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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

(CAHDI)

Meeting report

65th meeting
28-29 September 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 65th meeting in Strasbourg (France) on 28-29 September 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 welcomed a new member within the CAHDI Secretariat, Ms Constanze SCHIMMEL-KHALFALLAH, who started her secondment by the German Federal Foreign Office on 1 August 2023. Ms SCHIMMEL-KHALFALLAH will be primarily tasked with the follow-up to the CAHDI project on non-legally binding instruments but will also assist the Secretariat as well as the Council of Europe legal service in other matters.

3. The Chair also briefly reported on his participation, alongside Mr Jörg POLAKIEWICZ, Director of Legal Advice and Public International Law (DLAPIL), in an exchange of views with the International Law Commission (ILC) that took place on 13 July 2023 in Geneva, in the framework of the 74th Session of the ILC. The result of this exchange of views was, in his opinion, extremely positive and fruitful, particularly in relation to a possible cooperation with the ILC on the question of non-legally binding instruments.

1.2 Adoption of the agenda

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

1.3 Adoption of the report of the 64th meeting

5. The CAHDI adopted the report of its 64th meeting (document CAHDI (2023) 14), held on 23-24 March 2023 in Strasbourg (France), with the proposed amendments and instructed the Secretariat to publish it on the Committee's website.

1.4 Information provided by the Secretariat of the Council of Europe

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

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. The speaking notes of Mr POLAKIEWICZ are set out in **Appendix III** to this report.

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

2.1 Exchange of views in order to evaluate CAHDI activities and advise the Committee of Ministers and the Secretary General on future priorities in its sector

8. The Chair introduced the sub-item by recalling that an exchange of views to evaluate CAHDI activities is mandated by the CAHDI terms of reference for 2022-2025. The Chair also informed delegations that, in light of the new four-year Programme and Budget adopted by the Committee of Ministers, the draft terms of reference for the CAHDI for 2024-2027 had been prepared (document CAHDI (2023) Inf 2 *Confidential*).

9. No delegation took the floor on this topic. The CAHDI took note of the draft terms of reference.

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

10. The Chair presented a compilation of the Committee of Ministers' decisions of relevance to the CAHDI's activities (document CAHDI (2023) 15 *Restricted*).

11. The Chair drew particulars attention to several chapters of this document. Chapter 1 contained decisions concerning the CAHDI, including the decision in which the Committee of Ministers took note of the Abridged Report of the 64th CAHDI meeting. Chapter 2 included the

stocktaking document of the Icelandic Presidency of the Committee of Ministers, the priorities of the Latvian Presidency of the Committee of Ministers, and a link to the page of the 4th Summit of Heads of State and Government of the Council of Europe. The document further included a chapter dedicated to decisions related to the Summit, and a chapter regarding decisions related to the evolution of the Situation in Ukraine, among others. No delegation wished to take the floor under this item.

3 CAHDI DATABASES AND QUESTIONNAIRES

12. The Chair introduced the item by recalling the questionnaires and databases entertained by the CAHDI, especially those 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 updated replies from delegations: first, a revised reply from Croatia to the questionnaire on the *Immunity of state-owned cultural property on loan* (document CAHDI (2023) 16 prov *Confidential Bilingual*); second, a revised reply from Italy 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*); third, an updated reply from 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*); fourth, updated replies from Italy and Slovenia to the database on the *Practice of national implementation of UN sanctions and respect for human rights*.

13. The Chair then turned to the issue of possibly lifting the confidentiality of replies to the following four questionnaires under this item: 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, 19 of the 38 delegations that had provided replies at least to one of the four questionnaires, had signaled to the Secretariat their stance on lifting the confidentiality of their replies as shown in the table in document CAHDI (2023) 4 prov *Confidential* prepared by the Secretariat. In light of the results of this inquiry on lifting confidentiality launched by the Secretariat on 7 June 2022, the Chair proposed to publish the replies to those questionnaires to which at least the majority of the States concerned had replied in favor of publication. The Chair further noted that before any publication takes place, delegations would have the opportunity to revise their replies within an appropriate timeframe.

14. The representatives of Austria, Czechia, Cyprus, Japan, Romania and the United Kingdom stated that they had no objections to the lifting of the confidentiality of their replies to the mentioned questionnaires, especially given the relevance of the work by the CAHDI to the public and the importance of adopting an open approach towards information sharing on State practice.

15. The representative of Türkiye stated that his country maintained its objection to the lifting of the confidentiality of the replies to the questionnaire on the issue of *Immunity of State-owned cultural property on loan*.

16. The representative of Japan informed the CAHDI about his country's intention to update its replies to the questionnaire on the *Organisation and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs*. He also informed delegations about a new initiative by the legal office of the Ministry of Foreign Affairs in the form of an annual seminar for international law practitioners in the Indo-Pacific region for legal capacity building, known as the "Tokyo International Law Seminars".

17. The representative of Azerbaijan noted the interest of her country's Ministry of Foreign Affairs in contributing to the work of the CAHDI and benefits derived from CAHDI publications. She stated that Azerbaijan intended to soon provide replies to the questionnaires on the

Organisation and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs and the *Practice of States and international organisations regarding non-legally binding instruments in international law*.

18. Following this discussion and a proposal by the Chair, the CAHDI decided to lift the confidentiality of replies to three of the four questionnaires - namely those on *Settlement of disputes of a private character to which an international organisation is party*, *Service of process on a foreign State* and *Possibility for the MFA to raise public international law issues in procedures pending before national tribunals and related to States' or international organisations' immunities*. The CAHDI also agreed that delegations would have the possibility to review their contributions until 1 April 2024. The individual contributions to those three questionnaires would then be published on the CAHDI website unless the contributing State explicitly objects to its publication within this deadline. The CAHDI decided to return to the fourth questionnaire on *Immunity of State-owned cultural property on loan* at a later stage.

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

19. The Chair noted that no proposals had been made for exchanges of views on topical issues under this item. The Chair invited delegations to share information on recent developments concerning State practice and relevant case-law in their countries on the topic of immunities that may be of interest to other delegations.

20. The representative of Belgium informed delegations about a decision handed down by the Antwerp Court of Appeal on 7 March 2023 in the context of a seizure-execution. The seizure concerned several locomotives purchased from a Belgian manufacturer and owned by a foreign State. This State had refused to voluntarily enforce an arbitration award requiring it to pay the creditor. This award had received *exequatur* in Belgium. The purchase of these locomotives was part of the foreign government's desire to strengthen the operational capacity of the rail network on its territory. Basing his decision on the provision of the Belgian Judicial Code, which virtually reproduces *ad verbum* the terms of Articles 19 and 21 of the *UN Convention on Jurisdictional Immunities of States and Their Property (2004)*, the Belgian judge ruled that the other State did not enjoy immunity from execution, given the manifestly commercial nature of the locomotives. The judge therefore authorised the seizure, following the creditor's arguments that the locomotives were not intended for sovereign activities, and held that the locomotives would be used to transport essential goods and products, both imported and exported, as well as to transport people. The sale of train tickets, the designation of passengers as "customers" and the services offered on board the train were also mentioned as factual elements reinforcing the commercial purpose of the locomotives.

21. The representative of the United States of America informed the CAHDI of the opinion in the *Halkbank* case issued by the United States Supreme Court on 19 April 2023.[1] The case concerns a sovereign immunity claim by *Halkbank*, a Turkish instrumentality, in criminal proceedings for US sanctions violations. The question on appeal was whether the Foreign Sovereign Immunities Act (FSIA) confers blanket immunity on foreign-state-owned enterprises from all criminal proceedings in the US. Consistent with the positions taken by the US Government, the Supreme Court held that the District Court had jurisdiction over prosecution of *Halkbank* and that the FSIA applied only to civil proceedings and did thus not provide immunity from criminal prosecution. The Supreme Court remanded the case to the Court of Appeals for the Second Circuit for further consideration of the common law immunity argument raised by *Halkbank*. The representative explained the US Government's position to be that the common law does not provide for foreign sovereign immunity when, as in this case, the executive branch has determined that the entity does not enjoy immunity and accordingly has commenced a federal criminal prosecution of a commercial entity like *Halkbank*.

[1] *Türkiye Halk Bankasi A.S. v. United States*, 598 U.S. (2023).

22. The US representative then informed the CAHDI of a decision issued by the Court of Appeals for the Second Circuit on 24 August 2023 in another case, *Barlett v Baasiri.*[2] The issue before the Court of Appeals concerned whether the Lebanese Jammal Trust Bank (JTB) may raise a defence of immunity under the FSIA when its alleged immunity arose after the suit was filed. The Court of Appeals held, consistent with the views submitted by the US Government, that immunity under the FSIA may attach when a defendant becomes an instrumentality of a foreign State after a suit is filed. The court found that such an approach did not conflict with the 2003 precedent in *Dole Foods v. Patrickson*[3] where the US Supreme Court found that, for the purpose of establishing federal jurisdiction, the courts should look at the status of the relevant entity under the FSIA at the time of filing rather than at the status of such entity at some earlier time. There is no contradiction between the two decisions: for the purpose of establishing jurisdiction, courts will look at the entity's status at the time of filing; however, for the purpose of evaluating the immunity of an entity, courts should look at the status at the time immunity is invoked - even if the entity becomes a State agency or instrumentality during the course of the suit. The Court of Appeals for the Second Circuit remanded the case to the district court to determine as a factual matter whether the JTB was now to be considered such a State agency or instrumentality.

23. The representative of Israel shared a pending case with the CAHDI concerning a lawsuit filed by a trade union, the Organisation of labour, on behalf of local employees of an embassy of a foreign State against that State and the embassy. The Organisation seeks an order obliging the foreign State to adopt a collective agreement with the local employees. It was noted that the Attorney General of Israel, in accordance with Israeli law, together with the legal department of the Ministry of Foreign Affairs had filed a submission, a statement of interest, according to which the foreign State concerned is entitled to immunity. It was further stated that this case does not fall under the exception of either commercial or employee-employer contracts on the basis that the exception refers to individual contracts, individual employees, and private contracts between the State and the employees. While no judgment has been rendered, the representative noted a likelihood of appeal. The representative stated that this type of case is representative of an interesting trend which CAHDI delegations may see more of in the future and clarified that her Government's submission was made in accordance with the UN Convention on Jurisdictional Immunity of States and their Property, the *European Convention on State Immunity (ETS No. 074)* and Israeli law on immunities. She also noted that some case law on similar issues existed in Belgium, Canada and Portugal.

24. The representative of Azerbaijan referred to the speech of her predecessor during the 63rd meeting of the CAHDI (22-23 September 2022 in Bucharest, Romania) and informed the delegations that during the last two years, diplomatic missions of Azerbaijan abroad had constantly faced armed attacks and acts of vandalism in violation of the Vienna Convention on Diplomatic Relations (VCDR) causing human, financial and material losses. Her Government assumed that radical Armenian groups residing in the relevant countries were behind the attacks. In some cases, the law enforcement agencies of the host countries had taken appropriate measures against the perpetrators of these attacks; however, in most cases, despite a prompt request from Azerbaijan's diplomatic missions to the relevant authorities in the host countries, the attacks, acts of vandalism and damage to property were not prevented in time. The representative noted that Azerbaijan had repeatedly called on the host States to respect their obligations under the VCDR and stressed that the international community, in accordance with the spirit and purpose of the VCDR, should show solidarity and condemn the illegal actions, or even acts of terrorism, threatening the normal and safe functioning of diplomatic missions.

25. The representative of France reported on a judgment handed down by the Civil Division of the Court of Cassation on 29 June 2023.[4] The case concerned a judgment of the Court of Appeal of The Hague in the Netherlands, which was declared enforceable in France. The judgment

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[2] *Bartlett v. Baasiri*, No. 21-2019 (2d Cir. 2023).
[3] *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003).
[4] Civ 2, 29 Juin 2023, n° 19-14.929.

had ordered the State of Iraq and the Central Bank of Iraq jointly and severally to pay a sum to the company *Heerema Zwijndrecht BV* (*Heerema*). In execution of this decision, *Heerema* applied for a preventive seizure of receivables and of shareholder's rights in securities against the Iraqi State and certain of its entities whose funds belong to Iraq by virtue of UN resolutions. This included, notably, an entity called Montana Management Incorporated. The Court of Cassation held that the funds in question belonged to the Iraqi State and benefited from the immunity granted to State assets. The seizures were consequently cancelled. The French representative noted this decision mirrored a case pending before the European Court of Human Rights (ECtHR) concerning the immunity of foreign States from execution and the non-seizability of property and assets held or managed by foreign central banks.

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

26. No delegation took the floor under this sub-item.

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

27. The Chair invited delegations to provide information on cases before their domestic courts related to the implementation of UN sanctions and respect for human rights.

28. The representative of Switzerland wished to point out to due process deficiencies in several sanctions' regimes established by the UN Security Council. Indeed, following the inclusion of a person or entity on such a sanction list, a review at the international level was not necessarily available. The UN Ombudsperson, for instance, would only be in charge of the regime established for ISIL (Da'esh) and Al-Qaida. Proposals would now, for instance, be made to add new persons to the sanctions list concerning the Democratic Republic of Congo. Given that these persons are listed by several countries represented in the CAHDI on their national or regional sanction lists, it is clear that their listing by the UN would not give any more access to due process. Switzerland considered this to represent a fundamental shortcoming which bears some real risks - not only for human and due process rights, but also risks leading to an inconsistent implementation of UN sanctions regimes if cases challenging the listing would only end up before national courts, like had already been the case in several CAHDI member States. This practice was detrimental not only to the sanction system but also for the authority of the UN and the UN Security Council. The representative stated Switzerland, currently also a member of the UN Security Council, sought to try to correct the weakness of the system by endeavouring to guarantee due process for other sanctions regimes. The upcoming discussions concerning the prolongation of the sanction regime for Haiti would be a good opportunity to make progress with a view to strengthening this sanctions regime by incorporating certain elements of due process and by extending the Ombudsperson's competence. The representative thus invited CAHDI delegations, whether or not they are members of the UN Security Council, to reflect together on how to remedy this shortcoming, in the interest of the system and its credibility, and to support Switzerland in particular in the context of the prolongation of the sanction regime for Haiti to ensure that a solution to this problem is found. The representative recalled that this was a demand for the protection of fundamental human rights shared by all States represented in the CAHDI.

6 TREATY LAW

6.1 Exchanges of views on topical issues related to treaty law

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

29. The Chair recalled that at the previous CAHDI meeting in March 2023, the CAHDI agreed to keep the topic of non-legally binding agreements on the 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’. It was also proposed to adapt and complete the analysis on this topic and to liaise subsequently with the ILC with the aim of possibly making the report available to them. Accordingly, the *Revised report and annexes on the practice of States and international organisations regarding non-legally binding agreements* (document CAHDI (2023) 17 *Confidential*), and a non-paper entitled *Possible next steps relating to the CAHDI project on non-legally binding instruments in international law* (document CAHDI (2023) 18 *Confidential*) had been prepared by the Secretariat.

30. In total, the report now took account of the replies of 29 States (Albania, Austria, Bosnia and Herzegovina, Canada, Cyprus, Estonia, Finland, Germany, Greece, Hungary, Ireland, Italy, Japan, Republic of Korea, Lithuania, Luxembourg, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Slovenia, Spain, Sweden, Switzerland, the United Kingdom and the United States of America) and two international organisations, the European Union (EU) and the Council of Europe.

31. The Chair invited the delegations to first comment on the revised report and then, in a second round, on the non-paper prepared by the Secretariat.

32. The representative of Slovenia noted that, as already indicated in the response to the questionnaire, his country would not evaluate the legal nature of an instrument by its title but only by its content. He further agreed with Ireland’s assertion in its reply to question 4 concerning the distinction between legally binding and non-legally binding instruments. Terms such as “agree”, “article”, “entry into force, “parties”, “shall” or “undertake” would be indicative of a will to be legally bound. He added that his country would also agree that the terminology tables Canada and the United Kingdom had shared should be removed but he maintained that a CAHDI glossary of terms would be useful to have. The representative noted that the report explicitly mentioned Slovenia as differentiating between Memoranda of Understanding (MoU) and other non-legally binding instruments. He explained that, for his country, MoUs were concluded in more substantive areas than for instance letters of intent. Non-legally binding instruments not subject to parliamentary approval would entirely fall within the area of responsibility of the Government and no further action by Parliament would be needed. He added that for Slovenia the government could decide to inform parliament if non-legally binding instruments raised questions of public importance. His country’s main concern regarding the use of non-legally binding instruments was that the number of instruments was rapidly increasing and that other parties might prefer to conclude an instrument as non-legally binding in circumstances where it would be more appropriate to conclude a treaty. This could give rise to differences in the subsequent interpretation of the instrument.

33. The representative of Germany thanked the Secretariat for the revised report which he considered a solid basis for follow-up work. Other delegations such as the delegation of Austria, Norway, the United Kingdom and the USA also commended the report and underlined its usefulness.

34. The representative of Greece suggested modifying the first sentence under question 6, page 11 (“The majority of States reporting held that they do not distinguish between MoUs and other types of non-legally binding instruments.”), to “The majority of States reporting held that they do not distinguish between MoUs when those are not legally binding and other types of non-legally binding instruments”. According to her understanding this would be justified taking into account that some States reported that MoUs could be both legally binding and non-legally binding instruments. The Chair suggested integrating this comment in the next version of the report.

35. The representative of the USA noted that the report showed a significant degree of consensus in the key aspects of the practices in countries represented in the CAHDI.

36. Subsequently, the Chair summarised the three options identified in the non-paper prepared by the Secretariat as document CAHDI (2023)18 *Confidential*: the first option foresees taking note of the final report, authorising its publication and dissemination; the second option involves organising a follow-up workshop in order to discuss the areas that States have identified as

being of interest or where differences in the approach of States have been identified, to further develop on potential problematic areas that could arise through the use of non-legally binding instruments and/or to identify potential overlaps with other current questionnaires; and the third option of elaborating upon a glossary, a compilation of good practices, "CAHDI Guidelines" or a "Model MoU". The Chair then invited the delegations to comment upon these options with the aim of deciding on the follow-up activities.

37. The German representative noted that all three options deserved thorough consideration but seemed to present different levels of engagement. While his country agreed to the first option, he suggested that follow-up activities should not stop there. The report showed that some aspects of non-legally binding instruments could be analysed further, in particular: whether certain topics should be generally considered eligible for such instruments; to what extent these instruments could provide for financial obligations or secondment of personnel; whether they could create indirect legal effects; and whether there were any effects of the potential misuse of these instruments to circumvent treaty procedures or the conclusion of binding agreements. The representative suggested to also include the Council of Europe practice of partial agreements into the analysis as they were established by resolutions of the Committee of Ministers and hence required a certain degree of legal commitment. Therefore, his country considered a follow-up workshop would be helpful, noting that it should not be academic but practical in nature. The representative also suggested to combine options two and three, taking into consideration previous activities agreed upon by the CAHDI and to set up a working group with a clear mandate. This working group could, firstly, analyse the remaining open or controversial questions; secondly, draft best practices and guidelines which could also deal with some open, practical questions such as format, signature, registration and publication, as well as terminology; and, thirdly, explore the feasibility and usefulness of a model instrument.

38. The Finnish representative informed the CAHDI that Finland would remain open for all three options and would consider CAHDI guidelines, a model MoU and a MoU glossary to have added value. Her country also considered the organisation of a follow-up workshop to elaborate on these documents to be a good option. The representative also indicated that in any case the work should be made available to the ILC.

39. The representative of the United Kingdom noted that his country would strongly support the first option as it would provide greater clarity and positively inform public discourse on this important topic. As for the second option, in his opinion, the CAHDI already had sufficient opportunity to discuss the contents of the report and he would consider this option as offering limited added value. As for the third option, due to the challenge in seeking to establish Council of Europe wide practices on this topic, his country would not be supportive of such a project for the time being.

40. The US representative indicated that her country considered flexibility to be one of the main benefits of non-legally binding instruments. Her country would support the first option but, in view of the rather consistent practice reported, did not see a need for a broader effort to formalise or regulate State practice relating to non-legally binding instruments. She highlighted that, in her view, the pursuit of steps such as those included in the third option, could even put the benefits of those instruments at risk, namely their flexibility.

41. The representative of Slovenia stated that all three options would be desirable but in a different order. The follow-up workshop to discuss the areas identified as being of interest or for which States reported different approaches should come first. If the workshop showed consistent practice, the CAHDI could work on a glossary, best practices or guidelines. Only after the resolution of all outstanding issues should the CAHDI finalise the report and close the questionnaire.

42. The representative of Czechia noted the first option as the lowest common denominator which should be one of the outcomes. He considered the second and third option being desirable ways forward: holding a workshop could offer added value to discussions and the third option could represent a follow-up to such a workshop with the objective of coming up with a glossary, CAHDI guidelines and possibly a model MoU. He noted that these suggestions were motivated by the day-to-day experience of the legal services of the Ministries of Foreign Affairs being

faced with a number of non-legally binding instruments. His Ministry used the models the Netherlands and the United Kingdom had shared as guidance with regard to language and terminology. The representative indicated that his country would see added value in having a glossary and guidelines agreed upon and having benefitted from the input of all States represented in the CAHDI.

43. The representative of Hungary stated that she would be in favour of the gradual approach described by the representative of Germany and saw merit in each option. Due to the different approaches practiced within the CAHDI, it might be difficult, in her opinion, to get to the third option having heard the statements by the different delegations. However, while guidelines could be seen as limiting the flexibility of these instruments, she suggested that they rather be considered as practical references or as a practical tool to use. She explained that her country would use, for instance, Council of Europe Recommendation No R(87)2 containing a model agreement to enable the members of the family forming part of the household of a member of a diplomatic mission on a consular post to engage in a gainful occupation. From this perspective, it could also be worth considering establishing some models and guidelines with regard to non-legally binding instruments.

44. The representative of Norway indicated that the first option would be premature at the current stage. The topic would benefit if it were viewed in a wider context, in particular in connection with the work the CAHDI is currently commencing on soft law. A workshop and the gradual approach as suggested by the German representative could be beneficial. The representative also expressed doubts whether the CAHDI would get to the third option but suggested that it should start viewing the report in connection with related topics. Norway was still working on these issues domestically and his country would like to keep the topic “warm” in the CAHDI with the potential outlook of establishing best practices in due course.

45. The representative of Italy noted that the high number of replies to the questionnaire indicated the relevance of the topic which was also being considered by the ILC. He deemed it a good occasion for the CAHDI to develop synergies across the international multilateral legal environment. The option paper provided an excellent basis for evaluating further follow-up work. Having regard to the gradual approach mentioned by the German representative, his country agreed to a practice-oriented workshop to further discuss the areas identified as being of interest. More generally, his country’s view was that the evolution of MoUs was also strongly influenced by domestic regulatory developments that were not always easily foreseeable. National practices played an important role in this area, especially in those situations where large regional – and often autonomous – institutions are involved.

46. The representative of Austria commended the rich discussion on this topic. He joined other delegations in thanking the Secretariat for the preparation of the non-paper outlining the options put forward. His country would see merit in all options. The representative also noted some emerging trends of the discussion, namely that the second option and maybe the gradual approach introduced by Germany could be considered the middle ground while keeping the other options open. The representative joined the Italian representative in stressing the need for the practical orientation of the follow-up activities as non-legally binding instruments would constitute the Legal Adviser’s daily business. He also joined Czechia in noting that the elaboration of a glossary or some standard wording would be quite helpful in practice. In his view, the third option combined different grades in unifying the practice, with the model MoU being the highest, which might be worth aiming at. The workshop could help in further moving along the topic.

47. Summarising these interventions, the Chair noted that the first option should not be understood as finishing the subject and that the topic, in general, should be kept “warm”. As the majority of delegations highlighted that the report indicated some issues that would need to be further examined, the third option could not be decided at the present CAHDI meeting as it was very ambitious. Consequently, the Chair suggested as a middle way the organisation of a seminar or workshop – not academic in nature – on the basis of questions prepared by the Secretariat. Consequently, the CAHDI agreed to organise a workshop with a practical orientation in order to look at existing material provided in the answers to the CAHDI questionnaire on the topic

and address some open issues identified in the discussion. Such a workshop would clarify the possible added value of the CAHDI elaborating upon best practices or guidelines on non-legally binding instruments in the future. The results of the workshop could further be reflected in an updated version of the CAHDI report on the topic.

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

48. The Chair recalled that the Slovenian delegation had prepared the questionnaire on *Treaties not requiring parliamentary approval* (CAHDI (2022) 3 rev *Confidential*) that was consequently approved by the CAHDI by written procedure on 15 June 2022. So far, the Secretariat had received the replies of 19 delegations (Austria, Canada, Estonia, Finland, Germany, Greece, Hungary, Italy, Japan, Lithuania, Monaco, the Netherlands, Norway, Poland, Romania, Slovenia, Sweden, Switzerland and the United Kingdom) that were compiled in document CAHDI (2023) 7 BIL *Confidential*.

49. Asked by the Chair to present the *status quo* of the item, the representative of Slovenia noted that the review of the responses received so far suggested that States did not have a consistent practice in contrast to the replies provided to the questionnaire on non-legally binding instruments. However, it seemed that there were similarities for States sharing a common legal tradition, for instance Central European States with continental legal systems shared the use of treaties not requiring parliamentary approval. The United Kingdom seemed to have a different system where the essential distinction was made between treaties subject to ratification and those not (i.e., primarily treaties that entered into force on definitive signature). Of the non-European States, Canada did not differentiate or categorise treaties in terms of their function. For example, there was no distinction drawn between a “treaty” and a “protocol to amend a treaty”, both were simply regarded as treaties. For Japan the representative noted two types of treaties based on whether they required an approval or not. On the basis of this short summary of the replies received so far, the Slovenian representative suggested three options for follow-up: first, he invited delegations that had not yet replied to the questionnaire to do so at their earliest convenience; secondly, he suggested to organise an exchange of views on treaties not requiring parliamentary approval; thirdly, he suggested to the Secretariat to elaborate a report on the basis of the responses received so far, similarly to the report on non-legally binding instruments, and to organise an expert workshop.

50. The representative of Belgium announced her country’s intention to soon submit its responses to this questionnaire. She summarised the responses to be provided as follows: The Belgian legal system did not differentiate between categories of treaty. Under the Belgian Constitution, all treaties had to be approved by Parliament before they could take effect in the domestic legal order. However, in specific cases, it was possible for the Parliament to approve in advance certain treaties containing provisions implementing another treaty. In such a situation, in accordance with the case law of the *Conseil d'État* and the *Cour de cassation*, Parliament had to be informed with sufficient precision: Parliament had to know the limits of future treaties and/or amendments on the basis of the law granting advance approval.

51. The representative of Germany thanked Slovenia for the initiative. He pointed out that, according to his reading of the replies received so far, it seemed that the requirement of approval by Parliament would highly depend on the national constitutional framework. Therefore, he would expect the result of the analysis of the responses to be rather of informative or comparative value. The representative also suggested guiding questions for the analysis of the responses: What type of treaty requires no parliamentary approval? Does the lack of parliament approval change the hierarchy of treaties? Does it change the procedure to be followed?

52. The representative of the United Kingdom noted with interest the most recent responses. He highlighted that this type of up-to-date comparative information could help with treaty-making. The representative expressed his country’s wish that more delegations would provide their answers to this questionnaire. He pointed out that the analysis should commence once more answers had been received.

53. The CAHDI decided to invite the remaining delegations to submit their replies at their earliest convenience in order to enable the Secretariat to proceed to an analysis of the replies to be summarised in a future working document of the CAHDI.

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

54. The Chair recalled that this issue was included on the CAHDI's agenda on the initiative of the Italian delegation at the 63rd CAHDI meeting (22-23 September 2022 in Bucharest, Romania). For the 64th meeting (23-24 March 2023 in Strasbourg, France), the Italian delegation prepared a non-paper (CAHDI (2023) 11 *Confidential*) and, subsequently, the draft questionnaire on *International soft law: implications for Legal Departments of Ministries for Foreign Affairs* was circulated to all delegations on 7 June 2023 by the Secretariat. By the end of the consultation round, on 31 July 2023, the Secretariat had received comments from six delegations (Austria, Germany, Greece, Norway, Switzerland and the United States of America). On the basis of these comments, the Italian delegation then revised and restructured the draft questionnaire shared with all delegations as document CAHDI (2023) 19 prov *Confidential* on 18 September 2023.

55. The representative of Italy thanked the CAHDI Secretariat and all those States having provided comments on the first draft questionnaire in order to enhance its clarity and effectiveness. The aim was to make it a useful tool in areas such as environmental law, human rights and artificial intelligence which were increasingly covered by "soft" law instruments and ever more relevant for advancing the international cooperation. The representative pointed out that the role of soft law in the international legislative system and governance had significantly increased in recent years. It figured among the major trends shaping both multilateralism and international cooperation. A growing number of subjects – from international trade over human rights to environmental protection – were currently addressed through soft law instruments. The proposal of this new questionnaire would help deepen the knowledge about involvement, attitudes and working methods of the legal departments and national administrations of CAHDI members towards legislative instruments other than conventional treaties and/or customary law. The representative of Italy also informed the delegations that after the first UNIDROIT workshop held in Rome in 2022, a second UNIDROIT workshop on soft law would be hosted under the auspices of the Italian Ministry of Foreign Affairs and International Cooperation in Rome on 14 December 2023. The workshop would in particular focus on law making, State responsibility and sources of law. More details about the program and invitations, either in person or online, would be circulated to all CAHDI members and observers directly by UNIDROIT.

56. The representative of Greece inquired about the phrasing of the current version of the questionnaire and why only "soft" was put in quotation marks and not the whole term of "soft law". The representative of Italy explained that he had little doubt that these instruments were law, but, in his view, the question would be how far such possible legal effects would reach.

57. The US representative informed the CAHDI that in her country's comment to the initial version of the questionnaire the whole term of "soft law" had been put in quotation marks.

58. The Chair invited delegations to submit their comments on the questionnaire when replying to the questions as such.

59. The CAHDI approved the questionnaire on *International soft law: implications for Legal Departments of Ministries for Foreign Affairs* as contained in document CAHDI (2023) 19 prov *Restricted* and invited delegations to submit their replies to this questionnaire at their earliest convenience.

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***

60. 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) 20 prov *Confidential*). The Chair also drew the attention of the delegations to document CAHDI (2023) Inf 3 containing reactions to reservations and declarations to international treaties previously examined by the CAHDI and for which the deadline for objection had already expired.

61. The Chair underlined that the reservations and declarations to international treaties still subject to objection were contained in document CAHDI (2023) 20 prov *Confidential*, which included 10 reservations and declarations made with regard to treaties concluded outside and within the Council of Europe.

62. With its **declarations** to the *Convention on Road Signs and Signals (1968)*, the *European Agreement Supplementing the Convention on Road Signs and Signals (1971)* and the *Protocol on Road Markings, Additional to the European Agreement Supplementing the Convention on Road Signs and Signals (1973)* **Türkiye** declares that its decision to become a Party to these instruments "should in no way be construed as implying any form of recognition of the Greek Cypriot Administration's pretention to represent the 'Republic of Cyprus', nor as implying any obligation on the part of Türkiye to enter into any dealing with authorities or institutions of the so-called 'Republic of Cyprus' within the framework of the activities specified in the said Convention and its supplements". The Chair noted that these declarations might be considered problematic as ones 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 already discussed at length in 2021 and 2022.

63. The representative of Türkiye noted that these reservations should be considered as emanating from the legal and political situation on the Cypriot island since 1963. According to Article 2 of the VCDR diplomatic relations were established by mutual consent of States. In this regard, Türkiye had been exercising its rights under international law by resorting to such declarations. The accession by a State to a treaty – to which an entity that it did not recognise was also a Party – did not amount to the recognition thereof. In his view these declarations concerned the lack of capacity of an entity to be bound by a treaty rather than the application of the treaty. They should hence not be regarded as reservations under public international law.

64. The representative of Cyprus stated her country's intention to object to all three of the declarations made by Türkiye and considered declarations of this sort to go beyond declarations of pure non-recognition. The representatives of some other countries took the floor to declare their potential intention to object to the Turkish declarations upon finalisation of their respective internal examination of the same. They were worried that the second part of the declarations in particular would result in excluding the treaty relations between the two Parties and hence amount to an inadmissible reservation to the instruments in question.

65. With its **declaration** to the *Minamata Convention on Mercury (2013)* the Chair noted that Georgia had made similar declarations in the past, and notably in 2019, to the International Agreement on Olive Oil and Table Olives (2015). **Georgia** declares that "the application of the said convention in relation to Georgia's regions of Abkhazia and Tskhinvali region/South Ossetia - occupied by the Russian Federation as a result of its illegal military aggression - shall commence once Georgia's de facto jurisdiction over the occupied territories is fully restored". No delegation wished to make a comment in relation to this item.

66. With its **declarations** to the *Fourth Additional Protocol to the Convention on Extradition (CETS No. 212 - 2012)*, the *Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 217 - 2015)* and the *Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (CETS No. 182 – 2001)* **Azerbaijan** declares that it will not apply the provisions of these instruments 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 also noted that these declarations might potentially be considered problematic as they may fall under the category of declarations which imply the exclusion of any treaty-based relationship between the declaring State and another State Party to the treaty.

67. The representative of Azerbaijan took the floor to add to explanations given by her colleague at the previous CAHDI meeting. She noted that despite the fact that the Vienna Convention on the Law of Treaties (VCLT) did not specify exactly what is meant by “the right of a State” or describe in clear terms the differentiation between reservations and declarations, based on long-lasting international practice States would be entitled to make declarations to international treaties. Under the VCLT, she recalled, “reservation” means a unilateral statement, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State. Moreover, according to doctrinal views the legal effect of declarations and reservations to multilateral treaties differ in terms of their presumption to modify the treaty or not to do so: If a declaration purports to modify the treaty, it is a reservation; if it purports to clarify the interpretation of the treaty, it is an interpretative declaration. The representative further referred to the Meeting report of the “Group of Specialists on Reservations to International Treaties (DI-S-RIT (98) 5)” of February 1998, in which some delegations had clearly emphasised that only those declarations amounting to reservations should be considered for the purpose of the activity and that it would be necessary to give a more theoretical or academic thought to subjects such as interpretative declarations. The representative explained the rationale behind the three identical declarations as being obvious: Azerbaijan does not have diplomatic relations with Armenia corresponding to the bilateral military conflict. The substantive content of the declarations was to emphasise objectively the actual situation on the ground and to demonstrate the impossibility of applying this treaty between Azerbaijan and Armenia. In the view of the representative, the declarations were interpretative declarations and made by Azerbaijan upon its rights deriving from doctrine and international practice. She added that the declarations did not intend to change the scope, object and purpose of the multilateral treaty and did not purport to modify or exclude the legal effect of either the entire treaty or a part of its provisions and did hence not amount to reservations. She then referred to the presentation by the Chair of CAHDI at the 1449th meeting of the Ministers’ Deputies on 23 November 2022 emphasising the flagship activity of the CAHDI in examining reservations and declarations subject to objection that represented a working method of the CAHDI allowing member States an opportunity to clarify scope and effect of their potentially problematic reservations and which assisted the other delegations to understand the rationale behind reservations before formally objecting to them. In this context, the representative lastly drew the attention of delegations to the ECtHR judgment in the case of *Ilaşcu and others v. Moldova and Russia [GC]*. In its assessment the Court had indicated that, the “declaration”[5] made by Moldova in its instrument of ratification of the Convention, concerning the legitimate Moldovan authorities’ lack of control over Transdniestrian territory, “was not a valid reservation within the meaning of Article 57 of the Convention.”[6] The representative of Azerbaijan called upon all delegations not to evaluate the declarations at hand as “reservations”. It was her Government’s view, moreover, that objections to similar declarations made by Azerbaijan in the past should be withdrawn. Instead, she called all Council of Europe member States to strive and encourage the potential normalisation process of relations between Azerbaijan and Armenia. Azerbaijan had already invited Armenia to a dialogue on a peace agreement. The representative emphasised her Government’s hope that negotiations on peace and appropriate contributions from Council of Europe member States to this process would result in the anticipated consequences of a resolute normalisation of bilateral relations accompanied by the establishment of diplomatic relations. These developments would, in turn, make the declarations at hand null and void.

68. The representative of Austria stated his Government was still examining these declarations. He provisionally remarked, however, that based on the wording alone, the declarations seemed to try to exclude the application of the respective multilateral treaties between two States Parties, here notably between Azerbaijan and Armenia. The VCLT, however, endorsed an objective regime of multilateral treaties according to which a State Party simply could not

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[5] “The Republic of Moldova declares that it will be unable to guarantee compliance with the provisions of the Convention in respect of omissions and acts committed by the organs of the self-proclaimed Trans-Dniester republic within the territory actually controlled by such organs, until the conflict in the region is finally settled.”
[6] ECtHR, *Ilaşcu and others v. Moldova and Russia [GC]*, no. 48787/99, 8 July 2004, para.” 324.

pick and choose with which Parties of the multilateral treaty it applies the said treaty and with which it does not. From that perspective, the declarations by Azerbaijan seemed, in his view, to be problematic as they appeared to go beyond a simple interpretative declaration and thus amounted to reservations. Without wanting to prejudge the result of the final examination of these declarations by the Austrian Government, the representative further noted that this view would be consistent with the previous practice of Austria.

69. With regard to the reservations made by **Iceland** to the *Additional Protocol to the Convention on Cybercrime, concerning the Criminalisation of Acts of Racist and Xenophobic Nature Committed through Computer Systems (ETS No. 198 – 2003)* the Chair noted the substance of the reservations to be perfectly in line with the requirements under the Additional Protocol. The potential problem lay, however, in their late submission. Iceland had deposited its instrument of ratification with the Council of Europe on 30 January 2023. These reservations were not included therein but only submitted on 6 April 2023, i.e., some two months later. The representative of Iceland apologised for the late submission and explained the omission to include the reservations together with the instrument of ratification as a regrettable human error.

70. The **declarations** made by **Cyprus** and **Greece** 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)* (European MLA Convention) 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.

71. The representative of Türkiye took the floor to reiterate the main features of the EPPO as an EU body that is competent to investigate and prosecute crimes affecting the EU's financial interests and noted that, by the end of 2022, the EPPO had had 61 cases involving third countries, four of which with Türkiye. The representative underlined the crucial importance of cooperation between the EPPO and the competent authorities of non-EU member States in order for the EPPO to perform its tasks effectively. For this, the EPPO should have arrangements in place to receive mutual legal assistance from non-EU countries, and, where appropriate, provide such assistance to these. The relevant regulations would envisage two main avenues of cooperation with third countries: working arrangements concluded by the EPPO itself in accordance with Article 99 (3) and Article 104 of the *Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the EPPO (EPPO Regulation)*, and international, multilateral or bilateral agreements, concluded by the EU or by its member States. The representative explained working arrangements based on the EPPO Regulation to be non-treaty arrangements setting out the practical details of the cooperation between the EPPO and the competent authorities of third countries. Such arrangements while extremely important to streamline and facilitate the cooperation between the EPPO and its counterparts in non-EU countries could not, however, represent the legal basis for mutual legal assistance between the EPPO and third countries. In the representative's view, the EPPO's operational cooperation with third countries should therefore be regulated by means of a binding treaty based on agreements concerning mutual legal assistance. More precisely, the EPPO's cooperation with third countries should be regulated by an international agreement concluded by the EU or to which the EU has acceded or, in their absence, on the basis of multilateral international agreements concluded by the member States, or lastly, via bilateral agreements between a member State and third countries. The representative mentioned the *UN Convention Against Transnational Organized Crime (2000)* and the *UN Convention Against Corruption (2003)* as examples of international agreements to which the EU has acceded. In this context, the representative recalled the *European Convention on Mutual Assistance in Criminal Matters (ETS No. 30)* as representing one of the most important agreements in the field of cooperation in criminal matters and to which all EU member States are Party, but the EU is not. In accordance with Article 104 (4) of the EPPO Regulation, EU member States that participate in the EPPO must recognise and notify the EPPO as a competent authority for the purpose of the multilateral international agreements on legal assistance in criminal matters concluded by them. Such notification allows the EPPO to cooperate with the competent authorities of non-EU countries that are

parties to these agreements in accordance with the provisions set out therein. Türkiye, as a Party to the Convention, considers cooperation based on the declarations made by the EU member States as the most appropriate avenue for non-EU countries to cooperate with the EPPO. Currently, however, Türkiye still lacks the necessary legal basis in domestic law to allow such cooperation. In this context, Türkiye would desire a solution which does not contradict with the legal framework as established by ETS No. 30 and which also takes into account the Türkiye-EU relations, as well as other possibilities of cooperation with the EPPO. For instance, the various cooperation procedures for the EPPO provided by the Council regulation 2017/1939 could be considered in this respect.

72. The representative of the EU thanked the representative of Türkiye for the description of the EPPO Regulation and how that regulation foresees that cooperation shall be insured between the EPPO and the notified authorities in non-EU member States Parties to ETS No. 30, and its Additional Protocols. She reiterated that the EU Commission is aware that work is being carried out within the Council of Europe to clarify the situation. Already 19 of the 22 EU member States Party to the Convention and its Additional Protocols have notified EPPO as a competent authority and, with time, all EU member States participating in the EPPO regulation will have done so.

73. Before the Chair closed the sub-item, the representative of the Netherlands informed delegations that his country had recently lifted its objection to the reservation made by Bolivia to the *Single Convention on Narcotic Drugs (1961)* concerning the permission of the traditional use of the coca leaf.

7 CURRENT ISSUES OF PUBLIC INTERNATIONAL LAW

7.1 Topical issues of public international law

- *Exchange of views on the aggression against Ukraine*

74. Mr POLAKIEWICZ gave a short presentation on the recent developments within the Council of Europe regarding the aggression against Ukraine. He explained that, currently 43 countries and the EU (38 Participants and 6 Associate Members) had joined the *Enlarged Partial Agreement on the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine (Register of Damage)* created by the Council of Europe. A Host State Agreement between the Council of Europe and the Netherlands was concluded in July 2023 and was already in force. Furthermore, an informal conference of the Ministers of Justice had been held under the Latvian chairmanship of the Committee of Ministers on 11 September 2023 which resulted in a declaration outlining a series of principles (so-called “Riga principles”) that underlined the victim-centred approach of the Register. The Conference of the Participants of the Register already held two meetings, with the next to be held in Strasbourg on 16-17 November 2023 and at which the Board members were supposed to be appointed. The Director reminded the CAHDI that the deadline for the nomination of candidates for the Board was 26 October 2023 and that Participants and Associate Members were encouraged to nominate nationals from a range of countries, including from outside Europe. The Register only had a few staff members for the time being and its Secretariat was led by the newly appointed Executive Director ensuring the day-to-day operations of the Register. The team comprised both Ukrainian nationals and internationals and would have up to 45 staff members, with 10 of them working in the Register’s satellite office in Ukraine once the currently ongoing recruitment concludes. The Register was currently working on setting up a digital platform – its true “heart and soul”. The goal was to have the Register begin processing claims in the first quarter of 2024. The Register was currently housed in a temporary office with the search for permanent premises ongoing. Mr POLAKIEWICZ pointed out that the Register was but the first step in the setting up of a fully-fledged international compensation mechanism.

75. The representative of Latvia informed delegations about the informal conference of Ministers of Justice that was held under the Latvian chairmanship of the Committee of Ministers on 11 September 2023 where the Ministers could discuss further steps on the path to justice for Ukraine. The “Riga principles” mirrored the values of those adopting them and would guide the

member States to seek comprehensive accountability and efficient functioning of the Register of Damage. He called upon the delegations to continue the efforts and to dedicate resources to the continuous work towards establishing of an international comprehensive compensation mechanism. Furthermore, the representative underlined the need for the establishment of a specialised international tribunal in order to achieve comprehensive accountability for Russia's highest leadership.

76. The representative of Italy applauded the establishment of the Register as a major development both for the Council of Europe and the international community in pursuing accountability for serious violations of international law and crimes committed in Ukraine. The representative also welcomed the continued cooperation on the international level concerning the unprecedented crisis provoked by the aggression against Ukraine. The representative highlighted the need to work in stages as each stage could be the prelude and the necessary stimulus for the next. The meeting of the Ministers of Justice in Riga highlighted some fundamental principles useful for guiding the functioning of the Register. The victim-centred approach would provide full and effective remedies as quickly as possible to victims and the most vulnerable in particular, as well as to Ukraine.

77. The representative of Lithuania noted that the successful establishment of the Register of Damage could be seen as an example of what common political commitment can achieve in terms of results. The representative also cautioned that this was only a first step and that the next step – the compensation mechanism – would require quick decision-making, in particular concerning the question of funds. Lithuania also appealed for ongoing discussions to be accelerated. The representative further noted that while Russia was the primary aggressor one should not forget that Belarus had allowed access to its territory to carry out the aggression against Ukraine. The representative expressed the support for all ongoing national investigation efforts and the role of the International Criminal Court (ICC). He thanked the German delegation for the initiative regarding revision of the Rome Statute to give the ICC the same jurisdiction for the crime of aggression as for the other crimes. On the establishment of a special tribunal, Lithuania reminded the participants that a solution could only be found through unity and underlined the importance of considering the accountability question of leadership when discussing different modalities of the special tribunal.

78. The representative of the USA expressed her country's support for the Register of Damage that the USA had joined as founding Associate member and for which her country was working to provide funding. The USA was committed to providing an amount equivalent to a participant to the Register. The representative also mentioned that it would be crucial to have the broadest possible legitimacy and credibility and that the USA was raising this issue bilaterally in discussions with legal advisors from countries who do not yet participate in the Register. The representative encouraged other participants to do the same.

79. The representative of Australia underlined that his country was committed to supporting Ukraine in the long-term. Australia was actively participating in the Core Group on accountability and following the Register of Damage. The representative joined the other speakers in highlighting the compensation mechanism as the current central issue which would also be important in his country's consideration of potential participation in the Register of Damage. The representative explained that Australia would therefore be interested in the conceptual framework concerning the establishment and activation of such a compensation mechanism.

80. The representative of Finland inquired about the possibility of enlarging the scope of participants to the Register as membership was limited to the States that had voted for the UN resolution. The representative inquired about the procedure to join the Register for States that did not participate in the vote. Finland highlighted the importance of addressing this question when discussing the compensation mechanism itself.

81. The representative of Switzerland agreed on the importance of working in stages as mentioned by Italy. The first step would be to note the illegality of the Russian aggression. In this respect, the representative drew attention to the fact that the UN Security Council was paralysed and hence unable to take a clear stance on the illegality of the aggression. Switzerland also

commended the establishment of the Register of which it had become a member as a first step towards a fully-fledged compensation mechanism with sufficient funds. The representative also pointed to the need to find a sound and robust legal basis for this compensation mechanism. The third step would be to look at the crime of aggression itself: in this regard, Switzerland also fully supported the idea of the establishment of a special tribunal, embedded in a multilateral framework with a sound legal foundation, complementary to the ICC and other national investigation and prosecution initiatives. In his view it should be an international and not a national tribunal. He further noted that the establishment of the special tribunal should not be the end of efforts in this area and that his country welcomed the German initiative to modify the jurisdiction of the ICC in this regard.

82. The representative of Germany lauded the establishment of the Register as a great achievement which could be seen as a first step towards accountability. He explained that Germany would continue to support the Register and would be fully engaged in the establishment of a compensation mechanism. He noted that, as Legal Advisers, it would be important to look into the question of how to leverage Russian assets in this respect. Discussions on this aspect were ongoing on different levels, e.g., in the EU and amongst the G7. Germany highlighted the need for a broad international debate in order to achieve the goal of creating a compensation mechanism with a sound legal basis under international law. Concerning criminal accountability, the representative expressed Germany's engagement for finding a solution for the establishment of a special tribunal and informed the participants that Germany would host the next meeting of the Core Group on 16 November 2023 in Berlin. The representative noted that there was an accountability gap concerning the crime of aggression and that his country had therefore decided to start an initiative to review the Rome Statute, an initiative that was kickstarted by the German Foreign Minister during the high-level week in New York. He invited all Legal Advisers present in the CAHDI to join the group of friends for the review of the Rome Statute and announced a meeting between Legal Advisers during the international law week in New York. He invited participants to contact him for more information.

83. The representative of the United Kingdom expressed his country's gratitude for flagging the deadlines for submission of nominations for the Board of the Register and welcomed the good technical progress that had been made on cooperation issues so far. Concerning accountability, the representative explained that the United Kingdom remained engaged with Ukraine and the Core Group considering the modalities of a special tribunal and the complex legal issues involved. The representative also noted his country's interest in learning more about the so-called "third option" for setting up the special tribunal as proposed by Ukraine. He also welcomed the progress made by the ICC Prosecutor on the situation in Ukraine regarding who ought to be prosecuted for the most serious crimes of international concern, including war crimes.

84. The representative of Denmark noted that his country was a proud member of the Register and committed to making sure that the Register would be effective very soon. The establishment of the Register should, however, be considered only as a first step to a comprehensive compensation mechanism. His country would continue to be actively engaged in the Core Group. Concerning the crime of aggression, the representative highlighted that the tribunal, whatever form it would take, should have the broadest support possible. The representative referred further to two developments in his country that would send a clear message in support of the international legal order: first, setting up a commission for preparing the Danish ratification of the Kampala Amendments; and second, setting up a commission for the revision of the Danish Penal Code in order to specifically criminalise war crimes, crime against humanity and torture as these crimes were currently only typified under general provisions in Danish law. He further informed the CAHDI that Denmark had deployed a police investigation team to Ukraine to assist the ICC which constituted the first of three teams. This could lead to the further deployment of police teams in light of atrocity prevention around the world.

85. The representative of Slovenia stressed that ensuring accountability was a critical signal that the most serious violations of international law would not go unpunished as well as being a form of prevention. She informed the CAHDI that his country supported the Register and the

establishment of a special international tribunal. As for the Register of Damage, the Tribunal should enjoy international legitimacy and be established within a reasonable timeframe. The representative underlined that his country intervened before the International Court of Justice (ICJ),[7] participated in the meetings of the Core Group and took note of the last proposal regarding accountability ("new approach" or "third way"). However, she stressed that this new approach brought up different features that would call for further elaboration, in particular regarding the international character of the tribunal.

86. The representative of Japan stated that his country fully supported the initiatives striving for accountability and had participated in the Core Group for the establishment of a special tribunal on the crime of aggression. He added that his country also became an Associate Member of the Register to mark the support to the Register beyond Europe.

87. The representative of Ukraine informed the delegations that the public hearing in the case *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation with 32 intervening States)* before the ICJ had concluded on 27 September 2023. The hearing evolved around the question of whether the ICJ had jurisdiction to examine the case. The representative thanked all intervening States and underlined the unprecedented nature of this hearing in the history of the ICJ. She also mentioned the case of *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* for which the public hearing on the merits was concluded in June 2023 at the ICJ. She further mentioned that Ukraine had disputes currently pending under the *United Nations Convention on the Law of the Sea (1982) (UNCLOS)* before an Arbitration Tribunal. Concerning the establishment of individual criminal accountability, Ukraine was grateful for the support and for the investigations carried out by the ICC. The representative stressed that her country also hoped that more arrest warrants would be issued against Russian leadership. She explained that it was very important for Ukraine to adjudicate the crime of aggression against Ukraine and to find a modality to hold the Russian leadership accountable: this was why the establishment of a special tribunal for the crime of aggression was so crucial for Ukraine and also a key element of President Zelenskyy's peace formula. For this purpose, the Core Group had been created that would hold its next meeting in November in Berlin. The Ukrainian representative noted that Ukraine hoped that the members of the Core Group would soon find a consensus and take final decisions on the modalities of this tribunal. Further, on 3 July 2023, the *International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA)* had been created, and Ukrainian prosecutors and investigators were working there to investigate and prosecute the crime of aggression. She ended her intervention by underlining that Ukraine was hoping for more tangible results and outcomes of the Core Group in the near future.

88. The representative of Sweden underlined the importance of a comprehensive approach, and that accountability should be sought for all crimes committed in and against Ukraine by the Russian Federation. This included not only supporting national investigations and the ICC but also the need to find a solution for establishing a tribunal for the crime of aggression against Ukraine. The Core Group had not only an important role to play in this respect but also to argue the case of accountability beyond Europe as this question would touch upon the most fundamental tenets of international law. Therefore, outreach activities during the International Law Week at the UN in New York carried out beyond the CAHDI region would be particularly important. She also welcomed the German initiative as it sought to address the gap regarding the establishment of accountability for the crime of aggression for the future. The representative highlighted that it was important to show results to demonstrate to the people of Ukraine that initiatives for achieving accountability were indeed progressing. Therefore, the establishment of the ICPA and the Register was important. Sweden being part of the enlarged partial agreement was also happy to argue this case to gain future participants. The

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[7] ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation: 32 States intervening).

representative noted that her country would like to continue discussing with Ukraine the best way forward regarding compensation.

89. The representative of Belgium applauded the Council of Europe's work to create a Register for Damage as an important signal and a first step towards a comprehensive compensation mechanism. Her country would continue to participate in discussions within the international community with a view to establishing such a mechanism. The representative highlighted that it was essential for the Register of Damage and, subsequently, the compensation mechanism to receive the broadest possible trans-regional support in order to become fully operational and enjoy the necessary legitimacy. She informed the CAHDI that her country had seconded two Belgian police officers to Ukraine in the first quarter of 2023 for a reconnaissance mission in order to support the work of the ICC and would deploy around 12 defence experts in cooperation with the Royal Netherlands Marechaussee between September and November 2023, also in support of the ICC to investigate war crimes in Ukraine. With regard to the special court for the crime of aggression against Ukraine, she noted that her country was involved in discussions in the Core Group. Her country's position was clear in that, in the absence of a referral to the ICC due to the paralysis of the UN Security Council, the only means of prosecuting the perpetrators of the crime of aggression was a General Assembly resolution recommending the creation of an international tribunal by agreement between Ukraine and the United Nations. The representative highlighted the need for the tribunal - whatever its nature - to have the widest possible cross-regional support in order to have the international legitimacy necessary to fulfil its mandate.

90. The representative of Czechia made a statement in his capacity as Vice-Chair of the Conference of Participants of the Register of Damage. He expressed his gratitude for the support expressed during the CAHDI meeting as well as the voluntary contributions provided by Associate Members to the work of the Register. He used the opportunity to assure the CAHDI - along with the Chair, the first Vice-Chair of the Conference and with the Executive Director and his team - that substantial efforts were underway to ensure that the Register of Damage would become fully operational as quickly as possible. Furthermore, the Bureau of the Conference of Participants was committed to facilitating further outreach activities, not least at the UN level.

91. The representative of France joined others in their appreciation for the creation of the Register of Damage, tracing back the different steps leading to Reykjavik and Riga. Throughout the continuous support efforts for Ukraine, one of the lessons learned through that process - also in light of the creation of the fully-fledged compensation mechanism - was the importance of producing tangible results and advancing together as a group. The extension of the regional support base for this and all other initiatives as well as a sound legal basis were key in his view. As there could be no sustainable peace without accountability, his country would stay engaged in all efforts to ensure justice for this aggression.

7.2 Peaceful settlement of disputes

92. The US representative took the floor to underline the importance of the ICJ as a forum for peaceful resolution of disputes between States that consented to its jurisdiction. She also mentioned the US candidate standing for election as a member of the ICJ.

93. The representative of Romania informed the CAHDI that Romania would also present a candidate for the ICJ.

94. The representative of Mexico noted that his country recognised the compulsory jurisdiction of the ICJ which would represent, having particular regard to the current state of global affairs, a useful means for the peaceful settlement of disputes. The representative noted, in particular, the *forum prorogatum* rule as a means to enlarge the territorial jurisdiction of the ICJ. He further informed the participants that Mexico would also present a candidate for the ICJ.

95. The representative of Lithuania reminded the CAHDI members that the Romanian candidate for the ICJ would run in the regional group of Eastern European States, which was the same as for the Russian candidate.

96. The representative of Australia noted that Australia also accepted the compulsory jurisdiction of the ICJ and mentioned, as an example of the utility of alternative and creative means of peaceful dispute settlement mechanisms apart from the ICJ, the completion of a conciliation procedure under UNCLOS dispute resolution procedures leading to the settlement of the maritime boundary case between Australia and Timor-Leste in 2018. In his view, this example could be of great relevance for the debate about the rules-based system and underscored the principle of States' equal standing and equal rights in international law. The representative further informed the CAHDI of the Australian candidate for re-election to the ICJ.

7.3 The work of the International Law Commission

- ***Exchange of views with Ms Patricia Galvão Teles, Chair of the ILC***

97. Ms Patricia GALVÃO TELES presented the Report of the 74th session (2023) of the ILC. She also acknowledged the work of Ms Nilüfer ORAL as the previous Chair and noted the increase in the number of female chairs in the Commission. Professor GALVÃO TELES also observed that 2023 had marked a special year for the Commission as it began its new quinquennium, with more than half of its members being newly elected. Professor GALVÃO TELES then gave a presentation, as set out in **Appendix IV** to this report, on the progress made by the ILC during the 74th session with respect to each of each the topics on its agenda.

Discussion

98. Several representatives congratulated Professor GALVÃO TELES and Dr ORAL on their historic chairmanship.

99. The representative of Poland noted that the ILC was only engaged in the preparation or drafting of articles for treaties for two of its topics, namely the "Prevention and repression of piracy and armed robbery at sea" and "Immunity of State officials from foreign criminal jurisdiction". The representative enquired whether the ILC may return to this practice for any future topics. Professor GALVÃO TELES noted that there was a general feeling within the ILC that a mix of outputs was important. She provided the examples of the *Draft articles on the protection of persons in the event of disasters* and the *Draft articles on Prevention and Punishment of Crimes Against Humanity* as products of the ILC which have been given to States to consider turning them into conventions. The piracy and immunities topics were also current examples in which the ILC's output comprises draft articles. With respect to future topics, Professor GALVÃO TELES noted the difficulty of finding appropriate topics for codification and progressive development and reiterated the importance of State input in this regard.

100. The representative of Finland observed that the discussions concerning subsidiary means of determining rules of law in the report might represent an interesting development and requested Professor GALVÃO TELES' views on the matter. Professor GALVÃO TELES stated that it was too early to anticipate the outcome and impact of the topic. To the extent that new subsidiary means of determination might arise, Professor GALVÃO TELES noted that no agreement exists regarding what those additional means may be. This would also be an area in which the ILC is seeking to be guided by States.

101. The representative of Sweden asked what the ILC's expectations were in relation to the yearly dialogue with the UN Sixth Committee. Professor GALVÃO TELES noted that there was always an expectation that the dialogue would increase, in both formal and informal settings, and, in particular, in relation to matters such as those just raised by the representatives of Poland and Finland.

102. The Chair asked whether the ILC would follow CAHDI's decision to change "agreements" to "instruments" in the ILC's title for the topic "Non-legally binding international agreements" and, further, whether the ILC may consider the topic of universal jurisdiction. In response to the first question, Professor GALVÃO TELES noted that this represented a good example of cooperation between CAHDI and the ILC and further acknowledged the practical value of this issue for member States and their Legal Advisers. She remarked that the topic had been included on the agenda with the original title but that the matter could possibly be addressed in the Special Rapporteur's first report next year. Concerning the Chair's second question

regarding universal jurisdiction, Professor GALVÃO TELES observed that diverging views were held by States in both the ILC and the Sixth Committee on this matter.

103. The representative of Austria emphasised the importance of the ILC selecting a mix of practically oriented topics which have real-world output for States referring, as an example, to the topic of "Sea-level rise in relation to international law". Regarding the topic "Settlement of disputes to which international organisations are parties", he noted the practical value of this topic for host States of international organisations and, in particular, in light of the tension between immunities under host country agreements and compliance with human rights standards. The representative emphasised the importance of the topic of immunity of State officials and that, in the view of Austria, the exceptions to functional immunity contained in draft Article 7 on the Immunity of State Officials from Foreign Criminal Jurisdiction ought to include the crime of aggression. Professor GALVÃO TELES agreed regarding the importance of the ILC selecting topics which are responsive to the needs of States and reiterated that the ILC requires input and concrete examples from States to ensure this occurs. She explained that this was one reason why the ILC also examines the agendas of organisations such as the CAHDI and the Inter-American Juridical Committee which are closer to States. The ILC would receive plenty of input from States within the Council of Europe region, but Professor GALVÃO TELES observed that less input came from other regions in the world.

- ***Presentation and discussion on the "Sea-level rise in relation to international law" with Mr Bogdan Aurescu and Ms Nilüfer Oral, members of the ILC***

104. The Chair welcomed and introduced Mr Bogdan AURESCU, Professor of International Law at the Faculty of Law of the University of Bucharest, and Ms Nilüfer ORAL, Senior Fellow at the National University of Singapore. Mr AURESCU and Ms ORAL are Co-Chairs to the ILC's Study Group on sea-level rise in relation to international law. Their presentations are set out in **Appendix IV** to this report.

Discussion

105. The representative of Poland noted that the approach of the ILC appeared to be focused on the interpretation of existing law to establish the notion of frozen baselines and asked whether there was a need for new rules of customary international law in this regard. Professor AURESCU replied that the positions of member States in the 6th Committee were collated for the Additional Paper, with the majority focusing on the interpretation of the UNCLOS. The Study Group also debated this issue and there was a sense that this approach also ensures legal stability. Professor AURESCU explained that the *travaux préparatoires* of the UNCLOS did not foresee the issue of sea level rise with the result that different interpretations are available. Professor AURESCU noted that a number of statements made in the Sixth Committee in 2022 demonstrated hesitation by member States to acknowledge the existence of customary international law. Nonetheless, Professor AURESCU noted that the focus was on interpretation rather than custom as a possible solution, and hence why the idea of an interpretative declaration had been raised. He noted that the views of member States in the Sixth Committee toward an interpretative declaration or interpretative protocol would be very important and that other solutions had not been excluded. Dr ORAL emphasised that the Study Group's approach represented a coalescence of views from States and that the interpretation of existing law was a practicable way forward.

106. The representative of Germany noted the dynamic nature of this area of law and asked about the future of the ILC in relation to this issue. He further inquired whether any ground-breaking developments are expected from the present requests for advisory opinions to the ICJ. Professor AURESCU responded by welcoming the resolution of the General Assembly in March 2023, adopted by consensus, however he was unable to express any expectations on the approach of the ICJ due to his position as Co-Chair of the Study Group. Dr ORAL noted that it was an exciting time for international law and expressed optimism that the advisory opinions will contribute to clarifying existing obligations.

107. The representative of Norway agreed that no obligation exists requiring States to actively review baselines and update charts. He suggested that further reflection may be required on

the link between this lack of obligation and the ability for baseline to be legally challenged. Professor AURESCU noted that the freezing of baselines essentially means that they are no longer updated. He reiterated that this solution was envisaged and endorsed by many member States and in the declarations of certain bodies. Further, many States had already adopted this policy approach in their national political decisions to not update coordinates. He acknowledged that a frozen baseline is essentially a unilateral claim of a State which is open to the possibility of challenge by other States. Dr ORAL added that the starting point was to assume that existing baselines and boundaries are lawfully established and recognised. There was also a lack of State practice with regard to both the updating of baselines and the issue of whether they have an ambulatory status. Dr ORAL agreed that baselines are always open to challenge, however noted that the question under consideration was more specifically whether sea-level rise may form the basis for such challenge.

108. The representative of Italy reiterated the importance and urgency of the issue and welcomed the swift progress made within the ILC. He further emphasised, however, that this work should not undermine or diminish the relevance of the legal framework enshrined within the UNCLOS. Dr ORAL responded by noting that the ILC had first begun its work on the topic in 2018 because of the appeals from affected member States. She drew attention to the example of Tuvalu to highlight the importance of addressing the sub-issues of continuity of statehood and submerged territories and which would be discussed in the Additional Paper in 2024 and in the final comprehensive report in 2025.

109. The representative of Iceland noted that, as an example of an alternative reason to update baselines, Iceland sometimes had an addition to its country due to volcanic activity. The representative further enquired regarding Professor AURESCU's mention of a protocol instead of an explanatory note and the reasons for this approach. Dr ORAL noted that circumstances of land aggregation are not within the ILC's mandate, which is only concerned with the recession of baselines. Dr ORAL noted that the idea of an interpretative declaration to interpret UNCLOS was debated by the Study Group in addition to another proposal for a framework convention to cover more issues than just frozen baselines. Practical guidelines for member States that could potentially cover issues related to the protection of persons and other matters of further development were also discussed. Dr ORAL noted that the reactions of member States in the Sixth Committee this year will be taken into account by the Study Group.

7.4 Consideration of current issues of international humanitarian law

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

111. The representative of Denmark reported that the Danish government had published a position paper on cyber and international law in the Nordic Journal of International Law, covering some aspects of international humanitarian law (IHL), such as the view that IHL applies to cyberspace. The representative promised to transmit the position paper to the Secretariat for circulation to all CAHDI participants.

112. The representative of the United Kingdom informed the CAHDI about a project of the UK's National IHL Committee in collaboration with the British Red Cross which involved the publishing of a United Kingdom practitioners' legal handbook on conflict, hunger, and the role of IHL. The representative also mentioned that the United Kingdom continued to collaborate with the British Red Cross to provide practical assistance to selected States who wish to produce their own voluntary reports on IHL implementation, as well as having published a toolkit to enable other States to research and draft their reports more easily.

113. The representative of Slovenia announced plans to translate the Geneva List of Principles on the Protection of Water Infrastructure prepared by the Geneva Water Hub into Slovenian, as well as to explore ways to improve the protection of civilians and civilian critical infrastructure during armed conflicts, particularly the protection of water, energy and food infrastructure and water resources. In this respect, the representative mentioned Slovenia's intention to encourage debates in the UN and regional fora on issues concerning the protection of civilians, such as the implementation of the political declaration on the protection of civilians from the

use of explosive weapons in populated areas, cyber-attacks on the civilian critical infrastructure, and others.

114. The representative of the International Committee of the Red Cross (ICRC) took the floor to share three updates. The first one concerned the topic of cyber and other digital threats in armed conflict. In this respect, the ICRC had convened a Global Advisory Board of high-level leaders and experts from the legal, military, policy, technological and security fields from all geographic regions of the world. The representative informed the CAHDI of two elements which will be included in a report due to be published in October 2023. The first element concerned the need for further intergovernmental debates on the question of the application of international law in cyberspace, noting that long-standing rules of IHL only serve their purpose if interpreted and applied in ways that ensure adequate protection for civilians, civilian infrastructure, data and other protected objects in our increasingly digitalised societies. In this regard, it was noted that interpretations of IHL which remain focused on the protection of objects against physical damage are insufficient. The second element is a serious concern with the growing involvement of civilians – individuals, hacker groups, and companies – in digital operations related to armed conflicts. The representative noted that this growing involvement exposes civilian populations to new threats and risks undermining the universally supported principle of distinction. The representative reiterated that States must do what is in their power to ensure that anyone who conducts cyber operations in relation to an armed conflict on their behalf or from their territory respects IHL. In addition, States and the tech sector should discuss potential risks that arise when civilian digital infrastructure is used for military purposes and work towards a common understanding of limits on the military use of civilians and civilian digital infrastructure in digitalising armed conflicts.

115. The second update concerned the protection of the natural environment in armed conflicts. In this respect, the representative thanked all States for their participation in the State Expert Meeting on the Protection of the Natural Environment in Armed Conflict and informed the delegations that the Chair's Summary was available online. While noting that military practice is varied and that there is already considerable good practice, the representative provided five examples of what may be considered good military practice: first, some militaries have established staff or units within armed forces with specific environmental expertise and responsibilities; second, commanders and their teams consult maps of areas of particular environmental importance or fragility in combat areas during planning; third, military personnel involved in planning seek advice from agencies with environmental expertise when feasible, which can be supplemented by remote and open-source data; fourth, governments consider environmental impacts as they review the lawfulness of new weapons; and fifth, post-strike "battle damage assessments" or "after-action reviews" can include damage to the environment. The representative referred to the example of one State that, for instance, uses data sheets to record the impact of munitions in environmental fragile zones and which helps it, to inform choice of munitions in order to reduce risks of bush fires. The representative encouraged States to draw on the examples in the Chair's Summary Report to advance the implementation of IHL at the national level and ultimately strengthen the protection of the natural environment in armed conflicts.

116. Third, the representative informed delegations that the 34th International Conference of the Red Cross and Red Crescent would be held in Geneva from 28 to 31 October 2024. The agenda for the IHL pillar of the Conference will include urban warfare, autonomous weapons, protection of the natural environment in armed conflict, and disability inclusion and IHL. The representative announced that the ICRC anticipated two resolutions on IHL at the Conference, the first reaffirming IHL as a universal body of law and the second on preventing and minimising digital threats in armed conflicts. The representative noted that the draft elements of these resolutions would be shared in November 2023, with zero drafts expected in spring 2024. A preparatory meeting for the conference would be held in Geneva on 6-7 May 2024.

117. The representative of Switzerland informed the CAHDI that they had organised the aforementioned conference in collaboration with the ICRC, given that the Geneva Conventions did not mandate specific permanent fora for IHL, and this had given an opportunity for a better understanding of existing IHL practice, as well as useful informal exchanges. The

representative reminded the CAHDI of the 75th anniversary of the Geneva Conventions and invited them to submit reports on the implementation of IHL at the national level.

118. The Chair thanked the representative of Switzerland for his intervention and mentioned that Austria was in the process of preparing its voluntary report.

119. The representative of NATO informed the CAHDI that NATO allies had made a political commitment to integrate matters of Human Security and Women, Peace and Security across all NATO core tasks. In 2022, the NATO had adopted its Human Security Approach and Guiding Principles which included five pillars, namely the protection of civilians, preventing and responding to conflict related sexual violence, combatting human trafficking, children in armed conflict, and cultural property protection. The representative also informed the CAHDI that, as a concrete deliverable, at the Vilnius Summit in July 2023, the NATO Heads of State and Government had endorsed the NATO Policy on Children in Armed Conflict, as well as an updated NATO Policy on Combating Trafficking in Human Beings.

120. The representative of Romania took the floor to inform the CAHDI that Romania had expressed its support for the Montreal document, having sent their notification to the government of Switzerland. The representative also mentioned that the IHL national committees of Romania and the Republic of Moldova had held an exchange of views on their experiences in drafting the report on the fulfilment of IHL related obligations, the report on the implementation of the Hague Convention for the Protection of Cultural Property, and on the dissemination of IHL within the society in the two countries. The representative expressed Romania's wish to hold similar meetings on a more regular basis, as well as extending them to other countries in the region.

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

- ***Exchange of views with Ms Silvia Fernández de Gurmendi, Chair of the Diplomatic Conference for the Adoption of a Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes (15-26 May 2023, Ljubljana/Slovenia) and President of the Assembly of State Parties to the Rome Statute of the ICC***

121. The Chair welcomed and introduced Ms Silvia FERNÁNDEZ DE GURMENDI, the President of the Assembly of States Parties to the Rome Statute of the ICC and the Chair of the Diplomatic Conference for the negotiation and adoption of the *Convention on International Cooperation in the Investigation and Prosecution of Genocide, Crimes against Humanity, War Crimes, and other International Crimes (Ljubljana – The Hague Convention)* held in Ljubljana in May 2023. The presentation of Judge FERNÁNDEZ DE GURMENDI regarding her impressions of the MLA Diplomatic Conference held in Ljubljana in May 2023 is set out in **Appendix IV** to this report.

Discussion

122. Several delegations thanked Judge FERNÁNDEZ DE GURMENDI for her leadership and assistance in the adoption of the Ljubljana – The Hague Convention.

123. The representative of the Netherlands thanked Slovenia for hosting the Diplomatic Conference and Belgium for accepting the functions of depository. The representative stated that the Netherlands is prepared to provide interim support and convene the signing ceremony on 14 February 2024. He further reiterated that, because only 3 ratifications are required for the Convention's entry into force, cooperation could possibly start as of 14 February 2024. He also noted that the members of the Core Group had always taken the view that this Convention and the proposed Crimes Against Humanity Convention are mutually supportive. He hoped that the Crimes Against Humanity Convention could be adopted sooner rather than later and affirmed that care would be taken in negotiations to ensure that the two conventions remain compatible.

124. The representative of Slovenia expressed delight that his country had been able to successfully host the Diplomatic Conference in Ljubljana. She noted that this was the first time in history that States had a legal basis to cooperate directly with each other expeditiously in the prosecution of the most serious international crimes. This Convention would substantially enhance the capacity of States to prosecute international crimes at the domestic level, in turn allowing international tribunals to focus only on the most prominent cases that can only be handled at that level, in line with the principle of complementarity. The representative acknowledged the work of the Ministry of Foreign and European Affairs of Slovenia and the Secretary General of the Diplomatic Conference, Mr Marko RAKOVEC. She further observed that the Convention represented a progressive development of international law in some of its provisions and had been hailed by many international non-governmental organisations as a historic achievement and milestone in the construction of an international system to fight impunity for international crimes.

125. The representative of Belgium noted that work was still ongoing as the preparatory phase for the signing conference had now commenced. The representative made three points in this regard. First, Belgium would be the depository of the Convention and was in the process of finalising the official text of the Convention, with the final version to be shared in the coming days. Second, Belgium was currently examining, along with other members of the Core Group, the possibility of organising two events to coincide with the upcoming International Law Week and Assembly of State Parties to the Rome Statute of the ICC. Third, Belgium would be involved in the organisation of the Signing Conference on 14 and 15 February 2024 in The Hague. The representative invited all States to sign the Convention.

126. The representative of Italy expressed his gratitude to Judge FERNÁNDEZ DE GURMENDI for her work, particularly with respect of achieving compromise on extradition cases where the death penalty may be imposed which was an important matter for Italy. He recognised Ms FERNÁNDEZ DE GURMENDI's role as President of the Assembly of State Parties to the Rome Statute and congratulated her on the 25th anniversary commemorative event held in 2022, noting that a follow-up celebratory symposium would be held in Italy in October 2023.

127. The representative of Sweden asked if there were any examples in her experience which may give guidance on how States should approach outreach to the broader membership of the United Nations with respect to accountability for the most serious crimes. Judge FERNÁNDEZ DE GURMENDI noted that the process of the Ljubljana – The Hague Convention was orchestrated in order to ensure that it was an initiative which would go across regions. This intention was reflected in the composition of the Core Group, with each member responsible for reaching out to their respective region. Judge FERNÁNDEZ DE GURMENDI observed that the effectiveness of the Convention required ratification by all regions and noted that, while there are several legal frameworks facilitating cooperation within Europe, it is more difficult to achieve a framework uniting all regions. In her view the Diplomatic Conference had achieved good representation and participation from various regions, with the addition of civil society to assist in outreach at the regional level. Judge FERNÁNDEZ DE GURMENDI suggested that this could be used as a model for other processes.

128. The representative of Poland asked whether the provision concerning the crime of aggression in the Convention represented a change of paradigm in thinking about domestic jurisdiction for the crime. Judge FERNÁNDEZ DE GURMENDI replied that the Convention included the crime of aggression in the annexes, making it part of the optional but not mandatory scope of the Convention. However, this inclusion meant, in her view, that it was indeed a crime that can also be investigated and prosecuted at the national level.

8 OTHER

8.1 Election of the Chair and the Vice-Chair

129. In accordance with *Resolution CM/Res(2021)3 on intergovernmental committees and subordinate bodies, their terms of reference and working methods*, the CAHDI re-elected Mr

Helmut Tichy (Austria) and Ms Kerli Veski (Estonia), respectively, as Chair and Vice-Chair of the Committee, for a term of one year from 1 January to 31 December 2024.

8.2 Place, date and agenda of the 66th meeting of the CAHDI

130. The CAHDI decided to hold its 66th meeting on 11 - 12 April 2024 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.

8.3 Any other business

131. No item was handled under this agenda point.

8.4 Adoption of the Abridged Report and closing of the 65th meeting

132. The CAHDI adopted the Abridged Report of its 65th meeting, as contained in document CAHDI (2023) 24, and instructed the Secretariat to submit it to the Committee of Ministers for information.

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

APPENDICES

APPENDIX I – LIST OF PARTICIPANTS

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APPENDIX II - AGENDA

1. INTRODUCTION

1.1. Opening remarks
1.2. Adoption of the agenda
1.3. Adoption of the report of the 64th meeting
1.4. Information provided by the Secretariat of the Council of Europe

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

2.1. Exchange of views in order to evaluate CAHDI activities and advise the Committee of Ministers and the Secretary General on future priorities in its sector
2.2. Other Committee of Ministers' decisions of relevance to the CAHDI's activities

3. CAHDI DATABASES AND QUESTIONNAIRES

3.1. Settlement of disputes of a private character to which an international organisation is a party
3.2. Immunity of state-owned cultural property on loan
3.3. Immunities of special missions
3.4. Service of process on a foreign State
3.5. Possibility for the Ministry of Foreign Affairs to raise public international law issues in procedures pending before national tribunals and related to States' or international organisations' immunities
3.6. Organisation and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs
3.7. The implementation of United Nations sanctions
3.8. Inquiry concerning the lifting of confidentiality of certain CAHDI questionnaires

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

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

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

5.1. Cases before the European Court of Human Rights involving issues of public international law
5.2. National implementation measures of UN sanctions and respect for human rights

6. TREATY LAW AND SOFT LAW INSTRUMENTS

6.1. Exchanges of views on topical issues related to treaty law
6.2. Law and practice relating to reservations and interpretative declarations concerning international treaties: European Observatory of Reservations to International Treaties

7. CURRENT ISSUES OF PUBLIC INTERNATIONAL LAW

7.1. Topical issues of public international law
7.2. Peaceful settlement of disputes
7.3. The work of the International Law Commission
7.4. Consideration of current issues of international humanitarian law

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

8. OTHER

8.1. Election of the Chair and the Vice-Chair
8.2. Place, date and agenda of the 66th meeting of the CAHDI
8.3. Any other business
8.4. Adoption of the Abridged Report and closing of the 65th meeting

APPENDIX III – SPEAKING POINTS OF MR JÖRG POLAKIEWICZ

Dear Helmut,
Dear colleagues and friends,

- I am very happy to see you, all the new and older faces, during a truly international law week in Strasbourg.
- As has been the practice, I will present to you the most important developments within the Council of Europe ("CoE") since we met last time six months ago.

I. Fourth Summit of Heads of State and Government (16-17 May 2023, Reykjavík/ Iceland) and its outcomes

- As you all know, since our last meeting in March 2023 in Strasbourg, the 4th Summit of Heads of State and Government of the Council of Europe took place on 16 and 17 May 2023 in Reykjavík. I would like to come back to the main developments that arose from this Summit and that are reflected in the in the Reykjavík Declaration.
- The Summit focused on **five priorities** considered essential for the organisation's future that are: the agreement on the Register of Damage for Ukraine; the Declaration on the situation of the children of Ukraine; the Reykjavik Principles for Democracy; the recommitment to the European Convention on Human Rights ("ECHR") System as the cornerstone of the Council of Europe's protection of human rights; and the Council of Europe and the environment. In addition, the Summit also identified and addressed other major challenges.
- In the context of the summit, the Enlarged Partial Agreement on the **Register of Damage Caused by the Aggression of the Russian Federation against Ukraine** was established.
- Furthermore, in the Reykjavík Declaration, the Heads of State and Government welcomed "*international efforts to hold to account the political and military leadership of the Russian Federation for its war of aggression against Ukraine and* ***the progress towards the establishment of a special tribunal for the crime of aggression.***"
- Discussions on the modalities for such a tribunal continue in the **Core Group**, in which also the Council of Europe is participating. I had the opportunity to participate in the international conference 'Special Tribunal for the Crime of Aggression against Ukraine' that took place on 21 August 2023 in Kyiv.
- I do not want to go into any detail on either the register or the tribunal here, since we shall come back to the issue of accountability under item 7.1 of our agenda.

II. Framework Convention on Artificial Intelligence

- In the Reykjavík Declaration, the Heads of State and Government also "*acknowledge[d] the positive impact and opportunities created by new and emerging digital technologies while recognising the need to mitigate risks of negative consequences of their use on human rights, democracy and the rule of law, including new forms of violence against women and vulnerable groups generated and amplified by modern technologies.*" In this context, they "*commit[ted] to ensuring a leading role for the Council of Europe in developing standards in the digital era to safeguard human rights online and offline, including by finalising, as a priority, the Council of Europe's Framework Convention on Artificial Intelligence.*"
- The negotiations are now in full swing, and finalisation is foreseen for spring 2024, to coincide with the 75th anniversary of the Council of Europe. A complete draft has been made publicly available to allow multistakeholder participation. There is still work ahead, in particular regarding the Convention's scope of application.
- The success of the convention will depend on outreach. We must ensure that the convention's geographical scope will go well beyond Europe while being fully compatible with the EU's AI Act which is being finalised in parallel. I am happy to note that Argentina, Costa Rica, Peru and Uruguay are expected soon to join the negotiations, as observers to the Committee on Artificial Intelligence (CAI).

III. Latest developments related to the ECHR and the execution of ECHR judgments

- I would now like to move on to a point devoted to the European Convention on Human Rights (ECHR) and the execution of judgments of the European Court of Human Rights (ECtHR). First of all, I would like to mention some judgments setting out the Court's approach for the processing of applications against Russia, namely *Fedotova and Others v. Russia [GC]*[8], *Ukraine and the Netherlands v. Russia [GC]*[9], *Kutayev v. Russia*[10] and *Svetova and Others v. Russia*.[11]
- Essentially these rulings explain that the ECtHR is competent to deal with cases concerning acts or omissions which took place before 16 September 2022, the date on which Russia ceased to be a party to the European Convention; the office of judge in respect of Russia having ended, the Court will appoint an *ad hoc* judge from among the sitting judges to examine those cases lodged against Russia within its jurisdiction; and the Court may proceed with examination of the applications where the Russian authorities do not cooperate with it. The failure of a respondent State to participate effectively in the proceedings does not automatically lead to acceptance of an applicant's claims. However, the Court must be satisfied by the available evidence that a claim is well-founded in fact and law.[12] As of 31 August 2023, there were **15350 applications pending** against the Russian Federation, roughly **19.7% of the Court's docket.**
- Regarding the **execution**, there are currently **2,468 cases pending against the Russian Federation under the Committee of Ministers ("CM") supervision**. In practice, the Russian Federation has ceased to cooperate with the CM and judgments are no longer implemented. Information as regards the payment of just satisfaction is missing in 1,209 cases. As of 5 June 2023, the total outstanding amount stood at over 2.2 billion euros.
- During its 1475th (Human Rights) meeting held on 19-21 September 2023, the CM adopted, a decision CM/Del/Dec(2023)1475/A2a in which it decided, in light of the exceptional circumstances, "*to transfer all pending cases and classify all new cases against the Russian Federation to the enhanced supervision procedure*" and "*to keep under review strategies to ensure the implementation of the Court's judgments with respect to the Russian Federation including with regards to the unconditional obligation on the Russian Federation to pay the just satisfaction.*"
- The case of **Kavala v Türkiye** is now regularly on the CM agenda. In infringement proceedings, the ECtHR found on 11 July 2022 that the respondent state had failed to fulfil its obligations under article 46 (1) ECHR. It held in particular that the "the finding of a violation of article 18 taken together with article 5 had vitiated any actions resulting from the charges related to the Gezi Park events and the attempted coup."[13]
- Notwithstanding these findings, the applicant is still in prison. He was eventually convicted on 25 April 2022 to aggravated life imprisonment for attempting to overthrow the government by force. His appeals to the Court of cassation and Constitutional Court are pending.
- During its 1475th (Human Rights) meeting, the CM called again for the applicant's immediate release. In that context, the CM stressed the domestic courts' capacity to put an immediate end to the applicant's detention by delivering a ruling in line with the Court's Kavala judgments.
- On another regular topic of my presentation, namely **derogations from the ECHR under Article 15,** I would also like to inform you that only the derogations made by the **Republic of Moldova and Ukraine** are currently in force.
- Finally, I would like to inform you of a very recent development, which took place yesterday, namely the holding of a Grand Chamber hearing in the case of ***Duarte Agostinho and***

[8] ECtHR, *Fedotova and Others v. Russia [GC]*, nos. 40792/10, 30538/14 and 43439/14, 17 January 2023.
[9] ECtHR, *Ukraine and the Netherlands v. Russia (dec) [GC]*, nos. 8019/16, 43800/14 and 28525/20, 30 November 2022.
[10] ECtJR, *Kutayev v. Russia*, no. 17912/15, 24 January 2023.
[11] ECtHR, *Svetova and Others v. Russia*, no. 54714/17, 24 January 2023.
[12] There are eight inter-State cases pending concerning Russia, which remain a top priority for the Court: Georgia v. Russia (II) (Article 41 – just satisfaction); Georgia v. Russia (IV); Ukraine v. Russia (re Crimea); Ukraine and the Netherlands v. Russia; Ukraine v Russia (VIII); Ukraine v. Russia (IX); Russiav. Ukraine; Ukraine v. Russia (X). There are also currently approximately 16,700 individual applications pending before the Court against Russia. See the Press Release issued by the Registrar of the Court issued by the Registrar of the Court on 3 February 2023, ECHR 036 (2023).
[13] ECtHR, *Kavala v. Türkiye [GC]*, no. 28749/18, 11 July 2022, §§ 145 & 172.

Others.[14] The case concerns the greenhouse gas emissions from 32 member states, which in the applicants' view contribute to the phenomenon of global warming resulting, among other things, in heatwaves affecting the applicants' living conditions and health.

IV. Accession of the European Union to the Istanbul Convention

- As from 1 October 2023, the European Union ("UE") will be a party to the CoE Convention on Preventing and Combatting Violence against Women and Domestic Violence (the "Istanbul Convention", "IC").
- The IC represents the **gold standard** worldwide to combat violence against women and domestic violence. It establishes a specific monitoring mechanism consisting of a 'Committee of the Parties' ('COP') and a 'Group of Experts on Action against Violence against Women and Domestic Violence' ('GREVIO') to ensure effective implementation of its provisions by the parties.
- The EU's accession is unprecedented in several ways: it is the first time that the EU becomes party to a CoE convention with an independent monitoring mechanism. It is also the first accession by the EU to a mixed treaty where not all EU member states are parties, moreover, only as regards the matters falling within the exclusive competence of the Union. When submitting its instrument of approval, the EU deposited a declaration specifying the areas of its competence in the matters covered by the IC.
- By committing to the implementation of the Convention, the EU confirmed its engagement in combating violence against women, which was welcomed in Brussels and Strasbourg. There are still some outstanding issues. GREVIO will have to determine modalities of monitoring the EU. The COP will consider amendments to its rules of procedure. Unless special voting rules are adopted, non-EU member states will systematically be in a minority in the COP which risks undermining the effective functioning and ultimately the credibility of the monitoring mechanism.
- I am confident that pragmatic and efficient solutions will be found which respect both the requirements of EU law and the integrity and effectiveness of the CoE convention system.

V. Accessions to Council of Europe conventions by non-member States[15]

- Since the last CAHDI meeting, 8 non-member states have asked to be invited to become party to a Council of Europe treaty:
  - **Algeria, Côte d'Ivoire, Haiti and Palau** - Convention on Mutual Administrative Assistance in Tax Matters as amended by the Protocol of 2010 (ETS No. 127) ;
  - **Rwanda and Saõ Tomé** - Convention on Cybercrime (ETS No. 185) ;
  - **Cameroon and Senegal** - Council of Europe Convention on counterfeiting of medical products and similar crimes involving threats to public health (CETS No. 211).

- In addition, 7 signatures were affixed by non-member states:
  - **Viet Nam** - Convention on Mutual Administrative Assistance in Tax Matters as amended by the Protocol of 2010 (ETS No. 127) ;
  - **Congo -** Council of Europe Convention on counterfeiting of medical products and similar crimes involving threats to public health (CETS No. 211) ;
  - **Cabo Verde** - Protocol of Amendment to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 223) ;
  - **Cabo Verde, Canada, Ghana, Mauritius -** Second Additional Protocol to the Convention on Cybercrime, concerning the strengthening of cooperation and the disclosure of electronic evidence (CETS No. 224).

- Lastly, there were 6 ratifications or accessions by non-member states or organizations:
  - **Brazil** - Convention on the Transfer of Sentenced Persons (ETS No. 112) ;

[14] ECtHR, *Duarte Agostinho and Others v. Portugal and 32 Others* (Communicated case), no 39371/20, 13 November 2020, (in French only).

[15] 153 of the total number of 223 conventions are open to non-member States.

- **Viet Nam** - Convention on Mutual Administrative Assistance in Tax Matters as amended by the Protocol of 2010 (ETS No. 127) ;
- **European Union** - Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210) ;
- **Côte d'Ivoire -** Council of Europe Convention on counterfeiting of medical products and similar crimes involving threats to public health (CETS No. 211);
- **Argentina** - Protocol of Amendment to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 223) ;
- **Japan** - Second Additional Protocol to the Convention on Cybercrime, concerning the strengthening of cooperation and the disclosure of electronic evidence (CETS No. 224).

VI. Closing remarks

- "Our world is becoming unhinged. Geopolitical tensions are rising. Global challenges are mounting. And we seem incapable of coming together to respond." These were the words of the UN Secretary-General when he addressed the UNGA on 19 September.
- At the 4th Summit of the Council of Europe, Heads of State and Government came together, giving a fresh impetus to the Council of Europe and to multilateral cooperation in general. Our Organisation demonstrated its rapid reaction capacity by setting up a **Register of damage**.
- Let us seize this momentum and continue our efforts to ensure comprehensive accountability.
- I wish you a smooth and fruitful meeting. The Secretariat rests at your disposal for all questions you may have.
- Thank you very much for your attention.

APPENDIX IV – PRESENTATIONS OF SPECIALS GUESTS

- **Ms Patricia GALVAO TELES**

Chair of the International Law Commission

The presentation of Ms Patricia Galvao Teles is available at the following link

- **Dr Bogdan AURESCU**

Member of the International Law Commission, Co-Chair to the ILC's Study Group on sea-level rise in relation to international law.

The presentation of Dr Bogdan Aurescu is available at the following link

- **Ms Nilüfer ORAL**

Member of the International Law Commission, Co-Chair to the ILC's Study Group on sea-level rise in relation to international law.

- **Ms Silvia FERNANDEZ de GURMENDI**

Chair of the Diplomatic Conference for the Adoption of a Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes (15-26 May 2023, Ljubljana/Slovenia) and President of the Assembly of State Parties to the Rome Statute of the ICC.

The presentation of Ms Silvia Fernández de Gurmendi is available at the following link.