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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

(CAHDI)

Meeting report

62nd meeting
24-25 March 2022
Strasbourg, France (hybrid meeting)

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

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

1 INTRODUCTION

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

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 62nd meeting in Strasbourg (France) on 24-25 March 2022, with Ms Alina OROSAN (Romania) as the Chair. Due to the COVID-19 pandemic, the meeting was held in hybrid format. The list of participants is set out in **Appendix I** to this report.

2. The Chair opened the meeting and welcomed the experts attending the CAHDI for the first time.

1.2 Adoption of the agenda

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

1.3 Adoption of the report of the 61st meeting

4. The CAHDI adopted the report of its 61st meeting (document CAHDI (2021) 18 prov) with the proposed amendments and instructed the Secretariat to publish it on the Committee's website.

1.4 Information provided by the Secretariat of the Council of Europe

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

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

6. Owing to the current circumstances, the Director based his presentation mostly on the developments related to the aggression by the Russian Federation against Ukraine and its consequences for the membership of the former in the Council of Europe. Immediately on 24 February 2022, the day when the military invasion by the Russian Federation in Ukraine began, the Ministers' Deputies, while condemning the armed attack on Ukraine in violation of international law and urging the Russian Federation to immediately and unconditionally cease its military operations in Ukraine, decided to examine without delay, and in close co-ordination with the Parliamentary Assembly and the Secretary General, the measures to be taken in response to the serious violation by the Russian Federation of its statutory obligations as a Council of Europe member State.[1] On the next day, on 25 February 2022, the Ministers Deputies agreed to suspend the Russian Federation from its rights of representation in the Council of Europe in accordance with Article 8 of its Statute.[2] The exact legal and financial consequences of the suspension were laid out in a resolution of the Committee of Ministers adopted on 2 March 2022.[3] Lastly, on 16 March 2022, the Committee of Ministers decided that the Russian Federation had ceased to be a member of the Council of Europe with immediate effect.[4] The CAHDI delegations were further informed of the legal consequences this entailed:[5] In addition to the lost representation rights already covered by the suspension, the Russian Federation ceased to be a member to the 10 partial or enlarged agreements to which it was, until then, a member or observer. Any participation by the Russian Federation in activities and programmes organised by or conferences convened by the Council of Europe will henceforth be governed by the provisions in force or practices applicable to participation by non-member States. As from its expulsion, the Russian Federation also ceased to be a Party to so-called

[1] CM/Del/Dec(2022)1426bis/2.3, decision adopted by the Committee of Ministers on 24 February 2022 at the 1426bis meeting of the Ministers' Deputies.

[2] CM/Del/Dec(2022)1426ter/2.3, decision adopted by the Committee of Ministers on 25 February 2022 at the 1426ter meeting of the Ministers' Deputies.

[3] Resolution CM/Res(2022)1 on legal and financial consequences of the suspension of the Russian Federation from its rights of representation in the Council of Europe, adopted by the Committee of Ministers on 2 March 2022 at the 1427th meeting of the Ministers' Deputies.

[4] Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe, adopted by the Committee of Ministers on 16 March 2022 at the 1428ter meeting of the Ministers' Deputies.

[5] These were outlined, in detail, in Resolution CM/Res(2022)3 on legal and financial consequences of the cessation of membership of the Russian Federation in the Council of Europe, Adopted by the Committee of Ministers on 23 March 2022 at the 1429bis meeting of the Ministers' Deputies.

'closed' conventions it had ratified or acceded to prior to the expulsion. The European Convention on Human Rights (ETS No. 5) represents a special case in this regard given that according to its Article 58 paragraph 3 a High Contracting Party that ceases to be a member of the Council of Europe ceases to be a Party to the Convention only 6 months later, i.e., in the case of the Russian Federation as of 16 September 2022. In spite of its expulsion, the Russian Federation will continue to be a Contracting Party to the so-called 'open' conventions and protocols concluded in the framework of the Council of Europe, to which it has expressed its consent to be bound, and which are open to accession by non-member States. The modalities of the Russian Federation's participation in these instruments will be determined separately for each of them by the Committee of Ministers or, when appropriate, by the State Parties.

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

2.1 Terms of reference of the CAHDI

7. The Chair recalled that the Committee of Ministers had adopted the CAHDI Terms of Reference for 2022-2025 at the 1418th meeting of the Ministers' Deputies on 23-25 November 2021 as they appeared in document CAHDI (2022) Inf 1 *Confidential*. The Terms of Reference had also been published on the CAHDI's public website.

8. The Chair then guided delegations through the main changes introduced to the Terms of Reference. Notably, the duration of the Terms of Reference has been changed to cover four instead of the previous two years. However, the Terms of Reference have only been approved for the first biennial period 2022-2023. For the second biennial period 2024-2025 they were approved on a provisional basis, subject to confirmation upon the adoption of the Organisation's budget for the same period. Structurally the Terms of Reference now contain "Main deliverables" instead of the previously outlined "Specific tasks" in order to better grasp the output of the Council of Europe intergovernmental sector.

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

9. The Chair presented a compilation of the Committee of Ministers' decisions of relevance to the CAHDI's activities (document CAHDI (2022) 1 *Restricted*).

10. The Committee of Ministers had, *inter alia*, taken note of the Abridged Report of the 61st meeting of the CAHDI. The document further contained links to the stocktaking document of the Hungarian Presidency of the Committee of Ministers, which took place from May 2021 to November 2021, as well as the priorities of the ongoing Presidency of Italy until May 2022.

11. In view of the prevailing circumstances, the document dedicated a Chapter to the "Situation in Ukraine" featuring all the decisions of the Committee of Ministers concerning the suspension and expulsion of the Russian Federation from the Council of Europe following its aggression against Ukraine.

3 CAHDI DATABASES AND QUESTIONNAIRES

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

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

13. The representative of the Netherlands recalled that he had announced, at the previous meeting of the CAHDI, the intention of his delegation to raise the issue of "Settlement of private law disputes of international organisations" at the meeting of the Sixth Committee of the United Nations General Assembly (UNGA) in October 2021. These discussions had been curtailed and cut short because of Covid-restrictions and the Netherlands was now wishing to return to the question at the upcoming meeting of the Sixth Committee with a view to raise in the

negotiations on the resolution on the *Rule of Law at the National and International Levels* a proposal to the UN Secretary General to report next year on how the UN itself complies with rule of law principles, in particular in respect of the settlement of private law disputes. The Netherlands had further already previously suggested to the Sixth Committee to place the subject of *Settlement of international disputes to which international organizations are parties* on the short-term program of work of the International Law Commission (ILC) rather than on its long-term program. The representative of the Netherlands welcomed ideas and comments concerning these two proposals from CAHDI delegations, including discussing them bilaterally.

3.2 Immunity of state-owned cultural property on loan

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

3.3 Immunities of special missions

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

3.4 Service of process on a foreign State

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

3.5 Possibility for the Ministry of Foreign Affairs to raise public international law issues in procedures pending before national tribunals and related to States' or international organisations' immunities

17. There were no comments from delegations concerning the questionnaire on *Possibility for the Ministry of Foreign Affairs to raise public international law issues in procedures pending before national tribunals and related to States' or international organisations' immunities* and the database on *The immunities of States and international organisations* to be considered under this sub-item.

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

18. The Chair noted that, since the last CAHDI meeting, the Secretariat had received the updated replies of Switzerland to the revised questionnaire on *The organisation and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs*, which could be consulted in document CAHDI (2022) 6 prov *Bilingual*.

3.7 The implementation of United Nations sanctions

19. The Chair noted that the delegation of the United Kingdom had transmitted its revised contribution to the database *Implementation of United Nations sanctions* to take account of the new legal regime on sanctions that had entered into force in the United Kingdom in 2021.

20. To conclude the item, the Chair noted that the replies to four of the questionnaires under this item of the agenda were currently still confidential, notably those concerning the *Settlement of disputes of a private character to which an international organisation is a party*, the *Immunity of State owned cultural property on loan*, the *Service of process on a foreign State* and the *Possibility for the Ministry of Foreign Affairs to raise public international law issues in procedures pending before national tribunals and related to States' or international organisations' immunities*. Delegations held an exchange of views on whether the confidentiality status of these questionnaires was still justified or whether this could be lifted in the interest of making this information publicly available, e.g., in a new database, provided that the CAHDI would decide to create such a database and find the financial resources to undertake such a project. Some delegations provided their views on the issue of confidentiality underlining, in particular, the need for the States to have the possibility to review their contributions before any possible publishing. The CAHDI decided that the Chair would prepare, together with the Secretariat, an inquiry form to be sent to all delegations to find out which questionnaires each delegation would be ready to render public. The results of the survey would then be presented at the next CAHDI meeting in September 2022.

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

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

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

4.2 State practice and relevant case-law

22. The Chair invited delegations to share information on recent developments in their countries regarding the topic of immunities which might be of interest to other delegations.

23. The representative of Canada informed delegations of a decision of 20 May 2021 by the Ontario Superior Court of Justice in the *Zarei et al. v. the Islamic Republic of Iran*[6] *case* in which the plaintiff's family members were among the numerous victims of the Flight 752 shot down in January 2020. The Court granted the plaintiffs motions for default judgment against the Islamic Republic of Iran, the Islamic Revolutionary Guard Corps and other named Iranian defendants finding that the downing of the flight was intentional and constituted terrorist activity under Canada's Criminal Code and State Immunity Act. The Court further found that there was no armed conflict in place at that time, which would constitute an exception to the definition of terrorist activity in the Criminal Code. The Court found that Iran, in those specific circumstances, did not benefit from State immunity and was liable to the plaintiffs for damages on the basis of the cause of action under the Justice for Victims of Terrorism Act. The representative underlined that normally States benefit from immunity before Canadian domestic courts, yet Section 6.1 of the State Immunity Act provided an exception for terrorist activity committed by States featured on the list of Foreign States Sponsors of terrorism which included Iran. The Court awarded damages and significant punitive damages which it considered to be appropriate in view of the enormity of Iran's misconduct, the need for stronger responses for breaches of customary international law, and the need for civil remedies in the ongoing war against terrorism.

24. The representative of Belgium reported on three following national decisions dealing with employment contracts and the 2004 United Nations Convention on Jurisdictional Immunity of States and Their Property (2004 Convention): The first decision was rendered by the French-speaking Labour Court of Brussels (*Tribunal du travail francophone de Bruxelles*) concerning the granting of a double vacation allowance.[7] The judge declared himself competent to hear the case under Articles 8 and 11 of the Convention since the defendant State had waived its immunity from jurisdiction by not invoking it *in limine litis*. The second decision was rendered on appeal by the Labour Court of Brussels in a dispute concerning the dismissal of a member of the service staff of an embassy, a national of the defendant State and holder of a residence permit.[8] Although this was a dispute concerning a contract of employment, the Court accepted the immunity of the employer's State. It recalled that the 2004 Convention has not yet entered into force but that the principles it contains are part of customary international law. The Court considered that the reference to "permanent residence" in point e) of Article 11 paragraph 2 of the 2004 Convention was not a codification of customary international law but a provision for the progressive development of international law which applied only to States Parties to the Convention; however, Belgium has signed but not yet ratified it. The third decision was rendered on appeal by the Labour Court of Brussels on 2 November 2021 in a dispute concerning the liability to Belgian social security of a locally recruited employee. In the first instance, the convictions in the employing State were accompanied by a penalty payment. On appeal, the State contested this penalty payment on the grounds that it enjoyed immunity from execution under international custom. The Court rejected this argument on the grounds that the 2004 Convention had not yet entered into force in Belgian law and that the State had not provided sufficient evidence to consider that Articles 19 and 24 of the 2004 Convention reflected customary international law. The Court found that the rule of non-seizability of property assigned to the functioning of a diplomatic mission was indeed of a customary nature,

[6] *Zarei v Iran*, 2021 ONSC 3377.
[7] Labour Court of Brussels, 1 September 2020, RG n° 18/770/A.
[8] Brussels Labour Court of Appeals, *B.A.M. v Republic of Indonesia*, Nr. 2018/AB/868, 2 November 2021.

but a penalty payment was not a measure of execution practiced on such property, its sole purpose is to ensure the effectiveness of a judicial decision.

25. The representative of Japan shared with the CAHDI what he considered to be a worrying development in Asia. On 21 February 2022, a member of the Japanese Embassy in China was detained by the Chinese authorities against the person's will in Beijing. The Japanese representative considered this detention to be a violation of Article 29 of the Vienna Convention on Diplomatic Relations (VCDR) and said that Japan made a severe protest against the Chinese side.

26. The representative of Switzerland shared a recent Swiss case involving a waiver of immunity by a cantonal judicial authority, following a procedure which had been opened against a member of the administrative and technical staff of an embassy suspected of aiding the abduction of children and resorting to forgery of documents. She stated that, in accordance with Article 32 of the VCDR, Switzerland had sent a formal request through ordinary diplomatic channels to the State concerned to waive the immunity from criminal jurisdiction of the embassy member. The State had accepted to waive the immunity to the extent of the facts under investigation.

27. The Swiss representative recalled that the United Nations Convention on Jurisdictional Immunity of States and their Property had been so far signed by 22 States and that it would only enter into force with 30 signatures. She therefore encouraged States which had not yet done so to ratify the convention.

28. The representative of the Netherlands informed delegations on a decision of The Hague Court of Appeal of 16 November 2021 on the interpretation of the 2004 Convention concerning immunity from execution in respect of embassy property.[9] The case involved the former residence of the Ambassador of Egypt which was derelict, and claimants argued that it could not be maintained that this building was "in use" or "intended for use" as defined by the Convention. The Court denied the waiver of immunity from jurisdiction and execution. The representative specified that no cassation proceedings had been engaged and that a similar case was pending concerning the property of the Embassy of the Republic of Congo.

29. The representative of Slovenia reported that, on 1 March 2022, the Consulate of the Republic of Slovenia in Kharkiv had been destroyed during a Russian attack. The Republic of Slovenia had strongly condemned this outrageous act and clear violation of international law. The representative recalled that bombarding undefended civilian buildings, which were not military objectives, was a war crime under international law. His country had informed international organisations about this serious violation of international law and co-signed the referral of the situation in Ukraine to the Prosecutor of the International Criminal Court (ICC) with a request to investigate the situation.

30. The representative of Israel referred to two class actions concerning State immunity which had been submitted before an Israeli court against the People's Republic of China (PRC) and certain Chinese officials regarding damages caused to Israeli citizens as a result of the Covid 19 outbreak. The Ministry of Foreign Affairs together with the Ministry of Justice submitted an intervening brief upholding the immunity of the PRC. The government asserted the tort exception to foreign immunity from civil action under Israeli and international law contained a requirement that the acts attributed to the foreign government must be carried out in the territory of the foreign State. Since the actions or omissions in question did not point out to acts carried out by the PRC on the territory of Israel, the Government and authorities of China and the officials representing China acting in official capacity enjoyed immunity. The Israeli District Court accepted this position and dismissed the claim based on immunity.

31. The Israeli representative further drew the attention of the delegations to a recent case against the United Nations Human Rights Committee (UNHRC) concerning the immunity of the United Nations (UN) before its courts.[10] A defamation lawsuit had been filed by an Israeli businessman

[9] The Hague Court of Appeal, *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt (I)*, PCA Case No. 2012-07, 16 November 2021.

[10] See, for further information, e.g., Israel: Rami Levy files defamation suit against UNHCR for publication of Black List - Business & Human Rights Resource Centre (business-humanrights.org).

against the UNHRC and the High Commissioner following the publication of a controversial database of a business enterprise working in the West Bank. The representative of Israel stressed that, while the plaintiff had raised justified claims regarding damages to his reputation and while the Government had strongly opposed the unprecedent and discriminatory action of the UNHRC, the Government and the Israeli courts continued to apply Israel's long-standing practice of upholding the immunity of the UN.

32. The representative of France pointed out two recent rulings of the French Court of Cassation: The first one concerned the enforcement in France of a judgment rendered abroad by the District Court of Amsterdam in a dispute between a company, an emanation of the Iraqi State, and a bank based in the United States.[11] The company was ordered by the Dutch court to pay a sum of money to the bank. The bank proceeded, after exequatur of the Dutch judgment, to an attachment of an asset held by a third party. The company challenged the legality of this attachment by invoking immunity from execution on the grounds that it was an emanation of the Iraqi State. The judges of the court of first instance and of appeal rejected this invocation of immunity and the Court of Cassation rejected the appeal of the company based on customary international law such as reflected by Article 19 of the 2004 Convention. The Court had evolved its own jurisprudence by judging that for the seizure to intervene, it was not necessary that there was a link between the seized property and the legal claim, and that a link between the property in question and the entity against which the procedure was conducted was sufficient. The second ruling was a decision of the French Court of Cassation of 12 January 2022,[12] in a case opposing a Libyan State authority, the Libyan Asset Recovery Committee, which had entered into an assistance contract with a French company subject to Libyan civil law and the Libyan judge with a view to recovering Libyan assets held abroad and having belonged to a Libyan private company. There was a dispute between the company and the Libyan authority on the execution of the contract. The judges of appeal retained the existence of an immunity for the benefit of the Libyan authority, but the Court of Cassation overturned this decision of appeal by noting that the dispute related to a commercial contract and that, as such, the immunity could not be invoked.

33. The Chair thanked delegations for their contributions and invited them to submit their contributions to the Secretariat and reflect them in the respective database.

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

5.1 EU accession to the ECHR – international law aspects

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

35. The Chair recalled that since the last CAHDI meeting the Group had met twice. The 11th meeting took place from 5 to 8 October and the 12th from 7 to 10 December 2021, both in hybrid format. The 13th meeting was scheduled to take place from 1 to 4 March. However, it was postponed to May due to the consequences within the Council of Europe of the Russian military invasion in Ukraine. Due to the cessation of membership of the Russian Federation in the Organisation, the negotiations will continue with the 13th meeting of the Group in the formation 46+1.

[11] Cour de Cassation, Chambre civile 1 – Formation de Section, 3 novembre 2021, Pourvoi n° 19-25.404.
[12] Cour de Cassation, Chambre civile 1, 12 janvier 2022, Pourvoi n° 20-20.516.

36. The Chair then reported on the recent developments in the negotiations Basket by Basket. Regarding Basket 1, "The EU's specific mechanisms of the procedure before the European Court of Human Rights", the Group had tentatively agreed on an operative paragraph for the triggering of the correspondent mechanism (Article 3, paragraph 5 of the draft Accession Agreement) as well as on corresponding paragraphs for the explanatory report. The Group further tasked the Secretariat with revising the proposal for the operative provision of Article 3, paragraph 5a, on the termination of the co-respondent mechanism to align its language with the wording of the preceding paragraph on triggering of the mechanism. The Group will revert to this provision at the 13th meeting in May.

37. Regarding Basket 2, the Norwegian delegation had introduced, at the 11th meeting in October 2021, a revised proposal on "Inter-party applications under Article 33 of the European Convention of Human Rights" which it had elaborated together with the Secretariat. This proposal consists of a new paragraph 3 of Article 4 of the draft Accession Agreement providing the EU with the possibility to establish whether an inter-party dispute between EU member States or with the EU falls within the scope of Article 344 of the Treaty on the Functioning of the European Union (TFEU) and containing an obligation for the applicant High Contracting Party to withdraw such dispute insofar as this is the case. The EU provided a number of concrete text proposals to the Norwegian revised proposal suggesting, for instance, to deal separately with the two categories of disputes, "horizontal disputes" (i.e., inter-party cases between EU member States) and "vertical disputes" (i.e., inter-party cases between EU member States and the EU). The Group further discussed ways how to better separate the various aspects of so-called "mixed applications", i.e., inter-party applications which partly fall within the scope of Article 344 TFEU, and whether it would be conceivable to entrust the distribution of the issues to the well-established informal coordination between the two European courts. The Group will revert to the issue of inter-party applications at its next meeting after delegations have had sufficient time to study the proposed amendments by the EU.

38. Regarding Basket 3, the "Principle of mutual trust", the delegations had tentatively agreed, at their 12th meeting in December 2021, on a text for a new Article 5b of the draft Accession Agreement which reads as follows: "Accession of the European Union to the Convention shall not affect the application of the principle of mutual trust within the European Union. In this context, the protection of human rights guaranteed by the Convention shall be ensured." The corresponding paragraphs for the explanatory report might still require some streamlining during the next meetings but otherwise also Basket 3, like Basket 1, appeared to be near to being closed.

39. Regarding Basket 4, "EU acts in the area of the Common Foreign and Security Policy (CFSP)", the EU had introduced, at the 12th meeting in December 2021, a negotiation document including concrete wording proposals for the draft accession instruments based on earlier discussions within the Group. In particular, the EU had proposed a new operative Article 1, paragraph 4a, to allow the EU to designate - in an application before the Court concerning an act, measure or omission which falls within the scope of the CFSP – one or more EU member State(s) to which such act, measure or omission would be attributable for the purposes of the Convention. The declared aim of the proposal is to give the CJEU sufficient time to assess, if it had not yet done so, whether it has jurisdiction with regard to such act, measure or omission. Based on this decision, the designated EU member State(s) could become respondent(s) and the application would in such case be deemed to be directed against the designated parties.

40. Several delegations had welcomed the EU's proposal, in particular, as it did not ask for a carve-out from the jurisdiction of the Court with regard to CFSP, that it confirmed, that the situation of the applicant should not deteriorate but that there would always remain a respondent party to any application lodged to the Court concerning CFSP measures. Delegations had, however, also expressed concerns and posed requests for clarification to the EU regarding this proposal. According to the Chair some of these issues were also relevant from the point of view of public international law, namely, the difference between attribution of an act and responsibility for it: The EU proposal foresaw the allocation of responsibility under the Convention for an EU act, measure or omission in the area of CFSP, in cases where the CJEU lacked jurisdiction, to one or more EU member State/s, i.e. thus disconnecting the *de facto* responsibility from the *de jure*

responsibility through the so-called re-attribution. The proposal did not, at least so far, clarify the criteria for the re-attribution and how these would ensure a factual link between the act, action or omission in question and the designated respondent(s). Delegations had further raised concerns on the proposal with a view to the "Draft Articles on the Responsibility of International Organisations for an Internationally Wrongful Act": The ILC advocates an organ-based attribution approach, which is supplemented by the principle of *de facto* control. This is essentially characterised by the fact that measures are attributed to the initiating organ, which exercises effective control over the conduct. The EU, on the other hand, seemed to follow the approach that responsibility must be based on the internal regulation of competence. For the 13th meeting in May, the EU is invited to provide the Group with more detailed replies to the questions raised by delegations.

41. As regards proposals submitted on amendments to Articles 6-8 of the draft Accession Agreement, including relevant parts of the other accession instruments, the Turkish delegation had presented, at the 11th meeting in October 2021, its non-paper regarding the proposal to revisit the said provisions in light of developments which had taken place since the adoption of the draft Accession Agreement in 2013. The non-paper underlined the need to preserve the integrity of the Council of Europe and the Convention system in view of the size of the EU as a regional organisation comprising 27 member States. The non-paper suggests, *inter alia*, to revisit Article 6 (Election of judges) in order to ensure that the participation of the members of the European Parliament (EP) would be limited to the election of judges and to avoid coordination amongst parliamentarians through their EP-based political groups. Regarding Article 7 (Participation of the European Union in the meetings of the Committee of Ministers of the Council of Europe), the non-paper underlines the need to avoid a situation in the Committee of Ministers (when supervising the execution of judgments by the Court) in which the sheer number of the EU and its member States render the presence of the non-EU member States meaningless in terms of negotiating and voting. The Group will discuss concrete wording proposals to be tabled by the Turkish delegation on these articles at the 13th meeting in May 2022.

42. The Chair concluded her report by stating that, in her view, the negotiations had already advanced considerably, especially with regard to Baskets 1 (EU's specific mechanisms of the procedure before the Court) and 3 (the principle of mutual trust). However, challenges still lay ahead of the Group with regard to the other two baskets. Especially the issue of CFSP was likely to remain one of the most complex issues still to be solved before the accession instruments could be considered finalised. The Chair stated her strong belief that the Group will manage to obtain significant progress also on the more challenging items during its 4 meetings anticipated still to take place before the end of the year.

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

43. The Chair opened the item and gave the floor to Mr POLAKIEWICZ who gave an overview of the consequences of the expulsion of the Russian Federation from the Council of Europe on its status as a Contracting Party to so-called 'closed' conventions of the Organisation which are only accessible to its member States as is the case for the European Convention on Human Rights (ECHR/the Convention, ETS No. 5).

44. The Director began by recalling that these 'closed' conventions did, in general, not contain a clause dealing with the situation where a State Party ceases to be a member. But even where such a clause was missing, it was inconceivable that a State that ceases to be a member of the Council of Europe could remain a Party to a closed convention. The Treaty Office of the Council of Europe was hence called upon to notify that the Russian Federation had ceased to be Party to these 'closed' conventions.

45. The issue was, however, different with regard to the ECHR, which provided, in its Article 58 paragraph 3, that "any High Contracting party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions." In view of the Director this formulation left open whether the delay of six months' foreseen in Article 58, paragraph 1 of the ECHR for the case of denunciation of the Convention by one Contracting Party was to be applied also in the case when a State ceased to be member of the Council of

Europe. Article 58, paragraph 3 had never been applied before and hence no assistance could be drawn from a precedent. He further pointed out to the difference between the French version of the paragraph which refers to the expression "*sous la même réserve*" in the singular form and the English version which refers to the expression "*under the same conditions*" in the plural form. Theoretically, these formulations could give rise to several possible interpretations and the choice between these interpretations was a highly important question in practice. On its answer depended not only the fate of some 18,000 applications introduced by or against the Russian Federation that are currently pending before the Court,[13] including inter-state applications such as the one related to Crimea[14] or flight MH17.[15] The question was also whether it would still be possible for any person under Russian jurisdiction, or other High Contracting Parties, to introduce applications relating to facts occurring prior to the end of the six-month period. The Court[16] and the Committee of Ministers,[17] acting in parallel, had opted for the interpretation that assimilates the cessation of membership in the Council of Europe with the denunciation of the Convention. As a consequence, the Russian Federation will remain a High Contracting Party to the Convention until 16 September 2022.

46. Regarding the supervision of the execution of ECtHR judgments, the Director indicated Resolution CM/Res(2022)3 to provide that "the Russian Federation is to continue to participate in the meetings of the Committee of Ministers when the latter supervises the execution of judgments with a view to providing and receiving information concerning the judgments where it is the respondent or applicant State, without the right to participate in the adoption of decisions by the Committee nor to vote".[18] The Russian Federation had, however, although invited, chosen not to attend the Human Rights meeting of the Committee of Ministers on 8-9 March 2022.

47. The representative of Türkiye noted that the decision of the Committee of Ministers to exclude the Russian Federation[19] came after the receipt of the letter from the Russian Minister of Foreign Affairs, Mr Sergey Lavrov, informing the Secretary General of the Council of Europe about the withdrawal of the Russian Federation from the Organisation and its intention to denounce the European Convention on Human Rights. He understood from the Director's presentation that this letter had no official value as it was merely a scanned copy and the original had so far not reached the Council of Europe. Regarding the closed treaties, the representative noted that some of the closed conventions concerned very sensitive matters and might be particularly important in the event of an armed conflict. Thus, an automatic termination of such conventions could hold a potential risk for further human rights abuses in Ukraine.

48. The representative of Portugal believed that the CAHDI was created to discuss issues such as the expulsion of the Russian Federation and the resulting implications for the ECHR system. The current situation could also invite the CAHDI to consider which procedures it could put in place in case of consultation on urgent matters. The ECHR, he underlined, was a key instrument to protect the rights of Russian citizens but also those of Ukrainians against the current actions of the Russian Federation. It was unfortunate that the Russian Federation will cease to be a High Contracting Party to the Convention, but this was clearly provided for in the Convention. Thus, Portugal welcomed Resolution CM/Res(2022)3. Regarding the execution of ECtHR judgments, the solution adopted was the one provided for in the Convention. It was therefore logical that the Committee of Ministers would continue its supervision of the execution

[13] 24.8 % of all pending applications allocated to a judicial formation.
[14] ECtHR, *Ukraine v. the Russian Federation (re Crimea)* [GC] (decision), nos 20958/14 38334/18, 16 December 2020.
[15] Case of *Ukraine and the Netherlands v. Russia* (nos. 8019/16, 43800/14 and 28525/20), concerning events in eastern Ukraine, including the downing of flight MH17.
[16] Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights, 22 March 2022.
[17] Resolution CM/Res(2022)3 on legal and financial consequences of the cessation of membership of the Russian Federation in the Council of Europe, adopted by the Committee of Ministers on 23 March 2022 at the 1429bis meeting of the Ministers' Deputies.
[18] *Ibid*., para. 7.
[19] CM/Del/Dec(2022)1428ter/2.3, decision adopted by the Committee of Ministers on 16 March 2022 at the 1428ter meeting of the Ministers' Deputies.

of judgments where the Russian Federation was the respondent or applicant State, even those rendered after 16 September 2022.

49. The representative of Germany noted that in the Resolution of the ECtHR of 22 March 2022 reference was made to the aim and purpose of the Convention and the need to protect individuals under it. This was another argument for the application of the six months period also in the case of cessation of membership in the Organisation and as followed in the respective decisions by the Court and the Committee of Ministers.

50. The representative of Latvia noted the current situation to raise several issues regarding the continued processing of applications in relation to the Russian Federation. Firstly, practical modalities of examination of these applications after 16 September 2022 were to be considered, and, more specifically, the question of the participation of the national judge in the examination of these applications, in particular in the context of the many pending inter-State cases in which the Russian Federation is a Party. Furthermore, it was to be considered how pending cases against other Council of Europe member States in which the Russian Federation is a third party, notably cases in which it has intervened because the applications were made by its citizens or in the interests of the proper administration of justice, were to be followed. And, finally, further clarification was needed on the practical arrangements for supervising the execution of the Court's judgments with regard to judgments rendered against the Russian Federation.

51. The representative of Poland indicated that although his country supports both resolutions, some open questions remained. Regarding the closed conventions, echoing the question of the representative of France, he asked for clarification of the meaning of the resolution adopted by the Committee of Ministers on this issue and on the legal basis on which the Russian Federation would cease to be Party to these conventions. On the one hand, logic dictated that when a convention specified that it is only open to member States of the Council of Europe, the fact that a State ceases to be a member necessarily entailed the cessation of its participation in this convention. On the other hand, the Vienna Convention on the Law of Treaties (VCLT) provided that if the number of High Contracting Parties drops below the threshold required for the entry into force of a given convention, this does not affect the validity of the convention itself. Thus, it could be argued that the conditions required for the entry into force of a treaty do not apply symmetrically when a State is expelled or withdraws. The representative further considered that it was possible to consider, implicitly, that if a State consents to a treaty that is open only to the members of the Council of Europe, it also agrees that in the event that it ceases to be a member of the Council of Europe it will also cease to be a Party to such a treaty. However, where a closed convention contained a specific clause covering the situation where a State ceases to be a member, only this clause should be applied as the legal basis for the cessation of status as a Party to the convention concerned.

52. Concerning, the ECHR, the Polish representative noted that Article 58, paragraph 1 was a classical treaty clause enabling unilateral action while Article 58, paragraph 3 is formulated differently and implies an obligation for the member State which would cease to be a member of the Council of Europe to cease to be a High Contracting Party to the Convention. Thus, the two paragraphs covered different situations. Overall, his delegation supported, equally to Germany, that the pursuit of the object and purpose of the Convention was an important argument in favour of the application of a six-month period before the Russian Federation would cease to be a High Contracting Party to the Convention. The representative then inquired whether the Protocols to the Convention followed the same regime as the Convention itself, so that the six-month period provided for in Article 58 also applied to them, or whether they followed the regime of the other closed conventions and thus had the cut-off date of 16 March 2022 applied to them. For his delegation, logic dictated that the Protocols should follow the regime of the Convention itself. The Director confirmed that this was the interpretation that had been assumed also by the Council of Europe Treaty Office.

53. The representative of France underlined paragraph 7 of Resolution CM/Res(2022)3 to demonstrate that the Committee of Ministers had followed the position adopted by the Court. However, concerning other closed conventions, paragraph 8 of the Committee of Ministers' Resolution provided that the Russian Federation had ceased to be a contracting Party to them

on 16 March 2022 while only some of these conventions contain clauses dealing with the situation in which a State Party ceases to be a member of the Council of Europe. However, the representative assumed that all of these conventions contained denunciation clauses that provide for a certain period of time before the denunciation takes effect. Moreover, in the case of the Convention, this is the logic that led to consider that the Russian Federation was in the same situation as that of the denunciation insofar as it is excluded but the six-month period that must be respected by a denouncing State is applied to it. The representative therefore wondered why, with regard to the other closed conventions, the effect was immediate as of 16 March 2022. This question had important practical implications for his country, particularly regarding its obligations as host country of the Council of Europe since these conventions included the General Agreement of Privileges and Immunities of the Council of Europe (ETS No. 2, GAPI). His delegation therefore understood that as a result of the Committee of Ministers' Resolution, the GAPI no longer, as of 16 March, applied to the Permanent Representation of the Russian Federation.

54. Concerning the Convention and the resolution adopted by the Court, the representative of France recalled, as stressed by the Director, that it had been adopted by the plenary Court. However, the functions of the plenary Court, as provided for in Article 25 of the Convention, only referred to administrative activities. While this issue certainly had administrative implications, the question of the date on which the Russian Federation ceases to be a High Contracting Party to the Convention was not a purely administrative matter and should hence better have been addressed in the framework of an advisory opinion under Article 47 of the Convention upon a respective request by the Committee of Ministers. It was further questionable why the Committee of Ministers had not sought the opinion of the CAHDI on the issue of closed conventions. To the representative this raised questions about the role that the CAHDI played within the Organisation.

55. The representative of Italy shared some of the juridical doubts concerning the procedure that led to the adoption of the respective resolutions by the Court on 22 March 2022 and, on the next day, by the Committee of Ministers. He acknowledged the difficulty to resolve difficult juridical issues under exceptional political circumstances without the possibility to rely on any applicable precedent and to base decisions on treaty clauses that had never been interpreted before. Concerning the letter sent by the Russian Federation, for example, a choice was possible between a formalistic and legalistic approach, and it was necessary to fill the vacuum in some norms, particularly on the steps provided for in Article 8 of the Statute, within the boundaries allowed by the treaties.

56. Concerning the outcome of this process, the representative of Italy first recalled that the Russian Federation had ceased to be a member of probably the largest and oldest European international organisation dealing with the rule of law, democracy and the respect for human rights, which was a trademark for being in today's international community. This was a major setback to the Russian Federation politically and probably also morally piling up to a series of other steps the international community had adopted during the past month in the framework of the UN General Assembly, the International Criminal Court, the International Court of Justice and the UN Human Rights Council. This decision would be felt within the Russian Federation. The representative then stressed the paramount importance of the decision taken by the Court. His delegation was aware of some doubts about the full and complete correctness of the steps taken by the Court. However, the decision taken was perfectly in line with the expectations related to the protection of human rights in the Russian Federation. The main point remained that the two organs, the Committee of Ministers and the Court, had acted and reacted swiftly and in parallel.

57. The Director explained that the absence of consultation of the CAHDI was due to the unprecedented nature and urgency of the situation. Indeed, the excluded member State must be informed rapidly of the consequences of the Committee of Ministers' decision on its participation in the organisation and it would have been difficult to delay the decision of the Committee of Ministers any longer. The Director had, however, mentioned the CAHDI when questioned by the Committee of Ministers, explaining that the Committee should be consulted on notably on issues concerning the participation of the Russian Federation in conventions open to non-member States.

58. Returning to the issue of closed conventions, the Director recalled that these were few in number. Those closed conventions that do not contain clauses dealing with the situation where a State Party ceases to be a member, the possibility of applying to them the denunciation clauses by analogy had indeed been discussed. However, on the one hand there existed no legal basis for such analogous reasoning, and, on the other hand, the analogous application of these clauses in the case of certain conventions could have led to the Russian Federation remaining a Party to them for a long period of time because of the time limits that in some cases provided for the possibility of an effective denunciation, e.g., every two years only. This explained why the cut-off date of 16 March 2022 was retained for the other closed conventions. Another argument in favour of this cut-off date could be based on the rules of the organisation and Article 5 of the VCLT. Indeed, based on the precedent of the Greek case where a similar solution was adopted, it appeared possible to consider that the setting of this date was done in application of the rules of the organisation. Regarding, the GAPI, the Director explained that it was based on and further developed Article 40 of the Statute of the Council of Europe. Therefore, it was difficult to logically consider that the Russian Federation could have continued to be a Party to the GAPI after it has ceased to be a member of the Organisation.

59. In response to questions concerning the letter from Mr Lavrov announcing the withdrawal of the Russian Federation from the Council of Europe, the Director noted that it was of little importance that Mr Lavrov's letter was not an original. Even if it had been considered that the letter had official value, it would have made no difference in legal term. Since the Committee of Ministers had already previously initiated the procedure under Article 8 of the Statute, a withdrawal notice of a State that had already been suspended could no longer active the notification periods provided for by Article 7 of the Statute. In conclusion, once the procedure under Article 8 had been initiated, it was for the Committee of Ministers to take the final decision on the effective date of cessation of membership.

60. Coming back to the ECHR, the Director noted that one of the interesting issues that arose was the determination of the competent authority to interpret the Convention, in particular Article 58 thereof. It was debatable whether this was the exclusive competence of the Court or whether the High Contracting Parties, in the framework of the Committee of Ministers, also had a role to play in this respect. In the view of the Director, this was a shared responsibility and it was hence particularly important to underline that the Committee of Ministers did not "follow" the Court's position but acted in parallel with it.

61. In the context of the general discussion on judgments, decisions and resolutions by the Court involving issues of public international law, the representative of Switzerland presented the case of *Ivanyushchenko v. Switzerland*.[20] The case concerns an alleged violation by Switzerland of the right to respect for private and family life (Article 8 ECHR) and relates to a decision taken by the Swiss government following the regime change in Ukraine in 2014. The government blocked the assets of the former president and his entourage, and the application was brought by a relative of the former president who considered the blocking to be unlawful. The representative underlined the novelty of this case as it does not concern sanctions as such but autonomous measures.

62. The Chair thanked the Director for his presentation and the delegations for their numerous insightful contributions. She expressed her agreement with the representative of France concerning the consultation of the CAHDI and recalled that during her last exchange of views with the Committee of Ministers in November 2021 she had offered CAHDI's support to the Committee with regard to issues related to public international law.

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

63. The Chair invited delegations to provide the CAHDI with new information concerning cases before their domestic courts related to the implementation of the UN sanctions and respect of human rights.

64. The representative of the United Kingdom took the floor to update the CAHDI on the case *Youssef v Secretary of State for Foreign and Commonwealth Affairs*, in which an individual

[20] Communicated case, *Ivanyushchenko v. Switzerland*, (only in French), no. 54708/20, 10 December 2021.

listed under the UN Al-Qaida sanctions regime challenged the UK Anti-Money Laundering and Sanctions Act (2018) as incompatible with Articles 6 and 8 of the ECHR. The Act provided for a two-stage review mechanism for individuals listed under the UN sanction regimes. Listed individuals can ask the Foreign Secretary to use best endeavours to secure removal of their name from the list and, in the event that such request is refused, apply to the court to seek an order setting aside that refusal and requiring the Foreign Secretary to use best endeavours to secure their delisting. The representative reported that in November 2021, the High Court had dismissed the challenge, ruling that the review process was consistent with Articles 6 and 8 of the ECHR. The Court held that Article 6 of the ECHR did not require that the court of a contracting party has the power to order a UN sanction to be disapplied. Article 6 of the ECHR only entailed an obligation, for contracting states faced with UN sanctions resolutions, to establish mechanisms by which their courts can scrutinize the domestic measures implementing the resolution in order to assure that they are not arbitrary. The Court also recognised that the procedural aspects under Article 8 of the ECHR did not require any further protection than the one afforded by Article 6. Whilst this ruling could still be subject to appeal, it provided, in view of the representative of the United Kingdom, interesting guidance on the mutual compatibility of obligations a State has under the ECHR, on the one hand, and under the UN Charter, with regard to requests for delisting under the domestic regime.

65. The representative of Slovenia informed delegations on the recent adoption by the Slovenian National Assembly of an act amending the national Restrictive Measures Act to include issues to date implemented through government decrees, including provisions on penalties for breaches of EU sanctions legislation as well as laying down national competent authorities. Once the amendment enters into force, it will reduce the administrative burden on the Ministry of Foreign Affairs and increase the effectiveness and transparency of the system for the implementation of restrictive measures. The amendment would further solve the issue of delays in implementation of Security Council resolutions when new persons were added to sanctions lists by allowing the national sanctions legislation to apply to these persons immediately after these lists are published on the Security Council website and until the amendments of the relevant annexes of the EU legal acts enter into force. This issue had been brought up in the Moneyval evaluation reports on Slovenia.

6 TREATY LAW

6.1 Exchanges of views on topical issues related to treaty law

- *Exchange of views on the statutory and conventional consequences of the suspension/withdrawal/expulsion of a member State from the Council of Europe*

66. The Chair presented the framework of the discussion under this item, recalling that it concerned the participation of the Russian Federation to conventions open to non-member States of the Council of Europe. The discussions aimed at answering the questions presented in the document CAHDI (2022)8, namely: “a) should the continued participation by the Russian Federation in "open" conventions be automatic or would there be a prerequisite of a certain acceptance by the Parties?; b) is a distinction to be made between conventions to which the Russian Federation became a Party before or after its accession to the Council of Europe?; c) can a State, that has ceased to be a member of the Council of Europe, be excluded from the established treaty regime in certain cases, in particular as a result of the violation of Article 3 of the Statute, the values of which form the basis of many of the conventions at stake, including in explicit terms (e.g., recital 11 of the Framework Convention on the Protection of National Minorities [FCNM], ETS No. 157), or when the monitoring bodies of the convention maintain an inextricable relationship with the statutory bodies and structures of the Council of Europe (e.g., the CPT, the FCNM or the European Cultural Convention)?; d) could Article 60 of the VCLT, which provides for the possibility of termination or suspension of the operation of an international treaty as a consequence of a material breach of the treaty, be applicable? In a similar vein, consideration could be given to an exceptional application of the *rebus sic stantibus* principle within the meaning of Article 62 of the VCLT?; e) what are the legal effects of an armed conflict on the treaties in force in between the parties to the conflict which are also

parties to the treaties and in between the aggressor State and the other State Parties to a treaty?".

67. The Director of DLAPIL informed CAHDI members that the Russian Federation was Party to sixty-seven treaties concluded within the framework of the Council of Europe. Twenty-six of them were "closed" treaties and forty-one "open" treaties. Regarding the "open" treaties, he recalled the key role of the Committee of Ministers which is competent to invite non-member States to accede to Council of Europe's treaties or to adopt amendments or new protocols to such treaties. Furthermore, with respect to certain "open" conventions, such as the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT, ETS No. 126) and the FCNM, the Committee of Ministers is formally, although independent committees of experts exist, the monitoring body in charge of taking final decisions on the implementation of these conventions. This raises the question of the future participation of the Russian Federation, from now on as a non-member State, which in principle should enjoy the same rights as the other Parties to these open conventions.

68. Regarding the first question, there was a general consensus among CAHDI members to consider that the Russian Federation should be regarded as continuing to be a Party to the open treaties of the Council of Europe, in application of the principle *pacta sunt servanda*, as these conventions are open to non-member States and do not foresee automatic termination in the case of cessation of Council of Europe membership. Several representatives supported the idea that decisions regarding the denunciation, termination or cessation of the participation of the Russian Federation to open conventions should be taken on a case-by-case basis, taking into account the nature and the subject of each convention. In this respect, the representative of Austria stressed, as well as several other representatives did, the particularly important role that the CAHDI should play in the forthcoming convention-by-convention evaluation. The representative of Switzerland underlined that Council of Europe's conventions had an independent legal existence. She also recalled the importance of the consequences that could lead to a loss of rights for the Russian population and the necessity to take into account considerations of legal certainty, which implied a clear communication of the decisions taken for each of the treaties to the Russian Federation.

69. With regard to the second question, certain representatives agreed on the principle that a distinction should be made between conventions to which the Russian Federation became a Party before or after its accession to the Council of Europe insofar as procedures followed to become a Party differed. However, the representative of Türkiye indicated that his country considered that such a distinction was not relevant.

70. Concerning the third question and the possibility to exclude a State that has ceased to be a member of the Council of Europe from the established treaty regime in certain cases, the representative of the Netherlands indicated that his country did not consider that a flagrant and manifest violation of Article 3 of the Statute of the Council of Europe could lead to an automatic expulsion from treaties open to non-member States. However, it was possible for States to adopt countermeasures leading to the suspension of their treaty obligations towards the Russian Federation, such countermeasures to be aimed at stopping the violation of the values of the Statute by the latter.

71. As regards the fourth question and the possible application of Articles 60 and 62 of the VCLT, all CAHDI members agreed that these articles may indeed play a role in case of substantial violations of provisions of a Council of Europe treaty by the Russian Federation. However, as the conditions for the application of these articles are particularly strict, the representatives indicated that caution should be exercised and that it was important to remain within the scope of what these articles allow. Furthermore, these articles could not be applied in the abstract to all open conventions. Accordingly, when determining if the material breach defined in Article 60 of the VCLT or the application of the *rebus sic stantibus* principle within the meaning of Article 62 of the VCLT could be used to terminate or suspend the operation of a convention, the nature and the subject of the convention should be examined separately on a case-by-case basis.

72. The representative of Slovenia stressed, however, that the extraordinary nature of the circumstances and the gravity of the wrongful acts committed by the Russian Federation

should be taken into consideration in the assessment made, particularly with regard to the application of Article 62 of the VCLT. The representative of Portugal indicated that attention should be paid to Article 65 of the VCLT on the procedure to be taken to operationalise Articles 60 and 62. For her part, the representative of Switzerland made reference to Article 73 of the VCLT, in connection with Article 62, which states that the VCLT does not prejudge any issue that may arise in connection with a treaty as a result of the outbreak of hostility, to underline, even more, that a convention-by-convention approach will be needed regarding the application of these articles.

73. Finally, regarding the fifth question concerning legal effects of armed conflicts on conventional relationships, the representative of the Netherlands, supported by other representatives, agreed on the importance to reaffirm the position of principle that, unless a convention clearly provides for rules to be applied in such situation, such conflicts have no legal effect on the application of treaties between belligerents in the absence of denunciation or expulsion, more particularly in the case of conventions relating to international humanitarian law (IHL). As a consequence, the existence of an armed conflict should not automatically impede the application of "open" conventions between the aggressor State and the other States Parties to these conventions.

74. The representatives agreed that it was therefore to the parties to the conflict themselves to determine how a convention might apply between them based on treaty law. Furthermore, several representatives, including those from Germany, Slovenia, Switzerland, the United Kingdom, Finland and Austria, recalled the need to take into consideration the “ILC Draft articles on the effects of armed conflicts on treaties”[21], and more specifically their Articles 3 and 7, when adopting decisions on the issue of open conventions. These draft articles are built on a presumption of continuity of conventional relationships.

75. In this respect, the representative of Türkiye stated that, taking into consideration Article 63 of the VCLT, the fact that a vast majority of States have not severed diplomatic relations with the Russian Federation also supports the position according to which the decisions on the legal consequences concerning relations between the Russian Federation and these States should not be automatic and should be examined individually.

76. The representative of Ukraine focused her comments on the ECPT. This Convention is now an “open” convention. However, apart from the case of the Russian Federation, which is now a non-member State, only Council of Europe member States are Parties to it. In view of the Ukrainian representative, this raises a first practical issue concerning the financing of the ECPT mechanism. Indeed, the operation of this mechanism requires substantial funds, especially when it comes to visits in large countries such as the Russian Federation. It will therefore be up to the Committee of Ministers to determine the financial conditions under which the Russian Federation will participate in the Convention as a non-member State. She further drew the attention of delegations to a problem of a legal nature. Indeed, the ECPT refers to Article 3 of the ECHR in its preamble and can be seen as an integral part of the system of human rights protection set up by the ECHR as it develops the protection afforded by its Article 3. Furthermore, the ECPT is guided, as recalled in its explanatory report, by the case law of the Court. Although the prohibition of all forms of torture has other legal bases than the ECHR, notably in international law, this still raises questions in view of the Russian Federation's status as a non-member State. Regarding armed conflicts, the representative recalled that the ECPT has been successfully applied and that many visits have been carried out in the context of such conflicts or immediately afterwards.

77. The representative of Türkiye recalled that some “open” conventions” such as the European Convention on Extradition (ETS No. 024) or the European Convention on Mutual Assistance in Criminal Matters (ETS No. 030) implied bilateral relationships between two contracting

[21] Draft articles on the effects of armed conflicts on treaties, with commentaries, 2011 ; Adopted by the International Law Commission at its sixty-third session, in 2011, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session (A/66/10). The report, which also contains commentaries to the draft articles (para. 101), appears in Yearbook of the International Law Commission, 2011, vol. II, Part Two.

Parties on a specific topic. As a consequence, it will be very difficult to arrive to a general position in respect of these open conventions.

78. The representative of France emphasised the need, before taking any decision, to understand the complex legal architecture of these open conventions, which has legal and financial implications for the Council of Europe, but also a concrete impact on individuals and citizens whose rights and ability to have bodies to which they can turn themselves are affected. In this respect, the Council of Europe, as guardian of the rule of law, must adopt an extremely rigorous approach.

79. The representative of Portugal indicated that a balance must be found between the political choice to isolate the Russian Federation and the object and purpose of human rights treaties which notably aim to protect the rights of individuals living in the Russian Federation or in Ukraine.

80. The representative of the European Union (EU) mentioned a judgment of the European Court of Justice (ECJ) in the case of *A. Racke GmbH & Co. v Hauptzollamt Mainz*[22] as a relevant case in relation to the application of the principle of *rebus sic stantibus* (Article 62 of the VCLT). This case concerned the suspension of the Cooperation Agreement between the European Economic Community and the Socialist Federal Republic of Yugoslavia in view of the war at the time. The ECJ accepted expressly the action under Article 62 of the VCLT. In view of the EU representative, this was an important judgment that could play a role in the assessment of "open" conventions conducted by member States of the EU.

81. The Chair considered that it was not the role of the CAHDI to conduct a case-by-case examination of each "open" convention. However, it would be useful for the CAHDI to develop guidelines for the use of the Committee of Ministers and the various treaty bodies analysing each convention individually. These guidelines should refer to the application of the VCLT and also to the effect of armed conflicts on treaties. This will be particularly useful in determining, in a specific case, whether an "open" convention applies between the Russian Federation and the other parties to that convention or whether the Russian Federation should no longer be considered a Party to it. A document prepared by the Secretariat would be sent to delegations in mid-April and their contributions should be submitted by early May in order to finalise the document.

82. The Director expressed his agreement with the views expressed by the Chair. He also informed the CAHDI members that many "open" conventions provided for a monitoring mechanism through a Committee of the Parties, a Conference of the Parties or another form of treaty body. The question therefore arose as to whether the Russian Federation, when carrying out monitoring of the implementation of these treaties within the framework of these bodies, should be limited to the assessment of the implementation on its own territory or whether it can participate in such an assessment with regard to other Parties.

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

83. The Chair recalled that, on 26 March 2021, an Expert Workshop on "Non-legally binding agreements in international law" had been organised by the German Presidency of the Committee of Ministers, the University of Potsdam and the CAHDI Secretariat in which many delegations had participated. The event had brought about the idea to discuss the possible follow-up to this topic by the CAHDI during its 61st meeting (23-24 September 2021 in Strasbourg, France) during which the CAHDI had agreed to pursue its work on this issue on the basis of a questionnaire (document CAHDI (2022) 2 Confidential). A draft questionnaire had been prepared by the German delegation in cooperation with the Chair, the Vice-Chair and the Secretariat and sent to delegations on 22 February 2022.

84. The representative of Germany provided detailed information on the structure and substance of the questionnaire and thanked the CAHDI Secretariat for the substantial support in the drafting process.

[22] Judgment of the ECJ of 16 June 1998, *A. Racke GmbH & Co. v Hauptzollamt Mainz*, Case C-162/96.

85. Numerous representatives took the floor to thank the German delegation for this initiative. They underlined the value of the questionnaire for them as Legal Advisers of Ministries of Foreign Affairs given that non-legally binding agreements were a major part of their daily activities and raised many difficult questions. Many delegations recalled the importance of maintaining a high degree of flexibility in the framework of these agreements.

86. The representative of Canada indicated that in the practice of his country, agreements were considered to be legally binding under international law as for the definition of treaty under the VCLT. He then affirmed that non-legally binding instruments took the form of memoranda of understanding and the ultimate nature of an instrument needed to be determined by the terminology used in any intent expressed, and like treaties, non-legally binding instruments were not considered public unless the participants agreed to make them so, and for this reason, establishing a voluntary register of non-legally binding instruments as proposed in the option paper, might prove to be difficult for countries. The representative of Canada deemed that the use of non-legally binding instruments should not overshadow the necessity of resorting to legally binding instruments for international public matters, especially when creating new rights or enforceable dispute settlement mechanisms.

87. The representative of Armenia informed delegations that his country was preparing a new law on international treaties. He expected the questionnaire to be very useful in this process and asked for further details on the follow-up of the questionnaire.

88. The representative of the United States of America emphasised that he believed the main benefit of these instruments to be found in their flexibility and that, hence, any broader effort to formalise or regulate practice relating to non-binding instruments was unnecessary. From the viewpoint of his delegation any initiative that could, even inadvertently, put those benefits at risk should be avoided suggesting that particular forms, processes, and structures had to be followed as, in his opinion, these would take away a very valuable tool of foreign policy maintained by these non-binding instruments.

89. The representative of Italy informed the CAHDI of a circular of his Ministry addressed to all the other ministries of the government, agencies, and territorial entities in order to give them guidance on how to recognise when an agreement gave rise to legally binding obligations in international law or when these agreements, memoranda or documents with other denominations fell within the scope of political cooperation not giving rise to any legally binding obligations. He also presented the workshop that the Italian delegation had organised on 22 March 2022 on the subject of soft law instruments as a way to reenforce the process of unification, harmonisation and standardisation of practices. The Italian delegation was preparing a reflexion paper based on the outcome of this seminar. The paper would be circulated to member States at a later stage. The Chair took note of the Italian proposal to include a point concerning the issue of soft law instruments on the agenda of future CAHDI meetings.

90. The representative of Switzerland emphasised the particular interest of her country on issues related to non-legally binding agreements and informed delegations that, following the roundtable her country had organised with the Council of Europe on soft law, the discussions continued to be particularly extensive on this theme and most importantly with regards to democratic control and participation of the Parliament.

91. The representative of Poland announced that his Ministry had recently published, for the first time, a “Treaty Guide”. Despite its name, this guide also contained a chapter on how to draft and approach “MoUs”. While saluting the German delegation’s initiative, the representative noted that he was concerned about the level of details in the questionnaire, assuming that there were many procedures which, in his opinion, were not applicable to non-legally binding agreements.

92. The representative of Portugal drew the attention on the development at a national level of a manual with practical guidance on the drafting of this type of instruments and underlined that this manual was showing tangible results as his delegation was reaching a good level of harmonisation between most of the non-legally binding instruments concluded by Portuguese authorities at the international level.

93. The representative of the EU drew the attention of delegations to a judgment of the Grand Chamber of the ECJ concerning the internal distribution of powers between the institutions in the area of non-CFSP, but also in the area of CFSP.[23] He stated that in both areas, the same issue of distinction between legally binding and non-legally binding acts was at stake. The representative specified that in the EU these instruments are referred to as "NBI", non-binding instruments, in order to have as broad a notion as possible.

94. The representative of Spain pointed out that certain circumstances related to such non-legally binding agreements, e.g., that they are not officially published and that they avoid using imperative clauses, revealed that the parties to these agreements did not want to create international legal rights and obligations. He proposed to add questions tackling the language used in such agreements, i.e., whether these agreements use imperative language or more general formulas such us the "participants aim to establish".

95. The representative of the Czech Republic supported further exchanges of views on this topic given that Legal Advisors dealt with the matter on a daily basis. He welcomed every attempt to try and clarify this situation and to share best practices and also thanked the delegation of the Netherlands for the sharing of their practical guide on MoUs.

96. The Chair concluded the item by underlining the general support for the questionnaire amongst the CAHDI members. Delegations were invited to submit their replies to the questions by 1 August 2022 in order to allow the Secretariat to compile the answers in a document as a preparation for the discussion on the item at the next meeting of the CAHDI in September.

- ***Exchange of views on treaties not requiring parliamentary approval***

97. The Chair recalled that, at the last meeting of the CAHDI in September 2021, the delegation of Slovenia had suggested that the CAHDI would explore the issue of legally binding agreements not requiring parliamentary approval. The CAHDI had further agreed to pursue its work on the topic on the basis of a questionnaire (document CAHDI (2022)3 Confidential) prepared by the Slovenian delegation in cooperation with the Chair, the Vice-Chair and the Secretariat and in consultation with the German delegation for purposes of ensuring coherence. The questionnaire was sent to delegations on 22 February 2022.

98. The representative of Slovenia provided detailed information on the structure and the substance of the draft questionnaire that his delegation had prepared as agreed at the 61st meeting of the CAHDI (23-24 September 2021, in Strasbourg France) and thanked the German delegation and the Secretariat for their constructive cooperation.

99. Many representatives thanked the delegation of Slovenia for this initiative and the preparation of what they considered to be a comprehensive draft questionnaire.

100. The representative from the Netherlands suggested adding under the heading of "Distinction" of the questionnaire, with reference to the second question on the criteria for the classification of treaties into a specific category, the following question: "Does the form of the instrument lead to a different category of treaty?". He further proposed to insert under the heading of "Competence" the following question: "What is the competence of autonomous regions/territories for the conclusion of treaties?". Finally, under the heading of "Procedure" he recommended adding to the questionnaire the subsequent questions: "Do you allow electronic signature of treaties? If so, are there certain requirements concerning what type of electronic signature is acceptable? Do you accept the electronic transmission of treaties instead of the exchange of physical copies? What is the procedure?".

101. The representative of France suggested a modification of the presentation of the questions in order to make a clear distinction between the questions that concerned the form of the agreement and those that related to the internal procedures of States.

102. The representative from Finland affirmed that her delegation had doubts about whether the questionnaire intended to cover mainly treaties "in simplified form" or whether replies should also cover practices as regards to so-called international administrative agreements or inter-

[23] Judgment of the ECJ (Grand Chamber) of 28 July 2016, *Council of the European Union v. European Commission*, Case C-660/13.

institutional agreements that ministries and other State institutions might conclude. Such agreements may be considered as legally binding but not necessarily come under the VCLT's definition of treaty.

103. The representative of Ireland made reference to "the authority responsible for drafting the text of categories of treaty" in question 1 under the heading "Competence". He wondered whether what was meant with the reference "drafting" was instead "negotiating". In his opinion, "drafting" implied a unilateral act whereas what was at stake was the negotiation of a text between two or more parties. His second comment referred to the chapeau under the heading "Implementation" which, in the viewpoint of his delegation, suggested that all treaties not requiring parliamentary approval nevertheless required implementation in national legislation. The representative underlined that such procedure did not apply to Ireland and that, hence, the chapeau should be rephrased.

104. The representative of Armenia noted that this topic was very important to his delegation, particularly in the context of the constitutional reform process underway in the country. He asked for clarifications on the deadline for delegations to submit their comments and also on the follow-up to the questionnaire.

105. The representative of Norway proposed to add questions to the questionnaire aiming to clarify, on one hand, the matter of distribution of responsibility between line ministries and Ministries of Foreign Affairs, and, on the other hand, the issue of delegated competence of Ministries of Foreign Affairs or other competent authorities to enter into simplified agreement with other line ministries.

106. The representative of Switzerland asked the Slovenian delegation for further information on the follow-up of the questionnaire. She stressed that, given that the questions were matters of domestic law, finding a uniform formulation between countries might be a difficult task.

107. The representative of the United Kingdom suggested that, in order to avoid any confusion with regard to question 5 under the heading "Procedure before conclusion/signature", the terminology used should be strictly maintained in the treaty context.

108. The representative of the EU informed delegations that the Venice Commission had adopted, at its last session on 18-19 March 2022, a report on the domestic procedure of ratification and denunciation of international treaties that could be of interest here. She further specified that in this context, the EU had been consulted since the report contained a section on the EU and information on the member States of the Council of Europe.

109. The representative of Slovenia invited the CAHDI members to send their comments in writing and thanked the CAHDI members for their interesting suggestions.

110. The Chair concluded the item by thanking delegations for the exchange. Delegations were invited to provide their suggestions and comments to the questionnaire in writing by 30 April 2022. The Chair suggested that, on the basis of the comments provided by delegations, the Slovenian delegation would prepare, together with the assistance of the Chair, Vice-Chair and Secretariat, a revised version of the draft questionnaire to be adopted by the CAHDI by written procedure by June 2022 after which delegations are invited to submit their responses to the questionnaire by 30 September 2022.

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

111. The Chair introduced document CAHDI (2021) 13 prov Confidential Declarations implying the exclusion of any treaty-based relationship between the declaring State and another State party to the treaty in relation to which the declaration is formulated. She recalled that the document had been prepared by the Chair, the Vice-Chair and the Secretariat following a discussion on this topic at the 60th meeting of the CAHDI (24-25 March 2021 in Strasbourg, France). Delegations had been invited by e-mail to submit to the Secretariat their comments on the

working document by 18 February 2022. The comments by Cyprus, Germany, Türkiye and Armenia, are reflected in the revised working document (CAHDI (2022) 7 prov Confidential).

112. The Austrian representative thanked delegations for their interest in the subject and their comments. Since there were not enough comments for a full discussion, he suggested deferring the discussion to the next CAHDI meeting in September.

113. Numerous delegations thanked Austria for this initiative and were of the view that the analysis of these declarations should be conducted on a case-by-case basis.

114. The representative of Slovenia noted that in her delegation's viewpoint, reservations were deemed as exceptions and therefore defined restrictively. The definition in the ILC Guide to practice[24] allowed for exclusion or modification of the legal effect of certain provisions in their application to that State or international organisation, but paragraph 2 also allowed for exclusion or modification of the treaty as a whole with respect to certain specific aspects. She stressed that declarations excluding applicability of an instrument between parties should not be excluded from the regime of reservations since such declarations did modify the legal effect of the treaty as a whole, albeit in a way that targeted another State party, yet such reservations were not *ipso facto* incompatible with the object and purpose of multilateral treaties. She then drew the attention of the CAHDI to the use of similar declarations whereby States excluded application of establishment of any obligations with States Parties to a multilateral treaty with whom they did not have diplomatic relations, which were often considered reservations and objected to on the ground of their lack of transparency. In view of the Slovenian representative, these types of declarations were not general practice and more an exception. She considered that it would be unreasonable to bar a State from becoming a party to a multilateral treaty because it did not want to enter into relations with one other State, and that this approach could make the participation in multilateral treaties drop considerably. If the reservation was deemed *ipso facto* incompatible with the object and purpose of the treaty, an objection would not be necessary as per general rules relating to impermissible reservations. She further noted that when it came to effects of an objection, States had a certain choice to make. Considering that the declaration affected the entire treaty, objections with maximum (does not enter into force) and super-maximum (enters into force without reservation) effect could be considered. Since these declarations did generally not affect third States to justify objections with super-maximum effect, the State could choose for the treaty not to enter into force between the reserving and objecting State. Such an objection would probably only be lodged on principle with the aim of pressuring the reserving State to reconsider the reservation.

115. The representative of Türkiye reiterated that, according to Article 2 of the VCDR, diplomatic relations were established by mutual consent of States and that, in this regard, Türkiye had been exercising its rights under international law by resorting to such declarations. He emphasised that the accession by a State to a treaty to which an entity that it did not recognise was also a Party did not amount to recognition thereof. For him these declarations concerned the lack of capacity of an entity to be bound by a treaty rather than the application of the treaty and that, thereupon, they should not be regarded as reservations under public international law.

116. The representative of the Netherlands considered this type of declaration null and void as contrary to the object and purpose of multilateral treaties and that, hence, an objection should be made to them in every case.

117. The representative of Austria underlined the difference between, on the one hand, declarations to a multilateral treaty excluding that certain Parties had diplomatic relations with one another, yet the States were still Parties to the treaty, and, on the other hand, the question of whether a State could be excluded from membership to a treaty. He recalled that, in the context of the issue at stake, delegations needed to focus on the intention to not regard an existing State as a party to a multilateral treaty.

118. The representative of Israel underlined that, in accordance with Article 76 of the VCTL and the ILC work, States were only bound by the treaty to the extent to which they agreed to and

[24] UN General Assembly *International Law Commission Guide to Practice on Reservations to Treaties* A/66/10/Add.1 (ILC Guide).

therefore, her delegation understood the reluctance of States to the existence of a treaty relation between a State party and a non-recognised entity. She noted that in a recent case touching upon the competence of the UN Committee on the Elimination of Racial Discrimination, the CERD/OLA had upheld that a State Party could, through a unilateral statement, prevent the creation of obligations and rights under the convention with another State Party. She further raised concerns about the decision of the UNGA Third committee which had ignored the CERD/OLA finding, arguing that no treaty relations were required under human rights treaties.

119. The representative of Cyprus indicated that, from the viewpoint of her delegation, the analysis of statements of non-recognition was a complex issue and was not relevant to the topic at hand, which did not concern the permissibility in international law of statements of non-recognition. She noted that the purpose of the amendments proposed by her country was to clarify that any statement purporting to exclude or modify the legal effect of certain provisions of a treaty would qualify as a reservation and, as such, its permissibility would depend on whether it was prohibited by the treaty or was incompatible with its object and purpose. She further added thatthis should be examined on a case-by case basis, taking into account the specific circumstances of the type of treaty in question. She finally requested that if the CAHDI deemed it appropriate to maintain the issue of declarations of non-recognition in the legal analysis presented in the paper, the amendments proposed by Cyprus should be adopted to reflect the complexity of the issue in international law.

120. The Chair thanked delegations for the fruitful discussion and encouraged them to submit their comments on this issue by 1 August 2022 in order to revise the document in view of the discussion to be continued at the next meeting of the CAHDI in September 2022. In order to better focus the discussion, the Chair maintained that delegations should focus on declarations resulting in the exclusion of treaty-based relations between Parties to a treaty and on whether or not these were permissible under public international treaty law.

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

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

121. In the framework of its activity as the European Observatory of Reservations to International Treaties, the CAHDI examined a list of outstanding reservations and declarations to international treaties. The Chair presented the documents containing these reservations and declarations which are subject to objection (document CAHDI (2022) 4 prov Confidential). The Chair also drew the attention of the delegations to document CAHDI (2022) 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.

122. The Chair underlined that the reservations and declarations to international treaties still subject to objection were contained in document CAHDI (2022) 4 prov Confidential, which included 17 reservations and declarations. Four of them were made with regard to treaties concluded outside the Council of Europe (Part I of the document) while thirteen of them concerned treaties concluded within the Council of Europe (Part II of the document)

123. With regard to **declarations made by Togo** to the *Convention to the Convention on the Reduction of Statelessness (1961)*, the Chair noted that only the second part of the declaration appeared problematic with which Togo declared its legislation to allow for the deprivation of nationality in the case of a serious criminal conviction. The permissible grounds for exceptions listed in Article 8 paragraph 3 of the Convention from the general prohibition under Article 8 paragraph 1 concerning the deprivation of nationality in case such deprivation would lead to statelessness do, however, not feature criminal convictions among them. No delegation took the floor with regard to this declaration.

124. With regard to the **declaration made by Türkiye** to the *Paris Agreement (2015)*, the Chair noted that in its declaration, Türkiye affirmed that it would implement the Paris Agreement as a “developing country”. This declaration was problematic as Türkiye is considered as a “developed country” within the United Nations Framework Convention on Climate Change (UNFCC) regarding to its Appendix I which provides a list of States regarded as industrialised

countries for the implementation of the Paris Agreement. This "developing country" status entails a more favourable and flexible legal regime and less obligations for States categorised as such. The Chair pointed out that, through this declaration upon ratification, Türkiye had unilaterally decided to change its legal status within the legal framework without the approval of the Conference of the Parties, procedure provided by Article 16 of the UNFCC for any amendment to the Annexes to the Convention.

125. The representative of Türkiye explained that the declaration had been made in order to allow his country to contribute to the climate change to the extent of his country's financial capacity, which was not as significant as that of developed countries. He further affirmed that more detailed information on the declaration would be provided to delegations after the meeting.

126. The Swiss representative stated that the declaration aimed at excluding the application of certain provisions and could therefore be qualified as a reservation, while reservations were prohibited under Article 27 of the Paris Agreement. Her country was considering objecting to this declaration.

127. The Canadian representative stressed that such declaration could lead to other countries declaring themselves unilaterally as developing countries which could impact the efficiency of the Agreement and increase requests for multilateral climate financing. He recalled that it was up to the Conference of the Parties under the UNFCC to agree to accession of Türkiye to the status of "developing country" and hence to climate financing.

128. With regard to the **declaration made by Türkiye** to the *Amendment to the Montreal Protocol on Substances that Deplete the Ozone Layer (2016)*, the Chair noted Türkiye to declare that its ratification to the Amendment to the Montreal Protocol entailed any obligation to enter into dealing with States that Türkiye has no diplomatic relations with within the Framework of the UN Environment Program Activities. The Greek representative stated that her country had this declaration under examination, and the representative of Cyprus affirmed that her delegation intended to object to it.

129. With regard to the **reservation made by Iraq** to the *Convention on the Recognition and Enforcement of Foreign arbitral awards (1958)* stating that their ratification should not imply the application of the Convention to tribunal award made before the "law enters into force", the Chair noted that the reservation did not make clear the entry of which law it was referring to. No comments were made by delegations.

130. With regard to the **declarations made by Germany, Finland, Romania, Luxembourg, Slovak Republic, Malta, France, Lithuania, Slovenia, Latvia and Italy** 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 1882 -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 representative of the European Union took the floor to underline that 22 member States had already notified the EPPO as the competent authority under the Convention and that such notifications were in compliance with it. She recalled that the object and purpose of the Convention, as amended by the Second Additional Protocol, was to insure the widest possible cooperation between the authorities of the Parties, in particular between their judicial authorities. She viewed this intention of the Parties confirmed by the *Explanatory Report to the Convention* where it is stated that Article 1 paragraph 1 of the Convention "is of general character and is to be interpreted in the broad sense". The convention, as amended by the Second Additional Protocol, provided, in her view, for the autonomy of the Parties in the selection of their judicial authorities to be notified under the Convention. Indeed, the Explanatory Report to the Convention stated that, under Article 24 of the Convention, "it was agreed that any country could at the time of the signature, or of deposit of its instrument of ratification, define how it would construct judicial authorities for the purpose of the convention." This was further confirmed by Article 33 paragraph 2 of the Second Additional Protocol which did not allow the formulation of reservations with regard to Article 24 as amended by the Second Additional Protocol. The representative of the European Union concluded that, in view of the foregoing, the Swiss counter-declaration, by not affording the widest measure of mutual assistance to the EPPO, amounted to a reservation. The French representative, speaking in his capacity as representative of the State presiding the Council of

the European Union, specified that the Swiss reservation to the Convention was under examination in the Council.

131. With regard to the **reservations and declarations made by Jordan** to the *Convention on the Mutual Administrative assistance in Tax Matters as amended by the 2010 Protocol (1988 – ETS No.127)*, the Chair noted that Jordan seemed to exclude any treaty-based relationship with Parties to the Convention with which it did not entertain any diplomatic relations. The Austrian representative indicated that his country was considering objecting to the reservation given the ambiguity of its scope.

132. With regard to the **declaration made by the Republic of Moldova** to the *Council of Europe Convention on preventing and combating violence against women and domestic violence (2011-CETS No.210)*, stating that it would apply the provisions of the Convention only on the territory effectively controlled by its authorities until the full establishment of its territorial integrity, no comments were made by delegations.

7 CURRENT ISSUES OF PUBLIC INTERNATIONAL LAW

7.1 Peaceful settlement of disputes

133. The Chair informed delegations that there were neither updates under this item nor had any new States accepted the jurisdiction of the International Court of Justice (ICJ). The Chair then invited delegations to present any relevant information under this point.

134. The representative of the United States of America took the floor to recall that his country still has some of ongoing cases at the ICJ. The representative also informed delegations of Judge Joan E. Donoghue's decision not to seek another term at the Court and that the United States National Group intends to nominate a candidate, to be announced at a later stage, for the November 2023 election.

7.2 The work of the International Law Commission

135. Under this item, the representative of the United States of America took the floor to reiterate her country's commitment in supporting the work of the ILC. In their view, the ILC has considerable influence over the larger international law community. It was therefore critical for the Commission to succeed in its work. The United States of America would continue to provide comments and engage with ILC members and other States in order to ensure that States' views were properly considered and incorporated in the ILC's work product. It would, moreover, welcome if more States were more consistently engaged with the ILC. In the context of the composition of the Commission, the representative underlined the need to address the long-term issue of gender disparity in the ILC. As a last point, the representative expressed her country's disappointment over several technical roll-overs at the Sixth Committee on the Draft Articles on Crimes against Humanity. The representative declared that if more clarity was reached on certain articles, this would allow to proceed with an International Conference aimed at establishing a convention on crimes against humanity to fill an important gap in the international legal framework. In 2019, the USA had proposed a working group to further discuss and examine the Draft Articles and supported efforts for an ad hoc committee. The representative displayed the US Government's eagerness to engage with others to move this project forward.

136. The representative of the United Kingdom congratulated the newly elected members of the ILC, and along with the previous representative, emphasised the need to continue striving for diversity. The representative pointed out that given the increasing frequency at domestic and international courts citing the ILC work products, it was the responsibility of ILC to assist members of the legal profession by making clear in its products when it was codifying existing law and when suggesting the progressive development of the law. The contributions of States were an essential element of the working methods of the ILC - for States to avail themselves of the opportunity to express their views and for the ILC to engage fully with States and accurately incorporate their considerations. The representative noted that the agenda for the 73rd session of the ILC in 2022 included topics such as peremptory norms of general international law (*ius cogens*) and immunity of State officials from foreign criminal jurisdiction.

Where there were divergent views, it was important for the ICL to fully consider the views of States as expressed in their respective written comments and to reflect these clearly in its output.

137. The representative of Türkiye welcomed the success of the ILC's 72nd Session finally held, due to the Covid-19 pandemic, in 2021. The Session was carried out in a hybrid format which obviously brought about its own challenges, such as ILC members residing in different time zones. The representative declared his hopes for the undertaking of the upcoming session in the traditional format which would enable full, equal, effective and interactive participation of all members. Along these lines, the representative suggested creating additional opportunities for unofficial exchange of views between States and ILC members as this could help getting States engaged and ensure inter-sessional continuity. Moreover, the representative noted that the Commission currently had important and complex topics on its agenda, including topics related to contemporary challenges such as sea level rise. He supported the appropriate progressive development and codification of international law built upon the invaluable expertise of the ILC.

138. The representative of Israel underlined the importance of contributing to the work of the ILC. Israel had delivered statements on the ILC's report every year in the Sixth Committee and, in recent years, submitted written observations on various topics. The representative declared that the ILC's success to be measured by whether its output is ultimately accepted by States and reflected in their practice. In this regard, Israel believed that the road to success goes through the implementation of a rigorous methodology rooted in State practice and *opinio juris*. This would result in an output that enjoys a high degree of legitimacy and authority. Simultaneously, the representative affirmed that it was the responsibility of States to contribute to the work of the ILC and to engage meaningfully with it. She further highlighted the importance of reaching the highest number of States possible voicing their positions on the various topics and on them providing appropriate guidance to the ILC. Regarding the heavy workload of the ILC in recent years, and the related fact of limited resources, the representative stressed the importance to focus on the most important topics. On a final note, she echoed the words from the representative of the United Kingdom on the issue that the ILC should clearly state whether its work referred to the codification of or the progressive development of the law.

139. The representative of Mexico, underlining the importance of this UN body to his country, stated that his country had always been represented at the ILC since its establishment in 1949 (with the exception of a 10-year period). Two Mexican members of the ILC had been special rapporteurs on the topics of nationality (Roberto Córdoba), including statelessness, and the provisional application of treaties (Ambassador Juan Manuel Gómez-Robledo), together combining 10 years of work and reports.

140. The representative of Cyprus congratulated the newly elected members of the ILC, including the Cypriot nominee Ambassador Andreas Mavroyiannis for the 2023-27 term. She further stated her country's commitment to contribute in the best possible way to the work of the ILC.

7.3 Consideration of current issues of international humanitarian law

141. The chair opened the floor for the exchange of views and interventions from the delegations under this item.

142. The Canadian representative recalled that on 15 February 2021 his country had launched a declaration against the arbitrary detention in state-to-state relations with currently 69 global endorsements and growing support. Additionally, in October 2021, Canada had hosted a panel discussion on the margins of the International Law Week at the UN. The Canadian representative thanked those CAHDI members present at the event for their support and participation. The meeting had addressed a subset of arbitrary detention where States arrested, detained and sentenced foreign nationals to leverage their respective home governments. The Canadian initiative derived from case of the "Two Michaels" which continued to preoccupy authorities even though the two individuals had been finally released.

143. The Portuguese representative announced that following a pledge, made at the 33rd International Conference of the Red Cross and Red Crescent Movement by the Portuguese Government and the Portuguese Red Cross, the National Committee on International

Humanitarian Law had been created in December 2021 and was now eager to cooperate with other national committees. The national committee was to start preparing its first voluntary report to map the implementation of IHL in Portugal and to establish a roadmap for future work in the field.

144. Also the Italian representative informed delegations on the establishment of the Italian National Committee for the Study and Development of International Humanitarian Law. The committee is expected to deliver the first voluntary report on the state of implementation of IHL in Italy by the end of 2022. The representative further recalled the open pledge made by Italy during the 33rd International Conference of the Red Cross and Red Crescent Movement that aimed at taking all necessary actions to ensure that children can live safely and enjoy their fundamental rights also in situations of armed conflict, including the right to education. This important pledge would be covered extensively in the national report for possible future actions.

145. The Slovenian representative equally announced the start of preparations for a voluntary report on the state of implementation of IHL in Slovenia by their respective national IHL committee. She further informed the CAHDI of an emergency meeting held by the Slovenian national IHL committee with experts and civil society representatives on the current events in Ukraine during which the importance of establishing safe humanitarian corridors in order to evacuate civilians from the besieged areas had been underlined. The representative reiterated her country's support for the investigation and prosecution of core international crimes presumably taking place following the Russian Federation's invasion in Ukraine, including crimes against humanity or genocide. Finally, the representative welcomed the initiative to create a special tribunal for aggression against Ukraine.

146. The representative of the International Committee of the Red Cross (ICRC) started her intervention by describing the situation of civilians affected by the international armed conflict in Ukraine stressing that the suffering that can be witnessed today in Mariupol and in other Ukrainian cities must not become the new normal. The ICRC, together with the Ukrainian Red Cross, was working to improve the situation, having delivered several hundred tonnes of assistance, medical supplies, mainly weapon wounded kits and surgical kits, removed the unexploded ordnance to evacuate people and more.

147. The ICRC representative recalled that at the last CAHDI meeting in September 2021 she had brought to the attention of delegations two issues illustrated by the conflict in Afghanistan that are equally illustrated by the conflict in Ukraine: the human cost of urban warfare and the impact of sanctions on humanitarian action. The representative noted that one of the major causes of civilian harm in contemporary armed conflicts was the use of heavy explosive weapons in urban areas. Such weapons caused high numbers of civilian casualties, the destruction of the city itself and often the collapse of entire essential services systems. Their effects had become a prime cause for displacement as documented by the ICRC over the years. The representative informed the CAHDI of a report on these effects published in January 2022 offering detailed recommendations for political authorities and armed forces.

148. Moreover, the representative noted that the ICRC had been calling on States and all parties to armed conflicts to avoid the use of explosive weapons with a wide impact area in populated areas due to the significant likelihood of indiscriminate effects. The representative questioned how these heavy weapons continued to be portrayed as able to distinguish between civilians and combatants and civilians and military objectives. The representative welcomed that consultations were planned to take place early April 2022 in Geneva and the diplomatic process was expected to adopt a political declaration on explosive weapons in populated areas. The ICRC appealed to the States represented in CAHDI to adopt a strong and meaningful political declaration with concrete measures and commitments, including a commitment to avoid the use of heavy explosive weapons in such areas. On the matter of besieged cities, the representative noted that there was an increased trend of the use of sieges. Under IHL, civilians must be allowed to leave besieged areas and the Fourth Geneva Convention specifically required that parties endeavour to find local agreements to remove groups with specific risks such as wounded and sick, persons with disabilities, older persons, children and pregnant women from such areas.

149. The representative underlined the need to preserve humanitarian space, in particular, when it came to counter terrorism measures and sanctions. The ICRC was pleased by the positive developments in the UN Security Council, such as Resolution 2615(2021) on the Afghanistan sanctions regime, and in the EU that affirm that counterterrorism measures and sanction measures must comply with IHL.

150. Furthermore, the representative raised the issue of respect for IHL in the international transfer of weapons in many conflicts around the world. In line with the approach of IHL and its neutral approach to humanitarian actions, the ICRC does not question the transfer of weapons as such. The focus is on the obligation of States to ensure respect for IHL and to implement international instruments on arms transfers such as the arms trade treaty, in line with their humanitarian objectives. According to the representative, ICRC welcomed commitments by governments, including in the framework of the European Peace Facility, to monitor the end use of weapons and to take mitigating measures to ensure that arms provided, including in the form of military aid or donation, are used in accordance with IHL.

151. The representative echoed the deep concern by the ICRC and the whole Red Cross and Red Crescent Movement over the possibility that nuclear weapons might again be used by intent, miscalculation or accident, and stressed that any risk of use of nuclear weapons was unacceptable given their catastrophic humanitarian consequences. No State or humanitarian organisation would be prepared to respond to the catastrophic consequences of a nuclear explosion. The first meeting of States parties to the Treaty on the Prohibition of Nuclear Weapons in June and the 10th Review Conference of the Nuclear Non Proliferation Treaty in August 2022 will provide key opportunities for States to make tangible progress towards achieving nuclear disarmament.

152. The representative stressed that while much attention was put on the conflict of Ukraine, and rightly so, the reality was that armed conflicts continue to affect every region of the world. There is no end in sight for the protracted non-international conflicts continuing in Syria, Yemen, Myanmar, Ethiopia and many other places. The aftermath of the US withdrawal from Afghanistan has not meant the end of conflict for that country. The representative asserted that the price paid by the civilian population, especially children, was unacceptable.

153. Lastly, the representative of the ICRC commented how States, in particular those neighbouring Ukraine, have generously found practical responses to help people find safety. The same anguish leads people to flee conflict around the globe, in places such as Sahel, the Lake Chad region or the Middle East and the ICRC encourages States to apply similar practices for people fleeing these conflicts.

154. The representative of Switzerland joined the call of the ICRC to respect IHL in any conflict, including particularly the Ukraine-Russia situation. She affirmed that Parties to conflicts must ensure the protection of civilians not participating in the conflict, respect the rules of war, and must ensure the respect of civilian objects. The representative called for the cessation of hostilities occurring near and against nuclear sites and cited the special protection they are afforded under IHL. The representative expressed concern about reports on the use of cluster munitions and other explosives in populated areas. She recalled that the indiscriminate use of force was prohibited and constituted a serious violation of IHL. Lastly, an important matter for the Swiss delegation, was the question of the impact of sanctions on humanitarian activities and they addressed this issue in close cooperation with their Ministry of Economy in charge of sanctions because the purpose of sanctions is to condemn and avoid the continuation of violations of IHL in general without limiting humanitarian actions on the ground.

155. The representative of Ireland took the floor to inform delegations that the Irish national committee on IHL, meeting in December 2021, had equally decided to begin work on a voluntary report on national implementation of IHL. The representative further recalled Ireland's leading role in the process for the development of a declaration on the use of explosive weapons in populated areas that had resumed after the delays caused by the pandemic. The topic had become relevant again due to the current political context of the Russian Federation's aggression against Ukraine, yet he emphasised the general nature of the declaration. Ireland planned to hold three full days of in person consultations in Geneva from 6-8 April 2022 building on earlier work on the subject.

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

156. The Chair reminded the CAHDI of document CAHDI (2022) 5 prov presenting a summary of the developments at the International Criminal Court (ICC) and other international criminal tribunals since the last CAHDI meeting. She invited delegations to take the floor to share their comments.

157. The Georgian representative informed the CAHDI that the ICC Prosecutor had recently initiated an investigation into alleged crimes committed during the Russian Federation's aggression against Georgia in 2008. In March 2022, the Prosecutor had announced application for warrants against three individuals, focusing on unlawful confinement, ill-treatment, hostage taking and subsequent unlawful transfer of Georgian civilians. The investigation also targets the role of major generals in the armed forces of the Russian Federation and the deputy commander of the air force at the time, now deceased, who is believed to have intentionally contributed to the execution of some of these crimes.

158. The representative of the Netherlands informed the CAHDI of ongoing preparations for the conclusion of a treaty on international cooperation on national prosecution of international crimes, initiated by Belgium, Slovenia, Senegal, Mongolia and his country. He underlined the relevance of such an instrument, particularly in the present context, and informed delegations that a third round of informal consultations would take place in early June.

7.5 Topical issues of public international law

- ***Exchange of views on the "Use of force under public international law – the case of Ukraine" with introductory remarks from Prof. Dapo Akande, Blavatnik School of Government/University of Oxford***

159. The Chair welcomed and introduced Mr Dapo Akande, Professor of Public International Law and member of the International Law Commission, to the CAHDI.

160. Professor Akande began by expressing his solidarity with the Ukrainian people and regretted having to address with the CAHDI the tremendous situation occurring in Ukraine. He then went on to elaborate on the specific areas of international law in which the Russian Federation's invasion and ongoing use of force in Ukraine had resulted in violations. He stated that such invasion constituted violations of the prohibition on the use of force under international law, of various aspects of IHL and could also amount to violations of human rights law. He further noted that Russia's continuing use of force in Ukraine also constituted a violation of the provisional measures order indicated by the ICJ in the case brought by Ukraine against Russia under the Genocide Convention.[25]

161. Professor Akande then discussed the measures undertaken by States in response to the unlawful use of force by the Russian Federation. He distinguished between measures that were specifically authorised by exceptions to be found in applicable legal regimes, and measures that fell within the notion of "retortions" under international law. He further underlined particular challenges that might arise with respect to asset freezes, specifically regarding their consistency with State immunity, obligations under applicable bilateral investment treaties with Russia and with the human rights obligations of the State at the origin of the measure.

162. Professor Akande emphasised that in the context of Ukraine, Russia had clearly violated international *erga omnes* obligations. Therefore, he elaborated on the right of third States to take countermeasures in solidarity with the injured State referred to in Article 54 of the ILC's Draft Articles on the Responsibility of States for Internationally Wrongful Acts. He encouraged States to explicitly recognise that third party countermeasures were permissible in response to violations of obligations *erga omnes*.

163. Professor Akande concluded his presentation by briefly elaborating on the various mechanisms which could allow individual accountability in the context of the Russian Federation's aggression in Ukraine. He recalled that an initiative to create a special tribunal to

[25] ICJ, "Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide" (*Ukraine v. Russian Federation*), Request for the indication of provisional measures, order of 16 March 2022.

prosecute the crime of aggression against Ukraine had been prompted to remedy the lack of jurisdiction of the ICC in the circumstances in question. Such a tribunal might be established either on the basis of treaty between Ukraine and a group of other States or an international organisation, or even as a hybrid tribunal established by Ukrainian law with the practical support of international organisations and States.

164. The Chair and the representatives thanked Professor Akande for his comprehensive presentation on the topic.

165. Responding to a question in regard to the effectiveness of international law in addressing and preventing aggressions such as the one seen in Ukraine, Professor Akande shared his belief that the measures which were undertaken by the international community in response to the Russian Federation's aggression would set the scene and show whether or not international law could be effective for the future. He further emphasised the importance of reflecting on the legal basis for actions taken in that context, in order to ensure that such actions were legally generalisable in other future circumstances following the same pattern.

166. Concerning the individual accountability in the context of the Russian Federation's aggression, Professor Akande recalled that behind the pursuit of individual accountability, there was an expressive function which consisted in reinforcing the fact that the crime of aggression was prohibited by international law, and that it also entailed actions of accountability.

167. On the issue of third-party countermeasures, Professor Akande noted that States had widely resorted to such countermeasures over the last years in response to breaches of international law which were of an *erga omnes* character, and that States had not denounced such conduct. He therefore encouraged them to establish an explicit *opinio juris* on this matter since these questions would start to arrive before many courts and tribunals.

168. Concerning the interplay between the potential future special tribunal for the crime of aggression and the ICC, Professor Akande believed that the ICC for both practical and structural reasons was never going to be the sole actor in the field of accountability. The ICC must deal with numerous situations, not only with the situation of aggression in Ukraine and, therefore will always have a limited response. In that sense, States will always have to resort to other mechanisms in order to seek broader accountability, additionally to the work of the ICC.

169. In response to the recurring question of immunities for heads of States, Professor Akande underlined that the crime of aggression was not confined to individuals who had immunity *ratione personae* and therefore, immunity would only be an obstacle with respect to a small group of individuals and would not render the creation of a special tribunal for the crime of aggression unnecessary. He stated that the ICC's Appeal Chamber in the *Al Bashir case*, as well as the STSL in the *Taylor case*, had stated that there was no immunity before international tribunals and according to that view, it was important to create the special tribunal as an international tribunal. Professor Akande further noted that in his view there were other grounds allowing to negate immunity with respect to the victim of the crime of aggression such as the use of self-help or self-defense.

170. Responding to the compatibility of amnesties with international law, Professor Akande recalled that Article 53 of the Rome Statute enabled the ICC Prosecutor, while assessing the justification of a prosecution in the interest of justice, to take into account the provisions and effects of broader mechanisms that could have been established and this way amnesties could enter into play.

171. Concerning the issue of arrest warrants *in abstentia*, Professor Akande believed that international law allowed a State to exercise universal jurisdiction and start proceedings over an individual which was not located on its territory.

172. Responding to the question of the legitimacy of the various legal options available for establishing a special tribunal for the crime of aggression, Professor Akande stressed that the sole fact these options were constructed as an exercise of the delegated jurisdiction of Ukraine provided some legitimacy since Ukraine was the victim of the crime. He also recalled that this

issue was above all political and practical and that the broader the multilateral support was, the more legitimacy these legal options would achieve.

173. The Chair thanked Professor Akande for his responses and the CAHDI members for the insightful exchange.

174. Many delegations took the floor to express their solidarity with the Ukrainian people, recalled the importance of respecting the sovereignty and territorial integrity of Ukraine within its internationally recognised borders, and expressed their willingness to provide the country with all possible assistance. Various representatives also stressed the importance of establishing the greatest number of effective means to investigate the crimes committed in this context and holding the perpetrators accountable at both international and national levels, including through the exercise of universal jurisdiction. The representatives of Sweden, Slovakia and Lithuania noted that their countries had initiated national investigations to obtain evidence from victims or witnesses of crimes in the context of aggression in Ukraine. Many delegations agreed that it was necessary to act jointly in the area of accountability in order to effectively exchange information and evidence between States and with international courts. The representative of Lithuania invited the States that had launched national investigations to join the joint investigation team in order to promote international cooperation in this area. The representatives of Sweden, Lithuania and the United Kingdom affirmed that their countries had provided the ICC with financial and human resources in order to support its work in the context of crimes committed in the context of the armed aggression against the territory of Ukraine, and others expressed their intention to do so.

175. The Ukrainian representative expressed her appreciation to the delegations present for their support and for their many initiatives in the field of sanctions. She called upon delegations to work closely with the Ukrainian MFA to inform the country of any new sanctions being considered and recalled the important role of MFAs in the implementation of the principles of international law and in the establishment of procedures related to sanctions and criminal investigations. The representative stressed that, despite the many efforts of the international community, the humanitarian crisis was worsening and therefore urged delegations to continue and intensify their actions. She further asserted that her government continued to be fully operational and had prioritised its work so as to focus entirely on core business in the war context. The representative stated that, in her country's view, the most effective way to investigate crimes in this context was to create a joint investigation team, as was done in the case of the downing of flight MH17. She therefore also encouraged the prosecutors of the States present to be in close contact with Ukrainian prosecutors and to conclude memoranda of understanding in order to strengthen cooperation.

8 OTHER

8.1 Place, date and agenda of the 63rd meeting of the CAHDI

176. The CAHDI decided to hold its 63rd meeting in Bucharest (Romania), on 22-23 September 2022. The CAHDI instructed the Chair to prepare the provisional agenda of this meeting in due course in co-operation with the Secretariat.

8.2 Any other business

177. No delegation wished to take the floor under this item.

8.3 Adoption of the Abridged Report and closing of the 62nd meeting

178. The CAHDI adopted the Abridged Report of its 62nd meeting, as contained in document CAHDI (2022) 9, and instructed the Secretariat to submit it to the Committee of Ministers for information.

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

APPENDICES

APPENDIX I

LIST OF PARTICIPANTS

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

ALBANIA / ALBANIE

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

ANDORRA / ANDORRE

Mme Cristina MOTA GOUVEIA - Présente
Directrice
Département des Affaires juridiques internationales et des Ressources humaines
Ministère des Affaires étrangères
Govern d'Andorra Edifici Administratiu
C/ Prat de la Creu, 62-64
AD500 – ANDORRA LA VELLA

ARMENIA / ARMENIE

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

AUSTRIA / AUTRICHE

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

AZERBAIJAN / AZERBAIDJAN

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

BELGIUM / BELGIQUE

M. Piet HEIRBAUT - présent
Directeur Général
Service Public Fédéral Affaires étrangères, Commerce extérieur et Coopération au Développement
Direction générale des Affaires juridiques
15 rue des Petits Carmes
1 000 BRUXELLES

Mme Sabrina HEYVAERT - présente
Directrice
Service Public Fédéral Affaires étrangères, Commerce extérieur et Coopération au Développement
Direction générale des Affaires juridiques
Direction Droit international public
15 rue des Petits Carmes
1 000 BRUXELLES

Mme Laurence GRANDJEAN - Présente
Attaché
Service Public Fédéral Affaires étrangères, Commerce extérieur et Coopération au Développement
Direction générale des Affaires juridiques
Direction Droit international public
15 rue des Petits Carmes
1 000 BRUXELLES

BOSNIA AND HERZEGOVINA / BOSNIE-HERZEGOVINE

Mr Dag ĐUMRUKČIĆ - Remote
Head of Department for International Legal Affairs
Ministry of Foreign Affairs
Musala 2.
71000 SARAJEVO

BULGARIA / BULGARIE

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

CROATIA / CROATIE

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

Ms Petrunjela VRANKIC - Present
Attaché
Directorate-General for European and International Law
Ministry of Foreign and European Affairs
Trg N.S. Zrinskog 7-8
10 000 ZAGREB

CYPRUS / CHYPRE

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

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

CZECH REPUBLIC / REPUBLIQUE TCHEQUE

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

DENMARK / DANEMARK

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

Mr Ulf MELGAARD - Present
Director
Legal Service, Ministry of Foreign Affairs
Asiatisk Plads 2
1 448 COPENHAGEN

Mr Christian Astrup SØRENSEN - Present
Legal Adviser
Legal Service, Ministry of Foreign Affairs
Asiatisk Plads 2
1 448 COPENHAGEN

ESTONIA / ESTONIE

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

FINLAND / FINLANDE

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

Ms Tarja LÅNGSTRÖM - Present
Acting Director
Unit of Public International Law
Legal Service
Ministry for Foreign Affairs
Kanavakatu 3 B P.O.B. 176

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

Ms Laura PEURANIEMI - Remote
Legislative secretary
Legal Service, Unit for EU and Treaty Law
Ministry for Foreign Affairs
Kanavakatu 3 - P.O. Box 176
00 023 HELSINKI

FRANCE

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

Mme Charlotte DANIEL-BARRAT - Présente
Conseillère juridique
Sous-direction du droit international public
Ministère de l'Europe et des Affaires étrangères
57 boulevard des Invalides
75007 PARIS

GEORGIA / GÉORGIE

Ms Irine BARTAIA - Remote
Director of International Law Department
Ministry of Foreign Affairs
Chitadze Str. 4
0118 TBILISI

GERMANY / ALLEMAGNE

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

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

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

GREECE / GRECE

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

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

HUNGARY / HONGRIE

Mr Balázs MAGYAR - Present
Head of Unit
International Law Department
Ministry of Foreign Affairs and Trade
Bem rkp. 47
1027 BUDAPEST

Mr Balazs Aron MRAVIK - Present
Legal Officer
International Law Department
Ministry of Foreign Affairs and Trade
Medve str. 25-29.
1027 BUDAPEST

ICELAND / ISLANDE

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

IRELAND / IRLANDE

Mr Declan SMYTH - Present
Acting Legal Adviser
The Department of Foreign Affairs
2 Clonmel St.,
DUBLIN 2, D02 WD63

Mr Niamh McCORMACK - Remote
Legal Intern
The Department of Foreign Affairs
2 Clonmel St.,
DUBLIN 2, D02 WD63

ITALY / ITALIE

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

Mr Fabrizio COLACECI - Remote
Councelor, Coordinator for CAHDI
Legal Departement
Ministry of Foreign Affairs and
International Cooperation
Piazzale della Farnesina, 1
00139 ROME

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

LATVIA / LETTONIE

Ms Kristine LICIS - Present
Legal Adviser
Government Agent before the ECHR
Ministry of Foreign Affairs
K.Valdemara street 3
LV-1395 RIGA

LIECHTENSTEIN

Ms Esther SCHINDLER - Remote
Deputy Director
Office for Foreign Affairs
Kirchstrasse 9
9490 VADUZ

LITHUANIA / LITUANIE

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

LUXEMBOURG

M. Alain GERMEAUX - Présent
Conseiller juridique
Ministère des Affaires étrangères et européennes
9 rue du Palais de Justice
L-1 841 LUXEMBOURG

MALTA / MALTE

Ms Marilyn GRECH - Present
Junior Legal Officer
Legal Unit
Ministry for Foreign and European Affairs
331, Allied House, St Paul's Street
VLT 1211 VALLETTA

REPUBLIC OF MOLDOVA / REPUBLIQUE DE MOLDOVA

Ms Violeta AGRICI - Remote
Head of the International Law Directorate
Ministry of Foreign Affairs
and European Integration
80, 31 August 1989 Street.
MD-2012 CHIŞINĂU

MONACO

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

MONTENEGRO

Ms Milica VUKOVIĆ – Remote
Legal Advisor
Directorate for International Agreements in the
Ministry of Foreign Affairs

NETHERLANDS / PAYS-BAS

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

NORTH MACEDONIA / MACEDOINE DU NORD

NORWAY / NORVÈGE

Mr Kristian JERVELL - Present
Director General
Legal Department
Ministry of Foreign Affairs
7. juni-plassen 1,
0251 OSLO

Mr Markus A.B. LAURANTZON - Present
Adviser,
Department for Legal Affairs, Section for Treaty Law, Environmental Law and the Law of the Sea
Ministry of Foreign Affairs
7. juni-plassen 1,
0251 OSLO

Mr Helge SELAND - Present
Ambassador
The Norwegian Permanent Mission
to the Council of Europe
42 rue Schweighaeuser, STRASBOURG
Tel: +33 7 49 68 49 94
E-mail: helge.seland@mfa.no

POLAND / POLOGNE

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

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

PORTUGAL

Mr Mateus KOWALSKI - Present
Director of the International Law Department,
Department of Legal Affairs
Ministry of Foreign Affairs
Largo do Rilvas
1399-030 LISBON

ROMANIA / ROUMANIE

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

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

SAN-MARINO / SAINT-MARIN

Mr Stefano PALMUCCI - Remote
Legal Expert
Department of Foreign Affairs
Palazzo Begni, Contrada Omerelli
No 31 - 47890 SAN MARINO

SERBIA / SERBIE

SLOVAK REPUBLIC / REPUBLIQUE SLOVAQUE

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

Ms Michaela PANISOVA LEZAKOVA – Remote
JUDr
International Law Department
Ministry of Foreign Affairs
Hlboka cesta 2,
83336 BRATISLAVA

SLOVENIA / SLOVENIE

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

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

Ms Tjasa TANKO - Present
Special Assistant to the Legal Advisor
International Law Department
Directorate for International Law
and Protection of Interests
Ministry of Foreign Affairs
Prešernova cesta 25
1000 LJUBLJANA

SPAIN / ESPAGNE

M. Santiago RIPOL CARULLA - Present
Head of the International Legal Office
Ministry of Foreign Affairs
Plaza de la Provincia, 1
28 071 MADRID

M. Maximiliano BERNAD Y ÁLVAREZ DE EULATE - Present
Professeur émérite droit international public et relations internationales - Université de Saragosse
Président du ''Real Instituto de Estudios Europeos''
Coso, 32, 2º Of.
50 004 SARAGOSSE

SWEDEN / SUEDE

Mr Carl Magnus NESSER - Present
Director-General for Legal Affairs
Ministry for Foreign Affairs
103 39 STOCKHOLM

Mr Pär ERIKSSON - Present
Deputy Director
Department for International Law,
Human Rights and Treaty Law
Ministry for Foreign Affairs
103 39 STOCKHOLM

SWITZERLAND / SUISSE

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

TÜRKIYE

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

UKRAINE

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

Mr Mykola GNATOVSKYY - Present
Adviser to the Minister for Foreign Affairs
Ministry of Foreign Affairs of Ukraine
1 Mykhailivska Square
01018 KYIV

Mr Anton KORYNEVYCH – Present
Permanent Representative
of the President of Ukraine
in the Autonomous Republic of Crimea

UNITED KINGDOM / ROYAUME-UNI

Mr Andrew MURDOCH - Present
Acting Legal Adviser
Foreign, Commonwealth and Development Office
King Charles Street
SW1A 2AH LONDON

Mr Peter ARCHER - Present
Assistant Legal Adviser
Foreign, Commonwealth and Development Office
King Charles Street
SW1A 2AH LONDON

EUROPEAN UNION / UNION EUROPEENNE

EUROPEAN COMMISSION / COMMISSION EUROPÉENNE

Mr Lucio GUSSETTI - Present
Director
Legal Service
European Commission
200, Rue de la Loi 200
1 049 BRUSSELS
BELGIUM

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

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

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

Ms Petra MAHNIČ - Present
Legal Adviser
Council of the European Union
Council Legal Service Directorate
JUR 3 (External Relations)
Rue de la Loi, 175
1048 BRUSSELS

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

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

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

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

CANADA

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

Ms Angela VEZEY - Remote
Office of the Legal Adviser
and ADM Legal Affairs
Global Affairs Canada
Lester B. Pearson building
125 Sussex Drive
C7-223 OTTAWA
Ontario K1A 0G2

HOLY SEE / SAINT-SIEGE

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

JAPAN / JAPON

Mr Hiroyuki NAMAZU - Remote
Director-General / Legal Adviser
International Legal Affairs Bureau
Ministry of Foreign Affairs
2-2-1 Kasumigaseki, Chiyoda-ku,
100-8919 TOKYO

Mr Tomohiro MIKANAGI - Present
Deputy Director-General / Deputy Legal Adviser
International Legal Affairs Bureau
Ministry of Foreign Affairs
2-2-1 Kasumigaseki, Chiyoda-ku
100-8919 TOKYO

Ms Yuka MORISHITA - Remote
Assistant Director
International Legal Affairs Division
International Legal Affairs Bureau
Ministry of Foreign Affairs
2-2-1 Kasumigaseki, Chiyoda-ku
100-8919 TOKYO

Mr Masatsugu ODAIRA - Remote
Director / Assistant Legal Adviser
International Legal Affairs Division
Ministry of Foreign Affairs
2-2-1 Kasumigaseki, Chiyoda-ku,
100-8919 TOKYO

Mr Hiroyuki KANEKO - Remote
Principal Deputy-Director
International Legal Affairs Division
International Legal Affairs Bureau
Ministry of Foreign Affairs
2-2-1 Kasumigaseki, Chiyoda-ku,
100-8919 TOKYO

Mr Hikaru IWAKI - Present
Consul – Attorney
Deputy to the Permanent Observer of Japan
to the Council of Europe
Consulate General of Japan in Strasbourg
"Bureaux Europe" - 20, place des Halles
67000 STRASBOURG

REPUBLIC OF KOREA / REPUBLIQUE DE COREE

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

Ms So Hyun JUNG - Remote
Second Secretary
International Legal Affairs Division
Ministry of Foreign Affairs,
60, Sajik-ro 8-gil, Jongno-gu,
03172 SEOUL

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

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

Mr Cho Seong HYEON - Remote
Second Secretary
International Legal Affairs Division
Ministry of Foreign Affairs,
60, Sajik-ro 8-gil, Jongno-gu,
03172 SEOUL

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

Mr Yoo JIN - Remote
Second Secretary
International Legal Affairs Division
Ministry of Foreign Affairs,
60, Sajik-ro 8-gil, Jongno-gu,
03172 SEOUL

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

MEXICO / MEXIQUE

M. Juan Manuel GOMEZ ROBLEDO - Présent
Ambassadeur
Secrétariat des Relations Extérieures du Mexique
5 Bd. du Président Edwards
67000 STRASBOURG
Tel: +52 36 86 53 03

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

Mme Eva PIZANO - Présente
Première Secrétaraire
Représentation Permanente du Mexique auprès du Conseil de l'Europe
5 Bd. du Président Edwards
67000 STRASBOURG

UNITED STATES OF AMERICA / ETATS-UNIS D'AMERIQUE

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

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

Ms Danielle POLEBAUM - Present
Special Assistant to the Legal Adviser
U.S. Department of State
2201 C Street, NW
20 520 WASHINGTON DC

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

AUSTRALIA / AUSTRALIE

Mr Matthew NEUHAUS - Remote
Ambassador
Australian Embassy to the Netherlands
Carnegielaan 4
2517 KH THE HAGUE

ISRAEL / ISRAËL

Ms Tamar KAPLAN TOURGEMAN - Present
Principal Deputy Legal Adviser
Ministry of Foreign Affairs
JERUSALEM

NEW ZEALAND / NOUVELLE ZELANDE

UNITED NATIONS / NATIONS UNIES

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

Ms Céline FOLSCHÉ – Remote
Senior Legal Adviser
General Legal Affairs Division
2 rue André Pascal
75775 PARIS

Mme Diane GIRARD – Remote
Conseillère juridique
General Legal Affairs Division
2 rue André Pascal
75775 PARIS

Mme Camille VILLENEUVE – Remote
Conseillère juridique
General Legal Affairs Division
2 rue André Pascal
75775 PARIS

EUROPEAN ORGANISATION FOR NUCLEAR RESEARCH (CERN) / ORGANISATION

EUROPEENNE POUR LA RECHERCHE NUCLEAIRE (CERN)

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

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

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

Mr Brody WARREN - Remote
Attaché to the Secretary General
Churchillplein 6B,
2517JW Den Haag

INTERPOL

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

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

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

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

Mr John SWORDS - present
Legal Adviser
Office of Legal Affairs Divisio
NATO HQ Boulevard Léopold III
1110 BRUXELLES, BELGIUM

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

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

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

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

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

Ms Camille COPIGLIA - remote
Intern
Office of Legal Affairs / OSCE
1010 – VIENNA, AUSTRIA

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

Mr Kamalinne PINITPUVADOL – Remote
Secretary-General
29-C, Rizal Marg, Diplomatic Enclave,
Chanakyapuri,
110021 NEW DELHI

Mr Jun YAMADA – Remote
Deputy Secretary-General
29-C, Rizal Marg, Diplomatic Enclave,
Chanakyapuri,
110021 NEW DELHI

Dr Ali GARSHASBI – Remote
Deputy Secretary-General
29-C, Rizal Marg, Diplomatic Enclave,
Chanakyapuri,
110021 NEW DELHI

SPECIAL GUEST / INVITE SPECIAL

Pr. Dapo AKANDE
Co-Director of the Oxford Institute for Ethics, Law and Armed Conflict (ELAC),
Blavatnik School of Government
University of Oxford
120 Walton Street
OX2 6GG OXFORD, UNITED KINGDOM

SECRETARIAT GENERAL

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

Mr Jörg POLAKIEWICZ
Director / *Directeur*

CAHDI SECRETARIAT / SECRETARIAT DU CAHDI

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

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

Mr Antoine KARLE
Junior Lawyer – *Jeune juriste*
Public International Law Division
Division du droit international public

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

Ms Charlotte LINDON
Trainee International Law
Stagiaire Droit international
Public International Law Division

INTERPRETERS / INTERPRETES

Mme Lucie DE BURLET
Mme Corinne McGEORGE
Mme Chloé CHENETIER
M. Jean-Jacques PEDUSSAUD

APPENDIX II

AGENDA

1. INTRODUCTION

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

1.2. Adoption of the agenda

1.3. Adoption of the report of the 61st meeting

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

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

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

2.1. Terms of reference of the CAHDI

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

3. CAHDI DATABASES AND QUESTIONNAIRES

3.1. Settlement of disputes of a private character to which an International Organisation is a party

3.2. Immunity of State-owned cultural property on loan

3.3. Immunities of special missions

3.4. Service of process on a foreign State

3.5. Possibility for the Ministry of Foreign Affairs to raise public international law issues in procedures pending before national tribunals and related to States' or international organisations' immunities

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

3.7. The implementation of United Nations sanctions

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

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

4.2. State practice and relevant case-law

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

5.1. EU accession to the ECHR – international law aspects

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

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

6. TREATY LAW

6.1. Exchanges of views on topical issues related to treaty law

- *Exchange of views on the statutory and conventional consequences of the suspension/withdrawal/expulsion of a member State from the Council of Europe*

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

- *Exchange of views on treaties not requiring parliamentary approval*

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

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

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

7. CURRENT ISSUES OF PUBLIC INTERNATIONAL LAW

7.1. Peaceful settlement of disputes

7.2. The work of the International Law Commission

7.3. Consideration of current issues of international humanitarian law

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

7.5. Topical issues of public international law

- *Exchange of views on the "Use of force under public international law – the case of Ukraine" with introductory remarks from Prof. Dapo Akande, Blavatnik School of Government/University of Oxford*

8. OTHER

8.1 Place, date and agenda of the 63rd meeting of the CAHDI: Bucharest (Romania), 22-23 September 2022

8.2 Adoption of the Abridged Report and closing of the 62nd meeting

APPENDIX III

Prof. Dapo AKANDE
Blavatnik School of Government
Oxford Institute for Ethics, Law and Armed Conflict
University of Oxford

USE OF FORCE UNDER PUBLIC INTERNATIONAL LAW
- THE CASE OF UKRAINE -

62nd meeting of the
Committee of Legal Advisers on Public International Law (CAHDI)
on 25 March 2022 in Strasbourg, France

1. Thank you very much, Madam Chair. It is an honour to be here to speak to members of the CAHDI and to contribute to your discussions. Typically, I would have said that it is a pleasure and an honour to be here, but of course, the circumstances in which we are meeting are extremely difficult and the topic that we will be discussing is one which we would rather not be speaking about. My heart goes out in solidarity to the people of Ukraine and to the Ukrainian delegation here in the room. I was asked to speak about the use of force under public international law in the case of Ukraine and on the range of related issues. I expect that your discussions will be somewhat wide-ranging, but of course, I can only cover a limited set of those issues. Russia's invasion and ongoing use of force in Ukraine constitutes a violation of international law yet it is probably useful to begin by setting out the particular areas of international law where we have seen violations. There have been violations of at least five areas of public international law.

2. First of all, this invasion constitutes a violation of the prohibition on the use of force contained in the UN Charter and in customary international law. The UN General Assembly, in the resolution that it adopted on 2 March 2022 by an overwhelming number of affirmative votes, characterised Russia's conduct as an "aggression by the Russian Federation against Ukraine in violation of Article 2, paragraph 4, of the Charter".[26]

3. Second, from what we are seeing, the conduct of hostilities by Russian forces appears to involve violations of various aspects of international humanitarian law and I will pick up on two of those areas. In particular, we have seen multiple reports of Russian forces directing attacks on civilian objects in breach of Additional Protocol I to the Geneva Conventions. At the very least, we have seen attacks which breach the prohibition of indiscriminate attacks in the sense that they are not directed at a specific military objective, or they employ a method/means of combat which cannot be directed at a specific military objective. The other aspect of international humanitarian law that I wanted to concentrate on deals with what we are seeing in places like Mariupol which seems to be a return to siege warfare and a denial of humanitarian access which appears to be in breach of the law relating to humanitarian relief operations in situations of armed conflict.

[26] UNGA, 'Aggression against Ukraine', A/RES/ES-11/1, resolution adopted on 2 March 2022, at, para. 2.

4. The rules of international humanitarian law, with respect to humanitarian relief operations, provide that if civilians are inadequately provided with essential supplies, such as food, water, medical supplies, offers may be made to conduct relief operations that are exclusively humanitarian and impartial in character. Where such offers are made, Additional Protocol I, which, of course, applies to the conflict in question, provides that such humanitarian relief operations shall be carried out with the consent of the relevant party. However, international humanitarian law also provides that such consent shall not be arbitrarily or unlawfully withheld.

5. The third area where we have seen violations relates to the individual who commits acts that amount to violations of international humanitarian law. To the extent that these individuals do so with the requisite state of mind, then these acts would also constitute international crimes for which those individuals would bear individual criminal responsibility.

6. Fourthly, the acts of Russian forces in Ukraine may amount to violations of human rights law by the Russian Federation. The International Court of Justice held in the Israeli Wall in Palestine advisory opinion that the protections that are offered by human rights conventions do not cease to apply in case of armed conflict.[27] Of course, it is well known that in the case of particular human rights treaties, such as the European Convention on Human Rights and also the International Covenant on Civil and Political Rights, whether the state has obligations outside of its own territory will depend on whether victims fall within the jurisdiction of that state within the meaning of the particular provisions of those treaties.

7. Fifthly, Russia's continuing use of force in Ukraine amounts to a violation of the provisional measures order indicated by the International Court of Justice on 16 March 2022, in the case brought by Ukraine against Russia under the Genocide Convention. The International Court of Justice held that "the Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine".[28] The Court also stated that "the Russian Federation, shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organisations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations referred to in point 1".[29] The International Court of Justice has made clear that provisional measures order that it indicates are binding, and thus, Russia has a legal obligation to comply with the ICJ's order.

8. The question that then follows is what are the legal consequences of this illegality? I would like to focus on two issues, one, the legal consequences for others, and the second, the legal consequences for those who are themselves perpetrating these violations of international law.

9. First, I would like to discuss the consequences for other States, in terms of how other States may react to this illegality. Many States have been taking measures to respond, and the question that arises relates to the legal basis for such reactions. The second question that I would like to address are the consequences for those individuals who are involved in these

[27] ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2002, I.C.J. Reports 2004, p. 136, at, para. 106.
[28] ICJ, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Aggression (Ukraine v. Russian Federation), Order of 16 March 2022, Request for the indication of provisional measures, at, para. 86(1).
[29] *Ibid.*, para. 86(2).

violations of international law. How may individuals be held responsible for violations of international criminal law?

10. Many of your states have taken a variety of measures to react to Russia's unlawful use of force, measures including freezing of assets of the Russian state, including those of the Russian Central Bank, freezing of assets of Russian nationals or entities who have a connection with the Russian government, the closure of airspace, trade restrictions and other measures. Now, in some cases, the measures in question fall within what we would characterise as “retortions” under international law. In that sense, while the measures are in response to violations of international law, the measures are not in breach of any legal obligation by the state that is taking the measure. While some of these measures may be unfriendly acts, they are acts which the state concerned has a legal right to take. This may be the case, for example, for travel bans because States do not, as a general matter, have an obligation to allow foreign nationals entry to their territory.

11. Other measures, however, may be specifically allowed by the relevant rules of the applicable legal regime, including applicable treaty rules. So it may be that the relevant treaty rules provide an exception to an otherwise applicable obligation. For example, with respect to trade obligations under the World Trade Organization Agreement, and in particular the General Agreement on Tariffs and Trade (GATT), it may be possible to rely on the security exception that we see in the GATT. For instance, Article 21 of the GATT allows contracting parties to take action which they consider necessary for the protection of essential security interests in time of war or other emergency and international relations. In this second category, we have acts which would otherwise be in breach of an applicable legal rule, but they are specifically permitted by an exception to be found in that legal regime.

12. Third, it may be that some of these measures rely on the suspension of the relevant treaty and that suspension of treaty obligations, and in particular cases, may be in accordance with the relevant provisions of the treaty concerned. These are cases where you find the legal basis within the regime, the applicable treaty or other legal regime.

13. Fourth, there may be cases where the measures being taken in response to the Russian aggression, on their face, are in breach of applicable legal rules, and there is not a relevant exception within the particular legal regime that would apply.

14. With respect to asset freezes in particular, a number of questions might arise. First of all, to what extent is the freezing of the assets of the Russian state consistent with the regime of state immunity, in particular, are measures of constraint on the property of a foreign state caught by rules regarding immunity from execution?. Second, to what extent are measures taken either against the Russian state or Russian nationals consistent with the customary international law minimum standard which a state is required to accord to foreign owned property? Third, to what extent are measures that are taken against Russian nationals consistent with obligations under applicable bilateral investment treaties with Russia, including the provisions on expropriation and fair and equitable treatment? A fourth question would be, to what extent are the manners in which the measures have been taken consistent with the relevant human rights obligations of the state that is taking the measure. In particular for European states, to what extent are they consistent with the provisions of the ECHR and, in that regard, a particular consideration needs to be given to at least four rights in particular: the right to peaceful enjoyment of possessions under Article 1 of Protocol 1, the right to

respect for one's home (Article 8), the right to a fair hearing (Article 6, paragraph 1) and the right to enjoy other ECHR rights without discrimination (Article 14).

15. These are a range of questions that one has to consider in order to see whether the measures are consistent with the rules in that regime, and if not, to what extent they may be justified under general international law. In respect of each of the foregoing questions, one may be able to determine that there is no breach of the relevant rule, and that determination of the absence of breach may be made with greater or less ease depending on the measure in question.

16. For human rights obligations previously mentioned, the fact that these rights in question are not absolute rights and the fact that the measures are taken in pursuance of a legitimate aim would make it more likely that the measures will be in conformity with the obligations of the state. Of course, these measures have to be proportional to the aim, but the gravity of the breach in question is likely to mean that it is easier to satisfy that proportionality requirement.

17. As we are speaking about human rights obligations and also about obligations relating to the protection of the interest of foreign nationals, there is a possibility of claims by individuals. On the one hand, these can be claims raising human rights issues in domestic courts or here in Strasbourg at the European Court of Human Rights, or, on the other hand, claims being brought under the relevant bilateral investment treaties (BITs). Whether the measures are consistent with the BITs, will depend on whether they fulfil rules of expropriation and obligations relating to fair and equitable treatment, but also whether for particular treaties, you can find an exception that covers the measures within those treaties.

18. Even if some of these measures are, on their face, in breach of otherwise applicable rules, it may be open to states taking these measures to rely on the fact that these measures are taken in response to Russia's violation of international law. In other words, the state may be able to rely on countermeasures as a justification for its own actions. Of course, to rely on countermeasures, a number of procedural and substantive conditions have to be fulfilled. A condition that needs to be pointed out is that a countermeasure cannot be used to justify infringement of fundamental rights. Thus, in relation to the obligations that I spoke about earlier, it is possible to justify those measures by referencing countermeasures in the investments and immunities context, but not in the human rights context.

19. It is clear that Russia's breaches of international law are breaches of obligations *erga omnes*, obligations owed to the international community as a whole and not simply breaches with respect to Ukraine. The critical issue with regards to countermeasures here is whether third states that are not directly injured by an unlawful act can take them in solidarity with the directly injured state, in this case Ukraine. The ILC in its Draft Articles on Responsibility of States for Internationally Wrongful Acts was very cautious in the approach that it took back in 2001. Article 54 of the Draft Articles speaks of the right of any state to take lawful measures against the responsible state to ensure cessation of the breach or reparation in the interests of the injured state. That reference to lawful measures was precisely to avoid making a judgement as to whether countermeasures were permissible when taken by third states not directly injured. At that time, the ILC referred to the embryonic state practice in this regard.

20. However, since the ILC articles were finalised in 2001, there has been a significant increase in the practice of third states taking measures in response to violations of obligations *erga omnes*. It seems to me that the time has now come to end that debate and to acknowledge

that third party countermeasures are indeed permissible in response to violations of obligations *erga omnes*. It is also probably time for states to start stating this explicitly, because, as I indicated, there is a possibility, perhaps even a likelihood, that some of these issues will come before international tribunals with respect to claims made by individuals. Those tribunals will need to make a judgement as to whether or not it is possible to rely on the general law of state responsibility in order to justify measures that are not necessarily consistent with the treaty regime that they are considering.

21. I will now come to the issue of accountability for international crimes, more precisely the consequences for individuals who are engaged in acts which violate international criminal law. I will try to briefly outline at least some of the issues. As already indicated, the acts we are seeing are not just violations of international law by the state, but they also entail individual criminal responsibility for individuals. The first issue that arises here is, what are the options for holding individuals to account? What mechanisms/tribunals may deal with this question of individual accountability? The second, but interrelated, issue is what crimes may individuals be held criminally responsible for?

22. With respect to the mechanism for establishing accountability under international criminal law, we have three possibilities. First of all, there is the possibility of prosecution before an international tribunal and in this regard, we have the International Criminal Court (ICC). We have seen a referral by a very large group of states to the ICC with the ICC prosecutor opening an investigation. The second possibility is that of prosecution in the domestic courts of Ukraine as and when they are able to exercise such jurisdiction. Then a third possibility is the prospect of prosecutions in foreign domestic courts, in the exercise of universal jurisdiction. A number of states have already opened investigations, and here I think it is important to recall that the grave breaches provisions of the Geneva Conventions do not just provide a right to exercise universal jurisdiction, but in some cases, they actually impose an obligation to do so.

23. The other issue is the issue of the crimes for which individuals may be held accountable. The jurisdiction of the ICC extends to war crimes, crimes against humanity, genocide and the crime of aggression. However, with respect to Russia's use of force in Ukraine there is a gap. While the Rome Statute, as amended in Kampala, provides for ICC jurisdiction over the crime of aggression, the ICC cannot exercise jurisdiction over the crime of aggression in this situation. There are two reasons for this. The first is that under the Kampala amendments to the Rome Statute, for the ICC to exercise jurisdiction over the crime of aggression, the state that is engaged in aggression must be a state party. Of course, the Russian Federation is not a state party to the Rome statute. The second reason for the absence of ICC jurisdiction over the crime of aggression is that, while the UN Security Council can refer the crime of aggression to the ICC, even with respect to a non-state party, that is clearly not going to happen in this situation.

24. In sum, the ICC is not able to exercise jurisdiction over the crime of aggression. There has been an initiative to create a special tribunal to prosecute the crime of aggression against Ukraine. I suppose the first question that is worth thinking about is why it is important to seek investigation and prosecution of the crime of aggression in this situation. It might be useful to go back to what the Nuremberg Military Tribunals Nuremberg Tribunal said about the crime of aggression or what was at that time called "crime against peace". The Nuremberg Tribunal spoke about the crime of aggression as being the supreme international crime since it contains within itself the accumulated evil of the whole.

25. We have spoken about the violations of IHL that are occurring in Ukraine, but even if the entire operations were conducted consistently with IHL, the level of suffering that we have seen is tremendous, and that arises principally because of the waging of an aggressive war. That is one reason for trying to fill that gap. The second reason to do so is because of the practical difficulties that sometimes occur with respect to proving the responsibility of senior leaders for war crimes, violations of IHL, in particular situations. To establish individual criminal responsibility, there is a need to tie those individual situations to decisions and/or lack of decisions that are made by the particular individual.

26. The higher the rank and the greater the distance of the person concerned from the acts under consideration, the more difficult is it typically to establish that responsibility. If we look at the record of the ICC over the last 20 years we see the difficulties that the ICC has had with establishing responsibility of senior leaders for the commission of war crimes. We have probably seen nearly as many acquittals as we have seen convictions. Aggression, of course, is a leadership crime but, although it is a leadership crime, it is not just restricted to one or two people. In this particular case, it is probably easier, in terms of proof, to establish responsibility with respect to the waging of an aggressive war, then it might be for establishing responsibility for individual violations of IHL, which is what you would need in order to prove war crimes.

27. Concerning the initiative to establish a special tribunal for the crime of aggression one question is, how might such a tribunal be established? There are a range of options which might be looked at. One option is to establish a tribunal by treaty between Ukraine and a group of other states. You establish an international tribunal which is created by treaty, but it is an interstate treaty between states. In one sense similar to the model that we had for Nuremberg.

28. A second possibility would be to have a treaty which is between Ukraine and an international organisation establishing an international tribunal. It could be a treaty between Ukraine and the UN, possibly between Ukraine and a more limited international organisation, the EU or some other international organisation. We have a number of models for that as well, we have got the Special Court for Sierra Leone, which was established on this basis, and, the Special Tribunal for Lebanon. Although the latter was established by a UN Security Council Resolution the original idea behind was a cooperation between Lebanon and the UN.

29. A third model is that you can have a tribunal, a hybrid tribunal, established by Ukrainian law but with the support of international organisations and states through some kind of arrangement whereby the international organisation or states provide practical, financial or other support to the tribunal. Maybe something similar to what we have seen with the Extraordinary Chambers in the Courts of Cambodia or perhaps something more similar to the Kosovo Specialist Chambers.

30. Final thing for now, and then we can open the floor for a discussion: the legal basis for the establishment of such a tribunal with respect to the crime of aggression. I think views differ to what the legal basis might be, but again, there is a range of options. Some people speak about a pooling of domestic universal jurisdiction with respect to the crime of aggression and not everybody accepts that there is universal jurisdiction for the crime of aggression. But a number of people have taken that view.

31. Second possibility is a delegation of Ukrainian territorial jurisdiction. I think it is well accepted that the state against which the crime of aggression has been committed on and on whose territory the crime of aggression has been committed has territorial jurisdiction with respect to the prosecution of those crimes which it can either exercise or could, in particular cases, delegate to an international tribunal. So that is another possibility for the establishment of such a tribunal. As I said at the beginning, I am sure that there is a wide range of issues that one might discuss with respect to the use of force against Ukraine. I have tried to focus on specific issues, and I am sure there will be others that colleagues might want to raise. Thank you very much Madam Chair.