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(CAHDI)

Meeting report

64th meeting
23-24 March 2023

Strasbourg, France (hybrid meeting)

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

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1 INTRODUCTION

1.1 Opening of the meeting by the Chair, Mr Helmut TICHY

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 64th meeting in Strasbourg (France) on 23-24 March 2023, with Mr Helmut TICHY (Austria) as the Chair. The meeting was held in hybrid format. The list of participants is set out in **Appendix I** to this report.

2. The Chair expressed his great pleasure to chair a CAHDI meeting for the first time and thanked all delegations for his election. He was looking forward to working with the new CAHDI Vice-Chair Ms Kerli VESKI (Estonia) to promote the CAHDI's activities and its contribution to international law, both within and outside the Council of Europe.

1.2 Adoption of the agenda

3. The CAHDI adopted its agenda as it appears in **Appendix II** to this report.

1.3 Adoption of the report of the 63rd meeting

4. The CAHDI adopted the report of its 63rd meeting (document CAHDI (2022) 19), held on 22-23 September 2022 in Bucharest (Romania), with the proposed amendments and instructed the Secretariat to publish it on the Committee's website.

5. The Turkish representative registered his indignation and protest with regard to the manner in which his predecessor's statement was recorded in the report of the 63rd CAHDI meeting. He was surprised to see that factual statements of Ambassador KAPUCU (paragraph 41 of document CAHDI (2022) 19) were registered in the report with the addition of negative qualifiers to make them look like they were mere claims and allegations. The Turkish representative stated that this was unacceptable and could have been avoided by foregoing the addition of these qualifiers and registering them as statements under the Ambassador's responsibility. He stated that he would like to see that the report of the 64th CAHDI meeting reflects the protest he voiced in this respect and reiterated that his country did not consent to the lifting of the confidentiality of the questionnaire and the replies on the issue of Immunity of State-owned cultural property on loan. The Chair assured him that his remarks would be duly reflected in the meeting report.

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***

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

7. Concerning the consequences of the aggression of the Russian Federation against Ukraine, the Director informed the CAHDI of, *inter alia*, the decision[1] adopted by the Ministers' Deputies on 24 February 2023, one year after the start of the largescale aggression. In this decision, the Minister's Deputies reiterated their commitment to ensure accountability for the crime of aggression against Ukraine and to ensure full reparation for the damage, loss or injury caused by Russia's violations of international law in Ukraine, including through the establishment of a compensation mechanism. In this sense, in an information document[2] published on 8 February 2023, the Secretary General had proposed the establishment of a Council of Europe liaised register to record and document evidence and claims of damage, loss or injury as a result of Russian aggression against Ukraine. It is foreseen to establish the register as an enlarged partial agreement open also to non-member States as well as to the European Union ("EU"). In comparison to an international treaty, a partial agreement is a more flexible cooperation tool that could become operational within a short period of time given that, at least from the point of view of the Council of Europe, no national ratification process must be undergone for this purpose. From a statutory point of view, a partial agreement remains an activity of the

[1] CM/Del/Dec(2023)1457/2.3, decision adopted by the Committee of Ministers on 24 February 2023 at the 1457bis meeting of the Ministers' Deputies.
[2] Information document, 31 January 2023, (SG/Inf(2023)7), Accountability for human rights violations as a result of the aggression of the Russian Federation against Ukraine: role of the international community, including the Council of Europe.

Organisation in the same way as other programme activities, except that a partial agreement has its own budget and working methods which are determined solely by the members of the partial agreement.

8. The Director then presented the main developments relating to the organisation of the Fourth Summit of Heads of State and Government on 16-17 May 2023 in Reykjavik (Iceland), the first one after 18 years. He noted that the outcome document of the Summit will be a political declaration of crucial importance for the future of the organisation and recalled, from the legal point of view, that summits are not foreseen in the Council of Europe's Statute and do not form part of the Organisation's institutional framework. Furthermore, regarding the internal legal framework of the organisation, he informed the CAHDI about the entry into force of the new Council of Europe Staff Regulations on 1 January 2023[3] and the adoption on 22 February 2023 of Resolution CM/Res(2023)1 establishing the general delegation framework for the Council of Europe Secretariat.[4]

9. The Director finally reported on the main developments that had occurred in the framework of the accession of the EU to Council of Europe treaties. In this regard, on 21 February 2023, the Council of the European Union formally requested the consent of the European Parliament to adopt the decisions on the conclusion by the EU of the Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210, "the Istanbul Convention"). It is to be expected that the European Parliament will follow this call at its April session and for the process of accession to be finalised by the Council before the summer break. With respect to the EU's accession to the European Convention on Human Rights ("ECHR"), major progress was made during the 18th negotiation meeting (14-17 March 2023) of the Council of Europe Steering Committee for Human Rights ("CDDH") ad hoc negotiation Group 46+1 ("46+1 Group"). The negotiators agreed notably on amendments and additions to the draft accession agreement addressing all the objections formulated by the CJEU in opinion 2/13. The only remaining obstacle concerned the CJEU's objection related to measures taken in the area of the EU's common foreign and security policy ("CFSP"). While this is essentially an internal issue of the EU, it is hoped that it can be resolved rapidly.

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

2.1 Opinion of the CAHDI on the participation of the Russian Federation and Belarus in the Committee of the Parties to the Council of Europe Convention on the Counterfeiting of Medical Products and other Similar Crimes Involving Threats to Public Health (CETS No. 211; "Medicrime Convention")

10. The Chair introduced the sub-item by recalling the decisions of the Committee of Ministers of 30 June 2022 and 5 October 2022 inviting the treaty bodies to decide, on the basis of their respective rules of procedure, on the modalities of participation of the Russian Federation and Belarus in the open conventions and, if needed, to request the advice of the CAHDI in this regard.

11. The Chair informed that on 2 December 2022, the Secretariat of the Committee of the Parties to the Council of Europe Convention on the Counterfeiting of Medical Products and Other Similar Crimes Involving Threats to Public Health, ("T-Medicrime"), submitted a request for the CAHDI's opinion on the compatibility with international law of a draft rule allowing for restrictions on the participation in the work of the T-Medicrime of any Contracting Party that has ceased to be a member of the Council of Europe due to a serious violation of Article 3 of the Organisation's Statute, or, in the case of a non-member State, if the Committee of Ministers has restricted or suspended its relations with it on similar grounds. A first draft opinion was

[3] Resolution CM/Res(2021)6 on the Council of Europe Staff Regulations adopted by the Committee of Ministers on 22 September 2021 at the 1412th meeting of the Ministers' Deputies, as amended by decision CM/Del/Dec(2022)1434/11.2, on 11 May 2022, at the 1434th meeting of the Ministers' Deputies and by Resolution CM/Res(2022)66, on 14 December 2022, at the 1452nd meeting of the Ministers' Deputies.
[4] Resolution CM/Res(2023)1 establishing the general delegation framework for the Council of Europe Secretariat, adopted by the Committee of Ministers on 22 February 2023 at the 1457th meeting of the Ministers' Deputies.

distributed to all CAHDI delegations on 14 December 2022 for their comments. Within the deadline, set for 13 January 2023, the Secretariat received comments from three delegations (the Netherlands, Switzerland, and the United Kingdom) which were included in the revised version and sent to delegations for their approval. The final opinion was adopted by the CAHDI on 31 January 2022 and transmitted to the Secretariat of the T-Medicrime as well as to the Committee of Ministers.

12. The Secretariat, reported on the state of play regarding the participation of the Russian Federation and Belarus in open conventions with a follow-up or monitoring body, i.e., 10 out of a total of 41 open conventions ratified by the Russian Federation (more specifically eight since two of them had specific features) and five out of the 12 conventions ratified by Belarus.

13. These conventions covered issues as diverse as terrorism, data protection, prevention of torture, protection of children against sexual exploitation, doping, recognition of diplomas, counterfeiting of medical products, safety at sports events or protection of biodiversity. Consequently, the text of the conventions and monitoring mechanisms differ from one another.

14. The Secretariat indicated that while adopting their decisions, the various conventional committees had taken into consideration the Guidance note prepared by the CAHDI in May 2022. The T-Medicrime Committee had also benefited from the CAHDI opinion mentioned above. Moreover, DLAPIL, as the Organisation's legal service, provided legal advice to the treaty bodies, especially in the context of the drafting of amendments to the existing rules of procedure.

15. The first step for these bodies was to decide whether or not the participation of the Russian Federation and Belarus in their work should be restricted, and if so, in a second step, to consider what means and concrete measures should be adopted in the light of the Committee of Ministers' decisions, their specific treaty regime and the role of the committee in question.

16. Most of the treaty bodies had decided to limit the participation of the Russian Federation and Belarus. The Secretariat representative summarised the decisions taken as follows:

17. Firstly, the restriction of the participation of the Russian Federation and/or Belarus in the work of the treaty committees was achieved through an amendment to the rules of procedure of the committee concerned (in seven cases out of the eight mentioned above concerning the Russian Federation).

18. In this respect, the vast majority of committees (seven) had added a provision to their rules of procedure allowing for the restriction of the modalities of participation of a Party in specific circumstances (i.e. any State which has ceased to be a member of the Council of Europe following its expulsion for a serious violation of the principles of the Organisation laid down in Article 3 of its Statute or where the Committee of Ministers has suspended its relations with a non-member State for similar reasons).

19. Secondly, based on this new provision, the following concrete measures were adopted:

- In all these cases (seven), the representatives of the Russian Federation and/or Belarus shall not be allowed to hold the office of Chair, Vice-Chair, Bureau member or any other elective position;
- Most of the Committees (five, including T-Medicrime which sought the advice of the CAHDI and held an extraordinary meeting on 16 March 2023) had decided to restrict the physical attendance of representatives of the Russian Federation and when relevant Belarus at the Committee's meetings, but these countries continue to have access to the working documents and can communicate their comments in writing, in particular concerning the implementation of the Convention in question. The right to vote has normally also been maintained (by written procedure) for situations provided for by the treaty in question.
- In one case (CETS Convention No. 198, laundering of the products of the crime and financing of terrorism) online participation was allowed. In another case (ETS Convention No. 108 on data protection), the participation was restricted to certain topics on the committee's agenda.

20. The mentioned eight committees had taken their decisions by vote in accordance with the rules laid down in their rules of procedure.

21. In all cases, both countries retained the right as Parties to participate in relevant treaty-based procedures such as the amendment of the treaty, consultation in case of request to be invited to accede by a non-member State or notification issues.

22. In addition, the Secretariat drew attention to the following specific conventions:

- The Lisbon Recognition Convention, which is a joint convention with UNESCO (ETS No. 165) : the Committee had adopted a declaration setting out that no candidates of the Russian Federation or Belarus will be elected as a Bureau member, Chair or Vice-Chair, or a chair of any Group of Experts or working group, and neither will such representatives be entrusted with any task of rapporteur, coordinator, or representation of the Lisbon Recognition Convention Committee in any circumstances. The Declaration also invited all the Parties to give further consideration to the steps that the committee could take to restrict the participation of the Russian Federation and Belarus representatives in the committee meetings and related activities, including, as necessary, amendments to the rules of procedure.
- The two conventions to which only Belarus is a Party: In one case, the Bern Convention (ETS No. 104), the Committee adopted a declaration (without changing the rules of procedure) undertaking not to elect a representative of Belarus as Chair, Vice-Chair or member of the Bureau, and in the other case, Action against Trafficking in Human Beings (CETS No. 197), the Committee did not change the *status quo*.

23. The Secretariat also indicated that the decisions of the committees had been and will continue to be discussed by the Committee of Ministers, first in the Rapporteur Group on Legal Cooperation, (GR-J). In this regard, the Chair of the GR-J will continue to report to the Deputies on the decisions taken.

24. Finally, as regards the evolution of the situation in the Russian Federation and its possible intention to withdraw from Council of Europe conventions, the Secretariat stated that the Russian Federation had notified on 20 March 2023 the denunciation of all closed conventions (for which the termination as a Party had already been notified by the Council of Europe Treaty Office following the expulsion from the Council of Europe) as well as the denunciation of an open convention, the Criminal Law Convention on Corruption (ETS No. 173). This convention was not included in the open conventions mentioned above, as its monitoring is provided by the GRECO, an enlarged agreement, and it was the subject of a specific decision by the Committee of Ministers in the context of the termination of Russia's participation in partial agreements.

25. The representative of Türkiye enquired on a possible detrimental effect of the conventional committee's decisions on the efficiency of the work of these committees. The Secretariat recalled that the decisions responded to the request by the Committee of Ministers and aimed also to ensure the proper functioning of the committees and the conduct of its meetings that were disrupted since the expulsion of the Russian Federation.

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

26. The Chair presented a compilation of the Committee of Ministers' decisions of relevance to the CAHDI's activities (document CAHDI (2023) 1 *Restricted*).

27. The Committee of Ministers had, *inter alia*, taken note of the Abridged Report of the 63rd meeting of the CAHDI. The document further contained links to the stocktaking document of the Irish Presidency of the Committee of Ministers, which took place from May to November 2022, as well as the priorities of the ongoing Presidency of Iceland until May 2023.

28. Moreover, the Chair drew attention to the decisions of the Committee of Ministers outlining the evolution of the recent events since the exclusion of the Russian Federation from the Council of Europe following its aggression against Ukraine and the Committee of Ministers reply to Recommendation 2231 (2022) of the Parliamentary Assembly of the Council of Europe ("PACE") on "The Russian Federation's aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes" to which also the CAHDI had given its opinion on 5 September 2022.

3 CAHDI DATABASES AND QUESTIONNAIRES

29. 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. He informed delegations that since the last CAHDI meeting, the Secretariat had received the following new or updated replies from delegations: 1) revised replies from Germany to the questionnaire on *Service of process on a foreign State* (document CAHDI (2023) 2 prov *Confidential Bilingual*); 2) replies from Andorra to the questionnaire on the *Exchange of national practices on possibilities for the Ministry of Foreign Affairs to raise public international law issues in procedures pending before national tribunals and related to States' or international Organisations' immunities* (document CAHDI (2023) 12 prov *Confidential Bilingual*); 3) updated replies from Andorra, Austria and the United Kingdom to the questionnaire on the *Organisation and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs* (document CAHDI (2023) 3 prov Bilingual) as well as a new contribution by the Republic of Korea; 4) lastly, Andorra had submitted a new contribution to the database on the *Practice of national implementation of UN sanctions and respect for human rights*.

30. The Chair then turned to the issue of the possibility to lift the confidentiality of the replies to four of the questionnaires under this item, 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*. He informed the CAHDI that so far 18 of the 38 delegations concerned, that had provided replies at least to one of the four questionnaires, had signalled to the Secretariat their stand on lifting the confidentiality of their replies as gathered by the Secretariat in a table in document CAHDI (2023) 4 prov *Confidential*. The Chair noted that all these 18 replies had been in favour of lifting confidentiality and encouraged all the remaining 20 delegations to approach the Secretariat and to let them know, before the 65th meeting of the CAHDI in September 2023, whether they would allow their replies to the four questionnaires to be made public. The Chair further reiterated that before any publication takes place, delegations would have the opportunity, within an adequate deadline, to revise their replies.

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

31. The Chair noted that there had been no proposals for exchanges of views on topical issues in relation to the subject matter of the item. The Chair then invited delegations to share information on recent developments concerning State practice and relevant case-law in their countries regarding the topic of immunities, which might be of interest to other delegations.

32. The representative of Canada referred to the *Zarei v. Iran* case which he had already presented previously. This case concerned the estates of family members of some victims of the downing of Ukrainian Airlines flight PS.752 on 8 January 2020. They had brought a claim against Iran, the Islamic Revolutionary Guard Corps and other Iranian individuals under Canada's Justice for Victims of Terrorism Act. They sought to lift Iran's State immunity under Canada's State Immunity Act. The defendants had not participated in this proceeding, the latter having chosen not to respond despite the fact that Canada had informed Iran of the existence of the case as required by its law. The immunity of foreign States in Canadian courts is codified under the State Immunity Act that also recognises exceptions. One of these exceptions lifts immunities for States listed as supporters of terrorism and allows civil claims to be brought against these States pursuant to the Canadian legislation. In May 2021, the Ontario Superior Court of Justice (OSCJ)[5] granted a default judgment to the plaintiffs and awarded them 107 million of Canadian dollars as damages. This was due to the fact that the defendants did not appear before the court. In a subsequent motion before the OSCJ, the plaintiffs sought to enforce their default judgment against the diplomatic property of Iran. The relevant property had been certified by

[5] Ontario Supreme Court of Justice, *Zarei v. Iran*, 2021 ONSC 3377, COURT FILE NO.: CV-20-635078, 20 May 2021.

the Minister of Foreign Affairs as continuing to enjoy immunity, including from enforcement, and the Attorney General of Canada responded to the motion as an affected party to protect diplomatic property from enforcement in accordance with Canada's obligations under international law. He argued that, in line with Article 45 of the Vienna Convention on Diplomatic Relations ("VCDR"), Canada continues to be obliged to respect and protect foreign diplomatic property, including its immunity from execution, even though diplomatic relations between the countries had been suspended since September 2012. On 10 January 2023,[6] the OSCJ, dismissed the plaintiff's enforcement motion in the *Zarei* case agreeing with the Attorney General of Canada that decisions about the diplomatic status of foreign States property in Canada rest with the Minister of Foreign Affairs pursuant to the Foreign Missions and International Organizations Act. Furthermore, the OSCJ found that the Minister's certificate was conclusive on the question as to whether the properties in question constitute diplomatic properties and are therefore immune from execution. The plaintiffs are appealing the decision in the Ontario Court of Appeal. The Attorney General of Canada is seeking leave to intervene as a Party in the appeal. This will be the first time an appellate court in Canada will rule on whether creditors of a foreign State can enforce their judgment against diplomatic property certified by the Minister of Foreign Affairs. The representative of Canada concluded his report by promising to keep the CAHDI informed of further developments in this case.

33. The representative of the United States of America reported on the case of *Turkiye Halk Bankasi A.S. v. United States.* In December 2022, the United States ("US") Government filed its brief before the US Supreme Court in this case concerning the sovereign immunity claim of Halkbank, a Turkish instrumentality, in criminal proceedings for US sanctions violations. The Supreme Court held its oral argument in the case in January 2023 and the decision is awaited. The question on appeal is whether the US Foreign Immunities Act ("FSIA") confers blanket immunity on foreign State-owned enterprises from all criminal proceedings in the US. The US Government argued that the Act, which codifies the prevailing restrictive theory of sovereign immunity under customary international law, would only apply to civil actions and not to criminal prosecutions. It argued in the alternative that, even if the Act applied in criminal cases, the FSIA commercial activity exception would deprive the petitioner of immunity.

34. The representative of the United Kingdom updated the CAHDI on the case of *London Borough of Barnet v. Attorney General* that was already presented during the 61st meeting of the CAHDI (23-24 September 2021, Strasbourg, France).[7] The case concerning social services and child protection relates to a claim introduced before the English High Court where a local authority sought to protect the children of a foreign diplomat based in the United Kingdom. The issues raised related to the compatibility of the VCDR with Articles 3 and 6 of the ECHR. The respondent in the case was the Secretary of State for Foreign, Commonwealth and Development Affairs. The High Court found that there was no incompatibility and essentially ruled in favour of maintaining immunity. A subsequent appeal was dismissed by the Court of Appeal in November 2022. ruling that the relevant provisions of the VCDR were long established principles of customary international law setting up a system by which situations could be dealt with, including instruments such as waiver of immunity, protection of the sending State, declaration of individuals as *persona non grata* and a system of recall.[8] The Court of Appeal recognised that this system was less effective in protecting children at risk than coercive powers available under domestic legislation, but nevertheless concluded that the system is not incompatible with Article 3 of the ECHR. This decision is therefore essentially in favour of traditional immunities.

[6] Ontario Supreme Court of Justice, *Zarei v. Iran*, 2023 ONSC 221, COURT FILE NOS.: CV-20-00635078-0000 and CV-22-0674774-0000, 10 January 2023.
[7] High Court of Justice (Family Division, Divisional Court), *London Borough of Barnet v Attorney General* [2021] EWHC 1253 (Fam), 13 May 2021.
[8] Court of Appeal (Civil Division), *London Borough of Barnet -v- AG (A Child) and another*, [2022] EWCA Civ 1505, 18 November 2022.

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

35. The Chair invited, Ms Alina OROSAN - appointed by the CAHDI at its 59th meeting (24-25 September 2020 in Prague, Czech Republic) to participate, on behalf of the Committee, in the meetings of the 46+1 Group - to provide delegations with a short overview of the developments in the negotiations that had taken place during the four meetings of the Group held since the last CAHDI meeting: the 15th meeting from 5 to 7 October 2022, the 16th meeting from 22 to 24 November 2022, the 17th meeting from 31 January to 2 February 2023, and, the 18th meeting from 14 to 17 March 2023.

36. Ms OROSAN started her overview by stating that in October 2022 the workload ahead of the Group had still appeared quite important. The spirit of good faith and the consensual atmosphere in the room had, however, enabled the negotiations to take up on speed, and, in the end provisional agreement on the package of accession instruments had been achieved at the 18th meeting of the Group.

37. At the 15th meeting in October 2022, an agreement on the outstanding proposal submitted on Basket 2 (requests for advisory opinions under Protocol No. 16) was found. The solution will essentially have the effect of precluding the highest national courts and tribunals of EU member States that have ratified Protocol No. 16 from making requests to the ECHR for advisory opinions under the Protocol if the question relating to the interpretation or application of the rights and freedoms defined in the Convention falls within the field of application of EU law. This bar is explained by the requirement for the respective national court to submit a request to the CJEU for a preliminary ruling under Article 267 TFEU. The final decision in the proceedings in which the CJEU has given a preliminary ruling can still be subject to review by the Strasbourg Court in the framework of an individual application under Article 34 of the Convention. The highest courts and tribunals of EU member States that have ratified Protocol No. 16 further retain the possibility to seek advisory opinions from the Strasbourg Court on any question outside the field of application of EU law.

38. Furthermore, at the 17th meeting of the Group, final agreement on Article 6 of the draft Accession Agreement concerning the participation of a delegation of the European Parliament in the election of judges to the European Court of Human Rights ("ECtHR") by the Parliamentary Assembly of the Council of Europe had been attained. This included the agreement within the Group that the provision did not relate to any other forms of participation of the European Parliament in activities of the Parliamentary Assembly which might continue or be established in the future. It was further made clear, in the text of the Explanatory Report, that the Committee of Ministers directives on the selection of candidates for the post of judge at the Strasbourg Court, including those concerning the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights established for this purpose, would apply also to the selection of candidates for the judge in respect of the EU.

39. The group further managed, at its final 18th meeting, to find agreement on the voting rules within the Committee of Ministers when it is supervising the execution of judgments to which the EU is a Party. The crucial point here was to find rules that would allow an effective and meaningful participation of non-EU member States in the execution process in situations in which the EU and its member States are obliged, under EU law, to vote in a coordinated manner and which could hence otherwise lead to a situation in which the EU could block negative execution decisions against it in the Committee of Ministers. The compromise solution found by the Group is one of great complexity combining several majority and hyper-minority requirements as well as, at times, also a prerequisite of an indicative vote. There is, furthermore, a separate rule for each category of decisions possible in the Human Rights meetings of the Committee of Ministers (e.g., on final resolutions, interim resolutions, procedural decisions and referral decisions in infringement proceedings). The Group agreed to clarify in the Explanatory Report to the draft Accession Agreement that the inclusion of additional majority thresholds was not to be understood as an attempt to depart from established practice in the Committee of Ministers of adopting decisions, in the great majority

of cases, by consensus, with formal votes only exceptionally taking place. It was moreover stated in the Explanatory Report that, given the unique nature of the Convention system, the voting arrangements now agreed upon should not be seen to constitute a precedent for other Council of Europe conventions or partial agreements to which the EU may accede in the future.

40. As the last point still open in the draft Accession Agreement the Group was able to find agreement also on an issue related to the prior involvement procedure (Article 3, paragraph 6 of the draft Accession Agreement). While it was important especially to one delegation to ensure, in the agreement, that an undue delay in the conduct of the prior involvement procedure by the CJEU would neither violate the rights of the applicant nor infringe upon the powers of the Strasbourg Court, the EU Commission was unable to agree on suggestions that a fixed time limit could be added into the accession instruments within which the CJEU would need to render its decision. A compromise solution now found emphasises the fact that it is the Strasbourg Court that affords “sufficient time” for the CJEU to make its assessment within the prior involvement procedure; that the EU shall, subsequently, ensure that such assessment is made “quickly” so that the proceedings in Strasbourg are not “unduly delayed”; and, finally, that the prior involvement of the CJEU does not displace the Strasbourg Court’s control of its proceedings, nor affect the powers and jurisdiction of the Court.

41. Ms OROSAN noted that the Group had finally decided to exclude from the scope of the draft Accession Agreement matters of the Common Foreign and Security Policy (CFSP) as an issue the EU should solve internally. Pending resolution of the matter, the Group had recommended that the CDDH should continue actively to follow the issue, not least because also the non-EU member States have an interest in being informed of and to consider the manner in which the issue will be resolved before they are able to give their final agreement to the whole package of accession instruments.

42. Ms OROSAN ended her overview by noting that with the 18th negotiation meeting the work of the 46+1 Group had now come to an end with regard to the second round of negotiations. The Group adopted its report to the CDDH in whose hands the issue will remain until a solution on CFSP has been found within the EU. It will then be for the CDDH to adopt its own report to be submitted to the Committee of Ministers together with the draft accession instruments. On this basis the opinions of the two Courts (the CJEU and the ECtHR) as well as of the Parliamentary Assembly will be sought before an adoption of the accession instruments by the Committee of Ministers can take place.

43. The Chair thanked Ms OROSAN for her service in representing the CAHDI within the 46+1 Group and gave the floor to delegations for their comments.

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

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

45. The representative of Georgia informed the CAHDI about the judgment of 7 March 2023 in the case of *Mamasakhlisi and Others v. Georgia and Russia*[9] which was initiated in 2004. The case concerns the illegal arrest and imprisonment of the applicants in Russian occupied Abkhazia for a period from 2001 to 2007, during which they were subjected to inhuman and degrading treatment and not allowed to see their families. In its judgment, the Court established the effective control of the Russian Federation over the territory of Abkhazia even before the August 2008 war in view of its decisive military, economic and political interferences, and thus the full responsibility of the Russian Federation for human rights violations committed in occupied Abkhazia. She recalled that in 2021, in the inter-State case initiated by Georgia against the Russian Federation,[10] the Court had confirmed that the Tskhinvali region in Abkhazia had been occupied by Russia since 2008, while in the present case, Russia's responsibility for human rights violations committed in the occupied territory before the August 2008 war was established for the first time, taking into account the given facts and the evidence

[9] ECtHR, *Mamasakhlisi and Others v. Georgia and Russia*, nos. 29999/04 and 41424/04, 7 March 2023.
[10] ECtHR, *Georgia v. Russia (ii)* [GC] (Merits), no. 38263/08, 21 January 2021.

provided by the Government. It found responsibility of the Russian Federation under Articles 3, 5 and 6 of the Convention and ordered payment of respective compensations. No violation by Georgia was found, as the Court concluded that the Georgian authorities took all necessary measures within their power at the time to secure the applicants' rights.

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

46. The Chair noted that no new information had been provided by delegations concerning cases before domestic courts related to the 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 non-legally binding agreements in international law with Prof. Andreas ZIMMERMANN (University of Potsdam/Germany)***

Presentation on the analysis of the replies to the questionnaire on "Non-legally binding agreements in international law" by Professor Andreas ZIMMERMANN (Professor of European and International Law at the University of Potsdam)

47. The Chair welcomed and thanked Professor Andreas ZIMMERMANN for the analysis of the responses to the questionnaire on non-legally binding agreements in international law. The Chair recalled that the analysis had taken account of the replies of 20 States and two international organisations, the EU and the Council of Europe, which were submitted until December 2022. Since then, four additional replies, those of Ireland, Monaco, Poland and Slovenia, had reached the Secretariat.

48. Professor ZIMMERMANN began his presentation with the substantive aspects of the report, where he identified the trend that a significant number of States participating in the survey rejected the very use of the term 'agreement' in relation to non-legally binding instruments, even though the Organisation of American States ("OAS") and the International Law Commission ("ILC") had used this term in their guidelines. He also noted that a majority of States had used the term 'Memorandum of Understanding' (MoU) to refer to non-legally binding instruments, while some States had used it to denominate legally binding agreements. While distinction is always made by States between treaties, civil law contracts, and non-legally binding agreements, States do not generally distinguish between MoUs and other types of non-legally binding agreements. The decision of whether an instrument is legally binding or not lies in the text, not only in the name. Professor ZIMMERMANN further explained that several factors were important to determine the legal character of the document, such as the content, form, terminology and context surrounding its conclusion. A clause explicitly stating that the instrument is not binding was identified as a strong indicator, but no consensus was present between the States that all such instruments should contain such a disclaimer. However, many States distinguished between the specific terminology used to imply legally binding or non-legally binding consequences, some of the States even providing detailed lists of terms and their correspondents in each of the two cases.

49. With respect to the procedural aspects, Professor ZIMMERMANN explained that the competence to enter into non-legally binding instruments differed between States on the basis of their different internal constitutional structures. A majority of States held that these instruments may generate indirect legal effects, citing in particular the instruments elaborated by the ILC, while some States noted that such instruments might be precursors of legally binding agreements relating to the same subject matter. Professor ZIMMERMANN also identified that most States recognised that non-legally binding instruments may also produce legal effects through general concepts of international law such as acquiescence and or estoppel.

50. Professor ZIMMERMANN identified that the reasons why non-legally binding agreements are preferred to treaties are often due to the political impossibility of reaching a binding agreement with all the parties involved or to facilitate the conclusion of a later binding agreement.

Moreover, he explained that technical or administrative issues are preferably regulated by way of non-legally binding instruments, while topics such as tax, trade instruments, regulating diplomatic privileges and immunities, or providing for binding dispute resolution mechanisms, were sometimes held to be ineligible to be regulated in this way. Other factors, such as time, flexibility and informality were distinguished as leading States to prefer non-legally binding instruments to treaties. Professor ZIMMERMANN posited that this flexibility extends to the aspect of which entities under domestic law have the competence to conclude such agreements., Since the constitutional rules for concluding treaties do not apply to them, parliaments are often only informed and not consulted. In some States, there is no formal assessment procedure for such instruments, in other cases there is a formal assessment and approval procedure, with this step being sometimes mandatory, other times being undertaken just as a matter of custom. Other points of consensus identified by Professor ZIMMERMANN had been that 1) most States have internal guidelines for concluding and assessing non-legally binding agreements; 2) generally no document containing full powers is required for the conclusion of such an instrument; 3) such instruments do not have to be concluded in the respective national languages, but can be concluded in a neutral language; and, 4) that there are no formal rules for the choice of paper or other similar items. A general consensus was not identified with respect to whether all the signatures must be on the same document, on whether electronic signatures may be used, or on whether there is a domestic database where such instruments are registered, but they are normally not published in the State's official gazette.

51. As possible future steps to be taken by the CAHDI, Professor ZIMMERMANN proposed that the results of the questionnaire and the report be shared with the ILC, and that the report be eventually published, along with the possible elaboration of guidelines or uniform practices on the topic of non-legally binding instruments.

Discussion

52. The representative of Poland enquired which issues relating to soft law would be of interest for the CAHDI from the national perspective. The representative of Germany supported the conclusions of Professor ZIMMERMANN and posited that States should agree on certain formal standards for non-binding instruments, to save time and resources for all national bodies who have to elaborate such instruments. The representative of Portugal asked on the possibility to reconcile the concept of non-legally binding instruments with that of soft law.

53. Professor ZIMMERMANN explained that given that the scope of soft law comprises more than non-legally binding instruments between States, expanding the subject would broaden the scope of the topic greatly. He also posited that it is for States to decide whether they want to keep as much flexibility as possible, or rather if they believe it is helpful in their practice to have a common denominator.

54. The representative of Canada noted that some domestic departments attempt to create legally binding instruments under the MoU denomination. For this reason, Canada had created an MoU registry, which had helped to identify instruments that contain binding clauses, to rectify them or transform them into full treaties where appropriate. Professor ZIMMERMANN indicated that the practice concerning a possible registry of MoUs was very diverse among the 20 States which responded to the questionnaire. The representative of Sweden stated that her country had guidelines that include elements of language indicative of binding or non-binding instruments. According to her one of the common issues would be that the signatories sometimes had differing views of the intention behind the instrument. She then asked about the use in practice of the principle of estoppel, where a State changes its intentions, and what this implies. Professor ZIMMERMANN responded that the issue was very complex and that it depended on the specifics of the instrument in question, giving the example of an instrument where financial transactions were carried out over time and investments were undertaken with funds received.

55. The representative of Switzerland stated that her country would like to provide some further information on the interpretation of its answers before these would be shared with the ILC. She would favour the development of a glossary of terms, but no further harmonisation, in order to maintain the flexibility of these instruments. Professor ZIMMERMANN confirmed that any further specifications from the States would be taken on board before its publication.

56. The representative of France supported the coordination with the ILC on this topic a view with which Professor ZIMMERMANN concurred. He added that there were often documents being negotiated by entities which may not be fully aware of the legal implications of these documents, especially MoUs, and which hence end up having an unclear status as to their binding character. For this case, France had prepared a guide of good practice to negotiate international texts, to explain which instruments are binding and which are not, and how each should be drafted.

57. The representative of Finland supported the proposal that the CAHDI develop guidelines, as well as a list of terms, and asked Professor ZIMMERMANN for his opinion about the fact that Finland was the only country which advised the publishing of significant MoUs in treaty series for reasons of transparency. Professor ZIMMERMANN replied that the publication of MoUs could be a matter of constitutional tradition or a developed practice in common law systems, but in the majority of the States which participated in the survey, this was not common.

58. The representative of Greece explained that Greece focused on the content of a treaty to determine whether it is binding, not on the title, and that it has multiple MoUs which are binding. She further raised the issue of instruments which do not contain clauses to specify that they are not binding, but rather confusing clauses that specify that the instrument is not intended to conflict with international or internal law and, if it does, the other law prevails. Professor ZIMMERMANN stated that he had not encountered such conflicting clauses.

59. The representative of the United States of America noted the general conclusion of the analysis that there is a great deal of consensus amongst states in their practices surrounding non-binding instruments. He stated that the main advantage of non-legally binding agreements was their flexibility, and that this should not be constrained excessively through guidelines or attempts to codify practice in this area. He further raised the issue that such guidelines would invite interpretation of previous agreements or that it could cause confusion about the shared intent and understanding of the parties. Professor ZIMMERMANN noted that both the OAS and the ILC have developed guidelines, which were considered useful, so the Council of Europe should be able to do the same. With respect to the perceived retroactivity of these guidelines, Professor ZIMMERMANN proposed that this situation be clarified with the help of an *ad futurum* clause. The representative of the United Kingdom supported the issues raised by the representative of the USA, while agreeing to the publication of the report and sharing its results with the ILC.

60. The representative of the United Kingdom further suggested using the term ‘arrangements’ or ‘instruments’ instead of the term ‘agreements’. Professor ZIMMERMANN stated that he was open to making this modification but warned that the ILC currently uses the term ‘agreements’.

61. The representative of Cyprus asked Professor ZIMMERMANN to indicate which specific areas he identified in the questionnaire that the States believe should not be dealt with through non-legally binding agreements, and whether there should be guidelines to point out these areas. Professor ZIMMERMANN stated that the most common areas were tax matters, trade matters, diplomatic and other immunities, State immunities, and defence since these issues are often highly political or could interfere with individual rights.

62. The CAHDI Secretariat uttered its willingness to coordinate with the ILC, mentioning further that the new responses received since the report by Professor ZIMMERMANN should also be included in the analysis. In response to the issue raised by the representative of Finland, the Secretariat mentioned that that the Council of Europe also publishes MoUs on the website of the Treaty Office, but in a separate section of the treaty list.

63. The Chair presented the options for follow-up, as per the option paper prepared by the German delegation in document CAHDI (2021) 17 *Confidential*. In respect to these options, the Chair proposed to keep the topic of non-legally binding agreements on the CAHDI’s agenda, to task the Secretariat with the preparation of a working document in view of elaborating best practices and, where relevant, guidelines on the topic, and to change the term ‘agreement’ to ‘instrument’. The Chair also proposed to adapt and complete the analysis on this topic and to liaise subsequently with the ILC with the aim of making it available to them. The proposed decisions were adopted by the CAHDI.

64. The representative of Türkiye proposed to name the document elaborated by the CAHDI a 'non-paper', so as not to suggest a binding nature through the term 'guidelines'. The representative of the USA suggested the term 'best practices'. The Chair explained that the Secretariat would begin a working paper, and the issue of its denomination could be further discussed at the next CAHDI meeting.

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

65. The Chair recalled that, at the 61st meeting of the CAHDI (23-24 September 2021 in Strasbourg, France), the delegation of Slovenia had suggested that the CAHDI would also explore the issue of legally binding agreements not requiring parliamentary approval. The delegation then prepared a questionnaire on this topic, approved by the CAHDI by written procedure on 15 June 2022 as it appears in document CAHDI (2022) 3 rev *Confidential*. Until the 64th meeting, 14 delegations had replied to the questionnaire and the replies were compiled in document CAHDI (2023) 7 BIL *Confidential*. The Chair invited the representative of Slovenia, as the promotor of this initiative, as well as the other delegations to take the floor on this topic.

66. The representative of Slovenia thanked the delegations which had already replied to the questionnaire and emphasised that the procedure of concluding treaties without parliamentary approval was becoming more widespread, even for binding agreements. He explained that Slovenia was working on amendments to internal legislation on this topic and that contributions would thus be very helpful for this process, as well as that it would be important for two States concluding such an agreement to have a common understanding regarding the necessary procedures. The representative finished by encouraging States who have not yet done so to contribute to the questionnaire. This encouragement was joined by the representative of the United Kingdom with a view to discussing the responses at a future CAHDI meeting.

67. The representative of the EU stated that the EU could conclude such agreements in at least two specific cases, namely with regard to decisions taken under the CFSP, and decisions on behalf of the Euratom treaty. He further confirmed that the European Union would also provide written answers to the questionnaire.

68. The representative of Germany proposed to clarify the main aims and questions of the analysis, since, in his view, this questionnaire could only be of an informative character due to the fact that the issue was highly dependent on internal legal and constitutional provisions. He then offered some suggestions for questions to be included in the questionnaire, namely: What type of treaty requires no parliamentary approval? Does the lack of parliamentary approval change the hierarchical status of the treaty? Does the lack of parliamentary approval change the procedures to be followed?

69. The representative of the Republic of Korea stated that his delegation would submit its written responses before the next CAHDI meeting. He then explained the three types of treaties concluded by Korea: treaties subject to parliamentary consent, normal treaties, and treaties effective by notice. According to the Constitution of Korea, the President has the general responsibility and right to conclude and ratify treaties. However, for some specific types of treaties, the National Assembly has the right to consent to their conclusion and ratification, namely treaties regarding mutual assistance or mutual security, important international organisations, friendship, trade and navigation, restrictions of sovereignty, peace, unimportant financial obligations, or legislative matters. All other treaties that do not fall under these categories are classified as normal treaties which the President may bring into force without the intervention of the National Assembly. The representative stated that the percentage of the treaties that reach the National Assembly for their consent was about 20 percent. With respect to treaties effective by notice, he explained that any treaty with regards to the matters delegated by existing treaties, to the matters for implementing provisions of existing treaties, or concerning minor technical or procedural matters, was classified as a treaty effective by notice and followed a simplified procedure.

70. The Chair and the representative of Slovenia agreed to add the questions proposed by the representative of Germany to the questionnaire. The representative of Germany suggested to add them as guiding questions for the second step, the analysis. The Chair suggested to wait

for the collection of replies to the questionnaire until the next CAHDI meeting and to decide on the second step subsequently.

- ***Exchange of views on soft law instruments***

71. The Chair recalled that the topic of soft law instruments was included on the CAHDI's agenda at the 63rd meeting in Bucharest, on the initiative of the Italian delegation and that, at the occasion of the 62nd meeting of the CAHDI in March 2022 the Italian delegation had organised an online side-event entitled *"Legislative Guides, Model Laws, Recommendations, Principles: A 'Soft Multilateral Law-Making' for International Governance?"*. The Italian delegation had also prepared an additional non-paper titled "The International Soft Law: implications for CoE MFA / LD", as per document CAHDI (2023) 11 *Confidential*. The Chair invited the Italian delegation to take the floor in order to introduce the non-paper, as well as the other delegations to contribute to the topic.

72. The representative of Italy explained that the role of soft law in the international legislative system and governance had been significantly increasing in recent years, both in the ascending, creation phase and the descending, interpretation phase of legislative tools. In the light of previous decisions by the CAHDI, a questionnaire on the subject has been prepared by Italy, comprising three to five main thematic areas, all seen strictly from a national perspective. It will be now made available to the Secretariat for further transmission to CAHDI members for comments, in view of its approval at the next CAHDI meeting.

73. The representative of Switzerland underlined her country's interest in the subject, especially from the perspective of two core issues: democratic legitimacy and considerations linked to the rule of law. The representative then mentioned events that they had organised on this topic and explained a general definition of soft law instruments not to exist, which is why the information offered by this questionnaire will be helpful.

74. The representative of Germany thanked the Italian delegation for expanding the scope of the German questionnaire and topic to the larger topic of soft law.

75. The representative of Norway noted the recent increase in the usage of soft law instruments and brought attention to the fact that they were sometimes concluded without enough scrutiny, which could become an issue when soft law instruments are converted into hard instruments. States could find it difficult, at that point, to go back to their original commitments, even if they were not binding. The representative of Norway also expressed interest in how other States handled this situation, as well as how the domestic law and courts in other States use these soft law instruments. The representative concluded by positing the issue to be relevant at three different levels: the adoption of the soft law itself, the transition into hard law at a later stage, and the use of soft law before domestic courts.

76. The representative of Poland suggested maintaining the focus of the topic on the national perspective and to refrain from expanding the debate into an approach that would be too general on such a broad topic.

77. The representative of the United Kingdom addressed two issues on the topic of terminology and substance, respectively. Firstly, the representative found the term 'soft law' to be too confusing, given the fact that it contains the word 'law', which would imply a binding instrument. She considered it preferable to make use of the term 'non-legally binding instrument'. Secondly, with respect to the substantial aspect, the representative of the United Kingdom explained that, even though there might be a differentiation between the bilateral and multilateral instruments that the German and Italian questionnaires refer to, respectively, the topics were very similar, since the instruments they refer to share the same characteristics and suggested merging them.

78. In response to the views of the representative of the United Kingdom, the Chair underlined the importance of the German and Italian initiative not overlapping in their scope in order to avoid duplication.

79. The representative of Slovenia supported the continuation of the Italian initiative in form of a questionnaire, adding that this questionnaire could supplement the questionnaires on non-

legally binding agreements and on treaties not requiring parliamentary approval without any overlap.

80. The representative of Ireland expressed his country's support for keeping the topic on the agenda of the CAHDI reiterating that Ireland had recently revised its procedures on soft-law instruments and is hence likely to find the information provided by a future questionnaire very useful. He proposed to first give the CAHDI a chance to examine the draft questionnaire prepared by the Italian delegation before deciding to what extent it may be necessary to merge or combine two separate but complementary processes, the one on soft-law and the one on non-legally binding instruments.

81. The Chair agreed with the Irish proposal and encouraged the Italian delegation to continue drafting the questionnaire hereby aiming at avoiding overlap with the questions already discussed in the questionnaire on non-legally binding agreements.

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***

82. 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 (2023) 8 prov *Confidential*). The Chair also drew the attention of the delegations to document CAHDI (2023) Inf 1 containing reactions to reservations and declarations to international treaties previously examined by the CAHDI and for which the deadline for objecting had already expired.

83. The Chair underlined that the reservations and declarations to international treaties still subject to objection were contained in document CAHDI (2023) 8 prov *Confidential*, which included 7 reservations and declarations made with regard to treaties concluded outside and within the Council of Europe.

84. With regard to the **declaration made by the Philippines** to the *Convention on the Reduction of Statelessness (1961)* the Chair stated Article 8, paragraph 3 of the Convention to only allow the revocation of citizenship in certain defined cases. In sub-paragraph c of its declarations the Philippines resorted to quoting several national laws based on which it declared revocation of citizenship to remain possible without explaining the content of the quoted laws. According to the Chair one could hence already take the view that sub-paragraph c of the declarations was problematic as such given that the other Contracting Parties could not possibly foresee, without going through the different national laws, which revocation grounds the Philippines intended to maintain. In addition, one of the grounds of revocation maintained by the Philippines, the possibility to deprive citizenship for desertion, appeared to be also materially problematic since it might be difficult to subsume this ground under the exceptions allowed under Article 8.3 of the Convention, e.g., under "conduct seriously prejudicial to the vital interests of the State". The Chair explained Tunisia to have made an, albeit slightly different, but perhaps comparable declaration to the same convention concerning "evading obligations under the law regarding recruitment into the armed forces" against which several States, among which States represented in the CAHDI, had objected at the time.

85. The representative of Germany stated that lit. a of the declaration by the Philippines would amount to a general constitutional reservation incompatible with the object and purpose of the Convention on the Reduction of Statelessness, and thus to an inadmissible reservation under Article 17, paragraph 2 of the Convention. Moreover, the declaration under literal c would, in view of the German Government, not meet the requirements of Article 8, paragraph 3 of the Convention which grants a contracting State the right to deprive a person of his or her nationality, even though this renders him or her stateless, if it specifies its retention of such right on one or more of the grounds that follow. The declaration by the Philippines, however, contains a general reference to Philippine laws that go beyond the exceptions provided for in Article 8, paragraph 3 of the Convention. In addition, the declaration refers to further applicable laws that are not comprehensively listed. The declaration thus does not provide the necessary

specification and clarity required under the exceptional nature of the provision. The German representative hence stated his country to have initiated an objection to both, the reservation under literal a and to the declaration under literal c as made by the Philippines.

86. The representative of the Netherlands stated that his country was also considering to object to these declarations by the Philippines.

87. With regard to the almost identical **declarations made by the Holy See** to the *United Nations Framework Convention on Climate Change (1992)* and the *Paris Agreement (2015)* the Chair noted the potentially problematic part of these declarations to pertain to the part in which the Holy see reiterated its position regarding the term 'gender' by underlining that any reference to 'gender' and related terms in any document that has been or that will be adopted by the Conference of State Parties to the said conventions or by their subsidiary bodies are to be understood as grounded on the biological sexual identity that is male and female.

88. The representative of Germany took the floor to reiterate his country's understanding that the term gender is not limited to persons identifying as male or female.

89. The representative of the United Kingdom stated his country not to have considered these declarations yet (nor the declaration concerning the declaration by Azerbaijan referred to at paragraph 93 below) but that his delegation was preserving possible reservations in this regard.

90. The **declaration made by Portugal** to the *European Convention on Mutual Assistance in Criminal Matters (ETS No. 30 – 1959) and its Additional Protocols (ETS No.99 – 1978 and ETS No 182 -2001)* designate the European Public Prosecutor's Office (EPPO) as a judicial authority for the purposes of mutual legal assistance under the Convention and its protocols. The Chair recalled that Switzerland had submitted, on 27 January 2022, a counter-declaration. No delegation wished to take the floor under this item.

91. With regard to the **declaration made by Ukraine** to the *Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210 - 2011)*, Ukraine declared that it did to consider any of the provisions of the Convention as obliging it to amend its Constitution, the Family Code or other national laws. The Chair explained that this declaration could be seen to limit the scope of application of the Istanbul Convention in a manner not allowed by Article 78 of the Convention.

92. The representative of Ukraine took the floor to explain that ratification of the Istanbul Convention had been a major success for her Government, one that had been planned for years. Due to the position of different stakeholders, however, ratification had only been possible now. She would take the concerns uttered by other delegations and which she very well understood back to her capital for internal consultations on how to best reflect them. She promised to report back to the CAHDI as soon as answers would be ripe.

93. With regard to the **declaration made by Azerbaijan** to the *Fourth Additional Protocol to the Convention on Extradition (CETS No. 212 - 2012)* by which Azerbaijan declares that it will not apply the provisions of the Protocol in relation to the Republic of Armenia until the consequences of the conflict are completely eliminated and relations between the Republic of Armenia and the Republic of Azerbaijan are normalised, the Chair noted that the declaration might potentially be considered problematic as one falling under the category of declarations implying the exclusion of any treaty-based relationship between the declaring State and another State Party to the treaty – a matter the CAHDI had previously discussed at length.

94. The representative of Azerbaijan recalled the respective CAHDI document on declarations implying the exclusion of any treaty-based relationship between the declaring State and another State Party to the treaty (document CAHDI (2021) 13 prov *Confidential*). In the understanding of her delegation this document was not conclusive on whether these declarations can be understood as reservations or not. Her country hence maintains its position that this declaration does not constitute a reservation but, departing from the understanding that every sovereign State has the power and discretion to establish diplomatic relations with other States, only defines the scope of application of the Protocol towards other State Parties to it. Azerbaijan hence deemed it necessary and also useful to inform other State Parties

through this declaration on the scope of implementation of the instrument. This unilateral statement would aim to inform other State Parties that Azerbaijan is not in a position to apply this Protocol to a country with which it does not have any diplomatic relations. However, once the circumstances on the ground change, this declaration can be withdrawn depending on the circumstances.

95. With regard to the **partial withdrawal of a reservation by Oman** to the *Convention on the Rights of the Child (1989)*, the Chair explained this withdrawal to leave untouched the remaining problematic part of the reservations made by Oman concerning the right to freedom of religion of the child. Oman had made a similar reservation already upon accession to the Convention in 1966, to which several States had objected, including member States of the CAHDI. This reservation was since modified but the part on the right to religion never changed in substance. No delegation took the floor concerning this item.

96. Before closing the sub-item, the CAHDI discussed the possibility to also examine reservations and declarations to treaties deposited with the Hague Conference on Private International Law (HCCC) and decided to include the examination of such reservations and declarations in its work as European Observatory of Reservations to International Treaties. The Secretariat was tasked with contacting the European Council Working Group on Public International Law (COJUR) and/or the Treaty Office of the HCCC in order to find out how to best monitor the new reservations and declarations made to treaties deposited with the HCCC in practice.

7 CURRENT ISSUES OF PUBLIC INTERNATIONAL LAW

7.1 Topical issues of public international law

- *Exchange of views on the aggression in Ukraine*

97. The representatives of Ukraine gave an overview of the latest developments on the topic of the aggression in Ukraine. They thanked the delegations and their Governments respectively for their unwavering support in the ‘lawfare’ efforts of Ukraine. They extended their gratitude further to the CAHDI and the Council of Europe for the fruitful discussions on the establishment of the Special Tribunal within the Core Group, which includes representatives of 33 States as well as of international organisations. The representative also emphasised the political support for the establishment of the special tribunal received through resolutions adopted by the Parliamentary Assembly of the Council of Europe, the European Parliament, the Parliamentary Assembly of NATO, as well as national parliaments. The representative expressed their gratefulness for the support received in the establishment of the International Centre for the Prosecution of the Crime of Aggression in Ukraine (“ICPA”) in the Hague within the Joint Investigation Team (“JIT”) between Ukraine and six other States with the support of Eurojust. The representative reiterated the progress made by the Core Group in its discussions and the need for the establishment of the special tribunal as a final goal. Delegations were further reminded of their invitations to the Bucha Summit on 31 March 2023. Lastly, the Ukrainian representatives updated the CAHDI on the most recent developments in the cases of Ukraine before international courts, including the most recent development where the International Criminal Court (“ICC”) had issued an arrest warrant against the Russian President, Vladimir Putin, and the Commissioner for Children’s Rights in the Office of the President of the Russian Federation, Maria Alekseyevna Lvova-Belova.

98. An overwhelming majority of the representatives present at the meeting took the floor to express solidarity with Ukraine. Underlining the need for accountability for the Russian aggression, delegations voiced their support for the investigations of the ICC on this topic, and for Ukraine in its legal undertakings in this regard, including the cases brought by Ukraine against the Russian Federation before the International Court of Justice ("ICJ”) and the ECtHR. Delegations referred to their declarations of intervention in these cases, as well as the other mechanisms in which they participate, such as the JIT, or numerous international fora on this topic.

99. With respect to the Core Group established for the special tribunal for the Russian crime of aggression, the delegations of Australia, Austria, Belgium, Canada, Croatia, Finland, France,

Greece, Iceland, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania Slovakia, Sweden, the United Kingdom and the United States of America notified their participation in the Group, their work conducted within its framework, and their support for the establishment of an appropriate mechanism to address the crime of aggression.

100. The delegations of Croatia, Finland, Germany, Italy, Luxembourg and Portugal encouraged Ukraine to ratify the Rome Statute, including the Kampala Amendments on the crime of aggression, in order to further the legitimisation of the State's efforts to ensure accountability by committing itself to also being accountable before the ICC. A majority of delegations also expressed support for the continued strengthening of the ICC as the main universal criminal tribunal with the delegations of Belgium, Cyprus, Estonia, Germany, Iceland, Latvia, Lithuania, Luxembourg, Portugal and Slovenia also supporting the revision of the Rome Statute by adding possibilities for the ICC's jurisdiction on the crime of aggression to be triggered.

101. The representative of the EU explained that the Union was examining the possibilities of establishing a mechanism to close the gap of accountability. He also reiterated the support provided by the EU through its sanctions against Russia, including asset freezes, prohibitions of imports and exports and a reporting mechanism, as well as the investigations conducted via Europol and Eurojust.

7.2 Peaceful settlement of disputes

102. The representative of Canada announced that Canada and Denmark had peacefully resolved a long-standing territorial dispute in the Arctic over Hans Island. The representative reiterated that this case demonstrated the proper usage of the international framework in order to peacefully settle a 50 year long dispute.

103. The representative of the United States of America reported on the progress in the ICJ Case *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, related to the activities of Iran's Central Bank. The representative also informed the CAHDI of their observations with respect to Russia's objections on the ability of third States, many of which were represented in the CAHDI, to intervene in the case of *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*. The representative also informed the CAHDI of two proceedings for advisory opinions of the ICJ (*Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem* and *Obligations of States in respect of climate change*). Finally, the representative of the USA informed the CAHDI of their candidate, Professor Sarah H. CLEVELAND, for the position of Judge before the ICJ.

7.3 The work of the International Law Commission

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

105. The representative of Canada recalled the appreciation of his country for the important contribution of the ILC towards maintaining and strengthening an international rules-based order. In this sense, the country felt that it was important to intervene in the discussion regarding the Draft Principles on the Protection of the environment in relation to armed conflicts that took place during the previous General Assembly Sixth Committee. Canada's approach in doing so was to reiterate the very clear view, with respect to a couple of these issues, that in the absence of corresponding State practice and *opinio juris*, treaty obligations applicable during any international armed conflict should not be presented as customary ones applicable during a non-international armed conflict. Secondly, his country wanted to recall that common Article 1 to the Geneva Conventions would not entail a duty for States that are not a party to an armed conflict to ensure that all States and non-State parties to that armed conflict respect the Geneva Conventions.

106. The representative of Italy noted the war of aggression against Ukraine to have proven that it is crucial to reflect on the role played by States not directly affected by serious violations and the increasing significance of countermeasures adopted and implemented by third States. More specifically, his country believed that any potential binding instrument on State responsibility should closely outline the procedural and substantive requirements for the

exercise of the right to resort to countermeasures by third States. Italy strongly supported the elaboration of a multilateral instrument consisting of common rules to prevent and punish crimes against humanity based on the ILC Draft articles on Prevention and Punishment of Crimes Against Humanity. The representative then informed the CAHDI that his country was finalising the elaboration of a National Code of International Crime aimed at adapting the national legislation to the international obligations to investigate and prosecute international crimes typically perpetrated by State officials acting in their official capacity. Accordingly, the Draft Code will probably include a provision on the relevance of immunity *ratione materiae* before organs of national jurisdiction, in line with Draft Article 7 of the ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction whose customary nature cannot be peacefully affirmed. For this reason, this national Code expressly states that all provisions shall be interpreted in accordance with obligations arising under international law.

107. The representative of Mexico, a former member of the ILC and a current candidate for the ICJ, drew the CAHDI's attention to the subject of non-binding agreements. He expressed his satisfaction with the fact that the CAHDI had started work on this issue and recalled that the ILC will most certainly shortly do the same after deciding, at its 73rd session in 2022, to include the topic of “Non-legally binding international agreements” on its long-term programme of work following the suggestion included in the note prepared by Professor Mathias Forteau, the French ILC member. The representative noted that the fact that the CAHDI and the ILC were in contact on this issue was excellent news, recalling furthermore that the ILC was always looking forward to collaborating and exchanging with the CAHDI. After expressing his agreement with the representative of Italy’s previous remarks, he informed delegations about the resumption of the 77th session of the Sixth Committee on 10 April 2023 in New York. He informed the CAHDI, in this context, that despite initial difficulties an agreement had been reached concerning the issue of crimes against humanity. It should hence be possible to see a draft prepared by the ILC at a moment where the absence of a multilateral convention on this issue is more unacceptable than ever due to the war in Ukraine. The representative underlined the importance of the presence of the CAHDI members in New York for this session, which will be followed up by another one next year before reaching a final decision about the next steps to be taken. Ideally, the next step would be a diplomatic conference under the aegis of the United Nations.

108. The representative of the United States of America stressed that her country continues to follow closely and supports strongly the ILC's work. During previous CAHDI meetings, her country had highlighted certain concerns regarding the ILC's working methods, including a lack of clarity between codification and progressive development and some confusion about the format of ILC work products which has an impact on how the Commission is perceived by the broader community. The United States welcomed the initiative of the ILC's Working Group on methods of work to review these matters. She noted further her country to be a strong supporter of the resolution on the issue of crimes against humanity adopted in 2022 that finally advanced discussion of the respective ILC Draft Articles in the Sixth Committee. Her country recognised that States have a range of views on the final draft articles and the way forward. It would hence be interesting to learn how other countries plan to approach the 77th session to be resumed in April. The representative also reiterated her country’s support for all three new projects that had been added to the ILC's programme of work, namely, on the “Settlement of disputes to which international organisations are party”, “Piracy”, and “Subsidiary means for the determination of international law”.

109. The representative of Slovenia returned to the subject of ILC Draft Articles on the Immunity of State Officials from Foreign Criminal Jurisdiction. She noted that Draft Article 7 referred to crimes under international law in respect of which immunity *ratione materiae* shall not apply. The reason for this exception is not the gravity of these acts *per se*, but rather the core values of the international community that need to be protected. However, the ILC did not include the crime of aggression on this list of crimes. On the other hand, the prohibition of aggression is included in the ILC's draft conclusions on peremptory norms of general international law. These norms reflect and protect the common and overarching values shared by the entire international community and produce *erga omnes* obligations. The representative stated

Slovenia to believe that further thorough consideration of the possibility to include the crime of aggression in Draft Article 7 was needed.

110. The representative of Portugal underlined that the work of the ILC on Draft Article 7 had not been easy and it had even been necessary to organise a vote on this article. Nevertheless, Portugal also agreed that the express mention of the crime of aggression is lacking. However, his country believed that in terms of the existing law, aggression is already an exception to immunity *ratione materiae*. Portugal would of course welcome further clarification on this issue, including from the ILC, in case this would be possible. The representative thought it to be important for States, in the CAHDI but also in other fora, to share their views on the question of what the existing law regarding the exception of aggression was. Concerning the issue of crimes against humanity, he considered that an extremely important stage in the negotiations regarding the Draft articles on Prevention and Punishment of Crimes Against Humanity had been reached. His country looked very positively at the methodology adopted as a way forward for the General Assembly. He noted that we now lived in a time when, once again, international law and written conventions of international law are needed. A very good example of this was the recent conclusion of negotiations for the "BBNJ" Convention (also referred to as the "High Seas Treaty").[11] There is a common understanding of the need to fill this gap through a diplomatic conference in the very near future as well as the negotiation and adoption of a convention on crimes against humanity. The representative believed that it would be a very positive sign that there is no alternative to the rule of law and to an international rules-based order.

111. The representative of Poland informed the CAHDI that his country had adopted its position on the application of international law in cyberspace in 2022. Poland was of the view that countermeasures adopted by third States, also called collective countermeasures, in response to a violation of *jus cogens* norms were valid under current international law. Furthermore, he reminded that during the discussion on Immunity of State officials from foreign criminal jurisdiction that took place last year in the Sixth Committee, his country presented the position that functional immunity does not apply with respect to the crime of aggression.

7.4 Consideration of current issues of international humanitarian law

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

113. The representative of Switzerland reported to the CAHDI members on the organisation, by Switzerland and the International Committee of the Red Cross ("ICRC"), of a Governmental Expert Meeting from 24 January to 2 February 2023. The aim of this online meeting was to allow for a better protection of the environment in armed conflict through a better implementation of international humanitarian law ("IHL"). The meeting attracted numerous participants from CAHDI delegations as well as 370 experts from over 120 countries, who managed to identify common challenges, but also good practices to overcome difficulties. The representative thanked all participants present for their substantial contributions to this meeting, invited CAHDI delegations to draw inspiration from the good practices identified and informed them that the Chair's summary would be sent to them soon.

114. The representative of Austria informed delegations about the organisation of the first Regional Conference of European National Committees on International Humanitarian Law ("the Regional Conference"), which took place in Vienna on 13 and 14 March 2023. The conference was co-organised by the ICRC, the Austrian Ministry of European and International Affairs and the Austrian Red Cross. Austria thanked the ICRC for the excellent collaboration in the organisation of the conference. The Regional Conference convened European national committees and similar entities on IHL. Additionally, countries in the region which have expressed an interest in forming such a body were invited. The conference consisted of a closed-door meeting followed by a public conference. The closed-door meeting was organised in three parts: first, the core work of the IHL committees; second, selected contemporary IHL topics of relevance to national IHL committees; and third, the preparation of the 34th

[11] Draft agreement under the United Nations Convention on the Law of the Sea on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction, United Nations, 4 March 2023.

International Conference of the Red Cross and Red Crescent. The discussions were held in plenary working group format and smaller panels to facilitate peer to peer exchanges, encourage reflection on the role of IHL, and serve as a space to share experiences and ideas related to contemporary IHL topics. The public conference took place in the afternoon of 14 March 2023, and registration was open to a variety of stakeholders, including practitioners, academics, and civil society organisations. The public conference was titled "International Humanitarian Law and Technologies" and consisted of two panels, the first one on the Automatisation of Warfare, and the second panel on the Digitalisation of Warfare.

115. The representative of Belgium thanked, on behalf of the Inter-ministerial Commission on Humanitarian Law, Austria, the CICR and the Austrian Red Cross for organising the Regional Conference, which his delegation had found very useful and interesting not only with regard to the current challenges faced in the implementation of IHL, but also as to the role that could be played by national committees in this context.

116. The representative of Ireland reported on a conference hosted by Ireland in November 2022 on explosive weapons in populated areas ("EWIPA") at which a political Declaration had been formally adopted after almost three years of consultations amongst States. The Declaration recognises the nature and extent of the civilian harm caused by the use of weapons, including both the direct and indirect harmful effects of such use, and includes a range of practical commitments which will address this harm and improve compliance with IHL. The Declaration was endorsed by 83 States from all regions, including a large majority of EU and NATO member States, and it remains open for endorsement by others at their convenience.

117. The representative of the ICRC began by expressing his deep gratitude and pleasure for having been able to work with Austria in organising the Regional Conference of European National IHL Committees in Vienna. National IHL committees had demonstrated that they have a role to play in creating an environment conducive to the implementation of IHL. The roles and tasks of those committees have also evolved over time, and given the expertise and experience developed by these committees, strengthening cooperation among them at the regional level could inspire States and national societies to build on implementation practices that have proven effective in other contexts. It was against this backdrop that the ICRC wanted to co-organise this first Regional Conference. Besides the discussion of general topics, such as the functioning and collaboration of national committees or voluntary reporting, the participants also discussed how national IHL committees can enhance their State's implementation of obligations related to the emblem, the Missing and National Information Bureau, repression of IHL violations, EWIPA and humanitarian carve outs in sanction regimes. The representative believed that the conference was successful in achieving the objectives already mentioned by the representative of Austria. He also hoped that exchanges and discussions would continue in the future, either through the organisation of this type of Regional Conference or through *ad hoc* exchanges between national IHL committees, which the ICRC encouraged, as well as through any initiative that the delegations might deem relevant.

118. The representative of the ICRC thanked Switzerland for the co-organisation of the Governmental Expert Meeting on protection of the natural environment in armed conflicts. In the ICRC's view, the point was not to discuss legal interpretation, but to share challenges and practices based on each State's own understanding of its obligations. He felt that this was an effective and fruitful way to structure the discussion and thought that the rich practice shared suggests that an agreement on this point exists. He went on to underline some aspects of the meeting. First, there was a general recognition among all participants that environmental damage requires mitigation in armed conflict. The environment is often seen as an afterthought, secondary to the protection of civilians, but the two are interlinked and there is a sense that more needs to be done. In terms of challenges shared, many States reported ignorance of IHL rules in general, and those related to the environment in particular, to be an impediment to a better protection. Some States indicated that they lacked specific expertise and resources to be able to reduce environmental impact. In terms of good practices, numerous States emphasised the importance of anticipating environmental impact and ensuring continuous monitoring throughout the planning, operation and post-operational stages. States shared a wide range of tools and expertise, including dedicated databases to

track activities, products and services that affect the environment. The Expert Meeting was a milestone in the ICRC's continued work to promote better understanding and implementation of IHL protecting the environment in armed conflicts and it hopes that this discussion will continue.

119. Moving on to the question of EWIPA, the representative recalled that in ongoing armed conflicts it is possible to observe on a daily basis the devastating direct and indirect humanitarian consequences of the use of heavy explosive weapons in cities and other populated areas. The political Declaration on EWIPA adopted by 83 States in November 2022, among them most of the States represented in the CAHDI, is, in view of the ICRC, a very important step in this respect. The ICRC urges all States that have not yet done so to endorse the Declaration and to work individually and collectively for its universalisation and full and effective implementation. The ICRC will contribute to this effort, including by hosting a meeting of military experts on the prevention and mitigation of the effects of EWIPA in autumn 2023, and will continue to engage in confidential bilateral dialogues with States and parties to armed conflict to identify good practices for implementing a policy of avoidance of use of heavy explosive weapons in populated areas.

120. The representative then addressed the subject of the development of autonomous weapon systems, which raises serious humanitarian, legal and ethical concerns. He welcomed the adoption in January 2023 of a PACE Resolution [12] which recognises the need for new rules for autonomous weapon systems, the so-called two-tiered approach. In the ICRC's view, European States and observers represented in the CAHDI can play a key role this year in helping to build a critical mass of States supporting the negotiation of such rules. Many States in Europe have already committed to new rules and many others remained open to a legal response. The ICRC encouraged the continuation of these processes and urges States to translate this position into strong and concerted actions at the international level, including in conferences of the High Contracting Parties to the Convention on Certain Conventional Weapons[13] and other *fora* which are already discussing this issue. The representative mentioned the upcoming regional conference, to be hosted by Luxembourg at the end of April 2023, to represent a crucial opportunity for European States in this regard.

121. He also mentioned an important innovative project that the ICRC has been running over the past three years pertaining to the idea of a digital emblem, meaning a digital signal to identify medical and humanitarian actors in cyberspace, in the same way that a Red Cross, Red Crescent or Red Crystal emblem would allow it in the physical world. Over the past three years, the ICRC has worked with research institutions and a group of global experts on possible technical solutions for a digital emblem. Based on this in-depth study, the ICRC believes that a digital emblem could add a layer of protection against cyber operations for medical facilities and actors of the Red Cross and Red Crescent Movement. As a next step, the ICRC envisages a series of exchanges with States to hear their views, answer their questions, and determine whether and how such a new digital emblem or signal could be incorporated into IHL. Finally, the ICRC is now starting to look forward to the next International Conference of the Red Cross and Red Crescent Movement. Approximately every four years, the International Conference brings together all States Parties to the Geneva Conventions, all the 192 national societies, the International Federation and the ICRC. The representative indicated that the concept note of the conference had just been published on the conference website and that any feedback on this note would be welcome in order to shape the conference.

122. The representative of Slovenia informed the CAHDI about an IHL event in Ljubljana entitled "Humanitarian crisis, protection of critical infrastructure and the environment during armed conflicts and in relation to peacebuilding measures: Legal challenges of the 21st century". The event addressed the importance of protecting critical infrastructures during armed conflicts, the issue of environmental degradation in armed conflicts and its effect on human life and health as well as the provision of rapid and effective humanitarian aid to those most in need, in line

[12] Resolution 2485 (2023) of the Parliamentary Assembly of the Council of Europe (PACE) on the Emergence of lethal autonomous weapons systems (LAWS) and their necessary apprehension through European human rights law, text adopted by the Assembly on 27 January 2023 (9th sitting).
[13] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects adopted in Geneva on 10 October 1980.

with the existing legal frameworks. As stressed in many of the recent IHL events, the protection of critical civilian infrastructure, the environment, and humanitarian aid were global issues essential for the protection of civilians during armed conflicts. The representative noted that the main findings of the conference had already been distributed through Slovenia's EU network and would be shared within the CAHDI soon. Moreover, the representative thanked the Vice-President of the ICRC for his participation and contribution to the Slovenian event, as well as all CAHDI members who attended.

123. The representative of Germany started by congratulating Ireland for the EWIPA Declaration that constitutes, in the eyes of his Government, a great achievement. The representative underlined Germany's grave concern for the devastating and often long-term impact on civilians of the use of EWIPA. With the political Declaration signed in November 2022, States were sending a clear message that this toll is unacceptably high and that they are committed to a better protection of civilians as well as to the assistance to victims of EWIPA. The representative maintained many of these civilian casualties to result from situations where existing IHL obligations are either not respected or even blatantly ignored. This is, for instance, the case for non-State actors such as the so-called Islamic State, Boko Haram or the Taliban. However, it is also possible to witness such unacceptable behaviour by States. In its illegal war of aggression against Ukraine, Russian troops are reportedly, directly or indiscriminately, attacking civilians and civilian objects using explosive weapons. The representative reiterated that Germany condemns this behaviour in the strongest possible terms. In Germany's view obligations under IHL and international law have to be fully respected, Russia must immediately put an end to the war it started and end the tragic suffering and loss of life it continues to cause. Against this background, the representative continued, it was vital that the Declaration included a clear call on all parties to armed conflict - signatories of the Declaration, non-signatory States as well as non-State actors - to respect IHL and the humanitarian principles when using explosive weapons in order to minimise civilian harm. The representative suggested that future meetings should also discuss the notion of foreseeable, indirect effects in order to adequately consider the reverberating consequences of the use of EWIPA. The political Declaration, in his country's view, represented a strong signal of commitment for a better protection of civilians and for victim assistance. He noted Germany to be delighted to support it and uttered the hope of his Government that many more States will do the same. Germany would stand ready to assume its role in an inclusive follow up process with the participation of international organisations and civil society to pave the way for tangible improvements on the ground and to address the humanitarian impact arising from the use of EWIPA.

124. The representative of Germany then formulated some remarks about the meeting of the CCW Group of Governmental Experts on emerging technologies in the area of Lethal Autonomous Weapon Systems (GGE on LAWS) organised in Geneva from 6 to 10 March 2023. For him, this meeting had demonstrated the growing convergence on the basis of a two-tiered approach promoted by a group of countries, including Germany, on the basis of a working paper of July 2022. While there remained differences on important issues, the idea of a two-tiered approach had in general also been reflected in proposals such as the Roadmap Towards a New Protocol on Autonomous Weapon Systems submitted by a group of countries (Argentina, Costa Rica, Guatemala, Kazakhstan, Nigeria, Panama, Philippines, Sierra Leone, the State of Palestine and Uruguay) in 2022. It was further possible to observe that the Latin American and Caribbean regions promote this idea. The representative concluded his remarks by uttering his Government's appreciation for the fact that the draft articles submitted by Australia, Canada, Japan, the Republic of Korea, the United Kingdom and the United States of America at the beginning of the current meeting of the GGE reflected this approach as well.

125. The representative of the United Kingdom commenced by expressing her country's appreciation for having been able to sign the EWIPA Declaration amongst many other States represented in the CAHDI. In the future, the United Kingdom would be very keen to ensure that the momentum built in negotiating this Declaration actually drives through to a practical implementation. She stressed the importance of the latter constituting a concrete humanitarian benefit for the protection of civilians. Therefore, her country would be fully prepared to work with its allies, partners and civil society to promote the Declaration, to deliver against its

commitments, to develop the sharing of good practices and to encourage States, including her own, to put in place good procedures and trainings. She explained her country to thus envisage a practical approach for the next steps. She then highlighted the famine prevention initiative. The British national IHL committee was continuing to work, together with the British Red Cross and selected academics, on a project to produce a public facing handbook that will focus on the role of IHL in preventing or mitigating conflict induced hunger, with the aim of bringing relevant rules and practices into one place to increase knowledge amongst practitioners with a focus on best practices and on identifying pathways for a better implementation of IHL. The representative concluded her intervention by thanking Austria for the organisation of the Regional Conference which had been considered very useful by the British participants.

126. The representative of Romania joined the appreciation expressed by other delegations towards Austria and the ICRC for the thoroughly planned and executed Regional Conference in Vienna which had addressed many practical issues, based on hypothetical cases raising many questions of application or interplay between IHL and the sanctions or restrictive measures regimes. Her country found this very instructive, especially considering that her legal department dealt with the sanctions regime on a daily basis. In this framework, Romania had been quite surprised by the very strict views adopted by some States in relation to the interpretation of the sanctions regime. According to these views, many elements of IHL or humanitarian assistance were considered part of the sanctions regime and therefore considered as prohibited. Another aspect that her country deemed particularly important and that probably deserved further consideration was the protection of the ICRC emblem, especially in times of peace when it tends to be easily abused. She had also considered very useful the practical examples given in the context of the conference, especially from the Ukrainian side, that actually, in the context of the war, was faced with many difficulties in relation to the protection of humanitarian assistance offered by the ICRC and with regard to other actors who abuse the Red Cross emblem. Her country regarded these examples as very instructive and plans to discuss this issue in the framework of its national IHL committee. Lastly, the representative informed delegations of two headquarters agreements, one with the ICRC and the other one with the International Federation of Red Cross and Red Crescent Societies ("IFRC"), Romania was currently negotiating with the expected conclusion of the agreements by September 2023 or the end of the year the latest.

127. The representative of Spain drew the attention of the CAHDI to the first Spanish humanitarian diplomacy strategy approved by the Council of Ministers the in January 2023. This text, which will be enforced during the period of 2023-2026, focuses on three goals that are divided into 14 pillars of action. The first goal is to prevent and resolve conflict. Its pillars of actions include preventive diplomacy, the protection of the humanitarian sphere, and the fight against terrorism, among others. The second goal is to promote respect for IHL. Its main pillars of actions include the fight against impunity and accountability, the protection of medical missions and of children in armed conflicts. The third goal focuses on protecting people in vulnerable situations. Its pillars of actions include the fight against sexual violence and providing attention to refugees and internationally displaced persons. The representative noted the drafting of the strategy to have been coordinated by the Ministry of Foreign Affairs with an inclusive approach of collaboration between public authorities and civil society, such as the ICRC.

128. The representative of Luxembourg informed the CAHDI of the opening of an ICRC delegation on cyberspace in Luxembourg at the beginning of 2023. His country warmly welcomed this initiative and was looking forward to developing collaboration with the delegation. The headquarters agreement for the delegation was currently before the Luxembourg Parliament and should be finalised soon, enabling the establishment of the delegation and its full operation.

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

129. The Chair reminded the CAHDI of document CAHDI (2023) 9 prov presenting a summary of the developments at the ICC and other international criminal tribunals since the last CAHDI meeting. No exchange of views took place under this item since, as the Chair recalled, the

discussion had already been covered under item 7.1 concerning topical issues of public international law.

7.6 The use of new technologies and international law

- ***Presentation on the topic of "The use of new technologies and international law" by Professor Aurel SARI (Associate Professor of Public International Law at the University of Exeter, Fellow of Supreme Headquarters Allied Powers Europe)***

130. The Chair welcomed and introduced Mr Aurel SARI, Associate Professor of Public International Law at the University of Exeter and Fellow of Supreme Headquarters Allied Powers Europe, to the CAHDI.

131. In his presentation, Professor SARI concentrated on three topics, namely the applicability of international law in cyberspace, cyber incidents and developments that have taken place in the context of Russia's war of aggression against Ukraine, and cyber operations taking place outside of armed conflict.

132. Concerning the first topic, Professor SARI began by stating that it is widely recognised that international law does apply to cyberspace, with the main issue at stake being not if, but how it applies. However, since not all rules of international law are equally relevant in cyberspace, one must look at the content of the law. In this sense, Professor SARI identified three groups of provisions of international law: 1) rules that are not applicable to the cyberspace; 2) rules that are framed as general principles and not tied to a particular context, which then clearly apply to the cyberspace as well as to the kinetic world; and, 3) rules that are potentially relevant to the cyberspace, but where it is not immediately obvious whether and how they might apply. Following the example of Article 24 of the VCDR, which provides that the archives and documents of the mission shall be inviolable at any time and wherever they may be, a narrow approach might suggest that Article 24 must be limited to non-digital archives and physical documents. By contrast, a more inclusive approach might point out that the purpose of the VCDR is to ensure the efficient performance of the functions of diplomatic missions and that extending inviolability to electronic archives and documents is essential to achieve this end.

133. Expanding on this topic, Professor SARI looked at the applicability of international humanitarian law ("IHL") to the cyberspace, which the group of governmental experts at the UN were not able to reach consensus on in 2017. Professor SARI posited that IHL does not legitimise war in cyberspace and that one must look at which rules of IHL apply to it and how. He identified the same three categories of rules as above, explaining that a rule such as that war prisoners must be provided sufficient water and soap for hygiene purposes is clearly not relevant to the cyberspace, the duty to distinguish between civilian and military objectives can be relevant, while other rules can be extrapolated into the cyberspace. For example, the duty to enable prisoners of war to send capture cards to their family to inform of their captivity could be seen as entitling prisoners to inform their families through electronic means.

134. Professor SARI then turned to the second topic, the legal questions raised by cyber operations conducted in the context of Russia's war of aggression against Ukraine, listing a various number of such operations with large scale impacts on Ukrainian infrastructure. Professor SARI brought the attention of the CAHDI to four main features of these cyberattacks. First, operations against Ukraine have pursued three broad aims: the disruption of Ukrainian networks, infrastructure and services, the dissemination of propaganda, and the conduct of psychological operations and the gathering of intelligence. Second, although Ukraine has been targeted by hundreds of cyberattacks, their impact on the course of the conflict has been relatively limited, since cyber operations have not brought decisive political or military advantages to Russia. Third, many cyberattacks were not launched in isolation, but to complement conventional military operations. Finally, cyber operations have been carried out by a wide range of actors including State and non-state actors.

135. According to Professor SARI, the first legal question on this topic related to this nexus between hostile cyber activities and the broader armed conflict. Since Russia and Ukraine were engaged in an armed conflict already before Russia launched the full-scale invasion were these cyberattacks subject to IHL? Were these cyberoperations governed by the rules of IHL or international rules applicable in times of peace? Professor SARI posited that the rules

applicable in times of peace do not adequately reflect that these operations represent a prelude to war and enabled the following kinetic operations. Another legal issue related to the link between cyber operations and kinetic operations and the effect of this aspect on the applicability of IHL. Professor explained that cyber operations that do not entail acts of violence were not attacks within the meaning of IHL and therefore not subject to key IHL principles, such as the principle of proportionality. Thus, even those rules that are concerned with non-physical effects may require a kinetic component. However, Professor SARI clarified that, where cyber operations are carried out to complement kinetic acts of violence, it would not be unreasonable to treat the cyber element and the kinetic element as being part of the same attack within the meaning of IHL, provided that the cyber element is integral to the kinetic element. A third legal question pertained to the widespread participation of hacktivists and cyber volunteers in hostile cyber operations and their status under IHL. In this case, the civilians would lose their immunity under IHL as long as they participate in the hostilities. The ICRC has identified three constituent elements of the direct participation in hostilities (DPH), namely harm, causation, and belligerent nexus. Professor SARI explained that the notion of harm is crucial in this case, since it does not have to involve physical harm, so that participation in hostile cyber operations may amount to DPH and, depending on the level and nature of State coordination and involvement, groups of cyber volunteers may qualify as irregular militias and lose their civilian status altogether. A fourth question raised by Professor SARI related to the States' duty to take precautions, and whether this is compatible with the reliance on cyber volunteers. Finally, the support provided by third States to Ukraine in cyberspace or through cyber means raised questions about neutrality and co-belligerency. Professor SARI explained that whether a third State could be considered co-belligerent depends on whether the assistance makes a direct and integral contribution to the conduct of hostilities by Ukraine. On the topic of cyber operations below the threshold of armed conflict, Professor SARI added that, depending on their nature, they may engage a wide range of specialised regimes under international law, such as international human rights law.

136. Professor SARI drew attention to the principle of territorial sovereignty, explaining that there are certain cyber activities that are generally accepted to be prohibited by it, such as the unauthorised conduct of cyber activities by the agents of one State present in the territory of another State. However, some States would take the position that sovereignty also prohibits cyber operations that cause cyber systems in another State to lose functionality, even where no material damage occurs, while a few States claim that the mere penetration of national cyber systems, in particular those systems that are critical for national security, is a violation of sovereignty. Professor SARI identified a tension between the legitimate interests of a State to protect its cyber assets located abroad and the territorial focus of sovereignty, with a more restrictive interpretation suggesting that, according to this view, the principle of non-intervention could impair another State's capacity to carry out its functions on domestic territory. Some States have taken the position that cyber operations which severely disrupt the functioning of the State, including its economy, could amount to a use of force even where these operations do not cause physical damage. Professor SARI identified the key question: Given that cyber operations may cause significant non-kinetic harm and postcritical threats and vulnerabilities, it is likely that a growing number of States will support expansive interpretations of the predigital rules.

137. Professor SARI concluded by identifying four key points of his presentation: 1) cyber operations in armed conflict are both a driver and a symptom of the diffusion of warfare; 2) while cyber operations pose a multitude of legal challenges, one should be careful not to overestimate their novelty and alleged distinctiveness; 3)the way in which States interpret and apply the law in cyberspace may have a significant effect on the application and interpretation of the very same rules in other domains, and, 4) agreeing on clear legal standards is vitally important, but this alone does not guarantee compliance - in this case States will continue to turn to measures of self-help.

Discussion

138. The representative of Estonia asked Professor SARI about the converging views on data as an object, especially within the context of IHL and referring to data which might be of vital importance and that is available only digitally, such as medical data.

139. Professor SARI maintained the question of electronic data considered from the perspective of IHL to be one of the areas that are most debated and less clear-cut. The pre-digital mindset was focused on physical objects, such as paper documents. He explained that if we consider the physical objects that electronic data is stored on to be part of the data, such as hard drives or CDs, then they are clearly protected just as the more traditional forms of records. This creates a choice between the expansive and the restrictive interpretation, which States must come together on and clarify.

140. The representative of Ireland asked Professor SARI for his opinion on the application of the principle of due diligence in international law to cyber operations, and to what extent a State's responsibility is engaged by acquiescence or continued involvement. Professor SARI responded that, given that due diligence is a general principle, it clearly applies to the cyberspace, and a majority of States would subscribe to that view. The more important questions are how serious the violation must be, or if the violation must lead to harm, which is where some States will disagree, and each case must be treated depending on the specifics.

141. The representative of Finland noted that an increasing number of States were publishing unilateral statements of positions on the applicability of international law in cyberspace and asked Professor SARI for his opinion on how to develop these positions and transform them from general statements into detailed positions. Professor SARI replied that unilateral statements by States are very broad, but they should not become more detailed, since they are abstract and hypothetical. He identified the importance of maintaining international fora open to the subject and of calling out violations in order to decide on common positions with respect to specific cases.

142. The representative of Slovenia asked Professor SARI to elaborate on the concept of critical infrastructure, since there is no unified definition of this concept, as well as to provide proposals for States on how this concept applies in cyberspace. Professor SARI answered that a definition of critical infrastructure might not be needed, because the broadly reaching concept of harm is applicable in this case. Professor SARI further reiterated the importance of critical infrastructure and hardening it both through technical and legal means and explained that a definition might be more helpful at the national level, in order to determine specific cases.

143. The representative of the United Kingdom queried Professor SARI's description of the United Kingdom's position as expansionist and asked Professor SARI whether he considers that the position adopted by the United Kingdom on the principle of non-intervention, which he had mentioned before as expansive, to be a sensible way forward. Professor SARI answered that the perspective of the UK is perfectly reasonable and explained that the reason he had qualified the perspective as expansionist is due to the reliance of the principle of non-intervention and the aspect of coercion inherent to it.

144. To the second question, the representative of Italy mentioned that Russia recently presented a draft convention on international information security and asked Professor SARI to comment on it. Unaware of the Russian proposal, Professor SARI offered a more general reply by stating that Russia and some other States tend to direct their efforts in the cyber domain towards sovereignty as a way of shielding their own domestic discourse and keeping relevant people in power. While this Westphalian idea was consistent with some principles of international law, like the principle of non-intervention, Professor SARI believes that these views are also about strategic competition, not only about regulation, and that States must stand together to ensure that international law does not develop in this direction.

145. The representative of Poland asked Professor SARI to comment on the interaction between the classical types of State jurisdiction and emerging practice of States when they are enacting laws on the jurisdiction of their State organs in cyberspace. Professor SARI responded that, in his view, jurisdiction does not conflict very much with the cyberspace, since States enjoy a lot of flexibility in jurisdiction, including different types of broad jurisdiction. The main issue in this sense was jurisdiction in the case of enforcement, and the complexities created in the cyberspace by the rule that a State may not take enforcement action in the territory of another State without its consent.

146. The representative of Norway reiterated the importance of the definition of critical infrastructure on the national level and the risks associated with defining critical infrastructure at the international level, namely the timely process of obtaining agreement between States, the risk of it becoming outdated, and the risk of defining a lower threshold for malicious actors. Professor SARI emphasised that legal certainty and the definition of legal red lines still pushed down conflict and malignant activity below the legal threshold, even though it would not eliminate it.

147. The representative of Sweden reiterated their interest in combatting the authoritarian views on the applicability of international law in cyberspace. In reply to her question on interesting ongoing discussions in other regional bodies Professor SARI identified the EU and NATO as the main regional organisations currently involved in developing the discourse in this field, especially from an operational perspective, including in the legal field.

148. The representative of Canada ended the discussion by asking Professor SARI how one could assess at what point certain behaviour triggers the applicability of IHL. Professor SARI responded that the issue of determining the threshold of the applicability of IHL was very complex but suggested consulting the Tallinn Manual for guidance.

8 <u>OTHER</u>

8.1 Place, date and agenda of the 64th meeting of the CAHDI

149. The CAHDI decided to hold its 65th meeting on 28-29 September 2023 in Strasbourg (France). 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

150. No item was handled under this agenda point.

8.3 Adoption of the Abridged Report and closing of the 64th meeting

151. The CAHDI adopted the Abridged Report of its 64th meeting, as contained in document CAHDI (2023) 13, and instructed the Secretariat to submit it to the Committee of Ministers for information.

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

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APPENDIX III - PROF. ANDREAS ZIMMERMANN

'The practice of States and
International Organisations regarding non-legally binding agreements'

Oral Presentation by
Prof. Andreas Zimmermann,
LL.M. (Harvard), University of Potsdam

CAHDI meeting March 23, 2023

Part I: Introduction and background

Dear Ambassador Tichy,
Excellencies,
dear colleagues,

Many thanks for the invitation to present my report on 'The practice of States and International Organisations regarding non-legally binding agreements' to the CAHDI, and for having me invited to draft the report at the first place following up on our joint 2021 workshop on the same issue.

As you will recall my report is based on a questionnaire on the practice of member States and I am particularly grateful to those 22 member States that provided information as to their practice in line with the said questionnaire, so that my report could have been as representative of relevant State practice as possible.

It goes without saying though, that obviously I was thus only in a position to, in my report, for one, only reflect their very practice, and that, second, I made an attempt to present the main trends arising from those replies.

Today's oral presentation will, by and large, follow the structure of my written report, which in turn had followed the set-up of the questionnaire.

I will thus start with substantive aspects of such non-legally binding agreements, and then move on to related procedural aspects. I will conclude with some more general aspects including possible ways forward.

But let me start with the issue of terminology. I recall that a significant number of States rejected the very use of the term "*agreement*" in relation to non-legally binding instruments, but I note at the same time that both, the OAS and the ILC have used the very same term in their respective guidelines and studies in the matter.

If member States do wish, however, to avoid the term of 'non-legally binding agreements' as such, it might be advisable to henceforth e.g. use the generic term of 'non-legally binding arrangements'. In any case one has to recall that unilateral non-legally binding instruments are not being covered by the study.

At the same time, the practice reported to me confirmed that a whole range of terms are in use for such non-legally binding instruments. There was a consensus however that the crucial element is to be seen in the fact that – in contrast to treaties – they are by their very nature meant *not* to, and do not, create legally binding obligations under international law. Put otherwise, States work on the basis of a negative definition of such arrangements.

As far as the notion of so-called "Memoranda of Understanding" or 'MoU' is concerned, the State practice, as reported, confirmed that the said notion was rather used for non-legally binding instruments. At the same time, however, mention was made of the fact that other States sometimes also use the said term when referring to legally binding agreements.

Notwithstanding Article 2 (1) lit. a VCLT, which as we all know confirms that it is the content and language of an instrument that is decisive for determining its respective legal character and its legal effects, at least some States stated that they preferred not to use the term at the first place in order to avoid misunderstandings. States may thus consider the issues arising from the continued use of the notion of MoUs. In any case, most States do not distinguish between MoUs and other types on non-legally binding instruments.

As to the distinction to be drawn between treaties governed by international law on the one hand, and between different types and forms of 'non-legally binding agreements' on the other hand, States clearly distinguish between treaties, civil law contracts and non-legally binding instruments, while no distinction is made between MoUs (perceived as being not legally binding under international law) and other types and forms of non-legally binding instruments.

As to how to differentiate between legally binding agreements and non-legally binding instruments, there was also a consensus to the effect that this constitutes a matter of interpretation, where the intention of the parties, as expressed in the text, as well as the language and terminology used, is decisive.

Yet, there is not one single decisive element that typically qualifies an agreement as non-legally binding (or *vice versa*). Rather, every agreement ought to be assessed in its entirety, taking into account the content, form and terminology of the document, as well as the circumstances surrounding its conclusion.

Yet, a clause *explicitly* stating that an agreement was not legally binding was a very clear and strong indicator, if not even provides conclusive evidence that the parties did not intent to enter into legally binding obligations arising under international law.

There was some disagreement whether other States whether non-legally binding instruments should at least *normally* contain such a 'disclaimer' clause, and /or whether they should indicate that they are "not eligible for registration with the Secretary-General of the United Nations".

Many States listed typical terms and phrases that should be used in non-legally binding agreements instead of other terms that were typically used in treaties, in order to indicate that the instrument in question was not meant to be legally binding under international law.

As you will see in the written report, some States use standard language indicating the binding/binding-character of a given instrument such as e.g. *not* using language as to the 'entry into force' or 'parties' in an instrument that is *not* meant to be legally binding.

As far as the competence to enter into non-legally binding instruments is concerned, not surprisingly, replies of the reporting States differed significantly on the basis of the different internal constitutional structures of the State concerned. Normally, however, it is the respective government or individual ministers, and even State agencies or similar institutions (as well as federal sub-entities, where they exist) are considered competent to sign 'non-legally binding agreements' with no need for parliamentary approval.

One of the most crucial questions is the one that relates to possible (indirect) legal effects of non-legally binding instruments, and whether such types of instruments, their non-binding character notwithstanding, might eventually be precursors of legally binding agreements related to the same subject matter.

The majority of States participating in the survey held that non-legally binding agreements may under certain circumstances produce indirect legal effects by providing interpretative guidance and may also facilitate the later conclusion of a binding agreement, sometimes referring to the work of the ILC which has stated that such non-legally binding instruments may, their lack of binding force notwithstanding, nevertheless "provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development".

At least some States also noted that non-legally binding instruments may serve as subsequent agreements within the meaning of Art. 31(2)(a), (3)(a) VCLT provided the parties to the respective treaty participated in the non-binding instrument with the intent to clarify the underlying treaty in question, or could constitute subsequent State practice in accordance with Arts. 31(3)(b), 32 VCLT, provided such practice takes place "in the application of the [original] treaty", as required by Art. 31(3)(b), 32 VCLT.

In cases where a non-legally binding arrangement formed part of prior treaty negotiations it may also form part of the *travaux préparatoires* of the later treaty as a supplementary means of its interpretation pursuant to Art. 32 VCLT.

Finally, it was recognised that non-legally binding instruments may produce legal effects through concepts such as acquiescence and estoppel.

On the whole, it thus seems that States do not categorically exclude possible indirect legal effects under international law produced by instruments which themselves are, as such, not legally binding under international law. However, the extent to which, and under what conditions, such effects may take place,

seem to still need further analysis taking into account both, general rules of treaty law, as well as other general principles of international law such as estoppel or acquiescence.

As to the reasons why non-legally binding instruments are preferred as compared to treaties, it has become obvious that the former are sometimes concluded to later facilitate the conclusion of a binding agreement, and sometimes because it is impossible to reach a legally binding agreement with all parties involved.

Besides, apart from the fundamental question whether States want to enter into binding obligations or not at the first place, many States held that it was the subject matter that was decisive in order to opt for the conclusion of a treaty, or whether instead entering into a non-legally binding instrument. Notably, technical or administrative issues are preferably regulated by way of non-legally binding instruments which can more easily be amended or even terminated. In contrast, other topics such as e.g. tax or trade agreements, instruments regulating privileges and immunities, or providing for binding dispute resolution mechanisms were not infrequently held to be *per se* ineligible to be regulated by way of non-legally binding instruments.

Moreover the time factor as to their conclusion and the inherent flexibility of non-legally binding instruments were also considered to be important factors in deciding whether to conclude a treaty or to merely enter into a non-legally binding agreement.

On the whole, it thus seems that it is not least the very informality and flexibility inherent in non-legally binding instruments that make them the instrument of choice, as compared to (perceived) lengthy negotiation and entry into force procedures as far as treaties are concerned.

This flexibility also extends to the issue who, under domestic law, may make then decision to enter into non-legally binding agreements since in member States, typically, the constitutional rules regulating the formal conclusion of treaties do *not* apply to the conclusion of non-legally binding agreements, and most of the States that replied to the questionnaire, stated that there are no other rules below constitutional rank in place either. Thus, national parliaments only seem to become involved in ‘concluding’ non-legally binding agreements through its general right to be informed and to eventually petition the respective government, but are not asked to formally agree.

As far as the issue of some form of a mandatory centralised formal assessment of non-legally binding agreements to be eventually concluded the replies were mixed and showed a significant lack of uniformity among the States that engaged with the questionnaire: in some States there exists a mandatory formal assessment, while in other States such formal assessments are not mandatory but are nevertheless often being conducted as a matter of routine, while in a third group no formal assessment is conducted at all.

In those States where a formal assessment as to possible legal issues arising from the conclusion of non-legally binding instruments is (to be) conducted, it is mostly the legal department of the Ministry of Foreign Affairs which performs the assessment, or which shall be consulted.

What is more is that it is also its timing of such review – to the extent it takes place at all - which varies significantly among States contributing to the survey of State practice.

Mutatis mutandis, no uniform practice may be discerned either as to whether non-legally binding agreements entered into by sub-national territorial units/bodies or specialized agencies are also subject or not to the same formal assessment *e.g.* by the respective Ministry of Foreign Affairs.

The majority of States reporting, and indeed even some which do not have a mandatory formal assessment in place, have some kind of internal guidelines or written guidance for concluding and assessing non-legally binding agreements, which guidelines or handbooks are then made available to the various governmental departments potentially involved in the ‘conclusion’ of non-legally binding instruments.

As to the signature, there seems to be a consensus, that no document containing ‘full powers’ as referred to in Article 7 (1) lit a) VCLT is required for signing a non-legally binding agreement and, in contrast to the signing and ratification of international treaties, many States seem to not provide for *any* formal procedure whatsoever when it comes to the signing of non-legally binding agreements. In some States, however, an approval of the President, the Council of Ministers, or of the Minister of Foreign Affairs is required.

Finally, there does not exist a uniform practice among Council of Europe member States as to the issue whether the signatures of non-legally binding agreement necessarily have to be on the same document, while there is not yet a broader practice on mere ‘electronic signatures’.

In most States that participated in the survey non-legally binding agreements do not have to be concluded in the respective national language, but may also be ‘concluded’ in a neutral language, typically in English or possibly in French, unless said language was the official language of the other partner

Generally, there are neither strict formal rules applying to non-legally binding agreements as they do when it comes to treaties such as the choice of paper et al., but States are generally keen to make sure that non-legally binding agreements do not, by their outer appearance, give the impression to constitute treaties binding under international law.

In most States there is no specific domestic data base or register for non-legally binding agreements, but they are somewhere registered or archived, e.g. by the respective lead department and/or by the respective Ministry of Foreign Affairs.

Moreover, and in contrast to treaties, non-legally binding agreements are in almost all States reporting *not* published in an official treaty series or legal gazette.

Let me now move on to the pros and cons of such non-binding instruments, as perceived by States, and possible ways forward.

Most States saw the main benefit of non-legally binding agreements in their greater flexibility, with more expeditious and less formal processes needed given the increased speediness of political developments and growing international cooperation.

Furthermore, non-legally binding agreements are seen as useful in order to specify the terms and obligations of previous treaties, or by providing an alternative if the conclusion of a binding treaty is politically not possible.

Concerns were however also uttered about the frequent use of non-legally binding agreements, their potential misuse to avoid binding commitments, which could lead to less reliability in international relations.

Overall, as shown, the replies to the questionnaire provided by 20 States and two International Organisations show that there exists a significant level of agreement on the main characteristics of non-legally binding agreements, and on the main differences between their conclusion and effects as compared to treaties.

What are then possible smaller or bigger steps to be eventually taken, if at all.

For one, I propose that the results of the survey, including this report, could be made available to the International Law Commission for its consideration, given the fact that the ILC has included the topic of “Non-legally binding international agreements”/ “Accords Internationaux Juridiquement Non-Contraignants” in its long-term programme of work.

Besides, a publication, either on the CAHDI’s website and/or in form of a printed publication, of both, the survey of State practice, as well as of this report, might be helpful to further disseminate the respective practice of CAHDI member States.

As to possible additional future steps it is obviously for member States whether efforts could be made, or should be made, to establish specific substantive or procedural requirements or uniform practices regarding non-binding exchanges and instruments, following up on the “Guidelines of the Inter-American Juridical Committee for Binding and Non-Binding Agreements” developed within the framework of the OAS.

I thank you for your kind attention, apologize again that I could not make it to Strasbourg (which I would have loved I might say) due to prior academic engagements here in Poznan – and obviously stand ready for any further questions you might have.

APPENDIX IV – PROF. AUREL SARI

International Law and Cyber Operations: Current Trends and Developments

Professor Aurel Sari

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24 March 2023, Strasbourg

Mr. Chair,
Members of the Committee of Legal Advisers on Public International Law,
Ladies and Gentlemen,

1. Thank you very much for inviting me today. It is a pleasure and a privilege to address the Committee and I am grateful for the opportunity to contribute to your discussions. In my remarks this morning, I would like to build on the excellent presentations delivered at the Committee's last meeting in Bucharest, in particular the remarks made by Professor Dapo Akande and Dr Cordula Droege.

2. Let me proceed in three steps. First, to set the scene, I would like to briefly revisit the applicability of international law in cyberspace. Second, I will discuss some of the cyber incidents and developments that have taken place in the context of Russia's war of aggression against Ukraine. This will allow us focus on certain specific questions of international humanitarian law (IHL) and to identify several trends that merit our attention. Third, I would like to turn to cyber operations taking place outside armed conflict to briefly touch on the question of sovereignty and certain related matters.

International Law in Cyberspace

3. Let me begin by recalling two questions that were addressed at the meeting in Bucharest, namely the applicability of international law in cyberspace and, more specifically, the applicability of IHL to cyber operations.

4. First, as regards the applicability of general international law, it is widely recognised today that cyberspace is not a legal vacuum, but that existing rules of international law extend to this domain. This position has been repeatedly affirmed by States, including in the context of the Group of Governmental Experts and in the Open-ended Working Group on Developments in the Field of Information and Telecommunications.[14] Indeed,

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14 Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the

today it is difficult to find a State which does not share this position.

5. The fact that there is now a consensus on the applicability of international law should not come as a surprise. While cyberspace has some distinct features, other aspects of cyber are quite ordinary, even banal. Most definitions of cyberspace differentiate between the physical dimension of cyber, which includes information technology equipment and infrastructure, and the functional, logical or cognitive dimension of cyber, which includes software, data and even the exchange of data. There is absolutely no reason why existing rules of international law should not apply to the physical dimension of cyber, such as computers or other pieces of equipment. Nor is there any reason why rules that regulate intangible matters, such as freedom of speech or intellectual property, could not apply to the functional or cognitive dimension of cyberspace.

6. The real question, therefore, is not whether international law applies, but *how* it applies to cyberspace. Yet even this question needs to be broken down further. This is so because not all rules of international law are equally relevant. Take, for example, the Vienna Convention on Diplomatic Relations (VCDR) of 1961.[15] Article 22(1) of the Convention declares that 'The premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.' Evidently, the inviolability conferred by this rule does not extend to the internet presence of a diplomatic mission, since the notion of 'premises' clearly refers to physical premises that can be entered. By contrast, other provisions of the Vienna Convention are framed as general principles that are not tied to a particular context. Article 27 provides that 'The receiving State shall permit and protect free communication on the part of the mission for all official purposes.' There is no reason why this rule should not apply to communication through cyber means, such as correspondence by email. A third group consists of rules that are potentially relevant to cyber, but it is not immediately obvious whether and how they might apply. Article 24 of the Convention provides that 'The archives and documents of the mission shall be inviolable at any time and wherever they may be'. Since the Vienna Convention codified rules developed in the pre-digital age, a narrow approach may suggest that Article 24 must be limited to non-digital 'archives' and 'documents'. By contrast, a more inclusive approach might point out that the purpose of the Vienna Convention is to 'ensure the efficient performance of the functions of diplomatic missions'[16] and that extending inviolability to electronic archives and documents is essential to this end.

7. The point of these examples is that we need to look at the specific content of individual rules to determine whether they are relevant to cyberspace at all and, if so, how they apply. While some cases are relatively straightforward because the rule in question clearly does or does not apply, in many other cases the application of individual rules is open to reasonable disagreement. This is a source of considerable legal uncertainty. Since States make international law, it is ultimately for States to reduce this uncertainty by clarifying their understanding of the law.

8. This brings me to the application of IHL to cyber operations. Famously, in 2017, the Group of

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Context of International Security, 'Report', UN Doc. A/76/135 (14 July 2021), para. 69; Open- ended Working Group on Developments in the field of Information and Telecommunications in the Context of International Security, 'Final Substantive Report', UN Doc. A/AC.290/2021/CRP.2 (10 March 2010), para. 34.

15 Vienna Convention on Diplomatic Relations (18 April 1961) 500 UNTS 95.

16 Preamble, VCDR.

Governmental Experts was unable to reach a consensus on the applicability of IHL to cyberspace. At the time, the representative of Cuba suggested that recognizing the applicability of IHL would 'legitimize a scenario of war and military actions' in cyberspace.[17] This view overlooks the fact that the applicability of IHL does not legitimize or authorize any use of force inconsistent with the Charter of the United Nations.[18] Recognizing the applicability of IHL to cyber therefore does not legitimize war in cyberspace any more than it legitimizes war in other domains.

9. Again, the real question is not whether IHL as a regime of international law applies, but whether and how *individual rules* of IHL apply in cyberspace. Certain rules of IHL do not have any obvious cyber relevance at all. For example, detaining powers must provide prisoners of war with 'sufficient water and soap' for their personal hygiene: it is difficult to see any connection between this obligation and cyber.[19] By contrast, general principles and obligations of IHL, such as the duty to distinguish between protected persons and objects on the one side and military objectives on the other side, are clearly applicable. In still other cases, it is not immediately clear whether a particular rule is relevant or not. Consider the duty to enable prisoners of war to send 'capture cards' to their family to inform them of their captivity, their address and their state of health.[20] As originally drafted, the rule clearly envisages the sending of physical cards—but considering its purpose, should the rule not also entitle prisoners of war to inform their family through electronic means?

10. To develop these points, let me turn to the legal questions raised by cyber operations conducted in the context of Russia's war of aggression against Ukraine.

Cyber operations in and against Ukraine

11. Ukraine has been the target of hostile cyber operations linked to Russia well before Russia launched its full-scale invasion in 2022. For example, in March 2014, Ukrainian websites and services were hit by a major distributed denial-of-service (DDoS) attack. In 2015, the Ukrainian power grid was targeted, resulting in a loss of power for more than 230,000 consumers. In June 2017, Ukrainian institutions, businesses and services were hit by the *NotPetya* malware attack. The incident also affected numerous systems located outside Ukraine, causing an estimated loss of over USD 10 billion.

12. Ukraine continued to suffer cyber attacks following the launch of the full-scale Russian invasion in February 2022. One of the most damaging incidents, the Viasat attack, severely disrupted internet services across Ukraine, rendering thousands of satellite broadband modems inoperable, including modems used by the Ukrainian government and military. Since February 2022, both private and public networks have been targeted on an ongoing basis. The attacks have included operations against Ukraine's energy infrastructure, its postal and telecommunications services; false messages targeting the general public; phishing attacks

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17 Declaration oy Miguel Rodríguez, Representative of Cuba, at the Final Session of the Group of Governmental Experts on Developments in the Field of Information and Telecommunications in the Context of International Security (23 June 2017) <http://misiones.cubaminrex.cu/en/un/statements/71-unga-cuba-final-session-group-governmental-experts-developments-field-information>.

18 Preamble, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I) (8 June 1977) 1125 UNTS 3.

19 Convention Relative to the Treatment of Prisoners of War (Geneva Convention III) (12 August 1949) 75 UNTS 135, Article 29.

20 Geneva Convention III, Article 70.

directed against government officials and private persons; as well as various intelligence and surveillance activities carried out through cyber means. While many of these operations have been linked to pro-Russian groups and also to the Russian authorities, it should be noted that the Russian Government has denied its involvement.

13. Several features of these cyber operations merit attention. First, operations against Ukraine have pursued three broad aims: the disruption of Ukrainian networks, infrastructure and services; the dissemination of propaganda and conduct of psychological warfare; and the gathering of intelligence. Second, although Ukraine has been targeted by hundreds of cyber attacks, their impact on the course of the conflict has been limited. Cyber operations have brought neither decisive military nor decisive political advantages for Russia. Third, many cyber attacks were not launched in isolation, but to complement conventional military operations. For example, the Russian missile strike against a television tower in Kyiv on 1 March 2022 was followed by cyber attacks against a major broadcasting company on the same day. In May 2022, a Russian missile attack against the residential areas of Odesa was accompanied by a cyber operation targeting Odesa City Council. Finally, cyber operations have been carried out by a wide range of actors, including States and non-State actors. The latter include not only established groups and networks, but also thousands of cyber volunteers and 'hacktivists' who have engaged mostly in low-level cyber activities in support of the parties to the conflict.

14. Bearing these features in mind, the conduct of cyber operations in and against Ukraine poses a range of legal questions that are of wider interest and significance.

15. The first set of questions relates to the nexus between hostile cyber activities and the broader armed conflict. As I have indicated, Russian-linked cyber operations in and against Ukraine did not start in February 2022. In the weeks before the invasion, several waves of DDoS and data wiper attacks were launched against Ukrainian governmental and private networks and websites. Since Russia and Ukraine were engaged in an armed conflict already before Russia launched its full-scale invasion, were these cyber attacks subject to IHL? The answer depends partly on whether the attacks were designed to hand a military advantage to Russia in the context of the ongoing hostilities. The answer is fact-dependent, but has significant legal implications: cyber operations against certain Ukrainian government sites and networks may have been permissible under IHL, assuming it did apply to them, but not under the rules of international law applicable outside the conduct of hostilities.

16. Stepping away from the specific circumstances of the conflict in Ukraine, the fact that Russia's full-scale invasion was preceded by cyber operations aimed at shaping the battlespace highlights that cyber attacks may straddle the line between war and peace. Cyber shaping operations that predate the outbreak of hostilities are not governed by the law of armed conflict, yet the rules applicable in times of peace may not adequately reflect the fact that such operations may actually be a prelude to war.

17. Second, as noted earlier, cyber operations have been deployed in support of kinetic attacks. This too has significant legal implications. The bulk of IHL is concerned with kinetic matters. The majority of the rules governing the conduct of hostilities apply in the case of 'attacks', which are defined as 'acts of violence against the adversary, whether in offence or in

defence'.[21] Cyber operations that do not entail acts of violence are not 'attacks' within the meaning of IHL and therefore are not subject to some of its key rules and principles, such as the rule of proportionality. Even those rules that are concerned with non-physical effects may require a kinetic component. For example, 'Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited'.[22] The rule only covers cyber operations that cause terror among the civilian population through an act or threat of violence, but not cyber operations that cause fear and panic by disrupting vital infrastructure and services through non-kinetic means. However, where cyber operations are carried out to complement kinetic acts of violence, it would not be unreasonable to treat the cyber action and the kinetic action as part of a single 'attack' within the meaning of IHL, provided the cyber action is integral to the kinetic action. This means that basic rules, such as the principle of distinction or the prohibition of indiscriminate attacks, would be applicable to cyber actions that do not cause material destruction or injury.

18. Third, the widespread participation of 'hacktivists' in hostile cyber operations raises questions about their status under IHL. While civilians are normally immune from attack, they lose that immunity for such time that they directly participate in hostilities (DPH). The International Committee of the Red Cross has identified three constituent parts of DPH.[23] First, harm: the act by the civilian must inflict injury, death or destruction or, alternatively, be likely to adversely affect the military operations or military capacity of a party to the conflict. Second, causation: there must be a direct causal link between the act performed by the civilian and the harm likely to result from the act or the military action of which the act forms an integral part. Third, belligerent nexus: the act must be designed to directly cause harm in support of one party to the conflict against another. The notion of harm is critical for DPH: since harm does not have to involve kinetic effects, participation in cyber operations that are likely to inflict non-kinetic harm on an adversary (such as intelligence gathering, degrading their communications or adversely affecting command and control through ruses) may count towards DPH. Participation in hostile cyber operations may, therefore, amount to DPH and hacktivists and cyber volunteers who engage in such acts thus lose their immunity from attack. It is worth noting that this loss of immunity does not depend on their geographical location, meaning that they are targetable as a matter of IHL even when they are located outside active combat zones.

19. Related to DPH is the question whether hacktivists and other cyber volunteers may lose their civilian status on a permanent basis? States may seek to enhance the effectiveness of cyber volunteers by coordinating and supporting their activities. Depending on the level and nature of State involvement, groups of cyber volunteers may qualify as irregular 'militias' or 'volunteer corps' belonging to the State party, meaning that their members would lose their civilian status and gain combatant status.

20. Fourth, State reliance on cyber volunteers raises questions whether this practice is compatible with the duty to take precautions. Belligerents are bound to take the 'necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations'.[24] Encouraging and facilitating the participation

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21 Additional Protocol I, Article 49(1).

22 Additional Protocol I, Article 51 (2).

23 International Committee of the Red Cross, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law' (2008).

24 Additional Protocol I, Article 58(c).

of civilians in hostilities through cyber means, especially if this rises to the level of DPH, does not seem to be compatible with this duty. For example, Ukraine has developed an app for mobile phones (the ePPO app) that enables Ukrainian civilians to report the location of incoming Russian missiles or other airborne threats. The information is then relayed to Ukrainian air defence units. Since usage of this app may amount to DPH and render civilians liable to attack, its distribution by the Ukrainian authorities is difficult to reconcile with the precautionary duty to protect civilians from the dangers resulting from military operations. The question is not settled, however, partly because the precautionary duty is not absolute and partly because other relevant rules, such as the right of self-defence, may also have a bearing on the matter.

21. Fifth, the support provided by third States to Ukraine in cyberspace or through cyber means raises questions about neutrality and co-belligerency. It is common knowledge that third States have provided extensive assistance to Ukraine to bolster its cyber capabilities, including technical assistance and support, financial aid and intelligence on cyber threats. To the extent that these forms of support assist Ukraine in the conduct of its military operations against Russia, they are incompatible with traditional conceptions of neutrality. Other forms of support provided to Ukraine through cyber means, for example the sharing of military intelligence, may also be incompatible with the traditional requirements of neutrality. However, some nations adhere to the concept of 'qualified neutrality', whereby third States are entitled to support a belligerent that has been the victim of a flagrant act of aggression without loss of their neutral status. The matter is not settled though. In addition, the assistance provided by third States to Ukraine in the form of cyber means or to support its cyber operations may be of such kind as to render the third States providing this assistance co-belligerents. Whether or not this is the case depends on whether the assistance makes a direct and integral contribution to the conduct of hostilities by Ukraine. In principle, this could be the case where cyber assistance directly and integrally contributes to conduct of specific kinetic attacks.

Cyber operations below the threshold

22. Let me now turn briefly to cyber operations below the threshold of armed conflict. Depending on the nature of these operations, they may engage a wide range of specialized regimes of international law, such as international human rights law. In addition, they may also engage general rules of international law, including the rule of territorial sovereignty.

23. There has been some debate in recent years about the exact nature and scope of the sovereignty rule. There is broad agreement that sovereignty prohibits certain types of cyber activities. Thus, the unauthorised conduct of cyber activities by the agents of one State present in the territory of another State is a violation of sovereignty, as are remote cyber operations that cause physical damage in the territory of another State, operations that involve the exercise of governmental functions by the agents of one State in the territory of another or operations which interfere with the exercise of inherently governmental functions by the territorial State. All of these scenarios are relatively straightforward, as they merely extend to cyberspace prohibitions that are well- established in the non-digital world. However, some States take the position that sovereignty also prohibits cyber operations that cause cyber systems in another State to loose functionality or become inoperable, even where no material

damage occurs. A handful of States, such as France and Iran,[25] go even further to claim that the mere penetration of national cyber systems, in particular those critical for national security, is a violation of sovereignty. This reflects the fear that the penetration of national cyber systems may be part of shaping operations, rendering the targeted State more vulnerable in the future.

24. These expansive interpretations of sovereignty reflect the fact that hostile cyber operations may cause significant harm, or pose significant threats, to vital national interests even without causing physical damage or injury. This does not always sit well with the pre-digital mindset of the applicable rules of international law, many of which are framed in kinetic and geographical terms. For example, Israel has noted that there is a tension between the legitimate interests of a State to protect its cyber assets located outside national territory, for example data stored in cloud systems, and the territorial focus of the rule of sovereignty.

25. This creates an incentive for an expansive interpretation not only of sovereignty, but also other relevant rules of international law, including the prohibition of intervention and the prohibition of the use force. The United Kingdom, for example, has taken the view that coercive acts prohibited by the principle of non-intervention include not only acts compelling a State to act differently than it would otherwise have done, but also acts that constrain its freedom of control over matters within its domestic jurisdiction.[26] In other words, on this view, the principle prohibits acts that impair another State's *capacity* to carry out its functions. In essence, this could transform the prohibition of coercive interference into a prohibition of harmful interference. Similarly, some States have taken the position that cyber operations which severely disrupt the functioning of the State, including its economy, could amount to a use of force even where these operations do not cause physical damage.

26. Given that cyber operations may cause significant non-kinetic harm and pose critical threats and vulnerabilities, it is likely that a growing number of States will support expansive interpretations of the pre-digital rules. Such a development raises two questions that deserve our attention: what effect will such expansive interpretations have on the ability of States to conduct counter-cyber operations and what effect will they have on the interpretation and application of these rules outside cyberspace?

Concluding thoughts

27. In conclusion, let me leave you with five take-aways. First, cyber operations in armed conflict are both a driver and a symptom of the diffusion of warfare: cyber helps to extend warfare across different domains, actors, time and geographical spaces. Second, while cyber operations pose a multitude of legal challenges, we should be careful not to overestimate their novelty and distinctness. Similar or identical legal difficulties exist in other domains too. Third, the application of the existing rules of international law to cyberspace is not a one-way street: how States interpret and apply the law in cyberspace may have a significant effect on the application and interpretation of the rules in other domains. Fourth, we must acknowledge the limits of the law. Agreeing on clear legal standards and fostering legal certainty is vitally important, but this alone does not guarantee compliance. Where compliance is not forthcoming, and in the absence of effective enforcement mechanisms, States will continue to

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25 Ministère des Armées, 'Droit international appliqué aux operations dans le cyberespace' (2019), p. 6; Declaration of the General Staff of the Armed Forces of the Islamic Republic of Iran Regarding International Law Applicable to the Cyberspace (2020), Article II (3).

26 Attorney General, 'International Law in Future Frontiers' (2022).

turn to measures of self-help. Finally, for this reason, we cannot escape difficult choices and the fact that the legal dimension of cyberspace is not just about rules, but about order and strategic competition.

28. Thank you for your attention.