CAHDI
Committee of Legal Advisers on Public International Law

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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

(CAHDI)

Meeting report

61st meeting
23-24 September 2021
Strasbourg, France (hybrid meeting)

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

cahdi@coe.int - www.coe.int/cahdi

1 INTRODUCTION

1.1 Opening of the meeting by the Chair, Ms Alina OROSAN

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 61st meeting in Strasbourg (France) on 23-24 September 2021, with Ms Alina OROSAN (Romania) as the Chair. Due to the COVID-19 pandemic, the meeting was held in hybrid format. The list of participants is set out in **Appendix I** to this report.

2. The Chair opened the meeting and welcomed the experts attending the CAHDI for the first time. She expressed her hope that the future CAHDI meetings could be held again with all members in the room while noting the benefits of maintaining online access to the meetings.

1.2 Adoption of the agenda

3. The agenda was adopted as set out in **Appendix II** to this report.

1.3 Adoption of the report of the 60th meeting

4. The CAHDI adopted the report of its 60th meeting (document CAHDI (2021) 9 prov) and instructed the Secretariat to publish it on the Committee's website.

1.4 Information provided by the Secretariat of the Council of Europe

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

5. Mr Jörg POLAKIEWICZ, Director of Legal Advice and Public International Law (DLAPIL), informed the delegations of recent developments within the Council of Europe since the last CAHDI meeting.

6. The Director brought to the attention of the CAHDI that, at their annual session held in hybrid setting in Hamburg in May 2021, the Foreign Affairs Ministers of the 47 Council of Europe member States had expressed their appreciation for the *Secretary General's Strategic Framework of the Council of Europe*, agreed to introduce a four-year programming period for the Organisation as well as adopted Guidelines entitled *The Council of Europe in the coming four years*.

7. The CAHDI was further informed of the adoption of the revised Resolution CM/Res(2021)3[1] on intergovernmental committees adopted by the Ministers' Deputies on 12 May 2021, at their 1404th meeting, to enter into force on 1 January 2022 and to replace the current CM/Res(2011)24.

8. The CAHDI was also notified of plans to set up a partial agreement in order to finance activities to implement under the *Convention on the Conservation of European Wildlife and Natural Habitats* (ETS No. 104, Bern Convention). If these plans were to materialise, this would be the first time that a partial agreement was used for such a purpose.

9. The Director then informed the CAHDI about developments regarding the European Convention on Human Rights (ECHR/the Convention, ETS No. 5). There is currently only one member State, Georgia, who still has an active derogation under Article 15 of the Convention in place due to the COVID-19 pandemic.[2] On 1 August 2021, Protocol No. 15 to the Convention entered into force. This Protocol, *inter alia*, amends the Preamble to the Convention, which now includes explicit references to the subsidiarity principle and to the margin of appreciation doctrine. In addition, the six-month time-limit for submitting an application to the European Court of Human Rights (the Court) after the final national decision will be reduced to four months.

10. Regarding the execution of the Court's judgments, the Director noted the positive development concerning the execution of the judgment in the inter-state case *Georgia v. Russia (I)*.[3] With regard to the case of *Kavala v. Turkey*,[4] the Ministers' Deputies decided, at their Human Rights

[1] CM/Res(2021)3 on intergovernmental committees and subordinate bodies, their terms of reference and working methods.
[2] 23 March 2020, due to expire on 1 January 2022.
[3] ECtHR, *Georgia v. Russia (I)*, no. 13255/07, Grand Chamber judgment of 31 January 2019 (just satisfaction).
[4] ECtHR, *Kavala v. Turkey*, no. 28749/18, judgment of 10 December 2019.

Meeting on 14-16 September 2021, that it was necessary to commence infringement proceedings under Article 46 paragraph 4 of the Convention in the event that the applicant was not released before their next Human Rights meeting (30 November – 2 December 2021).[5]

11. The CAHDI members were informed that on 28 May 2021, the 24th plenary of the Cybercrime Convention Committee (T-CY), representing the Parties to the *Convention on Cybercrime* (ETS No. 185, Budapest Convention), had approved the draft *Second Additional Protocol to the Convention on Cybercrime on Enhanced Co-operation and Disclosure of Electronic Evidence*.

12. The Director completed his overview by drawing the attention of delegations to the Secretary General's annual report on the *"State of democracy, human rights and the rule of law – A democratic renewal for Europe"* which was made public on 11 May 2021.

2 COMMITTEE OF MINISTERS' DECISIONS WITH RELEVANCE FOR THE CAHDI INCLUDING REQUESTS FOR CAHDI'S OPINION

2.1 Working methods: Draft reply to the Committee of Ministers on the evaluation of the activities of the CAHDI for discussion and adoption

13. The Chair recalled that, in the course of the evaluation of the CAHDI's activities – as required by its Terms of Reference - the Committee had adopted, by written procedure on 2 June 2021, the *Non-paper on the evaluation of the activities of the CAHDI* (document CAHDI (2021) 1 rev 1 *Confidential*). Based on the non-paper the Chair had prepared, with the help of the Secretariat, a draft reply to the Committee of Ministers on the activities of the CAHDI (document CAHDI (2021) 10 *Confidential*). The CAHDI unanimously adopted the reply as proposed and instructed the Secretariat to transmit it to the Committee of Ministers. The Chair thanked delegations for the innovative and thought-provoking evaluation exercise. It was, in her view, important that the CAHDI activity remained meaningful for the everyday work of the members as Legal Advisers of the Ministries of Foreign Affairs but also as closely as possible related to the other activities of the Council of Europe.

2.2 Opinions of the CAHDI on Recommendations 2197 (2021) and 2201 (2021) of the Parliamentary Assembly of the Council of Europe (PACE)

14. The Chair introduced the sub-item by recalling the two opinions adopted by the CAHDI since its last meeting.

15. The draft for the first one, on Recommendation 2191 (2020) on *Investment migration* of the Parliamentary Assembly of the Council of Europe (PACE), was already extensively discussed at the 60th meeting of the CAHDI in March 2021 and adopted, subsequently, by written procedure on 30 March 2021. The final version of the opinion, already transmitted to the Committee of Ministers, appears in document CAHDI (2021) Inf 3 *Restricted*.

16. The request for the second opinion was made by the Committee of Ministers on 31 March 2021 when the Ministers' Deputies, at their 1400th meeting, agreed to communicate PACE Recommendation 2197 (2021) on *The protection of victims of arbitrary displacement* to the CAHDI for information and possible comments. The CAHDI adopted an opinion with regard to this PACE Recommendation on 17 May 2021 by written procedure as reflected in document CAHDI (2021) Inf 4 *Restricted*. The Chair noted that, albeit also this CAHDI opinion had already been transmitted to the Committee of Ministers, delegations should still discuss, at this meeting, whether it would be feasible for the CAHDI to develop "guidelines for member States willing to implement the principle of universal jurisdiction as a means to address impunity gaps and ensure accountability for war crimes and crimes against humanity, in general", as suggested in paragraph 16 of the opinion. The CAHDI held an exchange of views on the issue and concluded the Sixth Committee of the United Nations General Assembly (UNGA) to be the more appropriate forum to deal with the matter.

[5] H46-37 Kavala (Application No. 28749/18) and Mergen and Others group (Application No. 44062/09) v. Turkey, CM/Del/Dec(2021)1411/H46-37, adopted by the Committee of Ministers on 16 September 2021 at the 1411th meeting of the Ministers' Deputies.

17. The request for the third opinion, on PACE Recommendation 2201 (2021) entitled *Human rights violations in Belarus require an international investigation* was communicated to the CAHDI on 5 May 2021 by the Committee of Ministers for information and possible comments. The Chair prepared, with the help of the Secretariat, the initial draft for the opinion. Based on subsequent comments submitted by delegations the Chair had developed a compromise proposal which was put to delegations for discussion and possible adoption during the meeting as document CAHDI (2021) 14 prov *Restricted*. Some delegations had further raised general comments on the suitability of the CAHDI to adopt opinions a) concerning a specific country, b) even though the request by the Committee of Ministers was formulated in a non-obliging manner, c) via written procedure, or d) on issues discussed in the framework of the United Nations (UN). These general comments were appended to the Chair's compromise proposal in document CAHDI (2021) 14 prov *Restricted*.

18. In reply to these comments, the Chair emphasised, first, that relevant problems of public international law did not occur in a purely theoretical setting, but because there was a factual basis from which they arose. This was further not the first time that the CAHDI was about to adopt an opinion with regard to a PACE recommendation dealing with a specific country or region. In 2005, the CAHDI formulated comments on PACE Recommendation 1690 (2005) on *The conflict over the Nagorno-Karabakh region dealt with by the OSCE Minsk Conference*, and, in 2007, an opinion on PACE Recommendation 1788 (2007) on *The USA and international law*. In its comments concerning the Nagorno-Karabakh region, the CAHDI clarified, that it would only deal with the public international law issues of the recommendation. This approach was also followed in the current draft opinion that concentrated merely on the legal aspect put forward in paragraph 1.2 of the respective PACE Recommendation inviting the Committee of Ministers to "examine the scope of application of universal jurisdiction with a view to its use by Council of Europe member States to combat impunity for perpetrators of serious human rights violations".

19. With regard to adopting CAHDI opinions via written procedure, the Chair pointed out to the practical problem of timing. While the Committee of Ministers met once a week and could hence, at any time, request the CAHDI's opinion, the CAHDI only had two plenary meetings a year. The use of written procedure for the adoption of CAHDI opinions had, moreover, already been used in the past. For instance, the opinion on PACE Recommendation 1788 (2007) on *"The USA and international law"* was adopted "through correspondence" in want of a physical meeting at the given time. Furthermore, the use of written procedures by inter-governmental committees of the Council of Europe had been accepted by the Secretary General and the Chair of the Committee of Ministers as a working method compatible with the currently still applicable Rules of Procedure for such committees appended to Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods. Moreover, the revised Rules of Procedure appended to Resolution CM/Res(2021)3, to enter into force on 1 January 2022 and replacing CM/Res(2011)24, will expressly allow for decision-making by written procedure.

20. With regard to the adoption of opinions by the CAHDI on issues discussed in the framework of the UN, the Chair maintained that as a regional organisation, the Council of Europe approached the various issues against its own mandate and the CAHDI could not escape the duty of assisting the Council of Europe in discharge of its mandate on reason that a more general discussion on the same aspects of public international law was ongoing at the UN. Such an approach would not imply, however, that the CAHDI should contradict those discussions, but that it should place its deliberations over a subject in the context of those discussions; and in this way show coherence, consistency and avoid fragmentation.

21. With regard to the last point, on the adoption of opinions by the CAHDI even though the request by the Committee of Ministers was formulated in a non-obliging manner, the Chair referred to the Terms of Reference of the CAHDI (document CAHDI (2020) 1), which, in their main task iii), required the CAHDI to "provide opinions at the request of the Committee of Ministers or at the request of other Steering Committees or Ad hoc Committees, transmitted via the Committee of Ministers". The Terms of Reference would not require that the requests of the Committee of Ministers must necessarily be formulated in a constraint manner, but left the

CAHDI a certain leeway to assess, as the body better placed to undergo such an assessment, whether a certain request actually entails questions of public international law.

22. The Chair then opened the floor for comments.

23. The representative of Belarus stated PACE Recommendation 2201 (2021) to represent a political document which could only aggravate the confrontation. The recommendation did not deal with a member State of the Council of Europe and was an example of interference in the internal affairs of a sovereign State. He understood that the CAHDI, as a legal body of the Council of Europe, felt obliged to react to the request. The representative of Belarus noted further that the CAHDI draft opinion did not mention Belarus but only dealt with the question of universal jurisdiction in abstract terms. While his delegation appreciated this restraint and delicacy with which the CAHDI draft opinion was drafted, it objected to the context in which it was prepared. The issue of universal jurisdiction was a sensitive and controversial one, a subject that should be approached with due diligence and prudence in order to prevent not only a further fragmentation of international law but also danger to international peace and security.

24. The representative of Turkey, while underlining his country's full support to international efforts to fight impunity, noted that opinions on the principle of universal jurisdiction were, however, highly diverged, and politically sensitive and there existed no widely recognised rules of customary international law on the issue. Therefore, the opinions of the CAHDI on PACE Recommendations 2197 and 2201 (2021) pertaining to universal jurisdiction should have been drafted in a more elaborate manner. The limited timeframe allocated to each draft had not been commensurate with the complexity of the task. Turkey had therefore made its reservations to the CAHDI opinion on PACE Recommendation 2197 (2021) and submitted comments with regard to the draft opinion on PACE Recommendation 2201 (2021) now under examination. The Turkish representative underlined that his country was not a State Party, inter alia, to the Additional Protocols I and II to the Geneva Conventions of 1949 as well as to the Rome Statute. It was hence the understanding of Turkey that the "international humanitarian law" mentioned in the opinions of the CAHDI with their footnotes prepared and drafted for both PACE recommendations referred to the legal instruments to which Turkey was already a State Party. The abovementioned opinions along with their footnotes should not be interpreted as giving a different status to the armed groups other than the armed forces of a State and thereby creating new obligations or understandings for Turkey. They could, in particular, not prejudice Turkey's positions it has taken before or may take in future in regard to the content of the opinions as well as what constitutes customary international law in other international fora. The Turkish representative underlined that the topic of universal jurisdiction was highly debated at the UN. Because of the diversity of views expressed by States on the topic, including concerns conveyed in relation to the possible abuse or misuse thereof, the Sixth Committee had decided to continue its consideration of the scope and application of this principle. Given the legitimate concerns of States on scope, limits and application of what is an exceptional and a subsidiary form of jurisdiction, the CAHDI should, in view of the Turkish representative, refrain from giving conclusive opinions on the principle and sources of universal jurisdiction. The representative of Turkey further stated that the sentence "[s]imilar obligations are found in other sources of applicable international law" in the compromise recommendation should not be interpreted as a source for universal jurisdiction for the reasons underlined in his statement before.

25. The representative of the Russian Federation maintained the Terms of Reference of CAHDI not to support the idea that the CAHDI would deal with human rights issues specific to a certain country. As a non-judicial body, the CAHDI should only pronounce itself on general issues of public international law. Given the way in which the PACE recommendation was formulated it did not appear possible to delink comments of CAHDI from the situation in Belarus. The representative of the Russian Federation concurred with the Turkish representative on that the topic of universal jurisdiction was very difficult and controversial and that it would hence require time to discuss it in order to reach consensus. Moreover, the Committee was free to refrain from giving any comments on the issue. The Committee of Ministers had only transmitted the PACE recommendation to the CAHDI for possible comments. In general, the CAHDI produced numerous opinions which proved its effectiveness. The fact that the CAHDI was now considering it appropriate to pronounce itself on universal jurisdiction in abstract terms in the

context of this PACE recommendation was further contradictory to the decision, taken just a moment earlier in the framework of its opinion of 17 May 2021 on PACE Recommendation 2197 (2021), not to engage in the elaboration of general guidelines on universal jurisdiction.

26. The representative of the Netherlands emphasised the clear mandate of the CAHDI which was not confined to non-country specific issues. The Committee would only be relevant if it could fulfil requests of this type. Human rights abuses were not confined to the internal matters of a State. It was furthermore clear, from the outset, that treaty obligations mentioned in the opinion would only apply to those States which were party to the said treaties.

27. The representative of the United Kingdom underlined the necessity to retain, in paragraph 5 of the draft opinion, the reference to customary international law.

28. The Slovenian representative maintained the draft opinion to accurately reflect the fact that the principle of universal jurisdiction as such was accepted but that there existed varying views on its scope. In his view this opinion did not touch upon such details.

29. In light of these comments, the Chair concluded that it was necessary to prepare a further compromise proposal that would clarify the CAHDI's wish to refrain from drafting an opinion on any non-legal issues relating to a country-specific human rights situation based on the argument that such situations fell outside of its Terms of Reference but that it would, instead, reply to the request by the Committee of Ministers with general remarks in relation to universal jurisdiction. This draft reply was presented to delegations during the meeting and, after examination, adopted by consensus as proposed. The CAHDI entrusted the Secretariat to transmit its reply to the Committee of Ministers which is also appended to this report in **Appendix III**.

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

30. The Chair presented a compilation of the Committee of Ministers' decisions of relevance to the CAHDI's activities (document CAHDI (2021) 11 *Restricted*).

31. The Committee of Ministers had, *inter alia*, taken note of the Abridged Report of the 60th meeting of the CAHDI. The document further contained links to the stocktaking document of the German Presidency of the Committee of Ministers, which took place from November 2020 to May 2021, as well as the priorities of the ongoing Presidency of Hungary until November 2021.

3 CAHDI DATABASES AND QUESTIONNAIRES

32. The Chair introduced the item by recalling the questionnaires and databases entertained by the CAHDI especially in the field of issues related to immunities of States and international organisations but also in other areas of particular interest for the CAHDI.

33. The Chair recalled that one of the adjustments to the CAHDI's agenda, carried out in course of the overall evaluation exercise concerning the CAHDI's activities during the past year, had been the grouping of the items that liaise to a database and/or questionnaire into a separate agenda point as a specific point of information. Following this grouping, the items that only relate to a database and/or questionnaire would not be reflected in the agenda as specific agenda points or as issues discussed within a general agenda item. This change shall allow for more flexibility in the meetings of the CAHDI to concentrate on those topics and developments that interest delegations most.

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

34. The representative of the Netherlands thanked all delegations who had, since 2014, submitted their replies to the questionnaire on *Settlement of disputes of a private character to which an international organisation is a party* compiled in document CAHDI (2020) 3 prov *Confidential Bilingual* and welcomed contributions from delegations not having yet done so. The Netherlands was considering raising, at the upcoming meeting of the Sixth Committee of the UNGA, the question of a possible invitation to the Secretary General of the United Nations asking him to address in his next year's report on the *Rule of Law at National and International Levels* the question of how the UN itself complies with rule of law principles, in particular, when

addressing disputes with private parties or contractors. The Netherlands was equally considering encouraging the International Law Commission (ILC) to move the subject of *Settlement of international disputes to which international organizations are parties* from the long-term program of work to the short-term program. The representative of the Netherlands welcomed ideas and comments concerning these two possible initiatives from CAHDI delegations, including discussing them bilaterally.

3.2 Immunity of state-owned cultural property on loan

35. No delegation took the floor concerning the questionnaire on *Immunity of state-owned cultural property on loan*.

3.3 Immunities of special missions

36. No delegation took the floor concerning the questionnaire on *Immunities of special missions.*

3.4 Service of process on a foreign State

37. No delegation took the floor concerning the questionnaire on *Service of process on a foreign State*.

3.5 Possibility 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

38. There were no comments from delegations concerning the questionnaire on *Possibility 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* and the database on *The immunities of States and international organisations* to be considered under this sub-item.

3.6 Organisation and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs

39. The Chair noted that, since the last CAHDI meeting, the Secretariat had received the updated replies of Armenia, Italy and Slovenia to the revised questionnaire on *The organisation and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs*, which could be consulted in document CAHDI (2021) 3 prov *Bilingual*.

40. The representative of the United States of America recalled, as explained in the replies of his delegation to the revised questionnaire on *The organisation and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs*, the Legal Adviser is a presidentially appointed position which is subject to confirmation by the US Senate. The nominee to be the next Legal Adviser is Ms Sarah CLEVELAND, former Counselor for International Law in the Office of the Legal Adviser, participant in the UN Human Rights Committee and the Venice Commission and Professor of International Law at Columbia Law School. If confirmed Ms Cleveland will be the second woman Legal Adviser confirmed to that position.

3.7 The implementation of United Nations sanctions

41. With regard to the database under this sub-item, the representative of the United Kingdom informed delegations that the new legal regime on sanctions in the United Kingdom had entered into force in the beginning of the year. His delegation will enter full details concerning the new laws into the CAHDI database on the *Implementation of United Nations sanctions*.

42. To conclude the item, the Chair noted that the replies to four of the questionnaires under this item of the agenda were currently still confidential, notably those concerning the *Settlement of disputes of a private character to which an international organisation is a party* , the *Immunity of State owned cultural property on loan*, the *Service of process on a foreign State* and the *Possibility 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*. Delegations were invited to consider, whether the confidentiality status of these questionnaires was still justified or whether this could be lifted in the interest of making this information publicly available, e.g., in a new database, provided that the CAHDI would decide to create such a database and find the financial resources to undertake such a

project. After some delegations had provided their views on the issue of confidentiality the CAHDI decided to continue the discussion on this aspect at its next meeting.

4 IMMUNITIES OF STATES AND OF INTERNATIONAL ORGANISATIONS, DIPLOMATIC AND CONSULAR IMMUNITY

4.1 Exchanges of views on topical issues in relation to the subject matter of the item

43. The Chair noted that there had been no proposals for exchanges of views to be held under this sub-item.

4.2 State practice and relevant case-law

44. The Chair invited representatives to share information on their recent practice under this item which might be of interest to other delegations.

45. The representative of the Czech Republic took the floor to raise the issue of restrictions imposed by the Russian Federation on Czech missions in Moscow and elsewhere in the Russian Federation. These restrictions are based on the *Executive Order on measures (countermeasures) in response to unfriendly actions of foreign States of 23 April 2021* and the list of unfriendly States of 13 May 2021, consisting of the Czech Republic and the United States which limits the ability of the relevant member States to appoint local Russian staff to their diplomatic missions in the Russian Federation. The Czech Republic considers these restrictions as violations of the Vienna Convention on Diplomatic Relations (VCDR), particularly Articles 7, 25 and 47, and the corresponding provisions of the Vienna Convention on Consular Relations (VCCR). These acts further contravene the 1993 *Treaty on Friendly Relations and Cooperation between the Czech Republic and the Russian Federation*.

46. The representative of the United States of America took the floor to echo the comments of the Czech representative and added that under Article 22 of the VCDR and the corresponding Article 31 of the VCCR, the receiving State was under a special duty to take all appropriate steps to prevent intrusion against premises of a mission. The actions of the Russian Federation had the effect of prohibiting the sending State from engaging local personnel to protect the premises and personnel of the sending State's missions.

47. The representative of the Russian Federation intervened to respond to the comments made by the representatives of the Czech Republic and the United States of America on the treatment of diplomatic missions in Moscow. He stated that the Russian Federation had communicated the grounds of its decision to the States concerned and acted fully in accordance with diplomatic and consular law and practice. He referred, in particular, to Articles 11 paragraph 2 of the VCDR, which allowed the receiving State to refuse to accept officials of a particular category, as well as to Article 9 of the VCDR. According to the representative of the Russian Federation this practice had also been used before by other States. He further stated that both measures with respect to these countries were merely a reply to unfriendly measures taken with respect to the Russian embassies and consular missions in these two countries and the breaches of international law that these countries had committed.

48. The representative of the Russian Federation further sought to draw attention to the agenda of the UNGA Sixth Committee, and the agenda of the UN Committee on Relations with the Host Country, which is currently tasked with non-compliance of the United States of America with the 1947 *Agreement regarding the Headquarters of the United Nations* (Headquarters Agreement). He stated that the situation was worsening with regard to the non-issuance of visas to the delegates of a number of member States to the UN. He further brought up the issue of the seizure of property and part of the premises of the Russian mission in New York by US authorities. Upon proposal of the Russian Federation and a number of other member States, the UNGA had provided a mandate to the Secretary General to use the arbitration procedure between the US and the UN. The representative of the Russian Federation voiced his hope that this procedure could be initiated soon.

49. The representative of the United States responded to the comments of the Russian Federation stating that the US is acting in compliance with its obligations under the Headquarters Agreement. In response to the comments regarding the treatment of diplomats, the

representative referred to their prior comments before the CAHDI on decisions regarding the treatment of Russian diplomats in the US.

50. The Austrian representative noted the difficulties in the protection of diplomatic immunities in the context of the Covid-19 pandemic. He drew the attention of delegations to the requirements set by the government of Singapore for diplomats to quarantine in private quarters and wear an electronic tracking device, of which he deemed the latter measure to be excessive and a violation of Article 26 of the VCDR. He further drew attention to a question brought to the Austrian authorities regarding the immunity of family members of reigning monarchs. It was replied that the absolute immunity under international law of acting heads of State extended to close family members travelling with the head of State, but not separately. Such family members travelling separately may, however, be protected if they have special tasks providing them with immunities as diplomats or as members of special missions.

51. The representative of the United Kingdom reported of the decision of the English High Court in the case *London Borough of Barnet v Attorney General* of 13 May 2021 concerning children's welfare and the relationship between immunities under the VCDR and the ECHR.[6] The case arose as a result of concerns from a local authority about the welfare of children of a diplomat and his wife based in the United Kingdom. The authority took steps to protect the children but found that the full range of steps available under domestic legislation could not be taken because of the inviolability and immunity of the diplomat under the VCDR. The local authority thus pursued a case against the Foreign Office seeking confirmation that the VCDR prevented the safeguarding of children of the members of a diplomatic mission and was incompatible with Articles 3 and 6 of the ECHR. The court dismissed the application, finding that the VCDR does allow a State to give effect to its ECHR obligations, in the form of seeking a waiver of immunity or declaring the diplomat and their family *persona non grata*, as was done in the case at hand. The court also found that Article 3 ECHR requires a State to act under the VCDR with the best interest of the children in mind but does not require the State to violate the latter convention.

52. The representative of the United States presented a number of cases to the CAHDI. He first recalled the US Supreme Court cases of *Germany v Philip*[7]and the related case of *Hungary v Simon*,[8] and noted that since the last meeting of the CAHDI, the 7th Circuit had upheld the dismissal of the case *Scalin v Société Nationale SNCF*.[9] The facts were similar to those in the *Simon* case. The 7th Circuit Panel found that there was no cause of action under the expropriation exception for what was termed as a "triple foreign suit", wherein a foreign national claims to have been injured by a foreign State agency in a foreign country. The case could still be appealed to the US Supreme Court.

53. The representative of the United States of America further reported that the District of Columbia Circuit Court of Appeal had upheld the District Court decision in the case of *Usoyan v Turkey*[10] finding that Turkey was not entitled to sovereign immunity in a case brought by protesters claiming that they were attacked by Turkish security personnel during President Erdogan's trip to the United States. The US representative stated that the decision was consistent with the views expressed by the United States, finding that the non-commercial tort exception to the *Foreign Sovereign Immunities Act* applied in this case. The Court found that while foreign security forces have discretion to undertake measures to protect their government officials from the threat of bodily harm, this discretion only extends to measures reasonably necessary to defend such protected persons. The Turkish representative intervened to note that the case was still ongoing, with an *en banc* application pending. In the view of the Turkish government the District Court decision was inconsistent with the rules of the US Supreme Court and it hoped the *en banc* decision to clarify the situation for the benefit of the protection of foreign heads of State abroad. The Turkish representative underlined the importance of the possibility

[6] *London Borough of Barnet v Attorney General* [2021] EWHC 1253 (Fam).
[7] *Federal Republic of Germany et al v Philip et al*, US Supreme Court (3 February 2021) No. 19-351
[8]; *Republic of Hungary et al, Petitioners v Rosalie Simon et al*, US Supreme Court (3 February 2021) No. 18-1447.
[9] *Scalin v Société Nationale SNCF SA*, US Federal 7th Circuit Court, Civil Court (6 August 2021) No. 18-1887.
[10] *Lusik Usoyan et al, Appellees v Republic of Turkey, Appellant* US Court of Appeals for the District of Columbia (27 July 2021) No. 20-7017.

for security agents to take necessary measures where national security authorities in the receiving State had failed to do so adequately.

54. The Swiss representative shared a judgment rendered by the Federal Supreme Court on the question of security agents of a head of State during a private visit.[11] The security agents had used force against a journalist, causing lesions and damaging his material, despite the fact that he was neither filming nor acting in an abnormal way. The security agents invoked immunity, which was refused by the Supreme Court for the following reasons: the *rationae personae* immunity of the President could not be extended to his security agents, and the *rationae materiae* immunity was not applicable as the security agents were not acting in the exercise of their official functions to protect the head of State, given that the journalist was not filming and the President was not present at the time of the incident.

5 THE EUROPEAN CONVENTION ON HUMAN RIGHTS, CASES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS AND OTHER HUMAN RIGHTS ISSUES INVOLVING PUBLIC INTERNATIONAL LAW

5.1 EU accession to the ECHR – international law aspects

55. At its 59th meeting (24-25 September 2020 in Prague, Czech Republic) the CAHDI appointed Ms Alina OROSAN (Romania), the current Chair of the CAHDI, to participate, on its behalf, in the meetings of the Council of Europe Steering Committee for Human Rights (CDDH) ad hoc negotiation Group 47+1 (47+1 Group). The Group has the mandate to finalise the legal instruments setting out the modalities of accession of the European Union to the ECHR. Pursuant to a decision of the Committee of Ministers of 15 January 2020, the CAHDI as well as the Registry of the Court have the right to participate in the work of the 47+1 Group as observers.

56. Since the last meeting of the CAHDI, the Group had held two further negotiation meetings, the 9th meeting from 23 to 25 March 2021 in virtual format and the 10th meeting from 29 June to 2 July 2021 in hybrid format. The Chair gave delegations an overview of the discussions in these two meetings.

57. Regarding Basket 1, *The EU's specific mechanisms of the procedure before the European Court of Human Rights*, the Group, while having now agreed on wording acceptable for all concerning some of the issues raised by the Court of Justice of the European Union (CJEU) in its Opinion 02/13 was still fine-tuning the exact modalities for the triggering and termination of the co-respondent mechanism.

58. Regarding Basket 2 and the issue concerning inter-party applications under Article 33 of the Convention, the Group was discussing a proposal submitted by the Norwegian delegation which aims at finding an appropriate way to ensure that the competences of the Court remain unaffected while allowing the EU to determine whether a case falls within the material scope of EU law.

59. Regarding Basket 3, the principle of mutual trust, the Secretariat had prepared, in light of the discussions based on an earlier proposal submitted by the EU Commission for the 9th meeting of the Group, a revised proposal that was discussed at the 10th meeting. This proposal is composed of a preambular paragraph recalling the Court to be mindful in its case-law of the importance of the mutual-recognition mechanisms within the EU and a substantive provision to be included in the accession agreement stating how accession shall not affect the application of the principle of mutual trust to the extent that such application also ensures the protection of human rights guaranteed by the Convention as interpreted by the Court. Furthermore, corresponding paragraphs for the explanatory report are proposed to explain the rather spare language proposed for the draft Accession Agreement itself.

60. Regarding Basket 4, *EU acts in the area of the Common Foreign and Security Policy (CFSP)*, the EU had given a presentation at the 9th meeting of building blocks for a solution for certain acts in the area of the CFSP that are excluded from the jurisdiction of the CJEU. The building blocks related to the need for a new attribution clause in the draft Accession Agreement. Such clause would enable the EU to allocate, for the purposes of the Convention, responsibility for

[11] Swiss Federal Supreme Court, Ire Cour de droit public « Arrêt du 26 juillet 2021 » 1B_539/2020.

a CFSP act of the EU to one or more EU member State(s) in cases where such act is excluded from the judicial review of the CJEU due to the limitations of the latter's jurisdiction. The EU representatives had maintained that the autonomy of EU law would require that the determination of whether such act falls within the CJEU's jurisdiction is provided by the EU itself. During the discussion, delegations had been divided on the question of whether an attribution clause as proposed by the EU was in accordance with public international law. Furthermore, concerns had been raised as to whether such a reattribution clause could put the applicant at a disadvantage, given that it may entail the changing of a respondent party in an ongoing proceeding before the Court, subject the applicant to a lengthy and cumbersome process or challenge the ultimate role of the Court in determining parties responsible for breaches of the Convention. This could also negatively reflect on the Convention system as a whole. Any possibility to reattribute responsibility for a CFSP act should hence, in their view, be sufficiently anchored in the draft Accession Agreement in order to ensure transparency.

61. At the 10th meeting, delegations had also held, for the second time within this second round of negotiations, an exchange of views with representatives of civil society and national human rights institutions, namely the AIRE Centre (Advice on Individual Rights in Europe), Amnesty International, the International Commission of Jurists, the Council of Bars and Law Societies of Europe (CCBE) as well as the European Network of National Human Rights Institutions (ENNHRI).

62. The Chair closed her overview by recalling that the next, 11th, meeting of the 47+1 Group was to take place from 5 to 8 October 2021.

63. The representative of the United Kingdom declared his country to support the aims of EU accession to strengthen and enhance human rights protection in Europe and to improve external human rights accountability for the EU institutions. In the view of the United Kingdom any accession agreement must also protect the effectiveness of the Council of Europe institutions and the integrity of the Court and Convention system. It must maintain the rights of applicants and ensure that EU accession does not impose additional burdens on applicants in their efforts to access remedies before the Court. The representative of the United Kingdom stressed the need for the EU to accede to the Convention on an equal footing to other High Contracting Parties. There should be no special treatment for the EU or its member States as a result of accession and that the EU should be bound by the Strasbourg Court in the same way as other High Contracting Parties.

64. The representative of Turkey underlined the central importance of the accession of the EU to the ECHR for creating a common European legal human rights space. With accession, the EU and its institutions needed also to come under the scrutiny of the Strasbourg Court. In the view of Turkey, the EU should move forward from its position, which previously ended in a deadlock of the negotiations. The EU should aim to protect the Convention system and join the Convention on equal grounds, i.e., with the same rights and obligations as the other High Contracting Parties. Turkey would further expect the EU to put forward concrete proposals to advance the negotiations.

65. The representative of the Czech Republic concurred with previous speakers on that the EU should accede to the ECHR on an equal footing without any special rights. At the same time, however, there was a need to take into account the specifics of the EU. Delegations committed to EU accession to the Convention would need to ensure that these specifics of the EU would be accommodated in the Accession Agreement.

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

66. The Chair invited delegations to report on judgments, decisions and resolutions by the Court involving issues of public international law.

67. The representative of Sweden informed the CAHDI about the Grand Chamber judgment of 25 May 2021 in the case of *Centrum för rättvisa v. Sweden*.[12] He noted the case to be connected

[12] ECtHR, *Centrum För Rättvisa v. Sweden* [GC], no. 35252/08, 25 May 2021.

to the case of *Big Brother Watch and Others v. the United Kingdom*[13] with regard to which the Grand Chamber judgment was delivered on the same day. The Swedish Government was currently analysing which measures should be taken in light of this judgment.

68. The representative of Ukraine drew the attention of delegations to inter-State cases concerning Ukraine while noting that there had not been many new developments in these cases. The most recent development concerned the case filed by the Netherlands against the Russian Federation[14] concerning the shooting down of Malaysia Airlines Flight MH17 over Eastern Ukraine in 2014 which was joined by the Court with the cases of *Ukraine v. Russia (V)* concerning actions of the Russian Federation in the Donbass region[15] and *Ukraine v. Russia (II)* concerning the abduction of three groups of Ukrainian orphan children and children without parental care, and a number of adults accompanying them.[16] The case is now referred to as *Ukraine and the Netherlands v. Russia*.[17] The representative of Ukraine noted the case to be potentially one of the fastest cases handled by the Court: the decision to join the cases was taken in January 2021 and the oral hearing on admissibility is scheduled for 24 November 2021. The representative also mentioned the decision in the case of *Ukraine v. Russia (re Crimea)*[18] declaring the application admissible. The parties now have until 28 February 2022 to submit their written submissions.

69. The representative of Finland then presented the rather exceptional case of *N.A. v. Finland*.[19] This case concerned a situation where the applicant, an Iraqi national living in Finland, alleged her father, who had been refused asylum in Finland, to have been killed in his home country, Iraq, shortly after his assisted voluntary return there. The Court concluded in November 2019 that the Finnish authorities had failed to comply with their obligations under Articles 2 and 3 of the Convention when dealing with the asylum application by the applicant's father and there had been a violation of both of those provisions. The Court had not been convinced that the Finnish authorities' assessment of the risks faced by the father if he was returned to Iraq had met the requirements of Article 2 or Article 3. Indeed, those authorities were or should have been aware of the risks he faced. The Court rejected, however, a complaint by the applicant about her own rights under Article 3 having been violated. Subsequently, Finland's National Bureau of Investigation, suspecting that documents submitted by the applicant regarding her father's death had been forged, launched a pre-trial investigation of a suspected aggravated fraud and aggravated forgery. With the help of evidence obtained through international police cooperation, the applicant's father was indeed found, alive and well, living in Iraq. This led to charges being pressed, and the applicant and also her ex-spouse were finally convicted for forgery and aggravated fraud by the District Court in February 2021. The applicant was also found guilty of false statement in official proceedings. She was sentenced to 1 year and 10 months of imprisonment and her ex-spouse to 1 year and 11 months of imprisonment. With regard to the European Court of Human Rights, the Finnish Government had requested the Court, in September 2020, to revise its judgment in accordance with Rule 80 of the Rules of Court.[20] On 13 July 2021, the Court decided to revise its judgment and declared the application inadmissible. For the Court, it was clear that the applicant knowingly intended to deceive the Court as to the core factual elements of her allegations in the complaint. It was also clear that had this information become known to the Court before its adjudication of the case, the applicant's complaint would have been declared inadmissible under Article 35 paragraph 3 (a) of the Convention. It followed that the Court's judgment of 14 November 2019 was annulled in

[13] ECtHR, *Big Brother Watch and Others v. the United Kingdom*, [GC], nos. 58170/13, 62322/14 and 24960/15, 25 May 2021.
[14] Application of the Netherlands v. Russia, no. 28525/20.
[15] Application of Ukraine v. Russia (V), no. 8019/16.
[16] Application of Ukraine v. Russia (II), no. 43800/14.
[17] Application Ukraine and the Netherlands v. Russia, nos. 8019/16, 43800/14 and 28525/20)
[18] ECtHR, *Ukraine v. the Russian Federation (re Crimea)* [GC] (decision), nos 20958/14 38334/18, 16 December 2020.
[19] ECtHR, *N.A. v. Finland*, Judgment (Merits and Just Satisfaction), no. 25244/18, 14 November 2019; ECtHR, *N.A. v. Finland*, Judgment (Revision), no. 25244/18, 13 July 2021.
[20] Rule 80 – Request for revision of a judgment: *"1. A party may, in the event of the discovery of a fact which might by its nature have a decisive influence and which, when a judgment was delivered, was unknown to the Court and could not reasonably have been known to that party, request the Court, within a period of six months after that party acquired knowledge of the fact, to revise that judgment."*

its entirety and the application was rejected as an abuse of the right of individual application pursuant to Article 35 paragraphs 3 (a) and 4 of the Convention.

70. The representative of the Russian Federation informed the CAHDI that on 22 July 2021 his country had lodged an inter-State application against Ukraine under Article 33 of the Convention.[21] The case concerned the allegation of an administrative practice in Ukraine of, *inter alia*, killings, abductions, forced displacement, interference with the right to vote, restrictions on the use of the Russian language and attacks on Russian embassies and consulates. They also complain about the water supply to Crimea at the Northern Crimean Canal being switched off and alleged that Ukraine was responsible for the deaths of those on board Malaysia Airlines Flight MH17 because it had failed to close its airspace.

71. Regarding the above-mentioned Grand Chamber's decision to join cases in the, now called, case of Ukraine and the Netherlands v. Russia, the representative of the Russian Federation noted that from the Russian perspective this decision represented an unprecedented move that did not comply with procedural requirements. The decision was remarkably swift and taken without consultation of parties as prescribed by Rule 51 paragraph 6[22] and Rule 58 paragraph 1[23] of the Rules of Court. The chambers of the first section did not relinquish their jurisdiction in accordance with Article 30 of the Convention and parties were not involved in the decision-making process. Furthermore, in the view of the Russian representative, the efficient administration of justice put forward as a justification for the joinder, could hardly outweigh the difference in subject matter between the cases, nor could it excuse the procedural violations occurred. The Russian Government considered that the decision of the Court and the manner in which it was taken reflected the political nature of the proceedings. It further casted doubts over the compliance with the standards of justice of any judgment in the case.

72. The representative of Switzerland drew the attention of the CAHDI to the application lodged in the case of *Duarte Agostinho and Others v. Portugal and 32 other States*.[24] This application raised particular substantive questions, notably concerning the practice of human rights in the field of environment, as well as procedural questions, the Court having joined together applications against the 33 States without insisting on the prior exhaustion of domestic remedies. Switzerland submitted its observations on admissibility and merits of the case on 25 May 2021. The representative indicated that her country had a particular interest in ensuring that States coordinated their responses in this case as much as possible.

5.3 National implementation measures of UN sanctions and respect for human rights

73. The Chair invited delegations to share information concerning cases before domestic courts related to the national implementation measures of UN sanctions and respect for human rights.

74. The representative of the United Kingdom took the floor to report on the first case before UK courts challenging the new national legislation on sanctions including implementing UN sanctions. The case had been brought by a person designated under the United Nations Security Council (UNSC) ISIL (Da'esh) and Al-Qaida sanctions regime challenging that legislation as incompatible with Articles 6 and 8 of the ECHR. The central allegation of the plaintiff is that the legislation does not permit a designated person access to a domestic court to review the designation. According to the representative of the United Kingdom the case raises similar issues as those dealt with by the European Court of Human Rights in the case of *Al-Dulimi and Montana Management v Switzerland*. Under the legislation of the United Kingdom, a court challenge can be made following an administrative review procedure, under which the listed person may ask the UK government to use best endeavours to have their name removed from UN sanctions lists. The UK representative explained that a court in the

[21] Application of Russia v. Ukraine, no. 36958/21.
[22] Rule 51 – Assignment of applications and subsequent procedure: *"6. Before fixing the written and, where appropriate, oral procedure, the President of the Chamber shall consult the Parties".*
[23] Rule 58 – Inter-State applications: *"1. Once the Chamber has decided to admit an application made under Article 33 of the Convention, the President of the Chamber shall, after consulting the Contracting Parties concerned, lay down the time-limits for the filing of written observations on the merits and for the production of any further evidence. The President may however, with the agreement of the Contracting Parties concerned, direct that a written procedure is to be dispensed with".*
[24] Communicated case, Duarte Agostinho and Others v. Portugal and 32 other States (only in French), no. 39371/20, 13 November 2020.

United Kingdom cannot revoke a UN designation, nor can it order a UN designation to be revoked. The UK Government's position is that the legislation is compatible with the Convention and the Strasbourg case-law as well as with the UN Charter.

75. As there were no other contributions, the Chair thanked the representative from the United Kingdom for his input and closed this item.

6 TREATY LAW

6.1 Exchanges of views on topical issues related to treaty law

- ***Exchange of views on non-legally binding agreements in international law***

76. The representative of Germany introduced the proposal of his delegation for the CAHDI to hold a discussion on non-legally binding agreements in international law as a follow-up to the online expert workshop on the topic organised by the Federal Foreign Office of Germany, the University of Potsdam and the CAHDI Secretariat in the framework of the 60th meeting of the CAHDI on 26 March 2021. At the expert workshop, the German delegation had sensed an interest amongst the Council of Europe member States and colleagues at the CAHDI to integrate the topic of non-legally binding agreements in international law into the work of the CAHDI. To incite the discussion the German delegation had prepared an option paper as contained in document CAHDI (2021) 17 *Confidential* inviting the CAHDI to consider the following three possible follow-up steps: 1) to place the topic as a standing item on the agenda of CAHDI meetings; 2) to assemble an inventory of State practice in the area of non-binding agreements; 3) to develop a Council of Europe glossary, a model memorandum of understanding or CAHDI guidelines in the sense of a comprehensive compilation and commented evaluation of practice at the Council of Europe and in its member States, inspired by the Organisation of American States (OAS) *"Guidelines on Legally Binding and Non-Binding Agreements"*.

77. Numerous representatives took the floor to support the German initiative underlining its value for the everyday practice for them as legal advisers. They noted the importance of harmonising related terminology and learning from each other's national experiences. Although it was not felt that the options as represented by the German delegation were mutually exclusive there was a common understanding among the delegations taking the floor that a step-by-step approach would be preferable. It was especially felt that option 2, the development of an inventory of State practice via a questionnaire, would pose an appropriate first step to embark on the subject matter. Depending on the results obtained in the course of the questionnaire exercise, further steps could be envisaged. While there was less support among delegations for introducing the subject of non-legally binding agreements in international law as a permanent item on the CAHDI's agenda, many delegations spoke in favour of the ideas proposed under the last option of the German option paper. Whether the CAHDI would, eventually, opt for one or another of these could be decided at a later stage based on the results obtained via the questionnaire phase.

78. The CAHDI agreed to pursue its work on this issue on the basis of a questionnaire prepared by Germany in cooperation with the Chair, the Vice-Chair and the Secretariat.

- ***Declarations implying the exclusion of any treaty-based relationship between the declaring State and another State party to the treaty in relation to which the declaration is formulated***

79. The Chair introduced the document CAHDI (2021) 13 prov *Declarations implying the exclusion of any treaty-based relationship between the declaring State and another State party to the treaty in relation to which the declaration is formulated*. She recalled that the document had been created by the Chairs and Secretariat following discussions during the 59th and 60th meetings surrounding a declaration made by Azerbaijan to the *Intergovernmental Agreement on Dry Ports*. The Chair particularly drew members' attention to the questions formulated at the end of the document and invited delegations to take the floor to provide their views on these questions.

80. Representatives thanked the Secretariat and the Chairs for the preparation of what they considered to be a well-written document.

81. The Armenian representative noted the continuing difficulties of his Government with Azerbaijan presenting such declarations in the context of treaties within the Council of Europe and the Commonwealth of Independent States. He shared that discussion had been initiated based on the debates within the CAHDI on the topic, and Armenia had opened inter-ministerial groups to have a clear picture on the matter. He hoped to be able to provide a more common position on the topic during the next meeting.

82. The Chair acknowledged that the discussion had started with a declaration from Azerbaijan but noted that the scope of discussion was wider than this declaration.

83. The Austrian representative noted that the foundation of the document was the reference in paragraph 12 to the purposes of multilateral treaties, namely the establishment of inter-State co-operation between all State parties participating. He accepted that it was possible for declaring States to deny diplomatic relations with another party, however affirmed that the essence of a multilateral treaty was its applicability to the territory of all parties. In response to the questions in the document, the representative stated that he saw such declarations as reservations and as *ipso facto* incompatible with the object and purpose of a multilateral treaty. He would further see no advantages in considering such declarations as anything other than reservations. In his view objections to such declarations were necessary. The representative lauded the quality of the document and encouraged further discussion on the topic during subsequent meetings.

84. The representative from Poland took the floor to note that, contrary to Austria, his country did not have a firm position or practice on the questions discussed. Yet he agreed with the distinction between such declarations and declarations denying recognition of a State. He further considered such declarations to amount to reservations and that the legality of such a reservation per se would depend on the object and purpose of the treaty in question. Particularly, such declarations should be considered as reservations when a treaty contained *erga omnes* or *erga omnes partes* obligations.

85. The representative of Cyprus noted the distinction in the document between such declarations and declarations excluding the application of a treaty with regard to a Party that the declaring State does not recognise. In her opinion, any statement which purports to exclude or modify the legal effects of certain provisions of a treaty would qualify as reservation, regardless of whether the declaration concerns the recognition of the State in question. While she accepted that a cautionary declaration noting accession to a treaty not to imply recognition of another party was a separate issue, a declaration explicitly rejecting the applicability of a convention between parties clearly had a legal effect on the application of the treaty. Whether such statements would amount to reservations should be determined on a case-by-case basis, taking into account the specific circumstances of the treaty in question, with particular accent on human rights treaties and those with provisions on non-discrimination. She finally noted that, while Cyprus agreed with the conclusion in paragraph 20 of the working document with regard to the elements to be considered in order to determine the permissibility of declarations purporting to exclude the application of a treaty in its entirety with regard to another Party, in her view, such conclusion should in no way be differentiated from the consideration of permissibility of such declarations in the context of non-recognition. Accordingly, Cyprus expressed its reservations with regard to the analysis contained in this document and reserved its right to submit written observations in the future.

86. The representative of the Netherlands indicated his delegation remained hesitant as to whether such declarations may be considered as reservations, considering that the definition of reservations in the VCLT targets specific provisions in a treaty without aiming to exclude the application of a treaty between two parties entirely. In the view of the representative of the Netherlands, it was unacceptable that one party to the treaty could exclude *a priori* the emergence of obligations with another State party given the purpose of multilateral treaties to create mutual treaty relationships between all parties to the treaty. The Netherlands therefore considered such declarations to be null and void. This should be made clear through an objection to such a statement, even though it would not be formally considered as a reservation. Expressing this position on the nullity of the declaration might prompt the declaring State to reconsider its position.

87. The Finnish expert intervened to note that her country's lack of objection to such interventions in the past was based on the lack of clarity as to whether such declarations can be seen as reservations under the VCLT. The existence of a legal void was problematic, however, given that such declarations were contrary to the functioning of the multilateral treaty framework in general. In the view of the Finnish representative, further discussion on the topic would be welcome.

88. The Turkish representative affirmed that, from a legal perspective, diplomatic relations were established by mutual consent of States, as affirmed by Article 2 of the VCDR. In this regard, every sovereign State had the power and discretion as to the recognition of an entity as a State and establishing diplomatic relations with other States. As a consequence of this, a State party to an international instrument may deem it necessary or useful to inform other State parties by means of a declaration on the scope of implementation of the instrument. Unilateral statements which exclude the application of a treaty to an unrecognised entity should be considered as valid in this regard. The Turkish representative further noted the study conducted by Alain Pellet as Special Rapporteur of the ILC to adopt this distinction regarding statements of non-recognition in paragraph 151. According to this, declarations excluding the applicability of a convention to an unrecognised entity were outside of the discussion on reservations. The comments of the ILC considering such statements as reservations were, however, somewhat misleading in this regard.

89. The Slovenian representative reminded of his delegation's comments during the previous session and appreciated their consideration in the document presented by the Chair. He further supported further exchanges of views on this topic.

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

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

90. In the framework of its activity as the *European Observatory of Reservations to International Treaties*, the CAHDI examined a list of outstanding reservations and declarations to international treaties. The Chair presented the documents containing these reservations and declarations which are subject to objection (documents CAHDI (2021) 12 prov *Confidential* and CAHDI (2021) 12 Addendum prov *Confidential Bilingual*) and opened the discussion. The Chair also drew the attention of the delegations to document CAHDI (2021) Inf 5 containing reactions to reservations and declarations to international treaties previously examined by the CAHDI and for which the deadline for objecting had already expired.

91. The Chair underlined that the reservations and declarations to international treaties still subject to objection were contained in document CAHDI (2021) 12 prov *Confidential*, which included 18 reservations and declarations. Three of them were made with regard to treaties concluded outside the Council of Europe (Part I of the document) while fifteen of them concerned treaties concluded within the Council of Europe (Part II of the document).

92. With regard to **declarations made by Kazakhstan** to the *Convention on the Privileges and Immunities of the Specialized Agencies (1947)*, no comments were made by delegations.

93. With regard to **reservations and declarations made by the United Kingdom** regarding the Bailiwick of Jersey to the *Convention on the Elimination of All Forms of Discrimination against Women (1979)* the Chair noted that the delegation of the United Kingdom had provided the Secretariat with an explanatory note with regard to these reservations and declarations. The note was made available to delegations before the meeting and it also appeared in document CAHDI (2021) 12 prov *Confidential*. No comments were made by delegations concerning this item.

94. With regard to **declarations made by Togo** to the *Convention on the Reduction of Statelessness (1961)*, the Chair noted that only the second part of the declaration appeared problematic with which Togo declared its legislation to allow for the deprivation of nationality in the case of a serious criminal conviction. The permissible grounds for exceptions listed in Article 8 paragraph 3 of the Convention from the general prohibition under Article 8 paragraph 1 concerning the deprivation of nationality in case such deprivation would lead to statelessness

do, however, not feature criminal convictions among them. The representative of Finland indicated that it seemed that Togo sought to restrict one of the essential obligations of the Convention in a way contrary to the object and purpose of the Convention. Her country was therefore considering objecting to this declaration. Also the representatives of Germany and the Netherlands stated their countries' intention to object.

95. With regard to the **declarations made by Finland** to the *Council of Europe Convention on Access to Official Documents (CETS No. 205 - 2009)*, no comments were made by delegations.

96. With regard to the late **reservations and declarations made by Monaco** to the *Council of Europe Convention on Laundering, Search and Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198 - 2005)* the Austrian representative stated that his country would oppose to these.

97. With regard to the declarations made by **Austria, Belgium, the Netherlands, the Czech Republic, Germany, Finland, Romania, Luxembourg, the Slovak Republic, Malta, France and Lithuania** to the *European Convention on Mutual Assistance in Criminal Matters (ETS No. 30 - 1959) and its Additional Protocols (ETS No. 99 – 1978 and ETS No. 182 - 2001)* designating the European Public Prosecutor's Office ("EPPO") as a judicial authority for the purposes of mutual legal assistance under the Convention and its Protocols, no comments were made by delegations.

7 CURRENT ISSUES OF PUBLIC INTERNATIONAL LAW

7.1 Peaceful settlement of disputes

- ***Exchange of views with H.E Joan E. Donoghue, President of the International Court of Justice***

98. The Chair welcomed and thanked H.E Joan E. DONOGHUE, President of the International Court of Justice (ICJ), for having accepted the invitation of the CAHDI.

99. President Donoghue began by welcoming the CAHDI's commitment to the peaceful settlement of international disputes. In her presentation, she briefly reviewed the different bases of the Court's jurisdiction and shared the Court's approach to certain jurisdictional issues.

100. First, States may consent to ICJ's jurisdiction in relation to a particular dispute, which is commonly accomplished by means of a special agreement (*compromis*). This represented the jurisdictional basis of approximately 15 % of the contentious cases submitted to the ICJ. In addition, States may consent to the ICJ's adjudication of a known dispute through the means of *forum prorogatum*.

101. Judge Donoghue further reminded of so-called optional clause declarations under Article 36 paragraph 2 of the ICJ Statute. During the ICJ's 75-year history, approximately 30% of the applications in contentious cases have invoked such declarations as the primary title of jurisdiction. President Donoghue recalled the instrumental role of CAHDI in promoting the significance of declarations in accordance with Article 36 paragraph 2 of the ICJ Statute with the Committee of Ministers, which led several member States to deposit respective declarations or withdraw reservations to their earlier acceptance.

102. Finally, the jurisdictional basis for the ICJ's adjudication in particular case may be derived from a bilateral or multilateral treaty. This represents the jurisdictional basis of approximately 40% of the contentious cases submitted before the court to date.

103. President Donoghue stated that, in her experience, great care was taken in assessing the existence of the ICJ's jurisdiction in a particular case. Procedurally, jurisdictional issues were commonly addressed on the basis of preliminary objections raised by the respondent State. Additionally, the ICJ may take the initiative to determine questions of jurisdiction and admissibility separately from any proceedings on the merits. In this regard, President Donoghue drew attention to the recently amended Rules of the Court clarifying the procedural framework concerning preliminary objections.

104. President Donoghue then shared a number of examples of restraint exercised by the ICJ on account of jurisdiction *ratione materiae*, such as the *Jadhav* case[25] in 2019. The Court rejected arguments under the 1966 *International Covenant on Civil and Political Rights* (ICCPR), focusing only on the 1963 VCCR, which formed the basis of jurisdiction of the dispute.

105. President Donoghue further noted the two cases concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* in the context of the former Yugoslavia, where the sole ground for the ICJ's jurisdiction was Article IX of the Genocide Convention, which barred the court from extending its legal assessment to other obligations under international law, not amounting to genocide.[26]

106. Lastly, President Donoghue invoked the ICJ's recent ruling in its judgment in *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v United Arab Emirates)* in which the applicant State invoked the compromissory clause in the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD) as the title of jurisdiction. The ICJ found the claim to lack jurisdiction on the grounds that the form of discrimination alleged was outside of the scope of the CERD, and, thus, the compromissory clause inapplicable.

107. President Donoghue further noted that the Court may apply, on an incidental basis, certain fundamental rules of international law, such as the law of treaties or State responsibility. Similarly, the Court has consistently applied the general rule of State responsibility, including for instance the rules on the attribution of conduct to a State and on the consequences of internationally wrongful acts, including in cases where its jurisdiction was limited *ratione materiae*.

108. President Donoghue reiterated the importance of determining jurisdiction, both for the applicant State and the respondent State. She thanked the participants for their attention and expressed her gratitude for finding herself in the CAHDI once again.

109. The Chair thanked President Donoghue for an interesting and helpful intervention and opened the floor to the CAHDI experts' questions.

110. The representatives congratulated President Donoghue on her election as President of the ICJ as well as the court's efforts during the Covid-19 crisis.

111. Concerning the importance of gender balance on the bench, President Donoghue stressed the importance for national groups to put forward female candidates and noted the multiplicity of them also in the CAHDI. On the other hand, she noted the importance of the best candidates being put forward, and not only being selected to account for the gender imbalance in the court.

112. Responding to a question on the improvement of working methods, President Donoghue shared that the Court has taken both formal and informal steps, including amendments to the rules of procedure and practice directives.

113. President Donoghue shared that the main challenge is currently maintaining the high quality of the Court's work in the Covid crisis. While the hybrid functioning of the Court has functioned well so far, she stressed the importance of all 15 judges convening together in person.

114. Responding to a question on the participation of ICJ judges in investor-State arbitration, President Donoghue clarified that a decision reached within the Court in 2018 prohibited judges from serving as arbitrators in investor-state arbitration proceedings. The decision did, however, not require judges to resign from ongoing arbitration cases where they had already been appointed prior to the adoption of the decision. Furthermore, according to the 2018 decision, each judge was authorised to participate in no more than one state-state arbitration at a time after conferring with a panel made up of the President, the Vice-President and the Chairman of the Rules of Committee of the Court.

115. In response to a question whether the issue of jurisdiction *ratione materiae* had any input when making use of other sources of international law apart from treaty interpretation, President Donoghue stated that the idea of jurisdiction *rationae materiae* was to associate jurisdiction

[25] *Jadhav (India v. Pakistan)*, *Judgment*, *I.C.J. Reports 2019*, p. 418.
[26] *Bosnian Genocide*, *Judgment*, *I.C.J. Reports 2007*, p. 105.

with the substantive scope of a particular instrument the ICJ had to deal with. From a broader perspective, *ratione materiae* may also be comprehended as the substantive scope of a particular dispute. Thus, there are many circumstances in which the ICJ looks at the content of a dispute and tries to appreciate exactly what the real dispute is beyond the question of jurisdiction *ratione materiae*.

116. The representative of Romania informed the CAHDI of a roundtable organised and hosted by the Romanian Ministry of Foreign Affairs on 24th June this year on promoting the jurisdiction of the ICJ. The representative shared that her country sees a predictable and stable base for accessing the Court's jurisdiction mainly by means of encouraging States to submit a declaration recognising *ipso facto* the jurisdiction of the Court as compulsory in relation to any other State accepting the same obligation. This can also be achieved by withdrawing relevant reservations blocking access to the ICJ's jurisdiction in existing treaties and by including compromissory clauses in treaties establishing the ICJ as dispute settlement mechanism. She shared that Romania has elaborated a declaration promoting the jurisdiction of the World Court, which was being finalised in discussions with other interested States. Once completed, the document would be circulated to all States, which could join by expressing their support for the declaration via diplomatic correspondence. The objective would be toturn the ICJ into a judicial body with *de facto* universal jurisdiction. President Donoghue mentioned her knowledge of the initiative and of Romania's long interest in the matter and expressed her support.

117. The representative of Portugal noted the importance of the ICJ as a means of dispute settlement but sought to underline the necessity to promote also other means whenever the court lacked jurisdiction, such as negotiations, inquiry, mediation, conciliation and arbitration. In connection with this point, President Donoghue disagreed with scholarly criticism warning of the dangers of proliferation of different means of dispute settlement. She noted, in this regard, a greater openness of the ICJ to the jurisprudence of other institutions, for example taking into account the jurisprudence of regional human rights courts.

118. Responding to a question on future exchanges between the CAHDI and the ICJ, President Donoghue indicated that the most salient point might be discussing the contrast between her experiences as a lawyer in the Foreign Ministry and her role as judge.

119. The Chair, on behalf of the CAHDI, thanked President Donoghue for the fruitful exchange of views on topical issues of peaceful settlement of disputes.

7.2 The work of the International Law Commission

- ***Exchange of views with Ambassador Mahmoud D. Hmoud, Chair of the International Law Commission***

120. The Chair welcomed and introduced Ambassador Mahmoud D. HMOUD, Chair of the International Law Commission (ILC), to the CAHDI.

121. Ambassador Hmoud began by expressing his gratitude of the continued dialogue between the ILC and the CAHDI and the opportunity to present the work of the ILC of the past year. Ambassador Hmoud went on to elaborate on the working conditions of the 72nd session of the ILC held from 26 April to 4 June and from 5 July to 6 August 2021. Due to the Covid-19 pandemic, the session occurred, for the first time, in a hybrid format. This had meant a variety of challenges including, *inter alia*, reduced hours of operation owing to different time zones of the members. He noted that collegiality was central to the functioning of the Commission and that it was challenging to engage in detailed drafting in a virtual setting. He also noted that access to library facilities for members participating online proved to be a challenge, despite the improved availability of online resources. He noted that the assistance of the Secretariat and the International Law Seminar were also missed in the deliberations of the ILC.

122. Notwithstanding the practical difficulties described, ambassador Hmoud reported that the ILC made substantial progress in its work during its 72nd session. It concluded the second reading of two topics, adopting a full set of Draft Guidelines and Commentaries thereto on the Protection of the Atmosphere and a draft Guide to Provisional Application of Treaties,

comprising Draft Guidelines, an Annex and Commentaries. The ILC decided to recommend that the UNGA take note of these draft instruments in a resolution and disseminate them to all relevant actors. With respect to the latter of these, they further recommended that the UNGA request the Secretary-General to prepare a volume of the United Nations Legislative Series compiling the practice of States and international organisations on the matter.

123. Ambassador Hmoud then noted the developments on the topics *"Immunity of State officials from foreign criminal jurisdiction"*, *"Succession of States in respect of State responsibility"*, *"General principles of law"* and *"Sea-level rise in relation to international law"* and drew the CAHDI's attention to the various documents published in their advancement. Ambassador Hmoud called for States to share their practice related to these topics.

124. Ambassador Hmoud concluded his presentation by briefly elaborating on the Commission's future work, which will include, *inter alia*, the topic *"Subsidiary means for the determination of rules of international law"*. In this regard, he also informed the group of the 73rd session of the Commission which will be held in Geneva from 18 April to 3 June and from 4 July to 5 August 2022.

125. The Chair and the representatives thanked ambassador Hmoud for his comprehensive overview on the activities of the ILC and acknowledged the difficulties the Commission was confronted with in the context of the Covid-19 pandemic.

126. In response to a question, Ambassador Hmoud noted that the issue of sea level rise in respect of ambulatory or fixed baselines had been subject to particularly controversial discussions in the Commission's elaboration of this year's report both within the respective Working Group as well as, subsequently, between members of the Working Group and the rest of the ILC. The different positions appeared in the documents produced. Certain members had further considered that the document should have been discussed by the ILC as a whole before publication. Ambassador Hmoud invited States to submit contributions on the question of the stability of baselines.

127. In respect of the topic of *"Immunity of State officials from foreign criminal jurisdiction"*, Ambassador Hmoud shared that while Article 7 of the Draft Articles remained controversial, its adoption had the overwhelming support of the Commission. He maintained that the goal of the Article was not to encourage political prosecutions of those who were normally immune.

128. In respect of the topic *"General Principles of Law"*, Ambassador Hmoud indicated that the Special Rapporteur's view on Article 38 paragraph 1 c) of the ICJ Statute, considering that general principles of law may emanate not only from national legal system but also directly from the international legal order, was controversial among members of the Commission.

129. Responding to a question on which issues currently on the ILC docket were most likely to produce consensus and provide next steps in the codification of international law, the Chair of the ILC shared his belief that the topics of the protection of the atmosphere and the provisional application of treaties were well settled and ready to be passed to the UNGA Sixth Committee.

130. The representative of the United States of America recalled the US proposal in the UNGA Sixth Committee of creating a practice guide for documents produced by the ILC, to provide additional clarity for which types of documents (guidelines, draft articles etc) should be produced for a given issue.

131. The CAHDI experts shared their support for gender and geographic diversity within the Commission and urged for further efforts to expand these in the future. Ambassador Hmoud acknowledged that the ILC had suffered for years from a lack of diversity, especially with regard to the issue of gender balance. He expressed his hope that on the next elections, more female candidates would be presented and elected.

132. On the importance for public international law practitioners to know whether the outcome of the Commission's work on a topic reflected customary law or aimed at a progressive development of public international law, Ambassador Hmoud recalled that whether a working product reflected *lex lata* or *lex ferenda* depended on the work of the Special Rapporteurs. He stressed that their methodological approaches and their views in the commentaries was the key – if they focused more on State practice and domestic jurisprudence, the differentiation

between a codification of existing law and a progression of international law was easier to make. Ambassador Hmoud further noted that a working group had been established for updating the working methods of the Commission, looking in particular to streamline the rule-making process. It was for instance planned that final products and commentaries should indicate more clearly whether a given rule represented *lex lata* or *lex ferenda*.

133. Concerning the processes for selecting the topics for the long-term programme of work of the ILC, Ambassador Hmoud explained that topics moved from the long- to the short-term program of work depending on how States reacted to an issue. He was cautious to share the specific topics that may come up in the upcoming years but stated that the topic of piracy was likely to move to the active agenda. Concerning the emerging technologies, Ambassador Hmoud noted that any consideration of new topics, including, for instance, new and emerging technologies such as cyber-space and artificial intelligence, would depend on the willingness of States.

134. In response to the current practice of the ILC of preparing conclusions, guidelines and reports instead of draft articles, Ambassador Hmoud stated that the choice of softer approaches was due to a general sentiment that the majority of existing rules of international law had already been codified, and the focus of the Commission had shifted to *lex ferenda*. He further noted that the treaty-making implications of daft articles were problematic, as any such initiative was likely not to be followed upon during discussions in the UNGA Sixth Committee.

135. The Chair of the CAHDI thanked Ambassador Hmoud for his presentation and his responses and encouraged a continued dialogue between the CAHDI and the ILC.

7.3 Consideration of current issues of international humanitarian law

136. The Chair invited delegations to present their interventions directly as there was no document to discuss under this item.

137. The Swiss representative commented on the emphasis placed upon national implementation of international humanitarian law (IHL) during the 33rd International Conference of the Red Cross and Red Crescent and, in particular, on the drafting of Voluntary Reports on the implementation of IHL at national level. Such reports allow to share the challenges and best practices in the implementation of IHL. In compliance with the commitments taken during the 33rd conference, Switzerland had published its first voluntary report on national implementation of IHL in 2020, as well as organised, along with the International Committee of the Red Cross (ICRC), a technical event on voluntary reports in June 2021, attended by nearly 300 experts from more than 100 countries. The event was an occasion for States to share knowledge and experience and develop a common understanding of voluntary reports. An increasing number of States have drafted or are drafting such a report. The preparation of these reports is a novel exercise for many of these States and brings up a number of concrete questions. In order to answer these, Switzerland and the ICRC were organising a virtual event on voluntary reports on the margins of the International Law Week on 28 October 2021. The Swiss representative invited the CAHDI to participate and to contribute to the event.

138. The Austrian representative drew attention to a European Regional Conference of the National IHL Committees to be organised in Vienna, bringing together officials, academia and national Red Cross societies. A concrete date for the meeting could not be announced yet as the best efforts were being made to ensure an in-person meeting rather than a virtual session.

139. The Slovenian representative intervened to draw attention to the 4th Report on the EU Guidelines on promoting compliance with IHL launched jointly by the Presidencies of Portugal and Slovenia on 8 September 2021 with the participation of more than 100 participants from all over the world. The document underlined the EU's commitment to promoting compliance with IHL and provided the main tools of the EU in its relations with third States. The panelists at the launching event, consisting of high-level representatives and including the Special Representative for Human Rights of the EU, agreed that only coherent, complimentary and mutually reinforcing actions can contribute to effective compliance with IHL on the ground, underlining the importance of a global response to IHL violations including a growing number of civilian victims, especially among children and vulnerable groups. The representative encouraged other regional bodies to adopt similar guidelines in the interest of promoting compliance with IHL. The representative further announced that Slovenia was planning to

organise consultations among national committees from Slovenia, Austria, the Netherlands and Germany on 16-17 November 2021 in Ljubljana, with the participation of the ICRC. The event is open to all interested States to follow.

140. The Swedish representative drew the CAHDI's attention to the upcoming elections of the International Humanitarian Fact-Finding Commission. 15 new members were to be elected by the States having made a declaration of recognition under Article 90 of Additional Protocol I to the 1949 Geneva Conventions. The elections will take place in Berne on 19 November 2021 and the elected experts, acting in their personal capacity, will serve until 2026. The nomination period has been extended until 7 October 2021 to make sure there are 15 or more candidates. The representative reminded that Sweden was the first country to accept the Commission's competence and remains the principal supporter of the work of the Commission. He further thanked Denmark for organising the Nordic launch of the updated commentary of the 3rd Geneva Convention, in Copenhagen on 17 September 2021. He noted the demonstration by the event of the great importance attached to IHL and the importance of updating the interpretation of IHL, including on gender issues. The commentary was previously launched by the ICRC in Geneva in June 2020.

141. The French representative reported that an event titled *International Humanitarian Law – Enhancing Monitoring, Improving Compliance* had taken place on 22 September 2021 in the margins of the 76th session of the UNGA. The event, held virtually, was co-chaired by France, Germany and the European Union. Presentations were made by the French and German Ministers, the European Commissioner for Crisis Management, the President of the ICRC, the UN Under-Secretary General for Humanitarian Affairs, the Secretary General of the Norwegian Refugee Council, as well as an academic specialised in IHL. The aim of the event was to review best practices and lessons learned in monitoring and recording IHL violations, and to identify gaps in the collection and analysis of IHL violation data. It also aimed to reflect on ways to strengthen the independent collection and analysis of data on IHL violations, using new technologies and civil society initiatives to foster understanding among public policy actors, and to promote adherence to and respect for IHL.

142. The ICRC took the floor to present the developments in IHL that they had noted and worked on since the last meeting.

143. The representative first focused on two particular issues illustrated by the situation in Afghanistan: urban warfare and the need for continued humanitarian action and access. Concerning the former, the representative noted the devastating direct and indirect effects of explosive weapons with wide impact area when used in populated areas, such as weapon inflicted injuries, and the destruction of the city itself, including electrical, water and medical infrastructure. In order to tackle this, the ICRC is working with States and armed forces, on a bilateral and confidential basis, to review military policy and practice and identify measures for improving compliance with IHL in urban environments and reducing civilian harm. On a multilateral level, including in the context of the adoption of a Political Declaration on Explosive Weapons in Populated Areas (EWIPA), the ICRC is encouraging all States to undertake meaningful commitments to change the way conflicts are fought in urban and other populated areas.

144. On the question of continued humanitarian action and access, the representative noted that governments may be considering recognition of the Taliban government and conditions to attach to it. She explained that humanitarian action, however, should be unconditional, as is prescribed by international humanitarian law, and is solely dictated by the needs of populations affected by conflict. She explained that the ICRC engages with all authorities and parties that have control over territory and over populations in order to improve the situation for people. As such, the ICRC also engages with individuals listed on sanctions lists. She noted the need for humanitarian exemptions in sanctions regimes in order to ensure the effectiveness of IHL. She noted that without such exemptions, counter-terrorism measures and sanctions regimes could restrict the operation of humanitarian work in several ways, including by freezing financial flows or triggering over-compliance by banks and private companies, or even the criminalisation of humanitarian action. She reminded that both the UNGA and the UN Security Council have

sought to ensure that restrictive measures do not impede humanitarian activities and encouraged States to implement this.

145. In addition to her comments on Afghanistan, the representative of the ICRC commented on the ICRC's work on autonomous weapons systems (AWS). As a result of concerns surrounding such weapon systems lacking human intervention to select targets and apply force, the ICRC has, since 2015, been calling on States to establish internationally agreed limits on AWS and advised States on how to set limits that ensure human control is retained. To this end, the President of the ICRC presented a refined position in May 2021. The representative specified that while the ICRC does not support a total ban on AWS, it recommends that certain types of unpredictable autonomous weapons, such as machine learning-controlled systems whose targeting functions change during use, should be prohibited. Further, the ICRC proposes that States prohibit AWS that are designed or used to apply force against persons directly, rather than objects. Finally, the ICRC suggested that States strictly regulate all other AWS by setting limits on types of targets, on duration, geographical scope and scale of use, on situations of use, and clarifying requirements for human-machine interaction.

146. Finally, the expert from the ICRC noted updates on the developments related to the resolution Bringing IHL Home, including through preparing voluntary reports, and expressed her gratitude to States that had already produced such reports. She ended her intervention by announcing the 5th Universal Meeting of National IHL Committees to be organised from 29 November to 2 December 2021.

147. The representative from the United Kingdom reported on the 5th meeting of representatives from Commonwealth IHL Committees, co-hosted by the UK's National Committee on IHL, the British Red Cross and the ICRC. The topics covered included voluntary reporting, sexual violence and armed conflict, and famine protection. He noted the UK's initiative called *Action to Prevent Famine*, through which the UK's special envoy to prevent famine had visited several countries to call for respect for IHL by all parties to conflict.

148. The Romanian representative intervened to comment on her country's implementation of the resolution "Bringing IHL Home". She suggested that the ICRC creates a general webpage, facilitating access to documentation on voluntary reports that emerged during the recent meetings organised on the subject. She further noted that voluntary report of Romania had been adopted by the government in June 2021.

149. The Italian representative noted their own efforts to implement the "Bringing IHL Home" resolution. He indicated that Italy had reorganised its National Committee for the Study and Development of IHL. Italy had been without a national committee for over 10 years and lauded this development that will allow them to participate in the various meetings organised for such committees. Additionally, he drew the attention of the CAHDI to the 4th International Conference on the Safe Schools Declaration to be held in Abuja, Nigeria from 25-27 October 2021. He noted the importance of this meeting to Italy, stating that Italy has developed several programs in this regard concerning the safety of children in armed conflict and the right to access to education. His country is working to further increase collaboration and support to universities that work for children in armed conflict, with a network of 40 universities around the world.

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

150. The Chair reminded the CAHDI of document CAHDI (2021) 5 prov presenting a summary of the developments in the International Criminal Court (ICC) and other international criminal tribunals. She invited delegations to take the floor to share their comments under this point of the agenda.

151. The representative of the United States of America reiterated his country's shared goals with the ICC in terms of promoting accountability for atrocity crimes. Since the last meeting of the CAHDI, President Biden had lifted the sanctions imposed by the previous administration on the ICC. The representative voiced his hope that this could lead to a return to a period of co-operation with the court and noted the US efforts to encourage the civilian-led transitional government in Darfur, Sudan, to transfer fugitives to the ICC. The representative reminded the

CAHDI of his country's objection to the ICC's attempts to assert jurisdiction over nationals of non-states parties, such as the United States and Israel, absent the consent of the relevant State or a UN Security Council referral. The US representative concluded his remarks by underlining his country's support for efforts to reform the ICC, including efforts by States Parties to implement the reforms suggested by the Independent Expert Review (IER).

152. The Swiss representative noted her country's efforts to ensure that only the most competent and qualified candidates be elected to key positions within the organisation. Under the new rules surrounding the national selection processes for judges in the ICC, her country would submit its procedure to the Advisory Committee on nominations of judges of the ICC and encouraged other States to do the same. She noted that the exchange would be effective only if a sufficient number of States participate in it, so as to provide mutual inspiration for such procedures. The representative further noted the three additional ratifications of the amendment to the Rome Statute recognising famine as a war crime and encouraged other States to ratify.

153. The Slovenian representative shared the outcomes of the visit of the Slovenian COJUR-ICC Presidency team to the ICC on 9 September 2021. The Slovenian Presidency met with the ICC President, the Deputy Prosecutor and the Registrar. A virtual meeting was also held with the President of the Assembly of States Parties (ASP). During the meetings, a number of points were highlighted. The tension between the ICC's increasing workload and limited resources had led the Court to propose a significantly higher budget due to the expected increase in its workload. All organs of the Court were engaged in the process of implementing the IER recommendations. This implementation process was being carried out in parallel to the Court's ordinary workload. The new ICC prosecutor, Karim Khan, has set out his new vision for the re-organisation of the Office of the Prosecutor, including the appointment of two Deputy Prosecutors, the improvement of the working environment and ensuring the effectiveness of prosecutions. The 20th session of the ASP will take place in a hybrid format, where several important decisions must be made including adopting the ICC budget.

154. Finally, the representative of Armenia took the floor to report that, while his country had not yet ratified the Rome Statute, it had fully implemented Articles 5 to 9 of the Rome Statute into its newly updated Criminal Code.

7.5 Topical issues of public international law

155. No delegation took the floor under this item.

8 OTHER

8.1 Election of the Chair and Vice-Chair of the CAHDI

156. In accordance with Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods, the CAHDI re-elected Ms Alina OROSAN (Romania) and Mr Helmut TICHY (Austria), respectively as Chair and Vice-Chair of the Committee, for a new term of one year from 1 January to 31 December 2022.

8.2 Place, date and agenda of the 62nd meeting of the CAHDI

157. The CAHDI decided to hold its 62nd meeting in Strasbourg (France), on 24-25 March 2022. The CAHDI instructed the Chair, to prepare, in due course, the provisional agenda of this meeting in co-operation with the Secretariat.

8.3 Any other business

158. The representative of the Russian Federation wished to raise an issue related to the participation of delegations in CAHDI meetings. He underlined that in case of in person and hybrid meetings of the Council of Europe, the host country should provide unhindered access to delegations to the premises of the Council and should not put any obstacles to their work. The Russian Federation understood and fully supported efforts to fight the COVID-19 pandemic, but measures taken should not deprive official delegations to the Council of Europe of their participation rights. The representative of the Russian Federation expressed his expectation that the host country would provide for special arrangements or exceptions from the existing COVID-rules in case of their application in regard to official delegations.

159. The French representative recalled that her country paid the utmost attention to reconciling its obligations in this area with the national measures taken to combat the COVID-19 pandemic and, in particular, those relating to restrictions on access to the national territory. This issue had been raised in particular in the framework of the Council of Europe. While the strict application of these measures could undermine the guarantees of access to international organisations present in France for members of foreign delegations, the French authorities intend to comply with their obligations as a host State while recalling the importance of respecting the health protocols put in place to combat the pandemic. She further underlined that it was clear from the 1949 *General Agreement on Privileges and Immunities of the Council of Europe* (ETS No. 2, GAPI) that France was obliged to guarantee freedom of access to its territory for the persons concerned, regardless of any national measures taken to restrict access to the territory in the context of the health crisis. It should nevertheless be recalled that the French authorities may also ask these persons for a voluntary commitment to respect the "*health bubble*" set up by the Council of Europe services.

160. The representative of Poland informed CAHDI members that Ambassador Marcin CZEPELAK had been nominated by the Republic of Poland as candidate for the position of Secretary General of the Permanent Court of Arbitration (PCA) with elections expected to take place at the beginning of 2022. He underlined Ambassador CZEPELAK's extensive knowledge of public international law and his diplomatic competencies.

8.4 Adoption of the Abridged Report and closing of the 61st meeting

161. The CAHDI adopted the Abridged Report of its 61st meeting, as contained in document CAHDI (2021) 16, and instructed the Secretariat to submit it to the Committee of Ministers for information.

162. Before closing the meeting, the Chair thanked all CAHDI experts for their participation and efficient co-operation in the good functioning of the hybrid meeting. She also thanked the CAHDI Secretariat and the interpreters for their invaluable assistance in the preparation and the smooth running of the meeting.

APPENDICES

APPENDIX I

LIST OF PARTICIPANTS

MEMBER STATES OF THE COUNCIL OF EUROPE / ETATS MEMBRES DU CONSEIL DE L'EUROPE

ALBANIA / ALBANIE

Ms Inida METHOXHA - Remote
Director of International Law and Treaties
Blv "Gjergj Fishta" no.6
TIRANA 1100

ANDORRA / ANDORRE

ARMENIA / ARMENIE

Mr Vahagn PILIPOSYAN - Present
Head of International Treaties and Law Department
Ministry of Foreign Affairs
Vazgen Sargsyan 3,
Government House 2,
0010 EREVAN

AUSTRIA / AUTRICHE

Mr Helmut TICHY - Present
Ambassador
Legal Adviser
Federal Ministry for European
and International Affairs
Minoritenplatz 8
1 010 VIENNA

Ms Pia NIEDERDORFER - Remote
Legal Officer
Federal Ministry for European
and International Affairs
Minoritenplatz 8
1 010 VIENNA

AZERBAIJAN / AZERBAIDJAN

Mr Elchin GULIYEV - Remote
First Secretary
International Law and Treaties Department
Ministry of Foreign Affairs
Shikhali Gurbanov Str. 50
1 009 BAKU

BELGIUM / BELGIQUE

Mr Piet HEIRBAUT - présent
Director-General of Legal Affairs
Federal Public Service of Foreign Affairs
Directorate General of Legal Affairs
15 rue des Petits Carmes
1 000 BRUXELLES

Mme Sabrina HEYVAERT - présente
Conseiller général
Service Public Fédéral des Affaires étrangères
Direction générale des Affaires juridiques
Direction Droit international public
15 rue des Petits Carmes
1 000 BRUXELLES

Mme Laurence GRANDJEAN - Présente
Attaché
Service Public Fédéral des Affaires étrangères
Direction générale des Affaires juridiques
Direction Droit international public
15 rue des Petits Carmes
1 000 BRUXELLES

BOSNIA AND HERZEGOVINA / BOSNIE-HERZEGOVINE

Mr Dag ĐUMRUKČIĆ - Remote
Head of Department for International Legal Affairs
Ministry of Foreign Affairs
Musala 2.
SARAJEVO

BULGARIA / BULGARIE

Mr Danail CHAKAROV - Remote
Director
International Law and
Law of the European Union Directorate
Ministry of Foreign Affairs
2, Alexander Zhendov str.
1 040 SOFIA

CROATIA / CROATIE

Ms Gordana VIDOVIĆ MESAREK - Remote
Director General
Directorate-General for European and
International Law
Ministry of Foreign and European Affairs
Trg N.S. Zrinskog 7-8
10 000 ZAGREB

CYPRUS / CHYPRE

Ms Mary-Ann STAVRINIDES - Remote
Attorney of the Republic
Law Office of the Republic of Cyprus
1, Apelli str.
1 403 NICOSIA

Ms Maria KOURTI - Remote
Counsel of the Republic
Law Office of the Republic of Cyprus
1, Apelli str.
1 403 NICOSIA

Ms Maria PILIKOU- Remote
Counsel of the Republic
Law Office of the Republic of Cyprus
1, Apelli str.
1 403 NICOSIA

CZECH REPUBLIC / REPUBLIQUE TCHEQUE

Mr Emil RUFFER - Present
Director
International Law Department
Ministry of Foreign Affairs
Loretánské nám. 5
11 800 PRAGUE
Tel: +420 224 183 153

DENMARK / DANEMARK

Mr David KENDAL - Remote
Senior Adviser
Legal Service
Ministry of Foreign Affairs
Asiatisk Plads 2
1 448 COPENHAGEN

Ms Nana RASMUSSEN - Remote
Head of Section
Legal Service
Ministry of Foreign Affairs
Asiatisk Plads 2
1 448 COPENHAGEN

ESTONIA / ESTONIE

Ms Kerli VESKI - Present
Director General of Legal Department
Ministry of Foreign Affairs
Islandi väljak 1
15 049 TALLINN

FINLAND / FINLANDE

Ms Kaija SUVANTO - Remote
Director General
Legal Service
Ministry for Foreign Affairs
Laivastokatu 22 B B P.O.B. 176
00 023 HELSINKI

Ms Anu SAARELA - Remote
Deputy Director General
Legal Service
Ministry for Foreign Affairs
Kanavakatu 3 B P.O.B. 176
00 023 HELSINKI

Ms MÄKELÄ Sari - Remote
Director
Unit of Public International Law
Legal Service
Ministry for Foreign Affairs
Kanavakatu 3 B P.O.B. 176
00 023 HELSINKI

Ms Elina TÖLÖ - Remote
Legal Officer
Legal Service, Unit for EU and Treaty Law
Ministry for Foreign Affairs
Kanavakatu 3 B P.O.B. 176
00 023 HELSINKI

FRANCE

M. François ALABRUNE - Remote
Directeur des Affaires juridiques
Ministère de l'Europe et des Affaires étrangères
57 boulevard des Invalides
75007 PARIS

Mme Marianne ZISS - Present
Sous-Directrice du droit international public
Ministère de l'Europe et des Affaires étrangères
57 boulevard des Invalides
75007 PARIS

M. Nabil HAJJAMI - Present
Consultant juridique
Ministère de l'Europe et des Affaires étrangères
57 boulevard des Invalides
75007 PARIS

GEORGIA / GÉORGIE

Mr Mikheil KEKENADZE - Remote
Deputy Director of International Law Department
Ministry of Foreign Affairs
Chitadze Str. 4
0118 TBILISI

GERMANY / ALLEMAGNE

Mr Christophe EICK - Remote
Legal Adviser
Director General for Legal Affairs
Federal Foreign Office
Werderscher Markt 1
10117 BERLIN

Mr Frank JARASCH - Present
Head of Division
Public International Law Division
Directorate for Legal Affairs
Federal Foreign Office
Werderscher Markt 1
10117 BERLIN

Mr Thore NEUMANN - Remote
Desk Officer
Public International Law Division
Directorate for Legal Affairs
Federal Foreign Office
Werderscher Markt 1
10117 BERLIN

GREECE / GRECE

Mrs Zinovia STAVRIDI - Remote
Head of the Public International Law Section
Legal Department / Ministry of Foreign Affairs
10 Zalokosta str.,
10671 ATHENES

Mrs Athina CHANAKI - Remote
Legal Counselor
Public International Law Section
Legal Department/Ministry of Foreign Affairs
10 Zalokosta str.
10671 ATHENES

HUNGARY / HONGRIE

Ms Rita SILEK - Remote
Head of International Law Department
Ministry of Foreign Affairs and Trade
Bem rkp. 47
1027 BUDAPEST

Mr Balázs Áron MRAVIK - Remote
Legal Officer
International Law Department
Ministry of Foreign Affairs and Trade
Bem rkp. 47
1027 BUDAPEST

ICELAND / ISLANDE

Ms Anna JOHANNSDOTTIR - Remote
Director General
Directorate for Legal and Executive Affairs
Ministry for Foreign Affairs
Raudararstigur 25
105 REYKJAVIK

Ms Sandra LYNGDORF - Remote
Legal Adviser
Permanent Representation of Iceland
to the Council of Europe

IRELAND / IRLANDE

Mr James KINGSTON - Remote
Legal Adviser
The Department of Foreign Affairs
2 Clonmel St.,
DUBLIN 2, D02 WD63

ITALY / ITALIE

Mr Stefano ZANINI - Remote
Head of Service for Legal Affairs
Ministry of Foreign Affairs and
International Cooperation
Piazzale della Farnesina, 1
00139 ROME

Ms Luttine Ilenia BUIONI - Remote
Officer at the Office of the Legal Adviser
Ministry of Foreign Affairs and
International Cooperation
Piazzale della Farnesina, 1
00139 ROME

LATVIA / LETTONIE

LIECHTENSTEIN

Ms Esther SCHINDLER - Remote
Minister Counsellor
Office for Foreign Affairs
Kirchstrasse 9
9490 VADUZ

LITHUANIA / LITUANIE

Ms Ingrida BACIULIENE - Present
Head of International Treaties Division
Law and International Treaties Department
Ministry of Foreign Affairs
J. Tumo-Vaižganto 2
01 511 VILNIUS

LUXEMBOURG

M. Alain GERMEAUX - Présent
Conseiller de légation, adjoint Conseiller juridique
Service juridique
Ministère des Affaires étrangères
9 rue du Palais de Justice
L-1 841 LUXEMBOURG

MALTA / MALTE

Ms Kathleen VELLA MAMO - Remote
First Secretary
Legal Unit
Ministry for Foreign and European Affairs
Palazzo Parisio, Merchants Street,
VALLETTA

Ms Marilyn GRECH - Remote
Junior Legal Officer
Legal Unit
Ministry for Foreign and European Affairs
Palazzo Parisio, Merchants Street,
VALLETTA

REPUBLIC OF MOLDOVA / REPUBLIQUE DE MOLDOVA

Mr Vilen MURZAC - Remote
Head of Legal Affairs section
Directorate for International Law
Ministry of Foreign Affairs
and European Integration
80, 31 August 1989 Street.
MD-2012 CHIŞINĂU

MONACO

M. Xavier RAUSCHER - Remote
Administrateur juridique
Service du droit international, des droits de l'homme et des libertés fondamentales
Direction des Affaires Juridiques
Stade Louis II-Entrée H1
Avenue des Castelans
98 000 MONACO

MONTENEGRO

NETHERLANDS / PAYS-BAS

Prof. René LEFEBER - Remote
Legal Adviser
Head of International Law Department
Ministry of Foreign Affairs
Rijnstraat 8
2515 XP THE HAGUE

Mr Vincent DE GRAAF - Remote
Legal Counsel
International Law Division
Ministry of Foreign Affairs
Rijnstraat 8
2515 XP THE HAGUE

NORTH MACEDONIA / MACEDOINE DU NORD

NORWAY / NORVÈGE

Mr Kristian JERVELL - Remote
Director General
Legal affairs Department
Ministry of Foreign Affairs

POLAND / POLOGNE

Mr Konrad MARCINIAK - Remote
Director
Legal and Treaty Department
Ministry of Foreign Affairs
Al. J. Ch. Szucha 23
00580 WARSAW

Mr Łukasz KUŁAGA - Remote
Chief expert
Legal and Treaty Department
Ministry of Foreign Affairs
Al. J. Ch. Szucha 23
00580 WARSAW

PORTUGAL

Ms Susana VAZ PATTO - Remote
Director of the Department of Legal Affairs
Legal Adviser
Ministry of Foreign Affairs
Largo do Rilvas
1390 LISBON

Ms Ana COSTA PEREIRA - Remote
Legal Counsellor
Ministry of Foreign Affairs
Largo do Rilvas
1390 LISBON

Mr Rúben DIAS - Remote
Legal Counsellor
Ministry of Foreign Affairs
Largo do Rilvas
1390 LISBON

ROMANIA / ROUMANIE

Ms Alina OROSAN - Present
Chair of the CAHDI /*Présidente du CAHDI*
Director General for Legal Affairs
Ministry of Foreign Affairs
14 Modrogan Street District 1
011826 BUCHAREST

Ms Laura STRESINA - Remote
Counsellor
International Law and EU Law Division
Ministry of Foreign Affairs
14 Modrogan Street District 1
011826 BUCHAREST

RUSSIAN FEDERATION / FEDERATION DE RUSSIE

Mr. Maxim MUSIKHIN - Present
Deputy Director of the Legal Department
Ministry of Foreign Affairs
Smolenskaya-Sennaya sq. 32/34
119 200 MOSCOW

Mr Anton MARKOVSKIY - Present
Second Secretary
Legal Department
Ministry of Foreign Affairs
Smolenskaya-Sennaya sq. 32/34
119 200 MOSCOW

Ms Maria SUBBOTINA-YUKHNO - Present
Deputy to the Permanent Representative of Russia to the Council of Europe
75, allée de la Robertsau
67000 STRASBOURG

SAN-MARINO / SAINT-MARIN

SERBIA / SERBIE

SLOVAK REPUBLIC / REPUBLIQUE SLOVAQUE

Mr Peter KLANDUCH – Remote
Legal Adviser
Director of the International Law Department
Ministry of Foreign Affairs
Hlboka 2,
83336 BRATISLAVA

Ms Michaela PANISOVA–LEZAKOVA - Remote
Deputy Head of International Law Department
Ministry of Foreign Affairs
Hlboka 2,
83336 BRATISLAVA

Ms Michaela SYKOROVA - Remote
Legal Officer
Ministry of Foreign Affairs
Hlboka 2,
83336 BRATISLAVA

SLOVENIA / SLOVENIE

Dr. Marko RAKOVEC - Present
Director-General
Directorate for International Law
and Protection of Interests
Ministry of Foreign Affairs
Prešernova cesta 25
1000 LJUBLJANA

Ms Mateja ŠTRUMELJ PISKUR - Present
Head of the International Law Department
Directorate for International Law
and Protection of Interests
Ministry of Foreign Affairs
Prešernova cesta 25
1000 LJUBLJANA

Ms Tija KUHAR - Present
Expert
International Law Department
Directorate for International Law
and Protection of Interests
Ministry of Foreign Affairs
Prešernova cesta 25
1000 LJUBLJANA

SPAIN / ESPAGNE

M. Emilio PIN - Remote
Deputy Director of the International Legal Office
Ministry of Foreign Affairs, UE and Cooperation
Plaza de la Provincia 1. 2nd floor
28071 MADRID

SWEDEN / SUEDE

Mr Carl Magnus NESSER - Present
Director-General for Legal Affairs
Ministry for Foreign Affairs
Gustav Adolfs torg 1
111.52 STOCKHOLM

Mr Mårten EHNBERG – present
Ambassador
Permanent Representative of Sweden
to the Council of Europe
67, allée de la Robertsau
67000 STRASBOURG

Ms Karin DAVANI - Remote
Desk Officer,
Department for International Law
Human Rights and Treaty Law
Ministry for Foreign Affairs
Tegelbacken 2
111.52 STOCKHOLM

SWITZERLAND / SUISSE

Mme Corinne CICERON BÜHLER - Present
Ambassadeur, Directrice
Direction du droit international public Département
fédéral des affaires étrangères
Kochergasse 10
3 003 BERN

TURKEY / TURQUIE

Mr Mustafa KAPUCU - Present
Ambassador
Director General
Head of the Directorate General of Legal Affairs
Ministry of Foreign Affairs
06 100 BALGAT/ ANKARA

Ms Özge BILGE - Remote
Legal Councellor
Directorate General for Legal Affairs
Ministry of Foreign Affairs
06 100 BALGAT/ ANKARA

UKRAINE

Ms Oksana ZOLOTARYOVA - Present
Director-General
Directorate General for International Law
Ministry of Foreign Affairs of Ukraine
1 Mykhailivska Square
01018 KYIV

UNITED KINGDOM / ROYAUME-UNI

Sir Iain MACLEOD - Remote
Legal Adviser
Foreign, Commonwealth and Development Office
SW1A 2AH LONDON

Mr Paul BERMAN - Present
Legal Director
Foreign, Commonwealth and Development Office
King Charles Street
SW1A 2AH LONDON

Mr Peter ARCHER - Remote
Assistant Legal Adviser
Foreign Relations Team | Legal Directorate
Foreign, Commonwealth and Development Office
King Charles Street
SW1A 2AH LONDON

Mr Daniel BREGER - Present
Legal Counsellor
18, rue Gottfried
67000 STRASBOURG

EUROPEAN UNION / UNION EUROPEENNE

EUROPEAN COMMISSION / COMMISSION EUROPEENNE

Ms Mihaela CARPUS CARCEA - Present
Member of the Legal Service
European Commission
BERL 2/200
200, Rue de la Loi
1 049 BRUSSELS
BELGIUM

COUNCIL OF THE EUROPEAN UNION / CONSEIL DE L'UNION EUROPÉENNE

Mr Jan-Peter HIX - Remote
Senior Legal Adviser
Council of the European Union
Council Legal Service Directorate
JUR 3 (External Relations)
Rue de la Loi, 175
1048 BRUSSELS
BELGIUM

Ms Marie-Cécile CADILHAC - Remote
Council of the European Union
Council Legal Service Directorate
JUR 3 (External Relations)
Rue de la Loi, 175
1048 BRUSSELS
BELGIUM

EUROPEAN EXTERNAL ACTION SERVICE / SERVICE EUROPEEN POUR L'ACTION EXTERIEURE (EEAS)

Mr Stephan MARQUARDT - Present
Legal Adviser
Head of the Legal Department
European External Action Service
Rond Point Schuman 9A
1046 BRUSSELS
BELGIUM

PARTICIPANTS AND OBSERVERS TO THE CAHDI / PARTICIPANTS ET OBSERVATEURS AUPRES DU CAHDI

CANADA

Mr Alan KESSEL - Remote
Assistant Deputy Minister of Legal Affairs
Legal Adviser
Global Affairs Canada
Lester B. Pearson building
125 Sussex Drive
C7-223 OTTAWA
Ontario K1A 0G2

HOLY SEE / SAINT-SIEGE

Mgr Carlos Fernando DIAZ PANIAGUA - Remote
Official
Secretariat of State Section
for the Relations with States
00120 Vatican City

JAPAN / JAPON

Mr Hiroyuki NAMAZU - Remote
Director-General / Legal Adviser
International Legal Affairs Bureau
Ministry of Foreign Affairs

Mr Tomohiro MIKANAGI - Remote
Deputy Director-General / Deputy Legal Adviser
International Legal Affairs Bureau
Ministry of Foreign Affairs

Mr Yusuke NAKAYAMA - Remote
Assistant Director
International Legal Affairs Division
International Legal Affairs Bureau
Ministry of Foreign Affairs

Mr Masatsugu ODAIRA - Remote
Director / Assistant Legal Adviser
International Legal Affairs Division
Ministry of Foreign Affairs

Mr Hiroyuki KANEKO - Remote
Principal Deputy-Director
International Legal Affairs Division
Ministry of Foreign Affairs

Mr Hikaru IWAKI - Present
Consul - Juge
Adjoint à l'Observateur Permanent
du Japon auprès du Conseil de l'Europe
Consulat Général du Japon à Strasbourg
"Bureaux Europe" - 20, place des Halles
67000 STRASBOURG

REPUBLIC OF KOREA / REPUBLIQUE DE COREE

Mr Zha Hyoung RHEE - Remote
Director-General for International Legal Affairs
Ministry of Foreign Affairs,
60, Sajik-ro 8-gil, Jongno-gu,
03172 SEOUL

Mr Kukhyun AHN - Remote
Director for International Legal Affairs
Ministry of Foreign Affairs,
60, Sajik-ro 8-gil, Jongno-gu,
03172 SEOUL

Ms Jandi KIM - Remote
First Secretary
International Legal Affairs Division
Ministry of Foreign Affairs,
60, Sajik-ro 8-gil, Jongno-gu,
03172 SEOUL

Mr Jongin BAE - Remote
Deputy Permanent Representative
Permanent Mission of the Republic of Korea
to the United Nations
335 E, 45th St.,
NEW YORK, NY 10017

Mme Hyerin KIM - Remote
Deuxième Secrétaire
Ambassade de la République de Corée en France
125 Rue de Grenelle
75007 PARIS

MEXICO / MEXIQUE

Mtro Salvador TINAJERO ESQUIVEL - Remote
Coordinador de Derecho Internacional
Ministry of Foreign Affairs
Plaza Juárez No. 20, Piso 6 Col. Centro
Deleg. Cuauhtémoc
06 010 MEXICO

Mme Maria Noemi HERNANDEZ TELLEZ - Remote
Observateur Permanent adjoint du Mexique
auprès du Conseil de l'Europe
Chargée d'Affaires *a.i.*
Représentation Permanente du Mexique auprès
du Conseil de l'Europe
5 Bd. du Président Edwards
67000 STRASBOURG

UNITED STATES OF AMERICA / ETATS-UNIS D'AMERIQUE

Mr Richard VISEK - Present
Acting Legal Adviser
U.S. Department of State
2201 C Street, NW
20 520 WASHINGTON DC

Mr Harold Hongju KOH - Remote
Senior Adviser
U.S. Department of State
2201 C Street, NW
20 520 WASHINGTON DC

Ms Sabeena RAJPAL - Present
Acting Assistant Legal Adviser
U.S. Department of State
2201 C Street, NW
20 520 WASHINGTON DC

Ms Katie KING - Present
Special Assistant
U.S. Department of State
2201 C Street, NW
20 520 WASHINGTON DC

Ms Amy STERN - Present
Legal Adviser
United States Mission to the European Union
Rue Zinner, 13
1000 Brussels

AUSTRALIA / AUSTRALIE

Mr Matthew NEUHAUS - Present
Ambassador
Australian Embassy to the Netherlands
Carnegielaan 4
2517 KH THE HAGUE, THE NETHERLANDS
Tel: +31 70 3108200

BELARUS

Mr Aleksei BARBUK - Remote
Deputy Head of the Treaties Department
General Department of Treaties and Legal Affairs
Ministry of Foreign Affairs
19, Lenina str.
220 030 MINSK

ISRAEL / ISRAËL

NEW ZEALAND / NOUVELLE ZELANDE

UNITED NATIONS / NATIONS UNIES

ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD) / ORGANISATION DE COOPERATION ET DE DEVELOPPEMENT ECONOMIQUES (OCDE)

Ms Diana BENOIT – Remote
Head of General Legal Affairs Division
2, rue André Pascal
75016 PARIS

Ms Céline FOLSCHÉ – Remote
Legal Adviser
General Legal Affairs Division
2 rue André Pascal 75775 Paris Cedex 16

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

Ms Sofia INTOUDI – Remote
Legal Adviser
CERN
Esplanade des Particules - Meyrin
CH 1211 GENEVA 23

Mr Arthur NGUYEN DAO – Remote
Legal Adviser
CERN
Esplanade des Particules - Meyrin
CH 1211 GENEVA 23

THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW / LA CONFERENCE DE LA HAYE DE DROIT INTERNATIONAL PRIVE

Mr Christophe BERNASCONI
Secretary General (*apologised / excusé*)

INTERPOL

Ms Andrea STEWARD - Remote
Senior Counsel
200 quai Charles de Gaulle
69006 LYON

Ms Tonia GILLETT - Remote
Counsel
Senior Counsel
200 quai Charles de Gaulle
69006 LYON

Ms Stela LIPCAN - Remote
Litigation Paralegal
200 quai Charles de Gaulle
69006 LYON

NORTH ATLANTIC TREATY ORGANISATION (NATO) / ORGANISATION DU TRAITE DE L'ATLANTIQUE NORD (OTAN)

Mr David LEMETAYER present
Assistant Legal Adviser
NATO HQ Boulevard Léopold III
1000 BRUXELLES, BELGIUM

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

Ms Cordula DROEGE present
Chief Legal Officer, Head of Legal Division
19 Avenue de la Paix
1263 GENEVA, SWITZERLAND

Ms Julie TENENBAUM present
Regional Legal Adviser
ICRC, 10Bis Passage d'Enfer
75014 PARIS, FRANCE

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

ASIAN AFRICAN LEGAL CONSULTATIVE ORGANISATION / ORGANISATION JURIDIQUE CONSULTATIVE POUR LES PAYS D'ASIE ET D'AFRIQUE (AALCO)

SPECIAL GUEST / INVITE SPECIAL

Ambassador Mahmoud D. HMOUD,
Chair of the International Law Commission
United Nations Headquarters
2 United Nations Plaza
323 E. 44th St.
New York, NY 10017
United States of America

H.E Joan E. DONOGHUE,
President of the International Court of Justice
Peace Palace
Carnegieplein 2
2517 KJ The Hague
The Netherlands

SECRETARIAT GENERAL

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

Mr Jörg POLAKIEWICZ
Director / *Directeur*

CAHDI SECRETARIAT / SECRETARIAT DU CAHDI

Ms Ana GOMEZ
Secretary to the CAHDI / *Secrétaire du CAHD I*Head of the Public International Law Division and Treaty Office
Chef de la Division du droit international public et du Bureau des Traités

Mr Oliver CHAPMAN
Junior Legal Advisor
Public International Law Division
Division du droit international public

Ms Irene SUOMINEN
Legal Advisor – *Conseillère juridique*
Public International Law Division
Division du droit international public

Ms Isabelle KOENIG
Administrative Assistant / *Assistante administrative*
Public International Law Division
Division du droit international public

INTERPRETERS / INTERPRETES

Mme Sylvie BOUX
Mme Pascale MICHLIN
M. Nicolas GUITTONNEAU
Mme Bettina LUDEWIH

APPENDIX II

AGENDA

1. INTRODUCTION

1.1. Opening of the meeting by the Chair, Ms Alina OROSAN
1.2. Adoption of the agenda
1.3. Adoption of the report of the 60th meeting
1.4. Information provided by the Secretariat of the Council of Europe
- *Statement by Mr Jörg POLAKIEWICZ, Director of Legal Advice and Public International Law*

2. COMMITTEE OF MINISTERS' DECISIONS WITH RELEVANCE FOR CAHDI INCLUDING REQUESTS FOR CAHDI'S OPINION

2.1. Working methods: Draft reply to the Committee of Ministers on the evaluation of the activities of the CAHDI
2.2. Opinions of the CAHDI on Recommendations 2197 (2021) and 2201 (2021) of the Parliamentary Assembly of the Council of Europe (PACE)
2.3. Other Committee of Ministers' decisions of relevance to the CAHDI's activities

3. CAHDI DATABASES AND QUESTIONNAIRES

3.1. Settlement of disputes of a private character to which an International Organisation is a party
3.2. Immunity of State-owned cultural property on loan
3.3. Immunities of special missions
3.4. Service of process on a foreign State
3.5. Possibility 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
3.6. Organisation and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs
3.7. The implementation of United Nations sanctions

4. IMMUNITIES OF STATES AND OF INTERNATIONAL ORGANISATIONS, DIPLOMATIC AND CONSULAR IMMUNITIES

4.1. Exchanges of views on topical issues in relation to the subject matter of the item
4.2. State practice and relevant case-law

5. THE EUROPEAN CONVENTION ON HUMAN RIGHTS, CASES BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS AND OTHER HUMAN RIGHTS ISSUES INVOLVING PUBLIC INTERNATIONAL LAW

5.1. EU accession to the ECHR – international law aspects
5.2. Cases before the European Court of Human Rights involving issues of public international law
5.3. National implementation measures of UN sanctions and respect for human rights

6. TREATY LAW

6.1. Exchanges of views on topical issues related to treaty law
- *Declarations implying the exclusion of any treaty-based relationship between the declaring State and another State party to the treaty in relation to which the declaration is formulated*

6.2. 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*

7. CURRENT ISSUES OF PUBLIC INTERNATIONAL LAW

7.1. Peaceful settlement of disputes
- *Exchange of views with H.E Joan E. Donoghue, President of the International Court of Justice*

7.2. The work of the International Law Commission
- *Exchange of views with Mr Mahmoud D. Hmoud, Chair of the International Law Commission*

7.3. Consideration of current issues of international humanitarian law

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

7.5. Topical issues of public international law

8. OTHER

8.1 Election of the Chair and Vice-Chair of the CAHDI

8.2 Place, date and agenda of the 62nd meeting of the CAHDI: Strasbourg (France), 24-25 March 2022

8.3 Any other business

8.4 Adoption of the Abridged Report and closing of the 61st meeting

APPENDIX III

REPLY OF THE COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI) ON RECOMMENDATION 2201 (2021) OF THE PARLIAMENTARY ASSEMBLY

1. On 5 May 2021, the Ministers' Deputies, at their 1403rd meeting, agreed to communicate Recommendation 2201 (2021) of the Parliamentary Assembly of the Council of Europe (PACE) to the Committee of Legal Advisers on Public International Law (CAHDI), for information and possible comments. The Ministers' Deputies further agreed to communicate the Recommendation to the Steering Committee on Media and Information Society (CDMSI) and to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

2. The CAHDI examined the abovementioned Recommendation, and wishing to refrain from drafting an opinion on any country-specific human rights situation, since it falls outside of CAHDI's Terms of reference, made the following general remarks in relation to universal jurisdiction.

3. At the outset, the CAHDI recalls that the topic *"The scope and application of the principle of universal jurisdiction"* has been a standing agenda item of the UN General Assembly's Sixth Committee and recalls the respective reports of the UN Secretary- General as well as UN General Assembly resolutions on the matter.

4. The CAHDI notes that the notion of "universal jurisdiction", first and foremost, concerns criminal jurisdiction.

5. The CAHDI recalls that the 1949 Geneva Conventions place an obligation for the States Parties 'to search for persons alleged to have committed or to have ordered to be committed grave breaches [of the Conventions] and shall bring such persons, regardless of nationality, before its own courts". Similar obligations are found in other sources of applicable international law.

6. A number of international treaties on specific offences establish the principle of *aut dedere aut judicare* requiring the custodial State to prosecute the suspect in case of non-extradition. The principle of *aut dedere aut judicare* is incorporated also in a number of conventions concluded within the Council of Europe. Such conventions oblige their State parties to prosecute or extradite offenders in their custody.

7. Notwithstanding the above, the CAHDI underlines that the primary responsibility to prosecute lies with the State or States with direct jurisdictional links, notably those with territorial or personal jurisdiction.

APPENDIX IV

SPECIAL GUESTS - PRESENTATIONS

H.E Joan E. Donoghue, President of the International Court of Justice
Presentation

Mr Mahmoud D. Hmoud, Chair of the International Law Commission
Presentation