives – from Nuremberg to the ad hoc tribunals for the former Yugoslavia and Rwanda to the Kosovo* Specialist Chamber. With regard to the ICC, the U.S. Government is disappointed with the Appeals Chamber's decision of 5 March 2020 to authorize the Prosecutor to investigate the situation in Afghanistan. The decision seemed to preclude the possibility of judicial review of the Prosecutor's decision as to whether an investigation is in the interests of justice. An unchecked Prosecutor who could initiate investigations against personnel of non-States parties has been a concern of the United States since the negotiations surrounding the Rome Statute. As Secretary of State Pompeo indicated in a statement prior to the CAHDI, the United States would gladly withdraw sanctions it has imposed were there to be a permanent solution to the ICC's attempting to exercise jurisdiction over U.S. personnel. The U.S. representative expressed his country's concern about the ICC's disregard of highly negotiated doctrinal checks like complementarity, gravity, and the interests of justice; noted with interest the upcoming Independent Expert Review report; and encouraged work on systemic reform. Such reform must take account of the distinction between States that have accepted the jurisdiction of the ICC and those that have not. At this particular point in

time this question is of concrete importance for the United States. Afghanistan has asked for deferral of the investigations before the ICC due to the commenced peace negotiations. There should be time and space for such talks in order to bring an end to four decades of war, including to address issues of accountability. Finally, the U.S. representative noted that the United States stands ready to work with allies to resolve concerns about the ICC.

123. The representative of the Russian Federation reiterated his country's opposition to the ICC and its decision not to become party of the Rome Statute. The Russian Federation has consistently pointed out to systemic problems in the work of the ICC in various fora. In view of the Russian Federation, the ICC, during the 20 years of its existence, has demonstrated biased, gross unprofessionalism and inefficiency its work being currently not just a discredit to the ICC itself but to the notion of criminal justice.

14. Topical issues of public international law

124. The Director of the International Nuremberg Principles Academy, Mr Klaus Rackwitz, gave a presentation to the CAHDI members on "*The Significance of the Nuremberg Principles – Past, Present, Future*", on the occasion of the 70th anniversary of the formulation of the Nuremberg Principles by the ILC. The "Principles of International Law recognized by the Charter of the Nuremberg Tribunal and the Judgement of the Tribunal" were recognised for the first time by the United Nations in a UN General Assembly Resolution in December 1946; the Nuremberg Principles in their current version were then formulated by the ILC in 1950. One of the great advantages of these principles is that they clarify all the relations between the different spheres of international law (customary international law, treaty law, national law). The Nuremberg Principles were dormant for more than four decades, until the adoption of the Resolution 3314 in 1974 by the UN, and the adoption of the Resolution 808 by the United Nations Security Council, in 1993, establishing a criminal tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. Since 1993, several courts and tribunals have been established[11], all of them basing their law at least partially on the Nuremberg Principles or implementing them.

125. Even though the Nuremberg principles are an integral part of the *ius cogens* norms and customary international law, there is no unified or dominant opinion that these Principles create an obligation *erga omnes*, in doing so states have applied the Principles selectively. The most heavily contested principle is the Principle III, concerning the immunity of sitting heads of states. The Appeal Chamber of the ICC stated that such immunity was recognised under customary law only in certain circumstances but did not create a general immunity, and thus Principle III was maintained. In that respect, it was observed that states make efforts to limit the criminal responsibility of sitting heads of states and even within the ICC, amendments had been proposed that would weaken Principle III (enshrined in Article 27 of the Rome Statute), like the one proposed by Kenya in 2014.[12] However, an increasing number of domestic jurisdictions take on cases of core international crimes; for instance, in Germany, more than 100 active investigations and prosecutions, including cases concerning Syria, are underway. Furthermore, mechanisms to overcome impunity gaps have been established by various bodies of the UN, such as the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011 (IIIM); the Investigative Team (UNITAD), headed by a Special Adviser, to support domestic efforts to hold ISIL accountable by collecting, preserving and storing evidence in Iraq of acts that might amount to war crimes, crimes against humanity and genocide committed in Iraq; or the Independent Investigative Mechanism for Myanmar (IIMM) mandated to collect evidence of the most serious international crimes and violations of international law and prepare files for criminal prosecution.

126. The Nuremberg Principle VI describes the crimes which shall be punishable (war crimes, crimes against humanity, and genocide). It defines but also narrows down the scope of application of the

[11] International Criminal Tribunal for the former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), Special Court for Sierra Leone; Extraordinary Chambers in the Courts of Cambodia, Special Panels in East Timor, Special Tribunal for Lebanon (TSL), Kosovo Specialist Chambers.

[12] ICC, Assembly of State Parties, 8-17 December 2014, Report of the Working Group on Amendments, ICC-ASP/13/31, p. 16 - https://asp.icc-cpi.int/en_menus/asp/WGA/Pages/default.aspx.

Principles because newly emerging crimes, often committed by non-state actors, do not automatically fit into the crimes listed in Principle VI although they can form a similar, or even greater, threat, (cybercrime, terrorism, environmental crimes, human trafficking, etc.). In the view of Mr Rackwitz while such newly emerging crimes should be addressed through other initiatives, such as the Proposed Convention on the Prevention and Punishment of Crimes Against Humanity everything should be done to preserve the Nuremberg Principles as they are.

127. In reply of a question concerning the possible amendments to the Rome Statute and the fact that terrorism might deserve a special attention, Mr Rackwitz noted that terrorism was a phenomenon that affected the entire world and for that, the minimum one could expect was a declaration or a statement pronouncing that terrorism is today taken as seriously and should be fought internationally as intensively as war crimes, crimes against humanity and genocide.

128. The German delegation commented on the relevance of the Nuremberg Principles 70 years after their adoption and reminded the importance of the work the ILC had done, with regard to the subject of Prevention and Punishment of Crimes Against Humanity, one of the crimes also listed in Principle VI. The delegation highlighted the importance of working towards a convention on prevention and punishment of crimes against humanity based on the ILC's draft articles, including during the UNGA 6th Committee.

129. In reply to a question on what would be the best way for debates in the UNGA 6th Committee to lead to the adoption of a substantial solution that could pave the way for a Convention on the Prevention and Punishment of Crimes Against Humanity, Mr Rackwitz explained that the most important thing was not to lose sight of the Nuremberg Principles. He further stated that there should be a unanimous declaration by all states stating that crimes against humanity should be prohibited, and then start from the common ground from 70 years ago, when the Nuremberg Principles were created.

130. In reply to a question concerning the characterisation of cybercrime as war crime and how the Nuremberg Principles could assist in addressing this matter, Mr Rackwitz replied that the qualification of cybercrime as war crime was a perfect example of how things evolved. He then clarified that to prove a war crime, the most important evidence was the existence of an armed conflict. However, cybercrime did not require any deployment of arms in the traditional sense. In this regard, there was a necessity to examine where the cyber activities, leaving the physical space, were undertaken. Indeed, cyberspace left the dimensions of the traditional Nuremberg Principles and this led to a number of questions, such as how to deal with non-state actors. It also raised the question of the nature and the legal qualification of an arm, which went beyond conventional criminal law. Mr Rackwitz concluded by saying that cybercrime represented one of the fundamental changes of recent years. Cybercrime was definitely a crime but a war crime without arms was even more difficult to tackle than a war crime in its traditional meaning

131. A delegation raised the question whether a broader definition of crimes against humanity as entailed in the Proposed Convention on the Prevention and Punishment of Crimes against Humanity would not lead to a fragmentation of the notion and to different understandings of crimes against humanity by different nations. In the view of Mr. Rackwitz a need for harmonisation between domestic and international law in this regard still existed.

132. In reply to a question on whether the environmental crimes could be subsumed under the Nuremberg principles, Mr Rackwitz explained that the issue was the same as with cybercrime in the sense that such crimes did not fit the classical Nuremberg Principles. Most of the time, environmental crimes were committed during conflicts and these crimes could form a huge threat in armed conflicts. There was currently a discussion if such crimes would rather be seen as crimes against humanity, rather than war crimes. As for cybercrime, if there was an agreement on the gravity of these crimes, which should be comparable and be seen on the same level as the crimes described in Principle VI, there was no obstacle for these crimes to be recognised as war crimes or as crimes against humanity.

133. In reply to a question concerning the enhancement of the universality of the ICC and the stagnating increase in the number of state parties to the Rome Statute, Mr Rackwitz explained that the ICC was never intended as a court of first instance but as complementary to national jurisdictions. If a state did not want its nationals to be investigated by the ICC, it could simply investigate them by its

own authorities and help to minimise the risk of an impunity gap. Too much focus on the issue of the jurisdictional competence is regrettable.

134. In reply to a question on the best way to improve cooperation and prosecution of national crimes of states, Mr Rackwitz stated that international cooperation in criminal matters remained one of the most difficult problems and from his experience as an Administrative Director of Eurojust, that cooperation was mostly a matter of mutual understanding and of shared values. One of the obstacles was the difference between criminal judiciary systems around the world. A better cooperation on a practical level depended on the harmonisation of trends and practices.

135. In reply to a question concerning current projects of the Nuremberg Academy, Mr Rackwitz explained that all the projects of the Academy had one thing in common: their relevance for the practitioners on the ground. The objective was to make concrete and practical proposals to improve practices on the ground. Currently, for instance, an interdisciplinary project sought to address and to consider the potential impact that the increased usage of digital evidence and sophistication of technology might have on the rules of procedure and evidence in international criminal proceedings. The Nuremberg Academy was also training practitioners on the ground. For instance, in Nigeria, prosecutors and investigators underwent a training on the application of international criminal law in order to investigate crimes committed by Boko Haram. Mr Rackwitz concluded by stating that the Academy was always supporting the ones who took on the difficult tasks of investigating and prosecuting crimes as cited in Principle VI.

136. The Chair of the CAHDI thanked Mr Rackwitz for the interesting presentation.

IV. OTHER

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

137. In accordance with *Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods*, the CAHDI elected Ms Alina Orosan (Romania) and Mr Helmut Tichy (Austria), respectively, as Chair and Vice-Chair of the Committee, for a term of one year from 1 January to 31 December 2021.

16. Place, date and agenda of the 60th meeting of the CAHDI

138. The CAHDI decided to hold its 60th meeting in Strasbourg (France), on 24-25 March 2021. The CAHDI instructed the Chair of the CAHDI, to prepare, in due course, the provisional agenda of this meeting in co-operation with the Secretariat.

17. Any other business

139. The representative of Germany reminded delegations of an online conference organised jointly by the Office of Legal Affairs of the United Nations and the German Federal Foreign Office titled '*UN at 75: Effective Multilateralism and International Law*' on 9 October 2020.

18. Adoption of the Abridged Report and closing of the 59th meeting

140. The CAHDI adopted the Abridged Report of its 59th meeting, as contained in document CAHDI (2020) 16, and instructed the Secretariat to submit it to the Committee of Ministers for information.

141. Before closing the meeting, the Chair thanked all CAHDI experts for their participation and kind and efficient co-operation in the good functioning of the meeting. He expressed his joy of having been the Chair of CAHDI for two years, and its Vice-Chair for two years before that. He underlined the challenges his chairmanship had faced, both due to budgetary constraints and the COVID-19 pandemic. He also thanked the CAHDI Secretariat and the interpreters for their invaluable assistance in the preparation and the smooth running of the meeting. Finally, the Chair warmly thanked his staff members as well as the CAHDI Secretariat, especially given the hybrid nature of the meeting.

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

APPENDICES

Appendix I

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<u>APPENDIX II</u>

AGENDA

I. INTRODUCTION

1. Opening of the meeting by Mr Martin SMOLEK, Deputy Minister for Legal and Consular Section at the Ministry of Foreign Affairs of the Czech Republic followed by introductory remarks by the Chair of the CAHDI, Mr Petr VÁLEK

2. Adoption of the agenda

3. Adoption of the report of the 58th meeting

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

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

II. ONGOING ACTIVITIES OF THE CAHDI

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

a. Terms of Reference of the CAHDI for 2020-2021 and related matters

- Working methods during the COVID-19 pandemic
- Examination of the request by the Republic of Korea to be granted observer status in the CAHDI

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

6. Immunities of States and International Organisations

a. Topical issues related to immunities of States and International Organisations

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

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

c. State practice, case-law and updates of 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. The European Convention on Human Rights and cases before the European Court of Human Rights involving issues of public international law

- Derogations under Article 15 of the *European Convention on Human Rights*: Exchange of views
- 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. Consideration of current issues of international humanitarian law

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

- Exchange of views with **Judge Ekaterina TRENDAFILOVA,** President of the Kosovo* Specialist Chambers

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14. Topical issues of public international law

- Presentation by **Mr Klaus RACKWITZ,** Director of the International Nuremberg Principles Academy on "*The Significance of the Nuremberg Principles - Past, Present and Future*", on the occasion of the 70th anniversary of the formulation of the Nuremberg Principles by the International Law Commission, followed by an exchange of views

IV. OTHER

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

16. Place, date and agenda of the 60th meeting of the CAHDI: Strasbourg (France), 24-25 March 2021

17. Any other business

18. Adoption of the Abridged Report and closing of the 59th meeting

APPENDIX III

PRESENTATION BY PRESIDENT JUDGE EKATERINA TRENDAFILOVA, PRESIDENT OF THE KOSOVO* SPECIALIST CHAMBERS

59th Meeting of the Committee of Legal Advisers on Public International Law
25 September 2020, Prague (Czech Republic)

Ladies and gentlemen,
I am grateful for the opportunity to speak to you today about our institution, the Kosovo Specialist Chambers, or the KSC. These are unprecedented times and I am glad that I am able to be here in person, notwithstanding the challenges posed by the COVID-19 pandemic.

I will start by providing a brief overview of the KSC, its history, mandate and jurisdiction. I will then shortly discuss the external and internal structures governing the KSC, including the role of the European Union and the Council of Europe in this respect, which I believe will be particularly interesting to you as members of the Council of Europe Committee of Legal Advisors on Public International Law. After discussing matters related to the KSC's governance, I will touch upon some of the unique features found in its Rules of Procedure and Evidence, which is equivalent to criminal procedural codes in domestic systems. I will conclude with an update on the status of proceedings that are currently taking place at the court.

I. Background and mandate

The KSC was established following growing allegations that serious crimes in the context of the Kosovo conflict (1998-2000) had not been investigated and prosecuted, despite other crimes that have been tried by the International Criminal Tribunal for the former Yugoslavia.
The Parliamentary Assembly of the Council of Europe appointed a Special Rapporteur, Senator Dick Marty, to investigate these allegations. He submitted his report in December 2010, which was adopted by the Parliamentary Assembly of the Council of Europe on 7 January 2011.
In May of the same year, the European Union established the Special Investigative Task Force under the Chapeau of the EULEX mandate to conduct an independent investigation into the allegations contained in the Report.

As the investigations by the Special Investigative Task Force progressed, the then High Representative of the European Union for Foreign Affairs and Security Policy and the President of Kosovo reached an agreement by way of an exchange of letters in April 2014 for the delegation of authority under the Constitution of Kosovo for an establishment of separate and independent judicial chambers to adjudicate the crimes arising from the Task Force's investigations. It was also agreed that these separate judicial chambers would follow the structure of the Kosovo judicial system. However, the chambers would operate according to their own statute, would enact their own rules of procedure and evidence and would have a seat in a third State. The chambers would be staffed exclusively with international staff members, would have only international Judges on a roster, and any sentence imposed would be served outside of Kosovo.

The creation of such unique and self-contained chambers was premised on the need to ensure that the proceedings take place independently and impartially, free of political interference and would thus protect the safety and security, life and well-being of potential witnesses and victims. This Exchange of Letters, or international agreement, was ratified through a law by the Assembly of Kosovo in April 2014.

In March 2015, the President of the Kosovo Assembly referred to the Kosovo Constitutional Court a proposed constitutional amendment as required under the Constitution of Kosovo, providing for the implementation of the Exchange of Letters.

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In April 2015, Kosovo's Constitutional Court determined that the proposed amendment did not diminish or affect the rights and freedoms guaranteed by the Kosovo constitution and held that the amendment was in conformity therewith and was necessary for Kosovo to comply with its international obligations. The proposed amendment was ultimately implemented through the addition of Article 162 to the Kosovo constitution, which was adopted by the Kosovo Assembly on 3 August 2015. On that same day, the Kosovo Assembly adopted the Law on Kosovo Specialist Chambers and Specialist Prosecutor's Office, thereby formally establishing the Court.

Following the formal establishment of the KSC and the Specialist Prosecutor's Office, a host state agreement with the Netherlands was signed in January 2016, allowing for proceedings to take place in The Hague.

The Court is to ensure secure, independent, impartial, fair and efficient criminal proceeding and has jurisdiction over allegations of transboundary and international crimes committed during and in the aftermath of the conflict in Kosovo from 1 January 1998 to 31 December 2000, which were committed by or against persons of Kosovo or Federal Republic of Yugoslavia citizenship. The Court is concerned only with criminal responsibility of individuals and not of organisations, groups or ethnicities.

In March 2017, during their first plenary, the Judges of the Specialist Chambers adopted the Rules of Procedure and Evidence before the Kosovo Specialist Chambers. The Rules entered into force in July 2017, following a constitutional review by the Specialist Chamber of the Constitutional Court. With the entry into force of the Rules, the KSC became judicially operational in early July of the same year.

The Kosovo Specialist Chambers, which is funded entirely by the European Union and to a variant extent five Contributing States (the United States, Norway, Switzerland, Canada and Turkey), will operate until such time as the Council of Europe notifies the Government of Kosovo of completion of their mandates.

II. Governance

Closely tied to the matter of funding is the question of the KSC's governance, both internal and external, which in turn is inherently tied to questions of independence, as well as accountability.
The international agreement, to which I referred just and which set in motion the establishment of the KSC, as well as KSC's legal framework are the foundations upon which the institution's independence is built. These foundations are intended to shield the KSC from any external influence or interference in the fulfilment of its mandate.
While the KSC is entirely independent in its functioning, there are a number of safeguards in place to ensure that it is accountable for its actions. I will touch upon this mechanism as well.
Turning to the issue of external governance in the context of the KSC, the situation is rather interesting, given the involvement of both Kosovo and the EU in the KSC's establishment.

1. Kosovo

Starting first with the external governance of the KSC, I will commence with the question of Kosovo's role in this context. The short answer to this issue is that Kosovo has no role to play in either the governance or the termination of the KSC's mandate.
While the KSC was established through a legislative act of the Kosovo parliament, neither the government nor the parliament, nor any other Kosovo institution, for that matter, has any form of authority, oversight or control over the KSC. The exchange of letters and the constitutional amendment, to which I referred earlier, makes this clear through its provisions by expressly stating that Kosovo delegated "all necessary powers and mandates" to operate the separate judicial chambers and separate prosecutor's office.
Specifically, our institution has its own relocated Prosecution office and its own judicial chambers, which mirror the Kosovo judicial system, including its own constitutional court as well as its own Ombudsperson. The KSC receives no funding at all nor is it governed in any way by Kosovo. The KSC is governed exclusively by the Law on Specialist Chambers and Specialist Prosecutor's Office. Indeed, Kosovo law does not apply to the KSC and can therefore not govern, terminate or exercise any authority over the KSC.

The KSC Judges are all international – in other words, they are not citizens of Kosovo – and are not selected or appointed by Kosovo authorities, as is the process in Kosovo for its national judges. Instead, the KSC Judges have to be of European citizenship or have to have the citizenship of one of the five Contributing States. They are selected by an independent Selection Panel, composed of two international Judges and one member of the EU, and are appointed by the so-called Appointing Authority, who is the Head of the EU Common Foreign and Security Policy Mission.

KSC Judges can only be removed from their position, disqualified or otherwise held accountable through its own disciplinary mechanism provided in the Code of Judicial Ethics. In other words, Kosovo cannot dismiss or remove KSC Judges.

Similarly, the Exchange of Letters, to which I referred earlier, provides that the KSC's appointed officials and staff members shall be of EU or a Third Contributing State citizenship.

The international nature of the positions at the KSC was put in place to curtail any potential interference or influence over the investigations and proceedings, as well as to ensure the safety of the witnesses and victims who may appear before the chambers.

The KSC Judges have the sole authority to adopt the Rules of Procedure and Evidence. The compliance of the KSC's Rules of Procedure and Evidence with the Kosovo Constitution has to be determined by the Specialist Chambers of the Constitutional Court, and not by the Kosovo Constitutional Court. Other legislative acts, except if expressly referred to in the Law, do not apply before the KSC.

Lastly, and as mentioned before, Kosovo has no role to play in the termination of the KSC's mandate. As is reflected in the exchange of letters, Kosovo will be notified by the Council of Europe once the KSC has completed its mandate. Any attempts to abrogate the law establishing the KSC, such as the attempt in late December 2017 and, more recently this summer with talks in Kosovo about possibly terminating the KSC, are thus a clear violation of Kosovo's international obligations. Similarly, the attempts as recent as last month to try to amend the Law also constitute a clear violation of the international agreement. Indeed, and as provided for in the exchange of letters, Kosovo cannot unilaterally change the Law.

It may seem counter-intuitive that the very country that partook in the establishment of the KSC via its own constitutional amendment, has no influence or authority of the KSC's proceedings or the termination of the institutions. However, the international agreement to which Kosovo is a party, and to which it thus agreed, makes clear that the exclusion of Kosovo from any form of governance of the KSC was done by design. It serves as the foundation of the KSC and is intended to ensure the institution's independence and autonomy and serves as a further measure to safeguard the safety and security of the witnesses and victims. In sum, it is intended to guarantee the successful fulfilment of the KSC's mandate, free of any interference.

2. European Union

Contrary to Kosovo, the European Union does have a more prominent role to play in the governance of the KSC. For one, it provides the funding for the institution by means of a grant agreement. This in turn means that the KSC is bound by EU financial rules and regulations and is subject to strict internal and external auditing.

When it comes to the appointment of Judges to the KSC roster, EU Member States and Third Contributing States are involved only to the extent that candidates have to ensure that their applications are accompanied by a letter of support from their respective countries. While, as previously mentioned, the Judges are appointed by the Appointing Authority, who is also the Head of EULEX, they undergo a rigorous selection process undertaken by the independent Selection Panel I referred to before.

In accordance with the Law on Specialist Chambers and Specialist Prosecutor's Office, the Appointing Authority has no discretion in whether or not to appoint those candidates who were selected by the independent Selection Panel; he or she "shall" appoint those candidates nominated by the Panel. Accordingly, while the Appointing Authority may have some limited discretion as to whom to appoint to, for example, the Specialist Chambers of the Constitutional Court, the involvement of the EU in the

appointment of Judges is formulistic at best and is not such that it can, in any way, impact upon the independence and integrity of the KSC Judges.

3. Internal governance

I shall now turn to the KSC's internal governance mechanisms. The KSC's founding documents provide a clear roadmap for the internal governance structure of the KSC, including with respect to the President's authority over the judicial administration of the Specialist Chambers. For example, the KSC Judges only exercise their functions when called upon by the President to do so. To this end, the KSC Judges are also only remunerated when they are actually assigned to a matter. They do not receive any reimbursement simply for being on the Roster. The duration of the assignment is further determined by the President, following consultation with the Judges concerned, and taking into account the nature of the assignment.

In addition, and in accordance with the Law, the KSC Judges exercise their functions remotely as a matter of principle and will only come to the seat of the court when requested by the President.
The KSC Judges have also adopted their own Code of Judicial Ethics with a comprehensive disciplinary mechanism, reflecting not only their independence from external influences but also their strong commitment to holding each other accountable to the highest standards. Indeed, Judges can be sanctioned by the Plenary for misconduct and may, as a last resort, be removed from the Roster by decision of the Plenary.

These are just a few examples of the internal governance structure in place at the KSC as it relates to the judicial operations. For the KSC to operate as an institution there are of course numerous internal regulations, policies and rules governing the conduct and operations of the KSC as a whole. I will not delve into too much detail, but one can think of our own internal staff rules, governing the conduct of our staff members, as an example.

III. Specific Features of the KSC's Rules of Procedure and Evidence

I will now touch upon some interesting features found in the KSC's Rules of Procedure and Evidence. When adopted by the KSC Judges in March 2017, the main drive was to provide a solid legal basis conducive to holding efficient and effective proceedings. We also took into account critical observations on the functioning of other international courts and tribunals and lessons learned from their proceedings. By adopting the Rules, the KSC Judges sought to address existing criticism vis-à-vis these other international proceedings, to contribute in a positive way to the development of better practices in international criminal justice, as well as to increase the public's confidence in the mandate and functioning of the KSC.

1. Efficiency and effectiveness

One of the main criticisms levelled at international criminal proceedings has been their efficiency and effectiveness. One need only look at the issuance of judgments at other courts and tribunals, which has often taken many years to render. The Judges of the KSC have sought to address this by giving practical meaning to the principles of efficiency and effectiveness, while balancing due process standards.

a. Strict time limits

With respect to efficiency, we have committed ourselves to strict time limits, which are provided throughout the Rules of Procedure and Evidence, allowing for extensions only in exceptional circumstances. The strict time-lines set forth in the Rules do not bind the parties alone. There are specific time limits applicable to the Judges as well.
For example, the total duration of pre-trial proceedings, in principle, should not exceed 6 months, and the trial judgment is to be rendered within 90 days with a possibility of a 60-day extension. Any further extension of this deadline however is only possible if absolutely necessary - the justification thereof should be provided in a public decision.

b. Proactive management of proceedings by Judges

A proactive role by Judges can also greatly enhance the efficiency and effectiveness of proceedings. We were of the view that Judges should not be passive observers during the proceedings. The Rules

therefore provide for a variety of tools in this respect, which intend to contribute to the efficient preparation and management of proceedings at all stages.
For example, Judges are expected to set a calendar, a working plan and a target completion date for the proceedings before them. They may impose on the parties a strict and well-organised system of disclosure; instruct the removal of repetitive witnesses; request the parties to shorten the estimated length of the direct examination of witnesses, and invite the Prosecutor to narrow or reduce the number of charges in the indictment.

In a similar vein, the Rules provide for the Trial Panel to hold various preparation conferences/status conference), during which time limits for motions are discussed and set up as well as target dates for the completion of the Prosecution and the Defence cases.

Mindful of the need to expedite proceedings, the Rules provide that crimes against the administration of justice (such as contempt of court) can be handled by a single judge and only on the basis of the case file and written submissions by the parties.

The Rules require that the Specialist Prosecutor finalise the disclosure of evidence during the pre-trial stage, with further disclosure possible only when justified by reasons for the delay. Similarly, the Specialist Prosecutor is required to immediately disclose any exculpatory evidence as soon as it is in his/her custody, control or actual knowledge and not "as soon as practicable" as is the wording of the ICC statutory documents.

The Defence is also subject to a stricter regime in comparison with the legal framework at other courts and tribunals. For example, it is under the obligation to provide timely notice and supporting evidence of the intent to put forth an alibi defence. The Trial Panel may draw negative inferences from a delayed notification, without sound justification therefor.

The KSC Judges viewed continuity in the development of proceedings from stage to stage as an important remedy against delays in proceedings. To this end, the Rules provide that a handover document be prepared by the Pre-Trial Judge for transmission along with the case file to the Trial Panel so that the Trial Panel is assisted in acquiring expeditiously full knowledge of the case, like issues that have been addressed by the Pre-Trial Judge and those that remained pending; evidentiary material produced by the parties, a summary of their arguments and points of agreement; a list of all orders and decisions taken; suggestions as to the number and relevance of the witnesses to be called; the questions of law and fact in dispute, the status of the disclosure process, all meetings with the parties.

Special attention was given to the complicated evidentiary matters, in order to avoid a number of serious concerns that were raised at both the domestic and at the international level. For example, there are specific Rules regulating the admissibility and assessment of evidence; the specific requirements to be satisfied in respect of circumstantial evidence, as well as the manner in which inconsistencies within a single piece of evidence should reflect on its assessment. Moreover, particular emphasis is placed on the standard of proof, underlining that the subject matter of the case is to be proven beyond reasonable doubt, rather than proving each individual piece of evidence beyond a reasonable doubt.

These are but a few examples of the ways in which the KSC Judges have sought to ensure that the proceedings before the KSC take place in the most efficient and effective manner possible. While we of course have to see how these Rules are used in practice, I am proud of the extensive thought that has gone into our comprehensive Rules of Procedure and Evidence in this respect.

Lastly, the Judges prepared for the upcoming judicial proceedings by developing working papers on complicated legal matters such as the management of judicial proceedings; individual criminal responsibility; admissibility of constitutional referrals; admissibility of evidence and victim participation before the KSC, all of which were discussed at workshops organised by the KSC. Moreover, several colloquia were organised, during which prominent experts in the field presented on general complex and innovative questions in substantive law and engaged in discussions with the Judges thereon. A colloquium on the topic of the assessment and evaluation of evidence was scheduled for May this year, but unfortunately could not take place due to the COVID-19 pandemic.

IV. Update on the work of the KSC

Turning now to the actual proceedings that are taking place before the KSC, you may have heard that the Specialist Prosecutor informed me of his intent to initiate proceedings toward the end of February and again toward the end of April. To that end, I assigned a Pre-Trial Judge, who is working to decide whether to confirm the indictments in accordance with our statutory documents.

Indictments are filed by the Specialist Prosecutor on a confidential and *ex parte* basis and, in principle, will only be made public if and when confirmed. Given the confidential and *ex parte* nature of these proceedings, I am therefore currently not in a position to provide any specific information on the nature or content of the indictments, other than what the Specialist Prosecutor disclosed publicly on 24 June this year.

In his statement, the Specialist Prosecutor provided limited information on the indictments charging, among others, President Hashim Thaçi and Mr Kadri Veseli with a range of crimes against humanity and war crimes. The indictments against them and others have not yet been decided by the Pre-Trial Judge. The process leading up to the confirmation or not of an indictment may take up to a maximum of six months.

If and when and indictments are confirmed, and unless there are pressing reasons to maintain their confidential classification, the indictments become public and the accused are then notified of the charges against him or her. At this stage, the Pre-Trial Judge will adjudicate any preliminary motions raised by the parties, and will prepare the case to ensure the smooth and expeditious conduct of the trial. If the indictments are not confirmed, the Specialist Prosecutor may present additional evidence at a later stage in support of the indictment and seek its confirmation anew.

The recent initiation of judicial proceedings by the Specialist Prosecutor marks an important milestone for our institutions. This milestone was reached notwithstanding the challenges posed by the global pandemic, with the majority of staff working remotely since the middle of March and travel having been severely curtailed.

V. Conclusion

In conclusion, we are at a critical juncture in the life of the KSC. Proceedings have been initiated by the Specialist Prosecutor and the indictments are under review. If the indictments are confirmed by the Pre-Trial Judge, the KSC will soon be fully engaged in the conduct of judicial proceedings. We are ready for these proceedings, both from a logistical point of view, including any necessary arrangements made as a result of the pandemic, as well as from a judicial standpoint. The KSC Judges are experienced professionals who are ready to hit the ground running as soon as they are assigned. With the groundwork that has been carefully laid and having seen the determination of our Judges as well as our staff, I am confident that the KSC will conduct its proceedings efficiently and effectively, whilst upholding the highest international standards.