CAHDI
Committee of Legal Advisers on Public International Law

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# COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

## Meeting report

**60th meeting**
24-25 March 2021

Videoconference KUDO

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

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# I. INTRODUCTION

## 1. Opening of the meeting

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 60th meeting in Strasbourg, by videoconference on 24 and 25 March 2021 with Ms Alina OROSAN in the Chair. The list of participants is set out in **Appendix I** to this report.

2. The Chair opened the meeting and expressed her pleasure to chair the CAHDI meeting for the first time, assuring experts that she will do her outmost to be worthy of the trust placed on her to chair the CAHDI. The Chair further welcomed the experts who were attending the CAHDI for the first time.

3. The Chair introduced the two new members of the CAHDI Secretariat, Mr Antoine Karle, who joined the CAHDI Secretariat as Assistant Lawyer in February 2021 and the trainee of the Public International Law Division, Mr Oliver Chapman.

## 2. Adoption of the agenda

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

## 3. Adoption of the report of the 59th meeting

5. The CAHDI adopted the report of its 59th meeting (document CAHDI (2020) 17) and instructed the Secretariat to publish it on the Committee's website.

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

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

6. 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.

7. In relation to the Council of Europe's working methods during the COVID-19 pandemic, the possibilities, in exceptional circumstances, of holding meetings by videoconference and voting by electronic means have been included in the rules of procedure of the Ministers' Deputies and the Committee of Ministers. Resolution CM/Res(2011)24 on intergovernmental committees is being revised in the same direction.

8. The CAHDI was also informed that the Parliamentary Assembly of the Council of Europe elected Ms Despina CHATZIVASSILIOU-TSOVILIS (Greece) as Secretary General of the Parliamentary Assembly and Mr Bjørn BERGE (Norway) as Deputy Secretary General of the Council of Europe for a five-year term starting on 1 March 2021.

9. The Director brought to the attention of the CAHDI that on 20 January 2021, the Secretary General introduced her *"Strategic Framework of the Council of Europe"* to the Ministers' Deputies. The framework lists 12 key strategic priorities such as the implementation of the European Convention on Human Rights (ECHR, ETS No. 5) or artificial intelligence. This new approach should eventually lead to a four-year programming cycle with the effect that also the terms of reference of the CAHDI would then be adopted for 2022-2025. The Director also informed delegations on the establishment of a new Enlarged Partial Agreement of the Organisation, the Observatory on History Teaching in Europe, on 12 November 2020 by 17 member States.

10. Concerning the ECHR, the Director informed the CAHDI of certain decisions of the Court related in particular to inter-state cases. He further drew attention to the negotiations for the Second Additional Protocol to the Convention on Cybercrime (CETS No.185), which are currently being finalised.

11. Furthermore, in relation to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention, CETS No. 210), the Director

referred the CAHDI to the denunciation (effective as from 1 July 2021) by Turkey of this Convention which constitutes a huge setback for women's rights. Regarding the European Union's (EU) ratification of the Convention, he also drew attention to the Opinion by Advocate General Hogan of 11 March 2021 in the Opinion procedure 1/19 before the Court of Justice of the European Union (CJEU).

12. The representative of the European Commission emphasised the non-binding nature of the Opinion of the Advocate General. The opinion of the CJEU is expected to be rendered by the beginning of the summer.

13. The Turkish representative commented on his country's withdrawal from the Istanbul Convention the primary aim of which was the prevention of violence against women and domestic violence. However, certain elements have been the object of criticism in different segments of the society. Nevertheless, Turkey remains committed to zero tolerance on violence against women.

14. The German representative expressed his regret regarding the withdrawal by Turkey from the Istanbul Convention.

15. The representative of the United States found this situation regrettable. He stated that violence against women was an important issue for the new US administration and hoped that Turkey will re-join the Istanbul Convention.

- *Replacement of the old databases by the new ones, information provided by the Secretariat*

16. Ms Ana GOMEZ, Secretary of the CAHDI, provided information on the deletion of the three old databases from the CAHDI website. This change will render the new ones directly and hence more easily accessible on the site. These databases concern: "Immunities of States and international organisations"; "Organisation and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs" and "Implementation of United Nations sanctions and respect for Human Rights".

17. Initially, the databases were organised as simple lists of contributions in PDF documents on the CAHDI website. Further to the voluntary contributions from Germany and the Netherlands, searchable databases were developed and have been online since 2016. However, they coexist with the old databases. The aim now is to keep only the new databases by rearranging the access pages to them. To illustrate this, the Secretary of the CAHDI made a PowerPoint presentation showing how the databases look now, how they will look from 25 March 2021 and how delegations can submit their contributions directly through the personal space.

## II. ONGOING ACTIVITIES OF THE CAHDI

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

#### a. Working methods: Non-paper on the Evaluation of the Activities of the CAHDI

18. The Chair introduced the topic and recalled the origins of the evaluation exercise: According to its Terms of Reference for 2020-2021, as contained in document CAHDI (2020) 1, the CAHDI is instructed to evaluate its activities and identify its main work priorities. In order to start a discussion in this regard, the CAHDI agreed at its 59th meeting (24-25 September 2020 in Prague, Czech Republic) that the outgoing Chair together with the newly elected Chair and Vice-Chair for 2021 would form a Reflection Group to consider this question and prepare a non-paper to serve as a basis for an exchange of views in the plenary setting at this 60th meeting. The Non-paper on the Evaluation of the Activities of the CAHDI with a revised agenda template as an annex (document CAHDI (2021) 1) was sent to delegations ahead of the meeting.

19. The Chair summarised the conclusions of the Non-paper followed by an exchange of views among delegations on the subject. The Chair recalled that all member States had the right to propose changes to the Committee's agenda. Any proposal consensually supported by the Committee would be included in the agenda.

20. In sum, the Non-paper stated that the current activity of the CAHDI corresponds to the main objective of this intergovernmental committee by generating ample exchanges of views among Legal Advisers from member and observer States on cardinal issues of public international law and on issues of relevance to the activity of the Council of Europe. The welcome practice of inviting special guests to CAHDI meetings connected it to the wider public international law space.

21. Moreover, according to the Non-paper, no changes appeared necessary in the organisation of CAHDI's meetings in the short and medium term. The activity of the CAHDI was focused on issues of general and immediate concern and required, for proper discharge, at least two meetings per year. Given that the budgetary restraints at the Council of Europe would not allow adding another yearly meeting for CAHDI, any substantial additions to its activity would be difficult to accommodate. Several delegations taking the floor on this point welcomed the proposal made in the Non-paper that the practice of two physical meetings per year should be resumed once the pandemic was under control. Some of them, however, also uttered their support for a simultaneous maintenance of virtual participation at the meetings for the benefit of especially younger colleagues from the capitals.

22. Apart from these general conclusions, the members of the Reflection Group had identified some aspects of formal and substantive nature where adjustments of the agenda might be welcomed in order to ensure more visibility to the activity of the CAHDI and to further emphasise its relevance. These proposals concerned, from a formal point of view, an enhanced systematisation of the agenda by grouping the items that liaise to a database and/or a questionnaire into a separate agenda point named "CAHDI Databases and Questionnaires". These specific points of information could be identified, in the annotated agenda, as items that can be dealt with without discussion in the meeting. However, that would be without prejudice to delegations intervening and informing of various updates in relation to those topics. Furthermore, the Non-paper proposed to delete the current items 6.b and 6.c. from the agenda - the former, the "UN Convention on Jurisdictional Immunities of States and Their Property" since it had entertained hardly any discussion in recent years, and, the latter, "State practice, case-law and updates of the website entries" given that updates on these could also be given by delegations under the suitable sub-item. The Non-paper further suggested that other items that figure at the moment as standalone points on the agenda could be moved as sub-items under other general topics. For instance, issues relating to the "National implementation measures of UN sanctions and respect for human rights" could be discussed within "Topical issues of public international law". The streamlining and systematisation of the agenda found, in general, the support of a number of delegations taking the floor.

23. From a substantive point of view, the Non-paper encouraged the CAHDI to identify new topics on which the assessment of State practice might be relevant and, thus, to expand the CAHDI Databases and/or questionnaires. Moreover, the Non-paper suggested to expand the scope of the agenda point "Immunities of States and international organisations" to include diplomatic and consular immunities especially in light of recent State practice connected to the management of the COVID-19 pandemic. The Non-paper further proposed to introduce a general topic named "Treaty law" in the agenda. This item would include the current agenda point "Law and practice relating to reservations and interpretative declarations concerning international treaties: European Observatory of Reservations to International Treaties" but also comprise another sub-item, notably the Council of Europe treaty practice. Other treaty law related topics of interest to CAHDI members might equally be accommodated under this general topic. The inclusion of both topics, diplomatic and consular immunities and a general item on treaty law, found the support of most delegations taking the floor in the course of the exchange of views.

24. The proposition of the Non-paper to introduce, as a constant topic under "General issues of public international law", the agenda point "Work of the International Law Commission (ILC)" was welcomed by several delegations. Up until now the topic was included only on the agenda of the fall meeting of the CAHDI. The Chair underlined, however, that it might be useful to involve in discussions relating to the activity of the ILC in both annual CAHDI meetings in order to better assess the progress of work and to better prepare for the exchanges of views on the ILC report to be debated during the United Nations 6th Committee.

25. Several delegations were further in favour of the CAHDI identifying new topics on which exchanges of views between Legal Advisers might be deemed useful as also reflecting general discussions at international level while calling, at the same time, for caution in order not to duplicate the work undertaken by other Council of Europe bodies on related issues.

26. As a final remark, the Non-paper referred to the useful practice of organising expert seminars and workshops in the margins of CAHDI meetings. These events, while not formally part of CAHDI activities, had proven as useful opportunities for the Legal Advisers to informally discuss practical issues of public international law. The Non-paper hence suggested to explore whether such seminars could be financially supported by the Council of Europe e.g. with regard to covering expenses of guest speakers.

27. The Chair closed the exchange of views by concluding that delegations appeared in principle content with the outcome and proposals included in the Non-paper. With regard to next steps, the Chair proposed that together with the Secretariat, she would make an effort to add all the new ideas expressed in the meeting into a revised version of the Non-paper. This revised version would then be circulated to delegations with a deadline for further comments. Subsequently, the proposed changes to the agenda in the non-paper would be put to delegations' approval by way of written procedure. Changes unanimously approved would enter into force already for the upcoming meeting in September 2021. Furthermore, the Chair and the Secretariat would prepare a draft reply to the Committee of Ministers concerning this self-evaluation activity based on the finalised Non-paper. This draft reply would be circulated to delegations ahead of the next meeting of the CAHDI at which it shall be discussed.

### b. Opinion of the CAHDI on Recommendation 2191 (2020) of the Parliamentary Assembly of the Council of Europe (PACE)

28. The Chair recalled that, on 14 January 2021, the Ministers' Deputies at their 1392th meeting agreed to communicate to the CAHDI, for information and possible comments, Recommendation 2191 (2020) of the Parliamentary Assembly of the Council of Europe (PACE) on "*Investment migration*".

29. A preliminary draft Opinion prepared by the Chair in cooperation with the Secretariat was circulated to the CAHDI members by e-mail on 11 March 2021 (document CAHDI (2021) 6 prov *Restricted*), inviting delegations to submit their comments on this document. Only the delegation of the Czech Republic submitted its comments ahead of the meeting, yet several delegations made further comments and proposals during it. These proposals were taken into account for a version of the Chair to finalise the discussion during the meeting and to form the basis for the opinion to be adopted by written procedure after the meeting.

### c. 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) 2 *Restricted*).

31. The Committee of Ministers had, notably, taken note of the Abridged Report of the 59th meeting of the CAHDI and approved the request by the Republic of Korea to be granted observer status with the CAHDI.[1] Two other decisions of the Committee of Ministers concerning the transmission of Parliamentary Assembly Recommendations for information and possible comments to, among others, the CAHDI, were adopted. These decisions concern Recommendation 2180 (2020) on "*The Impact of*

[1] Decision of the Committee of Ministers adopted on 8 December 2020 at the 1391st meeting of the Ministers' Deputies.

*the COVID-19 pandemic on human rights and the rule of law*"[2] for which the CAHDI's opinion was adopted in January by means of written procedure and the above-mentioned Recommendation 2191 (2020) on "*Investment migration*".[3]

32. The document CAHDI (2021) 2 *Restricted* also took stock of the Greek Presidency of the Committee of Ministers, which took place from May to November 2020. Greece then handed over the Presidency of the Committee of Ministers to the current Presidency of Germany until May 2021 whose priorities are equally detailed in the document.

## 6. Immunities of States and international organisations

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

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

33. The Chair presented the topic "*Settlement of disputes of a private character to which an international organisation is a party*" which had been included in the agenda of the CAHDI at the 47th meeting in March 2014 at the request of the delegation of the Netherlands. The delegation of the Netherlands had prepared a document in this respect (document CAHDI (2014) 5 *Confidential*) aimed at facilitating an exchange on topical issues related to the settlement of third-party claims for bodily injury or death, and for loss of property or damage, allegedly caused by an international organisation, and the effective remedies available to claimants in such situations. The document contains five questions addressed to members of the CAHDI.

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

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

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

37. At the 59th meeting, the Secretariat presented this document, containing the experience of the Council of Europe, along with contributions from Austria, Belgium and the Netherlands, as well as NATO, examining the settlement of disputes of a private character with international organisations, in particular through case law of domestic courts.

38. The Austrian representative recalled the cases that they mentioned at the previous meeting of the CAHDI under this item and informed that the Austrian Constitutional Court had issued a judgment in December 2020 in a case brought against the Organization of the Petroleum Exporting Countries (OPEC). The Court rejected a request to declare the immunity of OPEC as unconstitutional on grounds of incompatibility with Article 6 of the ECHR on formalistic grounds. The Austrian representative mentioned that this was a recurring problem and was considered in the drafting of a new national Law

[2] Decision of the Committee of Ministers adopted on 12 November 2020 at the 1388th meeting of the Minister's Deputies.

[3] Decision of the Committee of Ministers adopted on 14 January 2021 at the 1392nd meeting of the Minister's Deputies.

on the Headquarters of International Organisations, in force as of 1 May 2021, inspired by the similar laws in Switzerland and Germany. The law authorises the government to conclude headquarters agreements, on the condition that they are compatible with Austria's human rights obligations and ensure that there is an adequate protection of the rights of individuals e.g. an alternative form of dispute resolution in case of immunity of the international organisation before Austrian courts.

39. The Belgian representative presented a case decided by the Brussels appeal court on 29 November 2019 in the matter of diplomatic notification. The case related to the non-execution of a grant agreement by the General Secretariat of the African, Caribbean and Pacific Group of States (ACP) to an international non-profit organisation. At first instance, the court found partially in favour of the applicant. The appeal judgment dealt exclusively with the admissibility of the application, specifically as concerned the date at which diplomatic notification takes effect. The Appeal Court's reasoning first established that the ACP Secretariat is an international organisation with international legal personality. The former has concluded a headquarters agreement with Belgium, which provides for the inviolability of the premises of the Secretariat. This inviolability restricts the host State from entering and performing acts of coercion, including notification of judgments by bailiffs. Such acts may only be completed via diplomatic channels, excluding any other form of notification usually permitted by the judicial code, including via electronic channels. The appellate court held that the nature of diplomatic channels distinguishes the time of sending a document from the time that it is received. Mere knowledge of a judgment is insufficient to start the time limit for appeal. Acknowledging receipt of an electronic communication is not equal to notification via diplomatic channels. The time limit began at the time of reception of the physical documents in question and not at the time that they were sent.

- *Immunity of State-owned cultural property on loan*

40. The Chair introduced the sub-theme concerning the immunity of State-owned cultural property on loan for which a Declaration and a Questionnaire exist.

- **Declaration on Jurisdictional Immunities of State Owned cultural Property**

41. The Chair recalled that this topic was included in CAHDI's agenda at its 45th meeting, in March 2013, following a joint initiative by the delegations of the Czech Republic and Austria to prepare a Declaration in support of the recognition of the customary nature of the relevant provisions of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, in order to guarantee the immunity of State cultural property on loan. The Declaration on Jurisdictional Immunities of State Owned Cultural Property was elaborated as a legally non-binding document expressing a common understanding of opinio juris on the basic rule that certain kind of State property (cultural property on exhibition) enjoys jurisdictional immunity.

42. The Chair informed the delegations that, since the last CAHDI meeting, there had been no new signatures of the Declaration. So far, the Declaration had been signed by the Ministers of Foreign Affairs of 20 States (Albania, Armenia, Austria, Belarus, Belgium, Czech Republic, Estonia, Finland, France, Georgia, Holy See, Hungary, Ireland, Latvia, Luxembourg, the Netherlands, Portugal, Romania, Russian Federation and Slovak Republic). The Committee noted that the Secretariat of the CAHDI performed the functions of "depositary" of this Declaration and that the text of this Declaration was available in English and French on the CAHDI website.

- **Questionnaire on the Immunity of State-owned Cultural Property on Loan**

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

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

- *Immunities of special missions*

45. Delegations were reminded that the topic of "*Immunities of special missions*" was included in the agenda of the CAHDI in September 2013, at its 46th meeting, at the request of the delegation of the United Kingdom, which provided a document in this regard (document CAHDI (2013) 15 *Restricted*). Following this meeting, the Secretariat and the Chair drafted a questionnaire aimed at establishing an overview of the legislation and specific national practices in this field.

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

- *Service of process on a foreign State*

47. Delegations were reminded that the discussion on the topic "*Service of process on a foreign State*" was initiated at the 44th meeting of the CAHDI in September 2012, following which a questionnaire on this topic had been prepared. Up to this meeting, 31 delegations (Albania, Andorra, Austria, Belarus, Belgium, Bosnia and Herzegovina, Canada, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Latvia, Mexico, the Netherlands, Norway, Portugal, Romania, Serbia, Slovenia, Spain, Switzerland, the United Kingdom and the United States of America) had submitted their replies. These contributions were reproduced in document CAHDI (2020) 6 prov *Confidential Bilingual*.

48. The Chair noted that there had been no new replies since the last CAHDI meeting. She encouraged delegations, which had not yet done so, to submit or update their contributions to the questionnaire.

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

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

50. The Chair reminded the Committee that the CAHDI followed the status of ratifications and signatures to the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property since its 29th meeting in March 2005. In this respect, she informed the Committee that, since its last meeting, no State represented within the CAHDI had signed, ratified, accepted, approved or acceded to the 2004 UN Convention. She further underlined that, up to this CAHDI meeting, 22 States had ratified, accepted, approved or acceded to the 2004 UN Convention. Finally, she pointed out that in order for the 2004 UN Convention to enter into force, the deposit of 30 instruments of ratification, acceptance, approval or accession with the Secretary General of the United Nations was needed.

51. The representative of Belgium brought the CAHDI's attention towards a decision handed down by the Brussels Labour Court of Appeals on 24 June 2020. The case concerned proceedings by an embassy employee in Brussels against her sending State before the labour court in 2016 claiming unpaid holiday allowances. These were granted at first instance, and, on appeal, the sending State plead that it was not obliged to execute the decision of any national tribunal owing to the immunity granted by Article 24 (1) of the 2004 UN Convention on Jurisdictional Immunities of States and their Property. In its judgment, the appellate court first recalled the lack of immunity for States in employment

disputes. The court then stated that, while the situation at hand did fall under Article 24 of the Convention, Belgium had not ratified it and, furthermore, the Convention was still to enter into force. The court further held that while some provisions of the Convention had been found to amount to rules of customary international law, this was not the case for Article 24. Indeed, Belgian courts had, on several occasions, ordered States to pay penalties. The defending State had failed to provide sufficient reasons for the application of Article 24 (1) of the Convention as a rule of customary international law and was ordered to pay the penalty.

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

52. The CAHDI noted that, up to this meeting, 35 States (Andorra, Armenia, Austria, Belgium, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Mexico, the Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey and the United Kingdom) and one organisation (EU) had submitted a contribution to the database on "*The Immunities of States and International Organisations"*.

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

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

55. The Belgian representative presented a judgment handed down by the Brussels Labour Court of Appeal concerning the immunity from jurisdiction of NATO. The application to the labour court in 2016 concerned the overturning of the decision by the NATO administrative tribunal rejecting the claimant's request to have her consultancy contracts retroactively recognised as a permanent contract. The labour court held that it lacked the competence to hear the case on account of the jurisdictional immunity of NATO. On appeal, the Brussels Labour Court of Appeal confirmed that the immunity of NATO did not violate the right of access to a tribunal *per se*, and that lower court's judgment should not be overturned. Since the start of the proceedings, the applicant had been claiming rights under the Rules for civilian staff and had used the opportunity to bring her case to the NATO Administrative Tribunal, which had decided that the aforementioned rules did not apply to her. It was only on appeal that the claimant based her claim on Belgian employment law provisions. She never attempted to apply the arbitration provision of the NATO Administrative Tribunal. Finally, the Court of Appeal held that there could be no responsibility of the Belgian government unless it was established that the NATO dispute resolution mechanism violated Article 6 of the ECHR. As this was not the case, Belgium did not commit a wrongful act by signing the Agreement on the status of the North Atlantic Treaty Organization, National Representatives and International Staff which provides jurisdictional immunity to NATO. The applicant had access to the NATO Administrative Tribunal with guarantees of independence and impartiality, and the Belgian State was not involved in the contractual process and in the litigation between the applicant and the NATO.

56. The Czech representative reported on a recent case regarding an attempt to seize the accounts of the Czech diplomatic mission in Berlin and the seizure of accounts of the Czech consulates-general in Munich and Dresden by a private company in execution of an arbitral award against the Czech Republic. The award is not valid under Czech law on account of the circumstances of its conclusion. Further, the recognition and execution of the award was denied by courts in other jurisdictions (including the Netherlands, France and Austria). The company was successful in using a judgment of a Luxembourgish court, which had recognised the award, before the district court in Frankfurt am Main in order to justify the seizure of the accounts of the Czech consulates-general in Munich and Dresden under EU Regulation No 655/2014,[4] despite the fact that this regulation explicitly excludes accounts protected by State immunity from seizure. Subsequently, based on consultations with the German Foreign Ministry and direct communication with the district court in Frankfurt am Main, stating the violation of Article 31 of the 1963 Vienna Convention on Consular Relations and customary international law, as codified in Article 21(1)(a) of the UN Convention on the Jurisdictional Immunities of States and their Property, these assets were released.

57. The German representative referred to a case concerning the immunity of State officials before the German Federal Court of Justice.[5] The defendant, a first lieutenant in the Afghan army, was accused of war crimes. He and the deputy commander had used violence and threats thereof during the interrogation of three prisoners. The accused had further arranged for the body of a Taliban commander to be hung on a wall, presented like a trophy and degraded. The Federal Court of Justice confirmed that the immunity of a subordinate State agent *rationae materiae* did not stand in the way of prosecuting the accused in Germany for war crimes committed abroad against non-German nationals. The representative of Germany further drew the attention of the delegations to a similar case pending before German courts concerning the prosecution of an agent of the Gambian armed forces for crimes against humanity and which hence equally concerned questions of immunity of State officials for criminal acts under international law.

58. The representative of the United States of America referred to a unanimous decision of the United States Supreme Court in the case of *Germany v. Philipp* finding that the US Foreign Sovereign Immunities Act (FSIA) rendered Germany immune from claims at issue in a case relating to the sale of medieval art in 1935 to Prussia. The court held that the expropriation exception did not extend to takings claims brought by a foreign State's own nationals. According to the representative this was consistent with the position of the US government as well as with many States represented within CAHDI that had provided the US representatives with their views. The Supreme Court emphasised the need to interpret the provisions of the FSIA consistently with international law and practice, specifically with respect to the restrictive theory that the FSIA is intended to codify. This view also applied to a second case before the US Supreme Court, *Hungary v. Simon*, involving claims relating to events in the 1940s. The US Supreme Court remanded both cases to the lower courts for further proceedings, including determining whether plaintiffs were nationals of Hungary and Germany respectively at the time of the alleged takings.

59. The representative of the United States of America also referred to the *Jam et al v International Finance Corporation*[6] litigation, continuing in the lower courts, where the US government had argued that the commercial activities exception in the FSIA did not cover a loan provided by the International Finance Corporation to a powerplant in India. The district court agreed, but the parties have appealed. Although the United States is no longer a party to this dispute, the US representative voiced his interest in hearing colleagues' experiences of what they consider to be commercial activities of international organisations, especially in the areas of finance and health.

60. The Chair noted that the majority of the replies to the questionnaires under this item of the agenda were currently still confidential. In the interest of transparency and considering the prospect of extending the existing CAHDI databases to include these replies, the chair suggested that the Committee would consider in more detail at its next meeting the possibility of making them public.

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[4] Regulation (EU) No 655/2014 of the European Parliament and of the Council of 15 May 2014 establishing a European Account Preservation Order procedure to facilitate cross-border debt recovery in civil and commercial matters.

[5] German Federal Court of Justice, judgment of 28 January 2021 - 3 StR 564/19 [Press Release only available in German].

[6] See, *Jam et al v International Finance Corporation*, US Supreme Court (27 February 2019) No 17-1011.

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

61. The Chair introduced the document CAHDI (2021) 3 prov *Bilingual* on the "*Organisation and functions of the Office of Legal Adviser of the Ministry of Foreign Affairs*" and welcomed the replies of 40 States and one organisation (Albania, Andorra, Armenia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Israel, Italy, Latvia, Lithuania, Luxembourg, Malta, Mexico, Republic of Moldova, Montenegro, the Netherlands, Norway, Romania, Serbia, Slovenia, Spain, Sweden, Switzerland, Turkey, the United Kingdom, the United States of America and NATO) to the revised questionnaire containing additional questions on gender equality in conformity with the Council of Europe Gender Equality Strategy. Since the last meeting, the Czech Republic and the Netherlands had updated their replies to the revised questionnaire.

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

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

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

64. The Swiss representative presented the case of *Al-Dulimi and Montana Management Inc. v. Switzerland [GC]*.[7] She stated that there had been no new developments regarding the revision procedure *per se*, but wished to reiterate Switzerland's commitment and involvement within the UN to foster compliance with human rights in the implementation of sanctions. She reported on Switzerland's involvement in a study published by the UN University investigating improvements in order to secure better safeguards within the UN system. The study was based on an analysis of forty-seven cases in twelve different jurisdictions. The authors of the study noted an increasing number of cases before the courts pertaining to various sanction regimes, and their conflict with human rights norms. This conflict could make it impossible to implement the sanctions at a national level, leading to a risk of fragmentation in UN sanctions regimes. In November 2020, Switzerland had co-organised a retreat with members and non-members of the United Nations Security Council (UNSC) with the aim to enhance the procedural safeguards in all of the sanctions regimes and to allow for their uniform implementation. Switzerland continues to research targeted sanctions within the Group of Like-Minded States.

65. The representative of the Commission of the EU intervened to state that the Commission had released a revised version of a handbook collecting the jurisprudence of the General Court of the EU with respect to sanctions and the protection of human rights. The representative encouraged CAHDI members to read the document, as it represents a collection of the common approach of not only EU law but the constitutional customs of the member States and the Charter of Fundamental Rights of the European Union, which is the reflection of the ECHR in EU law.

## 9. The European Convention on Human Rights and cases before the European Court of Human Rights involving issues of public international law

- *Exchange of views with Judge Robert SPANO, President of the European Court of Human Rights*

[7] ECtHR, *Al-Dulimi and Montana Management Inc. v. Switzerland* [GC], no. 5809/08, 21 June 2016.

66. The Chair welcomed Judge Robert SPANO, President of the European Court of Human Rights (the Court), who participated from the meeting room, and thanked him for his presence. The Chair indicated that President Spano's presentation focusing on inter-state cases before the Court would be followed by an exchange of views with delegations.

67. President Spano, after recalling the addresses of his predecessors Presidents Raimondi and Sicilianos before the CAHDI, presented the mechanism of inter-state application provided by Article 33 of the ECHR (the Convention) and underlined the ongoing internal reflection within the Court, through its Committee on Working Methods, on proposals for more efficient processing of inter-State cases and the work of the Steering Committee for Human Rights (CDDH)'s drafting group working on effective processing and resolution of cases relating to inter-state disputes (DH-SYSC-IV) which is preparing a report to be submitted to the Committee of Ministers by the end of the year.

68. There have been just under 30 inter-state cases since the Convention entered into force while there are currently 13 applications pending.[8] Since 2020, seven new applications have been lodged before the Court.[9] These seven applications demonstrate the different nature of inter-state applications. Some arise from political conflict or dispute; some are the result of steps taken by states to represent the interests of individual nationals; others demonstrate the possibility for states to operate a more general "policing" role.[10] Judgments in inter-state cases may affect a large number of individuals as there are currently 9600 individual applications associated with inter-state cases pending before the Court but also more generally through the conflict situations as such.

69. President Spano then focused on recent developments and important judgments in inter-state cases, first mentioning the admissibility decision in the case of *Ukraine v. the Russian Federation (re Crimea)*[11] which contains some interesting developments *inter alia* as regards the assessment of evidence and the burden of proof (non-exhaustion / administrative practice). Furthermore, in the case of *Slovenia v. Croatia*[12] (also an admissibility decision), the Court found that the Convention did not allow Governments to use the inter-state application mechanism to defend the rights of a legal entity that was not a "non-governmental organisation". In the case *Georgia v. the Russian Federation (II)*[13] the Court decided on important questions of jurisdiction, further defined the criteria of the concept of an administrative practice and examined the interrelation between the provisions of the Convention and the rules of international humanitarian law.

70. Finally, as regards the interpretation of the Convention in relation to other rules of international law, the Court, in 2016, in rejecting the Russian Government's arguments on jurisdiction in the case of *Mozer v. the Republic of Moldova and the Russian Federation*[14] and their reliance on two cases decided by the International Court of Justice (ICJ), reiterated that the test to be applied by the Court under Article 1 of the Convention differed from the test for establishing a State's responsibility for an internationally wrongful act under international law. In other words, interpreting the Convention "as far as possible" in harmony with other rules of international law does not necessarily lead to the conclusion that the interpretation of the Convention by the Court is, in all circumstances, ultimately determined by

[8] https://echr.coe.int/Documents/InterState_applications_ENG.pdf
[9] *Armenia v. Azerbaijan* (no. 42521/20); *Armenia v. Turkey* (no. 4351/20) and *Azerbaijan v. Armenia* (no. 47319/20) concerning the conflict in Nagorno-Karabagh; *The Netherlands v. the Russian Federation* (no. 28525/20) concerning the shooting down of Malaysia Airlines Flight MH17 over Eastern Ukraine in 2014; *Liechtenstein v. the Czech Republic* (no. 35738/20) concerning alleged breaches of property rights of Liechtenstein citizens following the 2nd World War ; *Latvia v. Denmark* (no. 9717/20) concerning a possible extradition of a Latvian national to South Africa, which has been struck off the list following the resolution of the issue; *Ukraine v. the Russian Federation* (IX) (no. 10691/21) concerning allegations of State-authorised targeted assassination operations against perceived opponents outside a situation of armed conflict.
[10] P. Leech, On Inter-State Litigation and Armed Conflict Cases in Strasbourg, European Convention on Human Rights Law Review (2021) 1-48.
[11] ECtHR, *Ukraine v. the Russian Federation* (re Crimea) [GC] (decision), nos 20958/14 38334/18, 16 December 2020.
[12] ECtHR, *Slovenia v. Croatia* [GC] (decision), no. 54155/16, 18 November 2020.
[13] ECtHR, *Georgia v. the Russian Federation* (II) [GC], no. 38263/08, 21 January 2021.
[14] ECtHR, *Mozer v. the Republic of Moldova and the Russian Federation* [GC], no. 11138/10, 23 February 2016, § 102.

other international bodies applying principles of public international law, as the legal issues they are determining may differ.

71. President Spano indicated that he would not comment on any particular judgment, as he does not believe that it is his role, and recalled that judgments and decisions of the Court are to be executed whatever the respondent Government's views of the respective judgments were.

72. President Spano pointed to the challenges which inter-state cases and associated individual applications represent for the Court and the Convention system. One of the greatest challenges in inter-state cases following armed conflict is the establishment of the facts and the assessment of whether or not there has been an administrative practice, as there usually have been no decisions of domestic courts, and the Court often has to request documents from the parties under Article 38 of the Convention and hold time-consuming and costly witness and expert hearings. Coordinating the processing of inter-state cases and related individual applications also poses a challenge for the Court which has introduced a number of practices to face it, notably not to decide on individual applications raising the same issues or deriving from the same underlying circumstances before the overarching issues stemming from the inter-state proceedings have been determined in the inter-state case.

73. Finally, President Spano concluded by mentioning some areas worthy of further reflection. For instance, friendly settlements have been successful in only a handful of inter-state cases but could potentially represent a suitable solution in that type of cases.[15] Furthermore, he pointed to the use of interim measures under Rule 39 of the Rules of Court in inter-state cases, which do not prejudge the admissibility or merits of the applications. Some call for the Court to go further in its use of interim measures, others note the inherent limits in this mechanism.

74. The Chair thanked President Spano for his interesting and thought-provoking presentation and invited delegations which so wished to take the floor.

75. In reply to a question concerning the basis on which the Court's new case-processing strategy was introduced, President Spano indicated that no changes to the Rules of Court were necessary as Rule 41 of these Rules already provided an adequate basis to implement the priority policy of the Court.

76. In reply to a question concerning the case law of the Court on the rule of exhaustion of domestic remedies and the shared responsibility concept, President Spano stated that the case law is clear under Article 35 of the Convention and mentioned a preeminent precedent in this area, namely the case of *Vuckovic and Others v. Serbia*[16] recalling the fundamental principles followed by the Court when applying the rule of exhaustion of domestic remedies. The Court takes this condition of access to the Court seriously and sees it as essential to its functioning. Therefore, any exception to this rule would require an examination by the Court in the individual case at hand. The Court will not depart from this rule unless there are very strong reasons to do so.

77. In response to a question regarding the cooperation between the Court and other regional courts and the UN monitoring bodies, President Spano underlined that regular and ongoing exchanges take place between the Court and other regional courts. The virtual International Human Rights Forum between the Court, the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights was held on the very day of this CAHDI meeting, to discuss common issues, notably in relation to the pandemic. Regarding UN monitoring bodies, President Sicilianos led a delegation to Geneva just before the outbreak of the pandemic in 2020 to meet with the UN Human Rights Committee to create mutual awareness about common issues.

78. In response to a question, President Spano indicated that the work of the Committee on Working Methods of the Court regarding inter-state cases should be finalised in the course of the year. This work takes into account several parameters. The Court is looking at the current stock of pending cases and is already instituting some internal working methods to try to harmonise the workflow in relation to pending inter-state cases, on the one hand, and to individual applications associated with inter-states cases, on the other hand. The Court applies, of course, a principle of impartiality when

[15] For example: *France, Norway, Denmark, Sweden and the Netherlands v. Turkey* (decision), nos. 9940/82 and 9944/82, 6 December 1983, before the former European Commission of Human Rights and the case of *Denmark v. Turkey* (Friendly settlement) no. 34382/97, 5 April 2000, before the European Court of Human Rights.
[16] ECtHR, *Vuckovic and Others v. Serbia* [GC] (preliminary objection), nos. 17153/11, 17157/11, 17160/11..., 25 March 2014.

establishing the judicial composition for these cases. However, when it comes to transversal inter-state cases having an impact on various member States, this can often be a difficult exercise. In these cases, the Court tries to institute as much coherence and transparency as possible.

79. The Slovenian representative drew the attention of CAHDI members to the Grand Chamber decision of 18 November 2020 in the case of *Slovenia v. Croatia*[17], which had been already mentioned during President Spano's presentation. The case concerned unpaid and overdue debts owed to the Ljubljanska banka (a legal entity which was nationalised by the Slovenian State) by various Croatian companies on the basis of loans granted at the time of the former Yugoslavia. The Court observed that under Article 34 of the Convention (individual applications) a legal entity could bring a case before it if it was a "non-governmental organisation" within the meaning of that Article. As the Ljubljanska banka was not, in the Court's views, a "non-governmental organisation" within the meaning of Article 34 of the Convention, it did not have standing to lodge an individual application. Accordingly, Article 33 of the Convention did not empower the Court to examine an inter-state application alleging a violation of any Convention right in respect of this legal entity. The Court therefore declared it had no jurisdiction to hear the case.

80. The Slovenian representative indicated that, from the point of view of his country, the question of the ownership of a legal person should not have a decisive impact to the issue of standing or jurisdiction *ratione personae*. A state-owned company that is not a part of a respondent State and takes part in open market activities should not be precluded from exercising its rights under the Convention. In these cases, every legal person should be entitled to the protection of its rights under the Convention either through individual or inter-state application. However, Slovenia is determined to fully respect the Court's decision.

81. The Portuguese representative commended the Court for having continued on delivering judgments and decisions and for having held important public events despite the difficult context of the pandemic. She recalled that, the Court being subsidiary to national systems safeguarding human rights, the exhaustion of domestic remedies remains a fundamental admissibility criterium, as grounded in Article 35 §1 of the Convention. On this point, she brought the attention of the CAHDI to the recent case of *Beizaras and Levickas v. Lithuania*[18], where the Court had stated that the application of the rule on the exhaustion of domestic remedies "must make due allowance for the context".

82. The Irish representative expressed his support for the Court's reform process and welcomed the new methods of settling cases. Ireland attaches great importance to the role of the Court, which it supports notably by contributing to the webcasting system of the Court's hearings and will engage in the reforms as they roll out. He agreed with the representative of Portugal on the importance of the subsidiarity principle. In the same vein, the representative of Sweden reiterated the firm support of his country to the Court and echoed the comments on the importance of the subsidiarity principle and the rule of exhaustion of domestic remedies, recalling the role of national courts in this respect, notably through the implementation of effective domestic remedies to avoid applications to the Court.

83. The representative of Georgia drew the attention of delegations to the judgment in the case of *Georgia v. the Russian Federation (II)*. The Court had upheld Georgia's claim that the Tskhinvali region and Abkhazia were an integral part of Georgian territory and that these Georgian regions were currently occupied by the Russian Federation. Concerning the violation of the rights of civilian populations, the Court had held that the Russian Federation was responsible for the torture, inhuman and degrading treatment of Georgian prisoners of war and civilians and also for the arbitrary detention of Georgian civilians. Furthermore, the Court had found that there was an administrative practice contrary to Articles 2, 3 and 8 of the Convention and Article 1 of Protocol No. 1 to the Convention as regards the killing of civilians and the torching and looting of houses in Georgian villages in South Ossetia and in the "buffer zone". The Court had also found that there was an administrative practice contrary to Article 2 of Protocol No. 4 to the Convention with regard to the inability of Georgian nationals to return to their respective homes in Abkhazia and South Ossetia. The representative of Georgia underlined that although the Court had found that events which occurred during the active phase of the hostilities (8 to 12 August 2008) did not fall within the jurisdiction of the Russian Federation for the purposes of Article 1 of the Convention, it still found the Russian Federation's responsibility for the violation of the

[17] ECtHR, *Slovenia v. Croatia* [GC] (decision), no. 54155/16, 18 November 2020.
[18] ECtHR, *Beizaras and Levickas v. Lithuania*, no. 41288/15, 14 January 2020.

procedural limb of the right to life as guaranteed under Article 2 of the Convention. Regarding the establishment of an armed attack by Georgia, the Court had held that this did not fall within its competence.

84. The representative of the Russian Federation indicated that his country's interpretation of the judgment in the case differed from that of Georgia. Presenting this interpretation, he stressed that in the judgment the Court concluded that the Russian Federation could not be held liable under the Convention for the incidents that took place when Russian forces were countering the offensive of the Georgian forces in South Ossetia. This meant, in view of the Russian representative, that the Court did not support the position of Georgia that the Russian forces entered Georgian territory before the Georgian army on 7 August 2008. Regarding the legal assessment of Russian activities in South Ossetia and Abkhazia between 8 and 12 August 2008, the Court concluded that these activities fell outside the Court's jurisdiction. Furthermore, the Russian representative indicated, the Court did not establish a single evidence of human rights violations against the civilian populations committed by the Russian forces.

85. The representative of the Russian Federation further drew the attention of CAHDI members to another point relating to the application of public international law by the Court, notably how the Court handles the issue of attribution. Regarding this issue, he expressed his country's preoccupation concerning the fact that a growing number of judgments delivered by the Court differ from the case law of the ICJ, as highlighted in the report of the CDDH on the "*Place of the Convention in the European and international legal order*". The current application of the criteria of attribution by the Court, from the Russian point of view, leads to the fragmentation of international law because of the unpredictability of the Court's case law which subsequently leads to mistrust in the Convention system. In this respect, the main concern of the Russian Federation related to the application of the effective control criteria.

86. Finally, the representative of the Russian Federation raised the issue of retroactive application of criminal law with regard to which the Court should, in his country's view, act more in line with the established practice of other international courts.

87. The representative of the Republic of Moldova reiterated his country's support for the application of the principle of effective control as established by the case law of the Court.

- *Overview of the state of play in relation to the EU accession to the European Convention on Human Rights*

88. The Chair provided the CAHDI with an overview of the state of play of the negotiations for the accession of the EU to the ECHR. She began by recalling that, on 15 January 2020, the Committee of Ministers had approved the continuation of the ad hoc terms of reference of the Steering Committee for Human Rights (CDDH) to finalise as a matter of priority and on the basis of the work already conducted the legal instruments setting out the modalities for the accession. This decision included the right of the CAHDI, alongside with the Registry of the Court, to participate in this work as observers. At the 59th meeting of the CAHDI (24-25 September 2020 in Prague, Czech Republic) she had been entrusted with the task of representing the Committee in the meetings of the ad hoc negotiation Group 47+1.

89. Due to the COVID-19 pandemic, the 6th and 7th negotiation meetings of the Group, originally envisaged for March and May 2020 respectively, had been postponed. An informal virtual meeting was held on 22 June 2020 and, finally, despite the pandemic, the 47+1 Group had been able to hold already three meetings between September 2020 and February 2021. The fourth one, i.e. altogether the ninth negotiation meeting of the Group, was taking place simultaneously with the present meeting of the CAHDI.

90. At the 6th meeting of the 47+1 Group (29 September - 2 October 2020), i.e., the first one of the second round of negotiations, the discussions focused on a paper by the Chair to structure the discussion addressing exclusively problems that arose from Opinion 02/13 of the CJEU of 18 December 2014 and that were further identified in the position paper of the European Commission. The Chair's paper was structured along four "baskets": 1) EU-specific mechanisms of the procedure before the ECtHR; 2) Operation of inter-party applications and of references for an advisory opinion under Protocol No. 16 to the Convention in relation to EU member States; 3) The principle of mutual

trust between the EU member States; 4) EU acts in the area of the Common Foreign and Security Policy. In addition to these four baskets the issue concerning the links between the Convention, the EU Charter of Fundamental Rights and national human rights regimes, i.e., the interplay between Article 53 of the ECHR and Article 53 of the EU Charter on Fundamental Rights, was identified as an issue in need of further clarification in the negotiations.

91. At the 6th negotiation meeting, several delegations had uttered their wish to address also other issues not contained in the Chair's paper in the course of the negotiations. In the view of these delegations the negotiations should look at the accession instruments as a whole and not be limited to those areas which the EU has identified as problematic. The election of judges and the participation of the EU in the Committee of Ministers with regard to the supervision of the execution of judgments of the European Court of Human Rights were mentioned among such issues reaching beyond the scope of Opinion 02/13.[19]

92. At the 6th meeting, the Group decided by consensus to reject the requests for observer status by several NGOs. It was felt preferable to continue the previous practice of holding consultation meetings at regular intervals with NGOs or any other civil society representatives. A first consultation was arranged for a half-day at the 7th negotiation meeting.

93. As regards the substance, the discussions at the 6th meeting were very much focused on a general exchange of views on the first two baskets, the EU-specific mechanisms of the procedure before the Court, inter-party applications and references for an advisory opinion under Protocol No. 16 by EU member States.

94. It was only at the 7th meeting (24-26 November 2020), that concrete proposals were tabled by the European Commission on these first two baskets. While these proposals turned out to be a good basis for in-depth discussions it became also clear that the proposals should be refined before they could find the consensual acceptance of the Group. It was hence decided that, at the 8th meeting (2-4 February 2021), the Secretariat would provide input in form of amended proposals or building blocks for further discussion with regard to these two baskets as well as concerning Article 53 of the ECHR.

95. At the 8th meeting, progress was achieved under some elements of Basket 1 e.g. as regards the necessity to ensure that member States' reservations under the Convention will retain their force also under the co-respondent mechanism to be established by the draft Accession Agreement. There remained, however, important differences between the negotiation parties as to the fundaments of how the co-respondent mechanism, including the prior involvement procedure, should function and be regulated in the Draft Accession Agreement.

96. The negotiations concerning issues under Basket 2, while making significant progress, remained still far from a solution. As regards inter-party cases, it remained unclear how the exigencies set by Article 344 of the Treaty on the Functioning of the European Union (TFEU) could be accommodated in the accession instruments in the case of an inter-state application between EU member States or between a member State and the Union.

97. The other equally open issue under Basket 2, requests for advisory opinions under Protocol No. 16 to the Convention, was seen as problematic by the CJEU in Opinion 02/13 due to concerns about a possible circumvention of the preliminary reference-procedure under Article 267 TFEU. In order to avoid such circumvention, Opinion 02/13 stated that the draft Accession Agreement should include a provision in respect of the relationship between these two mechanisms. For the critical voices against the proposals made so far to meet this concern of the CJEU the wording chosen did not state in sufficiently clear language that the last word on whether a request for an advisory opinion is accepted or not should lie with the Strasbourg court. In the negotiations delegations furthermore often recalled the fact that advisory opinions under Protocol No. 16 were not binding upon the requesting domestic court of a member State but merely of an advisory nature which should hence mitigate the problem from the point of view of EU law.

98. The Chair reported that with regard to Baskets 3 and 4, i.e. the complex issues around the principle of mutual trust and EU acts in the area of the Common Foreign and Security Policy (CFSP), developments had been less significant than concerning the first two baskets. The European Commission and the Secretariat had prepared, for the 7th meeting, compilations of relevant case-law

[19] Article 6 and 7 of the Draft Accession Agreement.

of the courts in Strasbourg and Luxembourg to prepare the forthcoming discussions on these baskets. At the 8th meeting in February 2021, these two baskets were subject to a general discussion. First concrete text proposals had been tabled by the European Commission for the 9th meeting taking place simultaneously with the ongoing meeting of the CAHDI.

99. The Group had further advanced in areas related to issues outside the scope of objections raised by the CJEU in Opinion 02/13, but which delegations nevertheless wished to discuss. At its 8th meeting in February 2021, the Group held an exchange of views with the Department for the Execution of Judgments of the European Court of Human Rights of the Human Rights Directorate of the Council of Europe and the Secretariat of the Committee of Ministers with a view to initiate a preliminary discussion on whether the procedures of the Committee of Ministers as regards the supervision of the execution of judgments had changed since the first round of accession negotiations. At the 8th meeting, the Secretariat further presented a paper on the updated estimated expenditure related to the Convention with a view to Article 8 of the Draft Accession Agreement on the annual contribution to be paid by the EU upon accession.

100. The Chair concluded her report by indicating the tentative dates for the next meetings of the 47+1 Group: 29 June - 2 July 2021 (10th meeting), 5-8 October 2021 (11th meeting) and 7-10 December 2021 (12th meeting).

101. The Turkish representative underlined that accession of the EU to the European Convention on Human Rights was of central importance for creating a common European legal human rights space. For the Council of Europe member States, EU's accession was preferable if it would establish a common European human rights legal system by preserving the ECHR system as a whole. With accession, the EU and its institutions needed also to come under the scrutiny of the European Court of Human Rights. A possible accession legal package should thus enable the EU to accede to the Convention on equal grounds with the other High Contracting Parties of the Convention with the same rights and obligations, while preserving the Convention system. According to the Turkish representative this was primordial for the goal of keeping the Convention system intact and relevant after EU's accession. Under the Treaty of Lisbon accession is an obligation for the EU. The Turkish representative emphasised that it fell first of all on the EU to provide for internal legal answers to the questions raised by the CJEU.

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

102. The German representative presented the case of *Hanan v. Germany*[20] concerning the investigations carried out following the death of the applicant's two sons in an airstrike near Kunduz, Afghanistan, ordered by a colonel of the German contingent of the International Security Assistance Force (ISAF) commanded by NATO. In the case, the Grand Chamber of the Court held, without finding a violation of the procedural limb of Article 2 of the Convention (right to life), that the fact that Germany had retained exclusive jurisdiction over its troops deployed within the ISAF with respect to serious crimes constituted "special features" which, taken in combination with other factors, triggered the existence of a jurisdictional link for the purposes of Article 1 of the Convention in relation to the procedural obligation to investigate under Article 2 of the Convention. In the view of the German government, Germany had not exercised extraterritorial jurisdiction in the case and the military operation had not been attributable to Germany. With regard to the question of jurisdiction, Germany generally shared certain concerns expressed in the joint partly dissenting opinion attached to the judgment. The German representative estimated that the judgment could have consequences for member States in the future. He further thanked respective member States for their interest and support during the proceedings.

## 10. Peaceful settlement of disputes

103. The Chair welcomed and thanked Professor Emmanuel DECAUX and Judge Erkki KOURULA, President and Vice-President respectively, of the Organisation for Security and Co-operation in Europe (OSCE) Court of Conciliation and Arbitration (CCA), for having accepted the invitation of the CAHDI.

[20] ECtHR, *Hanan v. Germany* [GC], no. 4871/16, 16 February 2021.

She underlined that the CAHDI members were delighted to hear their presentations and to have an exchange of views with them on the mandate and role of the CCA.

104. Professor Decaux, after recalling the interventions of some former members of the CCA, notably President Robert BADINTER, before the CAHDI, presented the origins of the CCA. The creation of the CCA within the OSCE was foreseen by the Convention on Conciliation and Arbitration within the CSCE (Stockholm Convention) which was adopted on 15 December 1992 and is now binding on 34 State Parties with 5 further States as signatories.[21] He invited all Council of Europe member States, especially the signatories, to ratify the Stockholm Convention, in order to create a positive dynamic on the eve of its 30th anniversary. Furthermore, he underlined that the CCA is open to all OSCE participating States (that is to say to all member States of the Council of Europe) on an *ad hoc* basis.

105. Even if the CCA is part of the OSCE's institutions and structures and presents its annual report to the Permanent Council of the OSCE (the Permanent Council), it is at the same time an independent court which is at the service of all European organisations. The Stockholm Convention continues the effort undertaken for more than a century to promote the peaceful settlement of disputes, and marked a new step with the implementation of a legal framework which is not only bilateral or multilateral but has become institutional with the creation of the CCA which combines conciliation and arbitration.

106. The main novelty of the Stockholm Convention is that it provides for the establishment of a court, without merely drawing up lists of conciliators and arbitrators, such as the 17 examples mentioned in the "list of lists" annexed to Recommendation CM/Rec(2008)9 of the Committee of Ministers to member States on the nomination of international arbitrators and conciliators, even if these lists are regularly updated by States Parties.[22] The members of the CCA, even if they are too numerous to meet, have the important role of electing the President of the CCA and the members of the Bureau. This is how Professor Decaux and Judge Kourula were elected for a 6-years term in November 2019. Above all, they are a "breeding ground" for the functions that may be entrusted to the CCA. However, on this point, Professor Decaux noted that, unfortunately, the CCA remains unused by the State Parties. He repeated the words of Mr GENSCHER, former Chairman of the OSCE, 20 years ago, who appealed to the members of the CAHDI to "awaken the courage of States to turn to the CCA".

107. The priority is first of all to make the CCA more present, more visible, more understandable. In this sense, several awareness-raising and information measures were adopted recently.

108. The Stockholm Convention only targets inter-state disputes, but its role can be preventive by avoiding the radicalisation of crises and the escalation of antagonism. Some political disputes are undoubtedly too complex to be resolved by resorting to third parties, but in many crises, resorting to conciliation, or even arbitration, would be a gesture of good faith and a sign of appeasement. In this sense, the Stockholm Convention, which is one of the very few treaties concluded under the auspices of the OSCE, constitutes not only a solemn commitment by the States Parties, but also an essential component of cooperative security in Europe, a pledge of political will to build "a united and free Europe". The CCA, which associates a great deal of flexibility and pragmatism with an institutional framework guaranteeing its independence and its impartiality, must therefore be ready to function at all times according to the two main formulas of conciliation commissions and arbitration tribunals.

109. Finally, Professor Decaux recalled that there was no contradiction or competition between the institutions of the Council of Europe and the CCA within the OSCE: while the European Court of Human Rights, at the end of a public trial, renders judgments with the authority of *res judicata*, the CCA for its part responds above all to the need for amicable settlement, through the good offices of a neutral third party, making it possible to conciliate, if not to reconcile the parties. Unlike the Venice Commission, the CCA does not issue a public opinion, but must attempt, in a confidential manner, to practise "quiet diplomacy" in order to promote the first steps towards a way out of a crisis.

110. In his speech, Judge KOURULA recalled the CCA's mandate, which is to settle, by means of conciliation and arbitration, disputes between States submitted to it. The Conciliation Commissions and Arbitral Tribunals are created on an *ad hoc* basis. Thus, the CCA is not a permanent body but rather a standby institution, which can be activated on request. Its structure in terms of personnel and finance

[21] Belgium, Bulgaria, the Russian Federation, Slovakia and Canada.

[22] For example, new nominations were made by Austria, Belarus, Portugal in 2020 and most recently by Lithuania.

is thus relatively modest. The CCA added value is the flexibility of its main mechanisms as there is no single operating mode but rather several formulas to be resorted to with respect to conciliation as well as arbitration.

111. As to the structure, the CCA has two kinds of members, appointed by States Parties, in line with two different procedures, i.e. conciliators and arbitrators. The members elect the President of the CCA as well as a Bureau, complemented by alternates. The Bureau is the executive body that maintains contacts with the OSCE community, takes care of outreach activities, and represents the CCA in external relations.

112. Two avenues are offered: conciliation and arbitration. If an opportunity arises, they can be complementary. Conciliation can be unilaterally activated, by application, by any State party to the Stockholm Convention for a dispute between two States that have ratified it. In this manner conciliation becomes compulsory for all States Parties to the Convention, which was regarded as a principal innovation. Moreover, the procedures are equally open, on a voluntary basis, to OSCE participating States that have not yet ratified the Stockholm Convention, on the basis of an agreement between the States concerned.

113. The Conciliation Commission (the Commission) helps the parties to find a settlement in accordance with international law and OSCE commitments. The work of the Commission may result in a mutually acceptable settlement or, alternatively, no mutual settlement is reached. In the former case, the terms of settlement are recorded in a summary of conclusions signed by the representatives of the parties to the dispute and the members of the Commission. In the latter case, the Commission prepares a final report with the proposal for the peaceful settlement. The report is notified to the parties who have to decide whether or not they accept the proposed settlement. A State is obliged to explain its reasons for the rejection of the proposed settlement.

114. In contrast to conciliation, the nature of arbitration between States is to adjudicate the dispute submitted to the OSCE Court with the authority of a final decision. The arbitration procedure can be initiated by agreement between States Parties to the Convention or by OSCE participating States. In this connection it may be recalled that States can also declare that they recognise as compulsory the jurisdiction of an Arbitral Tribunal (the Tribunal), which is subject to reciprocity.[23]

115. In accordance with the principle of a fair trial, all the parties to the dispute have the right to be heard during the arbitration proceedings. Hearings are held in camera unless otherwise agreed. The Tribunal shall have the necessary fact-finding and investigative powers to carry out its tasks. It takes its decision in accordance with the rules of international law. However, this does not prevent the Tribunal to show flexibility and decide a case *ex aequo* et *bono* if the parties to the dispute so agree. The award shall state the reasons on which it is based. It is binding on the parties, final and not subject to appeal.

116. Finally, Judge Kourula recalled that, for the purpose of safeguarding the existing means of settlement, the Convention contains a number of cases when a Conciliation Commission or an Arbitral Tribunal shall not take further action. They include, *inter alia*, disputes, which have been submitted to a tribunal or court, prior to having been submitted to the CCA, or which have already been decided.

117. In response to a question from the Chair concerning the reasons for which States did not use the conciliation procedure despite its numerous practical advantages compared to other forms of dispute settlement procedures, Judge Kourula explained that States have historically been very cautious and gave a subsidiary role to the CCA in order to ensure the adoption of the Stockholm Convention. Another reason is that disputes between States, notably a number of frozen conflicts, often involve sensible political issues, so political efforts are first needed to bring the case before the CCA, even if it would be a suitable institution to settle such cases. In the same sense, a number of “big countries” are so far reluctant to use the CCA, even if some of them are signatories to the Stockholm Convention. Finally, Judge Kourula indicated that if there was strong trust between States, the CCA would have the opportunity to settle smaller disputes, possibly moving on to more important cases later.

[23] During the existence of the Court six States, Greece, Denmark, Finland, Sweden, Malta and North Macedonia (FYROM) have made such a declaration. These declarations have, however, all expired.

118. Answering a question concerning advisory opinions, Judge Kourula recalled that in 1992, when the Stockholm Convention was being drafted, some countries feared that the CCA would interfere in certain issues. Thus, the CCA had to be very cautious with the use of advisory opinions. In response to another question regarding the costs of the procedure, Judge Kourula pointed out that one of the main issues concerning the attractivity of the CCA is the costs since any intervening party bears their own costs. A possible solution to this issue would be the establishment of a working capital or a fiduciary fund financed by voluntary contributions. However, the operating costs of the CCA are not so important and in any case the ratio between its efficiency and its costs would be very good for the States.

119. Professor Decaux, returning to the question asked by the Chair, stressed that the time of States is not the time of individuals, even if it is disappointing that so little has happened in 30 years, and that it is necessary to see things in a long-term perspective. The CCA needs to find intermediary disputes, as disputes that are too political are insoluble for the CCA in the absence of political will. Disputes between neighbouring countries or EU member States can be settled directly through negotiation and goodwill, so these disputes are also outside the scope of the CCA. However, there is an intermediate zone where the CCA could have a role to play, notably through the use of flexible instruments such as advisory opinions, in clearing the way for an agreement.

120. Professor Decaux also indicated that the CCA conducted its own internal review to identify reasons of this situation. He felt personally that, maybe, the CCA, which originally consisted of “giants” such as serving ministers, prominent diplomats and judges, may have been too intimidating, because of its political weight, for small or average disputes. Subsequently, the CCA may have seemed too discrete, too academic and too distant. He now wants the CCA to be a pragmatic court, and to ensure the feasibility and operability of its procedures in order to be ready, should a case arise.

121. Furthermore, regarding conciliation experiences, Professor Decaux drew the attention of the CAHDI members to a recent success in this field namely the dispute between Australia and East Timor concerning their maritime borders. In two years (between 2016 and 2018) a solution was found by a conciliation body chaired by a Danish diplomat and composed of two judges from the International Tribunal for the Law of the Sea (ITLOS) appointed by one country and two other experts appointed by the other country. The conciliation solution can therefore work.

122. In reply to a question regarding the role of external legal counsels in the process of conciliation and arbitration and the possibility to rely more on internal legal counsels, Professor Decaux pointed out that the main advantage of the CCA was its flexibility. Thus all depended on the choice of the States: if they wanted an economic format it would be possible for them to rely only on internal legal counsels; on the other hand, they can also choose to involve a large number of legal counsels including external legal counsels. The same applied to the duration of the procedure, which also depended on the choice of the States.

123. The Austrian representative recalled the very optimistic and positive times of the adoption of the Stockholm Convention in 1992 when it was hoped that an increasing number of international disputes would be settled by recourse to arbitration and conciliation procedures. It was in this spirit that the CCA was created. Since then, Austria has endeavoured to promote the CCA, notably together with Switzerland. He concluded by expressing the hope that States will take advantage of the CCA.

124. The Swedish representative stated that the CCA should be at the heart of the OSCE. He recalled that Sweden is the depositary of the Stockholm Convention and that the Minister of Foreign Affairs of Sweden, Ms Ann LINDE, is the Chairperson-in-Office of the OSCE. The main priorities of Sweden’s Presidency are to defend European order and security and the OSCE global security concept and to contribute to the resolution of conflicts in the OSCE area. The principle of peaceful settlement of disputes is an integral part of the European security order. The CCA, with its set of peaceful settlement of disputes mechanisms, is an important element of the OSCE toolbox. However, it is still waiting its first case. Thus, it is necessary to make the CCA more visible and to ensure that it is ready to carry out its tasks – an endeavour which was followed by Professor Decaux and Judge Kourula in an excellent manner. Sweden wishes to make its contribution, as Chair-in-office and depositary of the Stockholm Convention, and therefore wishes to organise a seminar to discuss these issues of practical interest in June 2021 in Vienna.

125. The representative of France reiterated the full support of France to the CCA and to any initiative that will allow it to be activated as well as better known.

126. The Chair thanked all the participants for this enriching discussion which will contribute to the CAHDI's debates on the question of the mechanisms of peaceful settlement of disputes. The CAHDI members would be able to share these discussions and reflections on how to promote the role of the CCA in their respective capitals in order to help it to achieve the purpose for which it was created. The Chair warmly thanked Professor Decaux and Judge Kourula for this very interesting insight into the work of the CCA.

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

128. The French representative informed the delegations on the judgment rendered in December 2020 in favour of France against Equatorial Guinea before the ICJ.[24] The representative of France indicated that the judgement was of particular importance as it relates to matters of diplomatic immunities. The court specified the requirements to be met in order for premises to be recognised as diplomatic. These must be based on a bilateral relationship, a request made and accepted by the host State, and cannot be based on a unilateral decision.

129. The representative of the United States of America informed the CAHDI on the ICJ judgment on preliminary objections in the *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)* case.[25] The United States representative stated, that while disappointed with the result in the matter, the US respects the judgment made by the Court. They deplored Iran's continuation of these cases despite the change in attitude of the new US administration. With regard to the *Certain Assets* case,[26] challenging the US legislation providing support to victims of terrorism allegedly perpetrated and supported by the Iranian government, the representative signalled that they had entered the merits phase, with written procedure underway and oral procedure expected at the end of 2021 or the start of 2022.

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

130. In the framework of its activity as the *European Observatory of Reservations to International Treaties*, the Chair first drew the attention of the delegations to document CAHDI (2021) Inf 2 containing reactions to reservations and declarations to international treaties previously examined by the CAHDI and for which the deadline for objecting had already expired. The reservations and declarations to international treaties still subject to objection were contained in document CAHDI (2021) 4 prov *Confidential*, which included 11 reservations and declarations. Four of them were made with regard to treaties concluded outside the Council of Europe (Part I of the document) while seven of them concerned treaties concluded within the Council of Europe (Part II of the document). She further referred to the tables of objections contained in document CAHDI (2021) 4 Addendum prov *Confidential Bilingual* which aimed at assisting delegations to inform themselves of objections submitted so far by States represented within CAHDI as well as to note down reactions from delegations during the meeting with regard to the reservations and declarations to be examined.

[24] *Immunities and Criminal Proceedings (France v Equatorial Guinea)* (Judgement on the Merits), 11 December 2020.
[25] *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)* (Preliminary Objections), 3 February 2021.
[26] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*.

- *General discussion in relation to reservations implying the exclusion of any treaty-based relationship in between the reserving State and another State Party to the treaty in relation to which the reservation is formulated*

131. The Chair indicated that, at the 59th meeting, the CAHDI had already discussed a declaration made by Azerbaijan to the Intergovernmental Agreement on Dry Ports (2013) now included as item A.1 of document CAHDI (2021) 4 prov *Confidential*. By its declaration Azerbaijan declares that the provisions of the Agreement shall not be applied "in respect of the Republic of Armenia" and states, in addition, that Azerbaijan "does not guarantee the implementation of the provisions of the Agreement in the territories occupied by the Republic of Armenia (the Nagorno-Karabakh region of the Republic of Azerbaijan and its seven districts surrounding that region)".

132. At the 59th meeting, several delegations had raised doubts as to the possibility for a party to a multilateral convention to exclude the application of the convention in relation to another State Party which it recognises as such. The CAHDI agreed at the time that, at this meeting, a general discussion would be held on the topical question raised by this declaration, namely the "Permissibility of reservations implying the exclusion of any treaty-based relationship in between the reserving State and another State Party to the treaty in relation to which the reservation is formulated".

133. The Slovenian representative recalled that the ILC "*Guide to Practice on Reservations to Treaties*" (ILC Guide) does not touch upon such unilateral statements when they are made against another State that is otherwise recognised by the declaring State. The Guide would, however, address the issue of a State excluding the applicability of a treaty to parts of its own territory. It also notes that exclusion of applicability of a treaty as a whole to a territory represented by another State in its international relations was not a reservation in the sense of the Vienna Convention on the Law of Treaties (VCLT) and therefore outside the scope of the Guide. Therefore, one would have to fall back to the basic principles of treaty law, namely *pacta sunt servanda*. Whether these unilateral statements were counted as reservations in the meaning of the VCLT or not, it was, according to the Slovenian representative, hard to suggest that a State could not regulate its bilateral relation towards another State within the regime of the multilateral treaty. Any valid multilateral treaty could only be applied in any concrete case in the framework of bilateral relations with a specific State Party. Moreover, the exclusion of the applicability of the treaty between two States was not unheard of in the regime of reservations to multilateral treaties. However, it usually occurred in the case of objections to reservations when a State opposes the entry into force of the treaty as between itself and the reserving State. It therefore could not be deemed impermissible *per se* just because it already occurs in the "reservations phase". The question of whether such unilateral statements are counted as reservations under the VCLT does however become valid with regard to treaties where all reservations are prohibited. If such statements are counted as reservations under the Vienna regime, they would be deemed as prohibited. If they are deemed as a separate and special kind of "reservations" the exclusion of application of the whole treaty with regard to another State could not be prohibited. This kind of reservation is notably specific enough, the scope *ratione materiae* and *ratione loci* of the obligations accepted by the reserving State is clear, and this exclusion does not affect other States Parties. The same position between the involved States would occur if one of them was not a party to the treaty. Particular attention should however be paid in cases of human rights conventions. Non-application of a treaty vis-à-vis a specific State party can mean an unjustified extension to the other State's citizens and may lead to discrimination based on nationality. Such reservations could be considered impermissible, as they would be contrary to the object and purpose of the treaty.

134. The Turkish representative indicated that, according to international law, diplomatic relations could be established by mutual consent of States as stated in Article 2 of the Vienna Convention on Diplomatic Relations (VCDR). In this regard, every sovereign State has 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 order, a State Party to an international legal instrument may deem it necessary and/or useful to inform other State Parties by means of a declaration on the scope of implementation of such instrument. Hence, unilateral statements, which exclude the application of the treaty to a non-recognised entity, should be considered in this context. The ILC Guide would also adopt this distinction regarding statements of non-recognition in its paragraph 1.5.1. According to this, a unilateral statement by which a State indicates that its participation in a treaty does not imply recognition of an entity which

it does not recognise, is considered to lie outside the scope of the Guide even if it purports to exclude the application of the treaty between the declaring State and the non-recognised entity. In the commentary to this paragraph the ILC emphasises that the word “reservation” referred to such statements was a misleading heading in this regard.

135. The Cypriot representative maintained that, in the context of the discussions on statements of non-recognition within the ILC and the ILC Guide, it was one matter for a State to make a unilateral declaration to the effect that its participation in the treaty would not imply the recognition of another party to the treaty. Categorising, however, a unilateral declaration whereby a State expressly excludes the application of a treaty between itself and the entity it does not recognise, was an infinitely more delicate matter. According to the Cypriot representative, as per the ILC Report, a statement of this kind clearly seeks to have and has a legal effect on the application of the treaty, which is entirely excluded, but only in the relations between the declaring State and the non-recognised entity. It seemed, thus, logical, in the view of the Cypriot representative, to also apply this reasoning to a statement having the effect of excluding the application of the entirety of a treaty in relation to another State even though the declaring State recognises the other State. According to the Cypriot representative as to whether a statement having such effect is indeed a reservation, although on the one hand it may be questionable whether a statement having such an effect, even when designated as a reservation, constitutes a reservation as generally understood under the VCLT since it does not purport in the usual circumstances to amend or modify any substantive provision of the treaty, the real question is whether because the statement does in effect exclude or modify the legal effect of certain provisions of the treaty, the statement would indeed qualify as a reservation, and, if it so qualifies, its permissibility would depend on whether it is prohibited or is incompatible with the object and purpose of the treaty.

136. The Greek representative stated that her country had, on various occasions, declared its intention to object to declarations whereby a country declares that it would not apply in its entirety a convention between itself and the country with regard to which the declaration is deposited. Greece considers such declarations problematic from the legal point of view as they would amount to reservations the purpose of which is to exclude the application of a treaty in its entirety between two States Parties to the same convention. In cases in which not permitted by the respective convention such reservations would be considered as contradictory to the object and purpose of the convention and could hence not be admissible.

137. The Austrian representative noted that already at the last meeting of the CAHDI he had raised doubts as to the permissibility of declarations of this kind. The representative further maintained that, with regard to a multilateral treaty, a distinction needed to be made between whether or not a State becoming a party to the multilateral treaty has diplomatic relations to individual other parties to the treaty, on the one hand, and, on the other hand, to state that the treaty applies to the entire territory of all parties to the treaty. Therefore, if a reservation is made to the extent that a State declares its wish to exclude the application of the treaty to a certain territory of another State this contravenes the object and purpose of the treaty since it is the object and purpose of a multilateral treaty to apply to the entire territory of the States that have become party to the treaty whether or not diplomatic relations between these two States exist or not.

138. The Chair thanked delegations for the fruitful discussion and suggested that on the basis of the comments made she and the Vice-Chair, assisted by the Secretariat, would prepare a working document on the issue in order to focus the discussion on this general topic at the next meeting.

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

139. The Chair then draw the attention of delegations to the 10 remaining reservations and declarations to be examined at this meeting by the CAHDI as incorporated in document CAHDI (2021) 4 prov *Confidential*.

140. With regard to **reservations made by Oman** to the *International Convention for the Protection of All Persons from Enforced Disappearance (2006)*, the representatives of Finland, the Netherlands and Norway indicated that their countries were considering to object to the reservation made with regard to Article 33 of the Convention.

141. The Swiss representative noted that the reservation aimed at excluding all visits in the meaning of Article 33 of the Convention on Oman's territory. Even if Article 33 provided States Parties with the possibility of requesting the postponement or cancellation of a planned visit it was a different matter to exclude all visits through a general ban. Such visits would be necessary for the general balance of the system under the Convention. The reservation by Oman would hence concern the very object and purpose of the Convention and Switzerland was hence considering objecting to it.

142. The Portuguese representative echoed the analysis made by the Swiss representative. The object and purpose of a Convention was not to be seen merely in relation to its substantive parts but also as concerned the use of its mechanisms and procedures. The Portuguese representative emphasised that Article 33 of the Convention was an essential part for the implementation of the Convention. Portugal would hence consider the reservation to be contrary to the object and purpose of the Convention and was envisaging to object to it.

143. The Japanese representative indicated that eliminating the system of visits under Article 33 of the Convention altogether appeared too far-reaching and such a reservation seemed hence hardly compatible with the Convention's object and purpose. Yet, the purpose of this particular Convention could only be realised with worldwide participation and accessions to the Convention were thus generally to be welcomed. Japan would in general attach great importance to the literal or conservative interpretation of reservations. Striking the right balance between universality and upholding the normative value of the Convention would, however, present a difficult challenge.

144. With regard to **declarations made by Kazakhstan** to the *Convention on the Privileges and Immunities of the Specialized Agencies (1947)* the Chair noted that with the first part of the notification Kazakhstan aimed at excluding its own nationals from some of the privileges and immunities to be granted to the officials of the Specialised Agencies. This might be problematic given that, and as stated in Section 22 of the same Convention, "privileges and immunities are granted to officials in the interests of the United Nations and not for the personal benefit of the individuals themselves". In the past similar reservations had been made by some States also with regard to the 1946 Convention on the Privileges and Immunities of the United Nations, especially as regards national service obligations, without any country objecting to such reservations. The second part of the notification concerned the definition of the term "customs duties" in the meaning of Section 9 of the Convention. The fact that it subjects the exemptions to be granted to those existing under its national law appears to amount to a reservation. Reservations are neither allowed nor prohibited under the Convention but the object and purpose of Section 9 of the Convention appears to be to exclude the use of any custom duties on specialiced agencies and not only those the exemption for which is foreseen by national law.

145. The Japanese representative noted that there was no reservation clause in the Convention and Section 19, Article 6 of the Convention did not mention the non-applicability of the privileges and immunities to the nationals of the host country whereas Section 20 clearly did. This raised, in view of the Japanese representative, firstly, the question, whether reservations to other provisions of the Convention than to Section 20 were allowed, and, secondly, if so, what would be the limits of permissible reservations. Although some countries would take the position that no reservations should be allowed the representative drew the attention of delegations to the fact that other countries including CAHDI members had made reservations to certain provisions of the Convention. The drafting history of the Convention indicated the necessity-based nature of the privileges and immunities bestowed by the Convention, meaning that these were accorded to the extent required for the independent exercise of the functions of the UN and its special agencies. Officials may hence also require some privileges and immunities against the State of which they are nationals. In addition, in view of budgetary or fiscal implications the equality of treatment of officials and member State equality might also be considered to be important factors.

146. The Japanese representative then pointed to a related issue namely to the practice of bilateral treaties on privileges and immunities of an international organisation. Such treaties tend to have provisions narrowly limiting the scope of privileges and immunities and include clauses that do not provide for privileges and immunities for local staff members for certain areas. This is due to the fact that bilateral treaties tend to focus more on the functionality of privileges and immunities than multilateral treaties and equality between local staff and the nationals of the host country is more accentuated. The Japanese representative emphasised that while it was important to ensure the basic principles covering privileges and immunities - independent functioning of international organisations,

equal treatment of officials and equality among member States - any possible impact bilateral treaties on privileges and immunities of international organisations might have on existing multilateral treaties should be discussed to the extent that adjustments to the existing conventions might become necessary in the future.

147. 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 Convention allowed for reservations but expressly prohibits reservations incompatible with the object and purpose of the Convention in its Article 28 paragraph 2. The reservations and declarations made by the United Kingdom regarding the Bailiwick of Jersey related to fields such as nationality, employment, social benefits, legal capacity, marriage and family relations. These areas could be considered as belonging among the core areas of the Convention within which discrimination against women shall be eliminated. The reservations made appeared to maintain existing discriminatory laws even if, in some cases, merely pending the planned abolition of the said law. The representative of the United Kingdom undertook to provide delegations with a note on the background of these reservations and declarations after the meeting.

148. With regard to the **declaration made by Turkey** to the *Council of Europe Convention on an Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events (CETS No. 218 - 2016)* stating that their ratification of this Convention "neither amounts to any form of recognition of the Greek Cypriot Administration's pretention to represent the defunct "Republic of Cyprus" as party to the Convention", neither should it imply any obligations by Turkey "to enter into any dealing with the so-called Republic of Cyprus" in the context of this Convention. The Chair indicated that Cyprus had notified an objection against this declaration. No comments by delegations were made with regard to this declaration.

149. With regard to the **declarations made by Finland** to the *Council of Europe Convention on Access to Official Documents (CETS No. 205 - 2009)* the Chair noted that Finland had ratified the Convention on 5 February 2015 and notified these declarations on 22 September 2020. The Finnish representative explained that when preparing the national government decree to bring the Convention into force in September 2020 they had come across that these declarations were not included in the instrument of acceptance deposited in 2015. The declarations had been formulated by the competent national authorities during the internal acceptance process of the Convention but due to an administrative oversight they had not been included in the instrument of acceptance albeit they were included in the national documents submitted to the parliament and to the President of the Republic when the agreement was ratified. The Finnish representative referred to the depositary practice of the Council of Europe according to which the late formulation of reservations had been seen justified in certain cases without any of the Contracting States having objected or opposed to these late reservations or declarations. In these cases, similarly to the case at hand, a certain reservation or declaration that had been formulated by the competent national authority during the internal ratification process had been forgotten at the time of the deposit of the instrument of ratification and thus communicated to the depositary late.

150. With regard to the **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 Chair indicated that since Monaco had ratified the Convention on 23 April 2019 and deposited these reservations and declarations on 21 October 2020, the question of late reservations and declarations arose also in this case. The representative of Monaco took the floor to explain, as already indicated in the notification of these reservations and declarations, that Monaco had not considered it necessary to make these reservations and declarations at the time of ratification for various reasons. This was, first, due to the fact that it was only the conclusions of the Conference of the Parties to the Convention that revealed an inconsistency between Article 7, paragraph 2, sub-paragraph c of the Convention and relevant Monegasque law - an inconsistency that had not been apparent to the Monegasque authorities when conducting an evaluation of the domestic law in the light of the exigencies of the Convention at the time of ratification. Second, the declarations under Article 9; Article 24, paragraph 3; Article 31, paragraph 2; Article 35, paragraph 3 and Article 42, paragraph 2 of the Convention only became necessary when a new central authority in the meaning of Article 33, paragraph 2, responsible for sending and answering requests for international co-operation was designated by Monaco in March 2020 and, thus, these declarations could not be made at the time of the deposit of the instrument of ratification in April 2019.

151. With regard to the declarations made by **Austria, Belgium, the Czech Republic and the Netherlands** 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. The Chair indicated that these four declarations were the first ones of this kind, but that it was to be expected that similar declarations would be notified by all member States of the EU in the foreseeable future. No delegation took the floor with regard to these declarations.

## III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

### 12. Consideration of current issues of international humanitarian law

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

153. The representative of Switzerland informed delegations of an event in June 2021 organised by the Swiss Interdepartmental Committee on IHL together with the International Committee of the Red Cross (ICRC). At this meeting national IHL committees from around the globe would gather to discuss the advantages of producing a report on the national implementation of IHL and provide a space for peer-to-peer exchange among such committees on good practices in voluntary reporting. The ICRC representative embraced the efforts undertaken by Switzerland to carry this issue forward. The planned event would surely lead to concrete measures on the national implementation of IHL.

154. The representative of the United States of America took the floor to reaffirm the commitment of the new US administration of the United States to its obligations under IHL. The new administration is conducting a series of reviews on a number of areas that it hopes will be influential in strengthening this commitment. These include the identification of any laws which should be re-examined or repealed as obsolete, enforced efforts to disengage from old conflicts that have been ongoing for a number of years, the reconfirmation that direct action policies are fully consistent with the rules of IHL, a renewed commitment to closing Guantanamo and, lastly, with regard to cyberspace, the cooperation with its allies to bring international technologies like autonomous weapons and other kinds of artificial intelligence under the norms of international law.

155. The Finnish representative informed the CAHDI of the implementation process of Finland's pledge made at the 33rd International Conference of the Red Cross and Red Crescent (9 - 12 December 2019) to increase knowledge and awareness of the ICRC "*Guidelines on the Protection of the Natural Environment in Armed Conflicts*" among the military, government officials, decision makers, the judicial sector, experts and the general public. The launching of the Finnish translation of the guidelines was planned for the spring of 2021 followed by an expert meeting on the guidelines and their usage in the training of the Finnish defence forces.

156. The Irish representative informed the CAHDI on the latest developments in Ireland with regard to IHL. On 8 December 2020, the Irish national committee on IHL held its annual meeting with representatives from the Ministry of Foreign Affairs, the Irish Red Cross and the Irish Defence Forces focusing, *inter alia*, on the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, the dissemination of knowledge and awareness of IHL as well as issues related to the UNSC and weapons law. On 1 January 2021, Ireland had taken up its two-year membership within the UNSC. In the context of the CAHDI, the theme of accountability appeared to be the most relevant among Ireland's priorities during this two-year term. In the framework of this theme, Ireland will endeavour to enhance its support for the ICC and other international criminal courts and tribunals as well as to accountability mechanisms beyond those operating with respect to Myanmar and Syria along with its continued support to the ICJ in its key role in the international legal architecture on international accountability issues. The Irish representative further drew the attention of the delegations to the discussions on a political declaration on the use of explosive weapons in populated areas facilitated by Ireland which had resumed after delays that had occurred due to the pandemic. Lastly, the Irish representative welcomed the entry into force of the 2017 Treaty on the Prohibition of Nuclear Weapons on 22 January 2021.

157. The German representative informed the CAHDI of the new voluntary report of the German national IHL committee on "*National Implementation of International Humanitarian Law*" issued in October 2020. In the same vain, the Romanian representative told delegations that also the Romanian voluntary report on the implementation of its obligations under IHL was about to be published.

158. The Austrian representative informed the CAHDI of amendments to the Austrian Red Cross Law which introduced a legal basis for the establishment of a national committee on IHL and stipulated an obligation for the State to provide for a regular and annual contribution to the national committee. The pandemic permitting, Austria is further hoping to be able to host a meeting of the European national committees on IHL as well as a conference on lethal autonomous weapon systems' laws in autumn 2021.

159. The Swedish representative informed delegations of an online panel discussion to be organised by the ICRC and the government of Sweden on the occasion of launching the "*Guidance for Armed Forces on the Protection of Health Care in Conflict*" on 31 March 2021. The event, with keynote remarks by Mr Peter MAURER, President of the ICRC, and Ms Ann Linde, Swedish Minister for Foreign Affairs, will highlight the concrete, practical ways in which armed forces can better protect medical workers and equipment as well as safeguard access to care in armed conflict. The logistical details would be made available shortly.

160. Lastly, the representative of the ICRC took the floor to inform the CAHDI on the implications of the COVID-pandemic for people living in conflict-affected areas, on the unsustainable humanitarian situation in North East Syria, as well as on other current issues on the ICRC's agenda.

161. The representative stressed the need to include the estimated 60 to 80 million people living under the control of non-state armed groups in governments' planning of COVID-19 vaccination campaigns. Although it was first and foremost the obligation of each State to ensure that all persons in its territory had access to a vaccine, the ICRC stood ready to assist in this 'last mile' of the global vaccination roll-out. However, in order to be able to do so, the ICRC needed political support. In this context, two aspects were worth recalling. First, the delivery of humanitarian assistance, including vaccines, in territory under the control of a non-state armed group did not affect the legal status of that group. In other words, humanitarian engagement does not legitimise a non-state armed group. Second, armed conflicts over the past decade had shown that counterterrorism measures can diminish the ability of impartial humanitarian organisations to carry out their humanitarian activities. To ensure that everyone benefits from vaccines, regardless of where they live, it is essential to preserve a 'humanitarian space'. The representative underlined the need of counterterrorism measures and sanctions regimes to comply with IHL. They must not restrict the right of impartial humanitarian organisations such as the ICRC to offer their services and must not impede the delivery of exclusively humanitarian activities in areas in which non-state armed groups designated as terrorist or included in sanctions lists are active.

162. The representative then recalled the unsustainable humanitarian situation in North East Syria due to which the ICRC calls on States to repatriate their own nationals currently present in places of detention and camps there, the great majority of whom are children. In this respect, the Council of Europe Parliamentary Assembly Resolution 2321 (2020) on the "*International obligations concerning the repatriation of children from war and conflict zones*," was to be welcomed as a concrete step in the right direction. The ICRC is urging States to consider the repatriation of their nationals as a way to build peace in the region and ensure a safer – more humane – future for all of us.

163. Lastly, the ICRC representative gave an update on the follow-up to the 33rd International Conference of the Red Cross and Red Crescent, which took place in December 2019. The ICRC had continued to work on implementing Resolution 1 entitled "*Bringing IHL Home: a roadmap for better national implementation of IHL*" and supporting States and National Societies in implementing the Resolution. Since the beginning of 2020, concerted efforts by the ICRC had contributed to 61 ratifications of or accessions to IHL treaties, other relevant instruments, or amendments to them, by a total of 39 States. One key focus of the Resolution related to national committees and similar entities on IHL. One important task that national IHL committees can undertake is to draft and publish a report on the implementation of IHL within their domestic legal framework and the representative welcomed the event mentioned by the Swiss representative. Supporting all these endeavours, the ICRC's Advisory Services on IHL continued to work on a number of materials meant to assist States and other actors towards better national implementation of IHL. It published legislative checklists on the domestic

implementation of the Anti-Personnel Mine Ban Convention,[27] on the Convention on Cluster Munitions and on the protection against sexual violence, and a new checklist on protecting health care from violence would be released soon. Finally, a guidance tool will soon be released on the implementation of the IHL resolution. The ICRC would be more than happy to share these tools with interested delegations.

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

164. The Chair welcomed and thanked Mr Peter LEWIS, Registrar of the International Criminal Court (ICC), for having accepted the invitation of the CAHDI. She underlined that it was a pleasure and a privilege for the Council of Europe and the CAHDI to count on his presence and have an exchange of views on the work and activities of the ICC.

165. Mr Lewis started by paying tribute to the ICC for the now almost 20 years of work. He acknowledged, in particular, the attention paid to victims, as well as the court's impartiality and respect for the rights of those standing trial.

166. Mr Lewis then took stock of the developments in the court in recent years. Notably, he referred to the 6 judges and new President recently welcomed by the court, as well as the imminent intake of a new Prosecutor, in light of a new phase of increased workload. Indeed, following a period of transition after the conclusion of a series of long-running cases over the last three years, such as those against *Bosco Ntaganda*[28] and *Dominic Ongwen*[29], the court now expects to see five cases running concurrently in the next three years. The Registrar congratulated the increase in victims participating, from 129 participating victims in the court's first case, *Lubanga*[30], to 2129 and 4095 in the recent *Ntaganda* and *Ongwen* cases respectively. The Registrar expected to see this trend increase, with the CAR II cases and the Darfur situation representing situations with a high number of victims which are expected to participate in the trials. He noted that despite the COVID-19 pandemic, which has posed challenges in international police cooperation, the ICC was still able to secure the arrest of two suspects. Yet 12 suspects remain at large, with the possibility of the latter number increasing as investigations progress. Mr Lewis encouraged CAHDI members to continue upholding their financial commitments to the court, despite the difficulties that may arise out of the pandemic.

167. Along with the difficulties created for the functioning of the Court by the COVID-19 pandemic, the Court has further faced difficulties due to the sanctions imposed upon the court and its personnel by US Executive Order 13928 of June 11, 2020 (Blocking Property of Certain Persons Associated with the International Criminal Court). The Registrar noted and was thankful for the support of the Netherlands and of the States Parties in speaking out against these measures. Mr Lewis stated that on this point, the priority remains the delisting of two individuals and the rescinding of the Executive Order.

168. Mr Lewis went on to discuss the Independent Expert Review (IER) process currently underway within the court. The IER process finds it mandate in a resolution of the Assembly of States Parties (ASP), which tasks a group of nine independent experts with identifying where the court may be able to improve in ways to achieve its goals, and to provide concrete recommendations aimed at enhancing the performance, efficiency and effectiveness of the court and the Rome Statute system as a whole. The final report of the Group of Independent Experts was submitted on 30 September 2020 and contained 384 recommendations covering a broad variety of the Court's work. The Registrar welcomed these suggestions and stated that the Court has started to examine how to properly implement them. Mr Lewis further referred to three other areas of development of the ICC, namely cooperation, universality and the adoption of national legislation implementing the main provisions of the Rome Statute on crimes and on cooperation.

169. Mr Lewis recalled Resolution 2134 (2016) of the PACE on "*Co-operation with the International Criminal Court: towards a concrete and expanded commitment*". The resolution notes that the Rome

[27] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction.
[28] ICC, *The Prosecutor v. Bosco Ntaganda*, ICC-01/04-02/06.
[29] ICC, *The Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15.
[30] ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06.

Statute has yet to receive universal status, with 123 States Parties since the recent addition of Kiribati. He noted that, in great majority, the Council of Europe member States are States Parties to the ICC and affirmed his commitment to continuing conversations with those remaining States that were not, in order to welcome them into the organisation in the near future. The PACE resolution further called upon States to establish mechanisms in their national legislation to effectively cooperate with the ICC and to conclude voluntary co-operation agreements with the ICC.

170. Regarding implementing legislation at a national level regarding the Rome Statute, Mr Lewis stated that this was key instrument in enacting effective and efficient cooperation mechanisms with the court, enabling successful interventions from it by providing procedural clarity. Such implementation at a national level would also help governments ensure that they can expeditiously respond to requests for assistance and cooperation coming from the court pertaining to areas such as arrest and surrender, tracing, recovery of assets and voluntary cooperation agreements. Mr Lewis further emphasised the importance of such cooperation agreements for filling the gaps left by the Rome Statute, especially in areas such as the protection of victims and witnesses, the enforcement of sentences and the release of persons. While no voluntary cooperation agreements were signed in 2020, he encouraged State Parties to do so in 2021.

171. Mr Lewis applauded the efforts of the Council of Europe, especially in the aforementioned Resolution 2134 (2016), as well as Resolution 2038 (2015), and Recommendation 2063 (2015) on the promotion of witness protection, as well as Resolution 1785 (2011), encouraging States to reform legislation in line with international standards with respect to war crime trials, including the transfer of war trial proceedings. In closing, he thanked the work of the CAHDI and the Council of Europe in its consistent support for the work of the ICC.

172. The United States representative took the floor to explain the position of the new administration on the ICC. He stated that they were closely studying the sanctions to see what the best solution would be. The new administration seeks to re-engage with all parts of the ICC, reminding of the US' recent involvement in aiding with the *Ongwen* and *Ntaganga* cases.

173. In reply to a question concerning the prioritisation of the recommendations established by the IER, Mr Lewis responded by saying that the initial focus of States should be on the changes that would require a change in the rules, on account of the need of approval by the ASP, which only meets once a year. His personal priority was tackling the issues around the culture of the court raised in the report, suggesting, for instance, the use of an ombudsperson as a solution to these issues.

174. The Japanese representative intervened to signal his country's particular interest in the prioritisation of cases in order to reinforce credibility and universality of the ICC. He further emphasised the need to avoid unnecessary delays in proceedings, so as to avoid the wasting of resources and ensure the protection of victims' interests. The different organs of the court should lay out timelines for each phase of proceedings and perform within that framework. In particular, he raised the issue relating to the need to start a fresh trial according to the Rome Statute should a judge become incapable of continuing. While this had not happened yet, when materialising this would cause significant delays if the Rome Statute was not amended or another creative solution found. The Japanese representative further encouraged approaching the issues of bullying and harassment by encouraging staff mobility. Mr Lewis noted that changes had been suggested in the past, but these had been rejected at the ASP.

175. The Portuguese representative reaffirmed her country's support for the ICC and expressed the need and importance for the economic impact of COVID-19 to be taken into account in the budgeting for the coming years. The Registrar responded by affirming his awareness of the impacts of COVID and affirmed that resources were being allocated as wisely as possible.

176. The German representative sought to emphasise the importance of national support and prosecution at the national level. He further welcomed the interaction between the ICC organs and national prosecutors and judges and encouraged that this should continue post-COVID.

177. The Swedish representative encouraged continued work on gender issues including an increased number of women in senior management of the ICC. In reply to the question on which elements of the review process would be the most challenging to implement, Mr Lewis stated that the IER had made certain radical suggestions, mostly with respect to governance, which could turn out to be difficult to implement. For instance, the recommendation to transform the Trust Fund into a fund-raising branch would require careful thought. He further expressed concerns, in particular as regards

the court's independence, about suggestions that the Registry should take over the functions of the Secretariat of the ASP. Furthermore, he was positive about the appointment of a gender focal point within the organisation.

178. In reply to a question as to how the ICC can ensure wide victim participation under the current financial constraints Mr Lewis pointed towards the exemplary work of the Victim Participation and Representation Unit in Darfur, operating thanks to support from civil society and many organisations in Darfur with able lawyers. He was positive about the recent decision of the pre-trial chamber recognising the power for NGOs to represent victims on a pro bono basis.

179. The Russian representative recalled their historical and continued commitment to fighting international crime but expressed concerns with respect to the current situation within the court following the IER. It was particularly worrisome to learn about the scale of harassment within the court. He further asked whether there would be a reform of the recruitment system and how the ICC would address the geographical imbalance signalled in the IER. In response, Mr Lewis noted the positive direction towards which the court was heading in tackling these issues, with a plan of action laid out in the IER. As to the recruitment system, he noted that the suggestions for reform in the IER had already been engaged. Regarding the geographical imbalance, the proposals in the IER might turn out not to suffice. Mr Lewis ensured his commitment to work with the ASP in order to decide whether more ambitious measures should be taken to correct this.

180. The representative of the Netherlands, along with other representatives, expressed concerns about the US sanctions, and the chilling effect that these might have on the work of the ICC. He encouraged States to continue their financial contributions to the ICC and the conclusion of voluntary cooperation agreements. Mr Lewis responded by confirming the impact of the sanctions, especially regarding the ability for the ICC to conclude private contracts. With respect to financial contributions, he noted the importance of sharing the burden between the different member States – if more States participate, the burden becomes lighter for all.

## 14. Topical issues of public international law

181. The Chair invited delegations to present any relevant information under this point.

182. The representative of the United States of America took the floor to discuss the proposed World Health Organization (WHO) treaty on pandemics. While he recognised the difficulties that have been caused by the COVID-19 pandemic and the need to come up with effective practical tools to manage such situations, he did not believe a pandemic treaty, as had been proposed by a number of European States, was the right solution in the short term. He suggested that States ought to wait for the results of the three reviews on the performance of the WHO currently underway due for presentation at the World Health Assembly in May 2021. Furthermore, the US' representative expressed concerns that the treaty would have little substantive effect if not done right. He further expressed concerns about the length of time it would take for such an instrument to be concluded and, subsequently, to enter into force. As an alternative, the representative suggested that a number of targeted modifications of the International Health Regulations be enacted in order to provide a short-term solution before embarking on a more complicated and thorough exercise of concluding a pandemic-specific treaty.

183. The Swiss representative intervened to encourage the opening of negotiations for a convention addressing crimes against humanity and to pay tribute to the work of the ILC on the topic. She encouraged States to take part in discussions regarding this point at the United Nations General Assembly (UNGA) in the autumn of 2021. Germany and Austria expressed their support for Switzerland on this point.

184. The German representative took the floor to present their position paper "*On the Application of International Law in Cyberspace*". The paper covers a broad variety of topics, including IHL, non-intervention, the use force and attribution. It seeks to reaffirm the relevance of existing international law as the most important regulatory framework also for international cyber operations. The document is available on the website of the Federal Foreign Office in English.

185. The Portuguese representative raised two issues under this item. First of all, she drew the CAHDI's attention towards the "*Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed*

*conflict*" released in the context of the Maritime Working Group of the Montreux Document Forum. The document is the result of over two years of consultations with various stakeholders, from the Maritime Working Group itself to international organisations, experts in international law, private maritime security companies and other industry and civil society actors. The document is an interpretative guide for the Montreux Document in the context of maritime security, compiling and reaffirming the obligations of States under international law, notably IHL, international human rights law and the law of the sea. The representative noted that the document is being finalised and will be published on the website of the Montreux Document Forum.

186. Secondly, the Portuguese representative drew the CAHDI's attention towards a case pending before the Portuguese courts relating to the status of diplomatic agents who are permanent residents of the receiving State, covered by Article 38 of the VCDR. The case related to a diplomat who was arrested and detained after attacking his wife and her new partner with sulphuric acid. In considering whether this detention was legal, the court examined the meaning of "permanently resident" in Article 38 of the VCDR. The court considered that permanent residence covered anyone who presents a lasting link to the receiving State, meaning a link that goes far beyond what is required from the effective fulfilment of diplomatic functions. The court listed a few examples, including the acquisition of property in the receiving State, a longer stay in the receiving State and the establishment of lasting bonds, such as becoming a parent of children that are nationals of the receiving State. In view of the circumstances, the court considered the diplomatic agent to be a permanent resident and thus to not be protected by diplomatic immunity. The court further considered that Article 29 of the VCDR should be interpreted restrictively when blunt disrespect for human rights is at stake and there is an intention to prevent crime that can endanger human life. More generally, the court stated that all rules of the Portuguese legal system need to be interpreted in light of human rights, here in light of the right to an effective remedy.

## IV. OTHER

### 15. Place, date and agenda of the 61st meeting of the CAHDI

187. The CAHDI decided to hold its 61st meeting in Strasbourg (France), on 23-24 September 2021. The CAHDI instructed the Chair of the CAHDI, to prepare, in due course, the provisional agenda of this meeting in co-operation with the Secretariat.

### 16. Any other business

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

### 17. Adoption of the Abridged Report and closing of the 60th meeting

189. The CAHDI concluded its 60th meeting by adopting its abridged report.

190. The representative of Turkey, Mr Firat SUNEL, took the floor to inform the CAHDI members that it will be his last participation after five years with the CAHDI further to his appointment as Ambassador in New Delhi.

191. Furthermore, the representative of the Czech Republic and former Chair of the CAHDI, Mr Petr VALEK, informed that he will leave the CAHDI after nine years of participation as he was taking up a new post as Ambassador in Strasbourg.

192. Likewise, the representative of Norway, Mr Helge SELAND, informed also about his departure after five years with the CAHDI as he was appointed Ambassador in Strasbourg.

193. The Chair of the CAHDI expressed her recognition and gratefulness to the three CAHDI members and wished them great success in their future endeavours.

194. Before closing the meeting, the Chair thanked all CAHDI experts for their participation and efficient co-operation in the good functioning of the remote 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

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# APPENDIX II

## AGENDA

**I. INTRODUCTION**

**1. Opening of the meeting by the Chair, Ms Alina OROSAN**

**2. Adoption of the agenda**

**3. Adoption of the report of the 59th meeting**

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

- *Statement by Mr Jörg POLAKIEWICZ, Director of Legal Advice and Public International Law*
- *Replacement of the old databases by the new ones, information provided by the Secretariat*

**II. ONGOING ACTIVITIES OF THE CAHDI**

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

**a. Working methods: Non-paper on the Evaluation of the Activities of the CAHDI**

**b. Opinion of the CAHDI on Recommendation 2191 (2020) of the Parliamentary Assembly of the Council of Europe (PACE)**

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

**6. Immunities of states and international organisations**

**a. Topical issues related to immunities of states and international organisations**

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

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

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

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

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

**9. The European Convention on Human Rights and cases before the European Court of Human Rights involving issues of public international law**

- *Exchange of views with Judge Robert SPANO, President of the European Court of Human Rights*

- *Overview of the state of play in relation to the EU accession to the European Convention on Human Rights*

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

**10. Peaceful settlement of disputes**

- *Exchange of views with Mr Emmanuel DECAUX and Mr Erkki KOURULA, President and Vice-President of the OSCE Court of Conciliation and Arbitration*

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

- *General discussion in relation to reservations implying the exclusion of any treaty-based relationship in between the reserving state and another state party to the treaty in relation to which the reservation is formulated*

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

## III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

**12. Consideration of current issues of international humanitarian law**

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

- *Exchange of views with Mr Peter LEWIS, Registrar of the International Criminal Court*

**14. Topical issues of public international law**

## IV. OTHER

**15. Place, date and agenda of the 61st meeting of the CAHDI: Strasbourg (France), 23-24 September 2021**

**16. Any other business**

**17. Adoption of the Abridged Report and closing of the 60th meeting**

# APPENDIX III

## SPECIAL GUESTS: PRESENTATIONS

Mr Emmanuel DECAUX, President of the OSCE Court of Conciliation and Arbitration
Presentation

Judge Erkki KOURULA, Vice-President of the OSCE Court of Conciliation and Arbitration
Presentation

Mr Peter LEWIS, Registrar of the International Criminal Court
Presentation

Judge Robert SPANO, President of the European Court of Human Rights
Presentation