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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

(CAHDI)

Meeting report

44th meeting
Paris, 19-20 September 2012

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I. INTRODUCTION

1. Opening of the meeting by the Chair, Ms Edwige Belliard

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 44td meeting in Paris on 19 and 20 September 2012 with Ms Edwige Belliard in the Chair. The list of participants is set out in **Appendix I** to the meeting report.

2. Adoption of the agenda

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

3. Adoption of the report of the 43rd meeting

3. The CAHDI adopted the report of its 43rd meeting (document CAHDI (2012) 11) and instructed the Secretariat to publish it on the Committee's website.

4. Statement by Mr Manuel Lezertua, Director of Legal Advice and Public International Law

4. Mr Manuel Lezertua, Director of Legal Advice and Public International Law (DLAPIL) and Jurisconsult, informed the delegations of recent developments at the Council of Europe. The CAHDI took note in particular of the progress in the work concerning the reform of the Organisation, the developments concerning the accession of the European Union to the European Convention on Human Rights and the information relating to some recent Council of Europe conventions or draft conventions. Mr Lezertua's statement is set out in **Appendix III** to this report.

5. The Committee took also note of the recent developments concerning the Council of Europe Treaty Series as well as of the observations of DLAPIL on the scope and the application of the universal criminal jurisdiction in the work of the Council of Europe as set out in **Appendix IV** to the present report.

II. ONGOING ACTIVITIES OF THE CAHDI

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

6. The Chair presented a compilation of Committee of Ministers decisions of relevance to the CAHDI's activities (documents CAHDI (2012) 12 and CAHDI (2012) 12 Addendum).

7. She reported on the interesting exchange of views on the work of the CAHDI which she had with the Committee of Ministers on 13 June 2012.

8. She then recalled that on 28 March 2012, the Ministers' Deputies had forwarded to the CAHDI – for information and possible comments – Recommendation 1995 (2012) of the Parliamentary Assembly on the "International Convention for the Protection of All Persons from Enforced Disappearance". The Parliamentary Assembly pinpointed four weaknesses in the UN Convention and invited the Committee of Ministers to consider launching a process of preparing negotiations, in the framework of the Council of Europe, on a European Convention for the Protection of All Persons from Enforced Disappearance.

9. Draft comments from the CAHDI were presented by the Chair (document CAHDI (2012) 17 prov and document CAHDI (2012) 17 Addendum containing the amendments proposed by the Albanian delegation). They were adopted by the members of the Committee and appear in **Appendix V** to the present report.

10. These comments stressed that the UN Convention was a recent text and underlined that the weaknesses pinpointed by the Parliamentary Assembly had already been debated during the negotiations held in the UN framework.

11. A large number of delegations stressed that in the current situation, it was inappropriate to draw up a new convention in the framework of the Council of Europe. Such an initiative might be considered as conflicting with that of the United Nations. The delegations considered that on the contrary, all efforts should be concentrated on universalising this Convention.

12. The representative of the International Committee of the Red Cross (ICRC) informed the Committee that the ICRC was closely monitoring the work of the Committee on Enforced Disappearance established by the UN Convention. It also advocated ratification of the Convention. It underlined that the ICRC was prepared to provide technical assistance in implementing it.

6. Immunities of States and international organisations

a. State practice and case-law

13. The Chair thanked Spain for updating its contribution to the CAHDI database on State practice regarding State Immunities (document CAHDI (2012) Inf 11) and for its contribution to the compilation of national replies relating to 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 (2012) 18 prov.). The delegations were invited to submit or update their contributions.

14. The Belgian delegation informed the CAHDI of recent developments in the two cases presented at the previous meeting of the CAHDI one of which concerned the immunity of a State and the other the immunity of an international organisation. In connection with the first case, concerning a preventive attachment order of the bank account of the Rwandan Embassy in Brussels, the Belgian delegation indicated that its State had appeared before the enforcement judge of the Brussels Court of First Instance in order to invoke compliance with the inviolability of the assets of diplomatic missions, in accordance with Article 22 paragraph 3 of the *Vienna Convention on Diplomatic Relations* (1961). The Belgian delegation pointed out that the enforcement judge had not yet issued its decision. In connection with the second case, which concerned the execution of an arbitral award and of a judicial decision in favour of private creditors against an international organisation enjoying immunity from jurisdiction and execution, the Belgian delegation recalled that the Brussels Court of First Instance had held that the immunity of the international organisation in question should be waived. Under a judgment of 26 June 2012, the Brussels Court of Appeal had ruled however, that the international organisation's immunity from jurisdiction and execution did not constitute a disproportionate restriction to the rights of the applicant and that it could therefore not be waived. Lastly, the Belgian delegation indicated that following a judgment issued by the Labour Court sentencing Ethiopia to pay damages to a worker who had been recruited locally in Brussels by the Ethiopian Embassy and then dismissed, this Embassy's bank account had been attached. Ethiopia has brought proceedings for the lifting of this attachment asserting the State's immunities.

15. The Italian delegation informed the CAHDI of recent developments concerning the accident which had occurred on 15 February 2012 off the Indian coast, pointing out that the case was currently being examined by the Indian Supreme Court. Two questions concerning international law had been raised during proceedings before the Indian Supreme Court: (1) the immunity from jurisdiction of State organs, and (2) the State's responsibility for the conduct of its organs. The Indian Supreme Court was expected to issue its decision in the next few weeks.

16. The Canadian representative informed the CAHDI of a practice in matters of State immunity, whereby the Canadian authorities refrain from intervening in domestic courts in cases involving foreign civil servants or States unless a question of constitutionality arises under the

Canadian State Immunity Act. It referred to the judgment delivered by the Quebec Superior Court in the case of Kazemi v. Islamic Republic of Iran granting the Islamic Republic of Iran immunity from jurisdiction. The Canadian authorities had intervened in this case because the applicants had adduced the unconstitutionality of the State Immunity Act.

17. The delegation of the Netherlands informed the CAHDI of recent developments concerning the case introduced against the United Nations and the Netherlands relating to the genocide in Srebrenica. The Netherlands Supreme Court had delivered its judgment on 13 April 2012, recognising the Organisation's absolute immunity, which meant that it could not be summoned to appear before the domestic courts. The Court further ruled that Article 6 of the *European Convention on Human Rights* could not be invoked in order to apply for an exception under international law to such absolute immunity on the part of the Organisation. The applicants had allegedly declared their intention to bring the case before the European Court of Human Rights. Lastly, the delegation of the Netherlands indicated that the case was still pending before the Supreme Court in connection with the question of the responsibility of the Netherlands.

18. The Portuguese delegation presented three points relating to the immunities issue on which it wished to know the other delegations' practice. The questions related to (1) the attachment of the bank accounts of foreign diplomatic missions, (2) summonses/serving of judicial acts, and (3) the execution of judgments *in absentia*. The delegation invited the delegations to supply information on this subject when submitting or updating their contributions to the CAHDI database.

19. The United States representative informed the CAHDI that since the decision given by the Supreme Court on 1 June 2010 in the case of *Samantar v. Yousuf*, three cases had been brought to the domestic courts against Heads of State. They included two cases against Mahinda Rajapaksa, President of Sri Lanka, and one against Sheikh Sabah al-Ahmad al-Jaber al-Sabah, the Emir of Kuwait. In all three cases, the suits had been declared inadmissible on the grounds of the immunity afforded to serving Heads of State. The US representative indicated that the US Department of State considers that former Heads of State and civil servants are entitled to residual immunity for acts taken in their official capacity and that the courts should presume that the act in question had been taken in their official capacity where a case is brought against former Heads of State and civil servants. He referred to two cases against the former President of Mexico, Ernesto Zedillo, and the former President of Colombia, Alvaro Uribe.

20. The Mexican representative presented to the CAHDI a case pending before the Mexican courts concerning an international organisation which had legally terminated a contract but had not claimed immunity. The court of first instance had issued a judgment by default, but the international organisation did not wish to be represented at the appeal, even though it could claim immunity. The Mexican representative pointed out that the Mexican Government could not participate or intervene in the appeal proceedings because it lacked *locus standi*. In connection with the case presented by the US representative concerning the former President of Mexico, the Mexican representative indicated that the charges against the latter had also been examined by the Mexican courts, including the Mexican Supreme Court. The Mexican Government had asked the US Government to present its observations on the former president's residual immunity. These observations had been presented on 7 September 2012.

21. The Austrian delegation informed the CAHDI of a judgment issued in 2011 by Vienna District Court ordering the attachment of art objects owned by the Czech Republic. It indicated that the case was currently before the Austrian Supreme Court, which had quashed the District Court decision but had not yet pronounced on the issue of the immunity of art objects owned by the State. The Austrian delegation informed the Committee of the judgment issued on 17 July 2012 by the European Court of Human Rights in the case of *Wallishauser v. Austria*[1]. The applicant, an Austrian national employed by the US Embassy in Vienna, had demanded payment of wages corresponding to the monthly amounts due since her dismissal, which had been ruled illegal. She

[1] European Court of Human Rights, *Wallishauser v. Austria*, Application no. 156/04, judgment delivered on 17 July 2012.

had complained in particular of having been deprived of access to a court in Austria because the American authorities, relying on their immunity, had rejected a summons to appear at a hearing in the case. The European Court of Human Rights had concluded that Article 6 paragraph 1 of the *European Convention on Human Rights* (right of access to a court) had been violated on the grounds that by accepting the American refusal, the Austrian authorities had failed to maintain reasonable proportionality between the legitimate aim (promoting courtesy and good relations between States) and the right of access to a court.

b. UN Convention on Jurisdictional Immunities of States and of their Property

22. In connection with the stocktaking of signatures and ratifications of the *UN Convention on Jurisdictional Immunities of States and of their Property* (2004) (document CAHDI (2012) Inf 2), the Chair informed the Committee that since the previous meeting of the CAHDI, no State represented within the CAHDI had signed, ratified, accepted, approved or acceded to this Convention. Moreover, she pointed out that 13 States were currently Parties to the instrument and that the entry into force of the Convention required 30 States Parties.

23. The Canadian representative informed the CAHDI of the recent adoption of the Canadian *Justice for Victims of Terrorism Act*. This law allows victims of terrorism to sue perpetrators of such acts as well as their supporters, and therefore facilitates the lifting of the immunity of jurisdiction of States and, where necessary, agents identified by Canada as providing support for terrorism. The Canadian representative pointed out that the adoption of this law was currently preventing Canada from becoming a Party to the Convention.

24. One delegation wondered about the consequences of Canada's adoption of its new law with regard to immunities and the burden of proof. The Canadian representative indicated that only the States listed by Canada were liable to be sued by individuals before the domestic courts. A court may hear and determine the action only if the action has a real and substantial connection to Canada or the plaintiff is a Canadian citizen or a permanent resident. The plaintiff has to prove his *locus standi*.

25. The US representative informed the CAHDI that the United States were not intending to accede to this Convention for the moment for raisons of incompatibility with domestic legislation relating to foreign sovereign immunity (*Foreign Sovereign Immunities Ac*t).

26. The German delegation informed the CAHDI that Germany had decided not to ratify the Convention for the moment because of doubts regarding the applicability of Article 12, the so-called "tort exception", to military activities, including the activities of armed forces during an armed conflict. It indicated, however, that Germany would continue to observe developments concerning the interpretation of this Article.

27. The Italian delegation indicated that Parliament was currently considering the proposed ratification of the Convention. A discussion would also be held on possible reservations, and the final decision would be taken within six months. Furthermore, it stressed that a law authorising review of judicial decisions incompatible with the judgments of the International Court of Justice (ICJ) in matters of immunity was likely to be adopted by Parliament. This proposal ensued from the judgment issued on 3 February 2012 by the ICJ in the case *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening),* in which the ICJ had declared that Italy had violated its obligation to respect the immunities which Germany enjoyed under international law.

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

a. Questions dealt with by offices of the Legal Adviser which are of wider interest and related to the drafting of implementing legislation of international law as well as foreign litigation, peaceful settlements of disputes, and other questions of relevance to the Legal Adviser

b. Updates of website entries

28. The CAHDI examined the issue of the organisation and functions of the Office of the Legal Adviser of the Ministry for Foreign Affairs and took note of Montenegro and Spain's contributions to the database (document CAHDI (2012) Inf 10 BIL). The Chair underlined the usefulness of the database and invited the delegations to submit or update their contributions.

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

29. The CAHDI noted that Ireland, Spain and the United States had updated their contributions to the database (document CAHDI (2012) Inf 7). Furthermore, the Chair underlined that document CAHDI (2012) 3 prov regarding "*Cases, that have been eventually submitted to national tribunals, by persons or entities removed from the lists established by the UN Security Council Sanctions Committees*" remained unchanged since the last meeting.

30. The Swiss delegation informed the Committee of the recent developments in the case of *Nada v. Switzerland*,[2] in which the Grand Chamber of the European Court of Human Rights delivered its judgment on 12 September 2012. The Court has concluded to the violation of the applicant's right to private and family life (Article 8 ECHR) and right to an effective remedy (Article 13 ECHR). The Swiss delegation drew the attention of the Committee on two aspects of the judgment:
- as for the travel ban, the Court had considered that Switzerland enjoyed some latitude in implementing the binding resolutions of the UN Security Council in question;
- the Court further considered that there was nothing in the Security Council resolutions to prevent the Swiss authorities from introducing mechanisms to verify the measures taken at national level pursuant to those resolutions. In practice, this involved that each person listed has a right to an effective remedy to ask for his/her delisting.

Several delegations underlined in this regard that attention should be brought to the renewal of the sanctions regime in New York at the end of the year. The representative of the European Union invited delegations to proceed with further consultations when the Court of Justice of the European Union (CJEU) would have delivered its judgment in the *Kadi* case. The Chair underlined the need to ensure adequate and concerted monitoring of these cases.

31. The Serbian delegation informed the CAHDI that the Ministry of Foreign Affairs of the Republic of Serbia has been requested by the Serbian Public Prosecutor's Office to provide information on sanctions imposed on Sudan, especially as to whether the said sanctions instituted by the United Nations or by the European Union are binding upon the Republic of Serbia. The Public Prosecutor's Office is investigating suspects towards whom there is a reasonable doubt that they have violated sanctions imposed by international organisations in conjunction with illicit production, possession, carrying and trade of arms and explosives. The Ministry of Foreign Affairs informed the Public Prosecutor's Office that the Republic of Serbia is bound by the embargo on arms supplies to all warring parties involved in the conflict, as established by Resolutions 1556 (2004), 1591 (2005) and 1945 (2010). The Republic of Serbia has also indicated that it has accepted the criteria and principles contained in the EU Code of Conduct by passing the *Law on Foreign Trade in Arms, Military Equipment and Dual-Use Goods*, whereby it approximated its legislation to relevant EU standards and procedures on this matter.

[2] European Court of Human Rights, *Nada v. Switzerland*, Application no. 10593/08, judgment delivered on 12 September 2012.

32. The Irish delegation supplied recent information on the Chafiq Ayadi case, informing the Committee that the case will be heard before the Irish High Court in November 2012. Chafiq Ayadi had also proceedings before the General Court of the European Union, which were stroke out when he was removed from the list. He has appealed that judgment to the Court of Justice of the EU. The Irish Government has now been given leave to intervene in this case in support of the European Commission.

33. The Finnish delegation informed the Committee that the Government had introduced before the Parliament, in June 2012, a proposal for an *Act on the Freezing of Funds with a view to Combating Terrorism*. The draft Act had been prepared in an extensive inter-agency working group and in consultation with the private sector NGOs and the Academia. It aimed at regulating the freezing, in an administrative procedure, of funds and economic resources of 1) persons and entities suspected, prosecuted or convicted in Finland of involvement in terrorist crimes, 2) persons and entities designated by the Council of the European Union as being involved in terrorist acts but whose funds have not been frozen by a directly applicable EU Regulation (the so-called "EU internal terrorists"), 3) on the basis of a well-founded request by another country, persons and entities identified in that request as being involved in terrorism, and 4) entities owned or controlled by any of the above. The proposal was being deliberated in the Parliament where committee hearings had begun. The process is expected to be finished by the end of 2012. An inter-agency working-group is also mandated to review by the end of 2012 the responsibilities of different authorities in the implementation of international sanctions with a view, if relevant, to redistributing those responsibilities.

9. European Union's accession to the European Convention on Human Rights (ECHR)

34. The CAHDI addressed the issue of the accession of the European Union to the *European Convention on Human Rights*. The CAHDI took note of the Report of the 75th meeting of the Steering Committee for Human Rights (CDDH, Strasbourg, 19-22 June 2012) and of the report of the first negotiation meeting between the CDDH and the European Commission on the accession of the European Union to the European Convention on Human Rights (Strasbourg, 21 June 2012). In this respect, the Chair recalled the renewal of the terms of reference of Mr Erik Wennerström as observer of the CAHDI to the negotiation meetings between the CDDH and the European Commission. The CAHDI took note of the information transmitted by M. Wennerström following the 2nd negotiation meeting (Strasbourg, 17-19 September 2012).

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

35. The representative of the United States of America informed the Committee about two recent meetings between the European Court of Human Rights and the United States Supreme Court (USSC), thus underlining a new relationship between these two institutions. Following this positive experience, meetings had also been recently organised between the US Supreme Court and the Court of Justice of the European Union (CJEU). A series of meetings between the USSC and the CJEU were to be organised in Luxembourg and Washington in the course of the next few years, co-sponsored by 9 law schools funding this programme.

36. The Chair recalled the importance of judges' dialogue and experience sharing.

37. The delegation of the United Kingdom updated the Committee about the case of *Othman v. the United Kingdom*.

11. Peaceful settlement of disputes

38. The Chair presented the document CAHDI (2012) 13 rev, updating information on the International Court of Justice's (ICJ) jurisdiction .

39. The Italian delegation informed the Committee that Italy would accept the compulsory jurisdiction of the ICJ under Article 36.2 of the Statute of the Court by the end of 2012. This declaration would probably be subject to limits.

40. The delegation of the Netherlands congratulated Italy for such an important step and informed the Committee about a meeting to be hosted by the Netherlands (New-York, 24 September 2012) specifically devoted to the issue of peaceful settlement of disputes in an effort to contribute to persuading other states which have not yet done so to accept the compulsory jurisdiction of the Court. This would also offer an opportunity to recall the important role of the Permanent Court of Arbitration.

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

41. 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. In this connection the Chair presented the documents updated by the Secretariat setting out these reservations and declarations (documents CAHDI (2012) 14 and CAHDI (2012) 14 Addendum prov) and opened the discussion on the reservations and declarations made to treaties.

42. The Chair reiterated the importance for delegations to transmit to the Secretariat their respective positions, when determined in order to keep document CAHDI (2012) 14 Addendum up-to-date.

43. With respect to ***Bolivia's re-accession*** to the *Single Convention on Narcotic Drugs as amended by the Protocol amending the Single Convention on Narcotic Drugs*, several delegations expressed their concerns with regard to the procedure chosen by Bolivia, which consisted in denouncing the convention and subsequently re-acceding to it with a reservation (thus challenging the legal certainty). Concerns were also expressed with regard to the substance of the reservation (particularly in light of its potentially undefined scope). Some delegations further noted that consideration should be given to the importance of having Bolivia as a party to the Convention.

44. With regard to the ***reservation and declarations made by the Holy See*** *to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, the *International Convention for the Suppression of the Financing of Terrorism* and the *United Nations Convention against Transnational Organized Crime*, the representative of the Holy See informed the Committee that a written note would be transmitted through the Secretariat to all delegations in order to provide further information on what is meant by "the sources of [the] law" as referred to in the Holy See's declarations.

45. With regard to the **reservations and declaration of the United Arab Emirates** to the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, some delegations wondered whether the declaration did not actually constitute a reservation and questioned the capacity of a State party to define 'torture' under the Convention.

46. With regard to the ***reservation and declarations made by Viet Nam*** to the *United Nations Convention against Transnational Organized Crime*, several delegations expressed concerns with regard to the unclear reference to 'reciprocity' as well as to the general references to domestic law. They considered that further information should be requested from Viet Nam, especially on this issue.

47. With regard to the ***declaration made by Malaysia*** to the *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, some delegations indicated that they were examining the normative consequences

of the declaration as well as its impact on the scope of the Convention, especially with regard to the interpretation of the notion of 'representation'.

48. The Serbian delegation informed the Committee on the scope and content of its recent reservations made to the *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, in accordance with Article 78 paragraph 2 of the Convention[3].

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

13. The work of the International Law Commission (ILC) and of the Sixth Committee of the United Nations

Exchange of views between the ILC, the Chair of the CAHDI and the Director of the DLAPIL, Geneva, 4 July 2012

49. With reference to documents CAHDI (2012) Inf 8 and Inf 9, the Committee was informed of the exchange of views on 4 July 2012 between the ILC, the Chair of the CAHDI and the Council of Europe's Director of Legal Advice and Public International Law.

Presentation of the work of the ILC and of the Sixth Committee by Sir Michael Wood, Member of the ILC

50. The 64th Session of the ILC had taken place in Geneva from 7 May to 1 June and from 2 July to 3 August 2012. Sir Michael Wood, member of the ILC and Special Rapporteur on "Formation and evidence of customary international law", presented the recent activities of the ILC. Sir Michael Wood's presentation is reproduced in **Appendix VI** to this report.

51. The ILC had continued its examination of several subjects included in its work programme. In connection with the subject relating to "Expulsion of aliens", the Commission had adopted at first reading a series of 32 draft articles, accompanied by comments. These draft articles would be re-examined at second reading in 2014 in the light of the States' written and oral comments. The Drafting Committee's report on these draft articles is reproduced in document A/CN/4/SR.3134. The Commission had continued its work on the theme of "Protection of persons in the event of disasters", on which subject the Special Rapporteur's fifth report had introduced three new draft articles. The Commission had then taken note of the five subsequent articles, 5bis and Articles 12 to 15, as provisionally adopted by the Drafting Committee. The Special Rapporteur was considering submitting a sixth report next year on the reduction of disaster risks, including prevention and mitigation of the effects of disasters. Moreover, the Commission had debated "The obligation to extradite or prosecute (*aut dedere aut judicare)"*. A Working Group had been set up with Mr Kriangsak Kittichaisaree in the Chair in order to evaluate progress in the work on this subject and to study various possible options for the Commission's future work. The debate within the Commission had highlighted the doubts on the part of many members as to the need to continue to consider this matter. The Working Group had asked its Chair to prepare a working document, to be examined at the Commission's 65th Session, taking stock of the different perspectives on this subject in the light of the judgment issued by the International Court of Justice on 20 July 2012 in the case of *Questions relating to the Obligation to Prosecute or Extradite* (*Belgium v*. *Senegal*). The Commission had continued to examine the theme "Treaties over time". The Commission had decided to refocus, as from its 65th Session (2013), its work on this subject on the topic "Subsequent agreements and subsequent practice in relation to interpretation of treaties" and to appoint Mr Georg Nolte Special Rapporteur for this subject. The Commission had also continued its work on the subject of "The Most-Favoured-Nation (MFN) Clause". The discussions on this subject had been led by the Chair of the Study Group, Professor McRae, who

[3] *Note of the Secretariat*: these reservations do not appear in document CAHDI (2012) 14.

had proposed an outline final report which would concentrate on laying down guidelines for interpreting MFN clauses in investment agreements, particularly in connection with their application to dispute settlement provisions.

52. In connection with newly launched activities, the Commission had appointed Mr Juan Manuel Gómez-Robledo Special Rapporteur on "Provisional application of treaties". A report on this subject was expected for the next Commission session. A second new subject had been added to the Commission's work programme on the "Formation and evidence of customary international law", for which Sir Michael Wood had been appointed Special Rapporteur. The Commission had invited States to forward information on their practices relating to the formation of customary international law and to the elements which could help identify such law in a given situation. This practice could be reflected in: a) official declarations before legislatures, courts or international organisations; and b) decisions from national, regional or sub-regional courts. Sir Michael Wood invited the delegations to refer in this connection to his preliminary note and declaration recapitulating the debates, which were available on the webpage of the CAHDI website relating to the Conference on "The Judge and International Custom". The Commission had also appointed Ms Concepción Escobar Hernández Special Rapporteur for the theme of "Immunity of State officials from foreign criminal jurisdiction". The Commission had examined the Preliminary Report presented by the Special Rapporteur, detailing a work plan geared to completing the first reading of a series of draft articles by the end of the quinquennium in 2016. The Commission had asked States "to provide information on their national law and practice on the following questions: (a) does the distinction between immunity *ratione personae* and immunity *ratione materiae* result in different legal consequences and, if so, how are they treated differently? (b) what criteria are used in identifying the persons covered by immunity *ratione personae*?". Sir Michael Wood further explained that these questions did not concern immunities enjoyed by diplomats, consular agents, staff of international organisations or persons on special missions, to the extent that such immunities were governed by conventional or customary law regimes which the Commission did not intend to address.

53. Three other subjects included in the Commission's long-term work programme had not been added to its agenda: the protection of the atmosphere, the fair and equitable treatment standard in international investment law, and the protection of the environment in relation to armed conflicts. Sir Michael Wood recalled that regardless of the number of themes being studied by the Commission, proposals for new subjects would always be welcomed.

54. Sir Michael Wood recalled that the "Guide to Practice on Reservations to Treaties" would be debated this year in the Sixth Committee of the General Assembly. In connection with the Commission's proposal concerning "observatories of reservations", he invited the delegations to present the CAHDI's work and experience during the debates for the benefit of all the other UN member States.

55. In conclusion, Sir Michael Wood recalled that the 48th Session of the International Law Seminar had taken place from 2 to 20 July 2012. He encouraged the delegations in future to consider helping to finance the fellowships granted in order to support participants notably from the developing countries. He also mentioned visits by organisations active in the field of public international law, such as the African Union Commission on International Law, the Inter-American Juridical Committee and the Asian-African Legal Consultative Organization (AALCO).

56. The Chair of the CAHDI thanked Sir Michael Wood for his presentation and invited any delegations which so wished to take the floor.

57. The representative of the United States recalled that his country had formulated commentaries on the themes relating to the protection of the environment in relation to armed conflicts and the protection of the atmosphere. He stressed his country's attachment to these issues, as shown by its participation in many treaties on air pollution. The US representative nevertheless mentioned the risk of developing norms in fields which were already regulated and of

transposing existing rules outside the context in which they had been developed, particularly where such rules had been established in treaties. He also recalled the need for the ILC to take account of the on-going high-level multilateral negotiations on such subjects as climate change and mercury.

58. In reply to questions from the Chair, Sir Michael Wood said that the Commission was in any case interested in receiving proposals for new subjects from individual States and from the United Nations General Assembly.

59. In response to a question from the German delegation, Sir Michael Wood pointed out that the final result expected of the Commission's work on the process of formation of customary international law was not so much the preparation of draft articles as the formulation of proposals, possibly accompanied by commentaries, primarily geared to assisting the national courts.

60. Several delegations argued that the theme of "Protection of the atmosphere under international law" did not provide at this stage a useful basis for constructive discussions within the ILC. The Norwegian delegation voiced its support for the ILC's approach to the theme of the "Protection of the environment in relation to armed conflicts", consisting in framing this issue in a productive manner. It requested information to enable States to usefully contribute to the ILC's work, particularly on the subject of the immunities of State representatives. It mentioned in this connection the recent developments in the practice of inter-state relations, raising the question of the scope of the immunity from jurisdiction *ratione personae*. Sir Michael Wood invited States to provide the Commission with any relevant information on their practice in this field. The Swiss delegation expressed the wish that the work of the ILC on immunities would achieve results capable of orienting national judges in this area.

61. The delegation of the Russian Federation voiced its interest in all the progress which could be made by the Commission on the immunities theme. It thanked Sir Michael Wood for the Commission's initiative in examining the question of the formation of customary international law.

62. The Greek delegation mentioned the topical issues being examined by the ILC which it considered particularly suited to the process of gradual development of international law. It mentioned in this regard the protection of the environment in relation to armed conflicts and universal jurisdiction, specifying, as did other delegations, that this latter theme should not be combined with that of "*aut dedere aut judicare"* in the absence of substantive links between the two subjects. It mentioned its country's reservations about the examination of the admittedly topical theme of protection of the atmosphere.

63. Sir Michael Wood pointed out that, within the ILC, it was not always clearly established whether its work fell under progressive development of international law or under codification.

64. In reply to a question from the Chair on the proposed creation of an "observatory to reservations" at UN level, Sir Michael Wood indicated that the original proposal of the members of the Commission to set up a select group of governmental experts had been replaced with the proposed creation of "observatories". He underlined that the modalities for implementing such a proposal within the United Nations had not yet been decided. He stressed the relevance of such a proposal for any regional organisations which might wish to draw on the collective work of the CAHDI on this subject.

65. The delegation of the Netherlands wondered about the criteria used for selecting the themes to be addressed by the ILC. More specifically, it asked about the mechanism used by the Commission to ensure that when selecting themes, it took due account of the competence of the intergovernmental organisations in the standard-setting field. Sir Michael Wood noted in this regard that the procedure followed by the Commission was lengthy and meticulous, providing States with an opportunity for holding exchanges with the Commission, notably in the framework of the Sixth Committee of the General Assembly.

14. Consideration of current issues of international humanitarian law

Intervention by Mr Fausto POCAR, President of the International Institute of Humanitarian Law of San Remo

66. Mr Fausto Pocar presented to the CAHDI the work of the International Institute of Humanitarian Law of San Remo, and more particularly the conclusions of the Institute's 35th annual Round Table on "Private Military and Security Companies (PMSCs)" (San Remo, 6-8 September 2012). The discussions had covered the legal issues arising from the increasing use of PMSCs, including the status of PMSCs and their employees, the links between PMSC employees and mercenary activities, the use of force by PMSCs and their involvement in detention activities. He also stressed that the Round Table had discussed issues of jurisdiction and responsibility on the part of States vis-à-vis the use of PMSCs. Finally, he noted that participants had discussed the activities geared to ensuring that PMSCs complied with international humanitarian law. M. Pocar's statement is reproduced in **Appendix VII** to this report.

67. Several delegations underlined the importance of holding the Institute's round tables which ensured that the different actors (diplomats, military personnel and private companies) could hold productive exchanges of views on topical issues in the field of international humanitarian law. One delegation stressed in particular that the discussions on using PMSCs in the maritime security sector had been very interesting in view of the recent incidents of piracy.

68. The representative of the International Committee of the Red Cross (ICRC) took stock of the implementation of Resolution 1 on "Strengthening legal protection for victims of armed conflicts", adopted at the previous International Conference of the Red Cross and Red Crescent which took place in Geneva from 28 November to 1 December 2011. This resolution invited the ICRC to pursue further research, consultations and discussions in close co-operation with the States and other relevant actors in order to reinforce the law in two fields, namely compliance with international humanitarian law and legal protection for persons deprived of their liberty in relation to armed conflict. In connection with reinforcing compliance with international humanitarian law, he underlined that an informal intergovernmental conference had taken place on 13 July 2012 attended by 71 States and two observers, geared to (1) raising the States' awareness on the difficulties of ensuring respect for international humanitarian law and creating the requisite dynamics for the success of this endeavour, (2) ensuring that all States had the same understanding and knowledge of the problem, and (3) providing Switzerland and the ICRC with guidance in conducting this initiative and identifying the subsequent phases. He underlined that a further informal intergovernmental conference was scheduled for May 2013. Where legal protection for persons deprived of their liberty in relation to armed conflict was concerned, he informed the CAHDI that four regional seminars of governmental experts would take place between November 2012 and the beginning of 2013, primarily geared to deepening the discussions and highlighting the regional perspectives on the specific humanitarian problems deriving from deprivation of liberty in relation to non-international armed conflicts. He invited in this regard delegations to transmit to the ICRC any proposals or suggestions regarding regional consultation processes.

69. The Swiss delegation informed the Committee of the action taken on the 2008 Montreux Document on private military and security companies, which currently had 42 participating States. It underlined that Switzerland was intending to organise a Conference on the Document's 5th anniversary in order to take stock of developments, especially on the issue of its implementation. The Conference, which was scheduled for the end of 2013, would be open to the 42 participating States and any other interested State or actor.

15. Developments concerning the International Criminal Court (ICC)

70. The Chair informed the CAHDI of Guatemala's recent accession to the Rome Statute and the Court's recent judicial activities. She also informed the Committee that on 13 July 2012, the Republic of Mali had submitted a case to the ICC Prosecutor based on Article 14 of the Rome

Statute, and reported on the follow-up to the ICC's verdict in the case of *The Prosecutor v. Thomas Lubanga Dyilo*. The Chair also recalled the recent developments following the submission of an application to the ICC concerning the situation in Libya in accordance with Security Council Resolution 1970 (2011) of 26 February 2011. She pointed out that Ms Fatou Bensouda (Gambia) had taken up her duties as ICC Prosecutor on 15 June 2012, and recalled that the next Assembly of States Parties to the Rome Statute (the 11th) would take place in The Hague from 14 to 22 November 2012.

71. The Austrian delegation, supported on this point by the German delegation, noted that in the event of a situation being referred to the ICC, the States concerned were required to recognise the privileges and immunities enjoyed by the representatives of the Court as laid down in the Agreement on the privileges and immunities of the ICC, whether or not they were Parties to the Rome Statute or the said agreement.

72. The Estonian delegation pointed out that at the High-Level Meeting on the Rule of Law scheduled for 24 September 2012 in New York, its country would undertake to ratify, by the end of 2013, the amendments to the Rome Statute adopted at the Kampala Conference. It also mentioned the High-Level Seminar on the ICC which had been organised by the President of the Assembly of States Parties and convened by the Estonian and Finnish Ministers of Foreign Affairs in Tallinn on 10 and 11 September 2012. The conclusions of the Seminar were intended to provide practical suggestions on the treatment of victims of atrocities.

73. The Latvian delegation informed delegations that the Latvian Ministry of Foreign Affairs would be organising an international conference to mark the ICC's 10th anniversary on a date to be published on the Ministry's official website.

74. The Swedish delegation mentioned a visit to Stockholm by Ms Fatou Bensouda, during which discussions had been held notably on questions of co-operation between States and the ICC, complementarity, compensation for victims and gender justice.

75. The German delegation indicated that on 22 August 2012, the German Government had approved a bill ratifying the amendments to the Rome Statute as adopted at the Kampala Conference. It underlined that the parliamentary procedure for adopting this legislation should be completed by the end of 2012. Furthermore, it informed delegations that an event celebrating the 10th anniversary of the Rome Statute would be held in Nuremberg on 4 and 5 October 2012.

76. Several delegations raised the issue of the violation of the Rome Statute by some States accepting on their territories persons under an international arrest warrant issued by the ICC. They proposed raising the question at the next Assembly of States Parties.

16. Implementation and functioning of other international criminal tribunals (ICTY, ICTR, Sierra Leone, Lebanon, Cambodia)

77. The Chair evoked the entry into force of the International Residual Mechanism for the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), on 1 July 2012 for the ICTR and on 1 July 2013 for the ICTY. She recalled that on 29 February 2012 the UN Secretary General had appointed Justice Theodor Meron (United States) President of the Mechanism for a 4-year terms as from 1 March 2012. Moreover, she underlined that the ICTY was currently examining the latest first-instance trials of defendants who had been arrested after protracted searches, namely Mr Radovan Karadžić, Mr Ratko Mladić and Mr Goran Hadžić. In connection with the Special Court for Sierra Leone, the Chair evoked the judgment issued on 26 April 2012 in the case of *The Prosecutor v. Charles Taylor* sentencing the former Liberian Head of State to 50 years' imprisonment. Lastly, she noted that on 1 March 2012 the mandate of the Special Court for Lebanon had been renewed for a further three-year period.

78. The Portuguese delegation informed the CAHDI that in August 2012 Mile Mrkšić, a former colonel of the Yugoslav People's Army (JNA), had been transferred to Portugal to serve the 20-year prison sentence handed down on him by the ICTY.

17. Topical issues of international law

79. The Belgian delegation evoked the judgment issued on 20 July 2012 by the International Court of Justice in the case of *Questions relating to the obligation to prosecute or extradite* (*Belgium v. Senegal*). It stressed the importance of this decision as it enshrined the obligation on States to combat impunity for the most serious crimes. As part of the obligation on Parties to implement the Court's judgments, Belgium welcomed Senegal's undertaking to organise without delay the trial of Mr Hissène Habré, the former President of the Republic of Chad. The Belgian delegation also pointed out that Belgium was maintaining its proposals for judicial co-operation with Senegal, and reiterated its commitment to help finance the organisation of the said trial. While noting that the Court had not pronounced on the customary value of the obligation to extradite or prosecute, the Belgian delegation pointed out that it would be interesting to read the conclusions which the ICC Working Group would draw from its in-depth analysis of this judgment.

80. The Danish delegation informed the CAHDI of the 11th ordinary meeting of the Working Group on legal questions of the International Contact Group on Piracy off the Coast of Somalia (CGPCS) in Copenhagen on 17 and 18 September 2012. It noted that the meeting had shown that the challenges facing States included notably the adoption of domestic legislation to facilitate the prosecution of the offence of conspiracy to commit acts of piracy, and the implementation of the decision to increase the number of prosecutions in the region, in the absence of adequate prison capacity. The Danish delegation also mentioned the new items on the CGPCS agenda, such as under-age pirates and the question whether their recruitment could give rise to aggravating circumstances. It announced that the CGPCS was considering adopting guidelines on these matters at its next meeting in Nairobi in 2013. The delegation also mentioned the adoption of guidelines by the International Maritime Organisation (IMO) on the use of force by Privately Contracted Armed Security Personnel (PCASP). The outstanding questions included the issue of piracy suspects detained by the PCASP and "innocent passage". With reference to the High-Level Meeting on the Rule of Law scheduled for 24 September 2012 in New York, the Danish delegation urged delegations to work constructively towards adopting a strong, future-oriented final declaration. It also recalled the holding in New York on 21 September 2012 of a ministerial meeting convened by the Danish and other governments on the responsibility to protect ("R2P"), which would concentrate on the prevention aspects of such responsibility and be followed by a second meeting of R2P national focal points.

81. The Albanian delegation referred to the round table held in Strasbourg at the initiative of the Albanian Chairmanship of the Committee of Ministers of the Council of Europe on the state of signatures and ratifications of three Council of Europe conventions, i.e. the *Convention on Action against Trafficking in Human Beings* (CETS No. 197), the *Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* (CETS No. 201), and the *Convention on Preventing and Combating Violence against Women and Domestic Violence* (CETS No. 210). It invited the delegations to ascertain the state of signature and/or ratification of each of these conventions by their countries and to provide information on the prospects of a signature and/or ratification, should they not yet have done so.

82. The delegation of the Netherlands informed the CAHDI of a project which its country was conducting in co-operation with Belgium and Slovenia, geared to reinforcing the complementarity principle under the Rome Statute. It referred to a meeting of experts and practitioners held in The Hague on 22 November 2011, which had concluded that the existing legal framework for international co-operation in the criminal-law field, especially in connection with investigations into and prosecution of crimes of genocide, war crimes and crimes against humanity, was insufficient and should consequently be improved. One option mentioned at the meeting was to negotiate a multilateral instrument on international co-operation based on the provisions of the latest treaties in

the field of mutual judicial assistance and extradition. The Netherlands delegation distributed to CAHDI members a document entitled "*A Legal Gap? Getting the evidence where it can be found: Investigating and prosecuting international crimes"*.

83. The US representative informed the Committee of the latest developments in the mechanism responsible for preventing mass atrocities and acts of genocide (the "Atrocity Prevention Board") presented at the 42nd meeting of the CAHDI. It also mentioned the measures subsequently adopted to improve the identification of and response to the threat of mass atrocities. It mentioned further the adoption by the US Government of targeted sanctions such as refusal of entry by means of visa bans, particularly for perpetrators of the most serious human rights violations. Furthermore, the US representative informed delegations of his statement at the US Cyber Command Inter-Agency Legal Conference on the applicability of international humanitarian law norms to "cyber-conflicts".

IV. OTHER

18. Election of the Chair and Vice-Chair of the CAHDI

84. In accordance with *Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods*, the CAHDI elected Ms Liesbeth Lijnzaad (Netherlands) and Mr Paul Rietjens (Belgium), respectively as Chair and Vice-Chair of the Committee for one year, as of 1 January 2013.

19. Date, venue and agenda of the 45th meeting of the CAHDI

85. The CAHDI decided to hold its 45th meeting in Strasbourg on 25-26 March 2013. The Committee instructed the Secretariat, in liaison with the Chair of the Committee, to prepare in due course the provisional agenda of this meeting.

20. Other business

86. The Chair presented to the CAHDI the request for observer status presented by the International Institute of Humanitarian Law at the 43rd meeting of the Committee.

87. The CAHDI decided to inform the Secretary General that it considered it inappropriate to respond positively to the request for observer status within the CAHDI submitted by the Institute and underlined, however, that it was appropriate to pursue contacts with this Institute and to invite it to present to the CAHDI its reflections under the item of the agenda devoted to International Humanitarian Law when deemed useful for the Committee's work.

APPENDICES

APPENDIX I

LIST OF PARTICIPANTS / LISTE DES PARTICIPANTS

Please contact the Secretariat : cahdi@coe.int

APPENDIX II

AGENDA

I. INTRODUCTION

1. Opening of the meeting by the Chair, Ms Edwige Belliard

2. Adoption of the agenda

3. Adoption of the report of the 43rd meeting

4. Statement by the Director of Legal Advice and Public International Law, Mr Manuel Lezertua

II. ONGOING ACTIVITIES OF THE CAHDI

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

6. Immunities of States and international organisations

a. State practice and case-law

- recent national developments and updates of the website entries
- 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

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

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

a. Questions dealt with by offices of the Legal Adviser which are of wider interest and related to the drafting of implementing legislation of international law as well as foreign litigation, peaceful settlements of disputes, and other questions of relevance to the Legal Adviser

b. Updates of the website entries

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

9. European Union's accession to the European Convention of Human Rights (ECHR)

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

11. Peaceful settlement of disputes

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

- List of outstanding reservations and declarations to international treaties

III. GENERAL ISSUES OF PUBLIC INTERNATIONAL LAW

13. The work of the International Law Commission (ILC) and of the Sixth Committee

- Presentation of the work of the International Law Commission (ILC) and of the Sixth Committee by Sir Michael Wood, Member of the ILC

- Exchange of views between the ILC, the Chair of the CAHDI and the Director of DLAPIL, Geneva, 4 July 2012

14. Consideration of current issues of international humanitarian law

- Intervention by Mr Fausto POCAR, President of the International Institute of Humanitarian Law

15. Developments concerning the International Criminal Court (ICC)

16. Implementation and functioning of other international criminal tribunals (ICTY, ICTR, Sierra Leone, Lebanon, Cambodia)

17. Topical issues of international law

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18. Election of the Chair and Vice-Chair of the CAHDI

19. Date, venue and agenda of the 45th meeting of the CAHDI

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APPENDIX III

STATEMENT BY MR MANUEL LEZERTUA, JURISCONSULT, DIRECTOR OF LEGAL ADVICE AND PUBLIC INTERNATIONAL LAW, COUNCIL OF EUROPE, ON THE OCCASION OF THE 44th MEETING OF THE COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

French only

Paris, 19 septembre 2012

Madame la Présidente,
Mesdames et Messieurs les membres du CAHDI,

C'est avec grand plaisir que je vous retrouve aujourd'hui à Paris, à l'occasion de la 44ème réunion du CAHDI. Cette réunion marque la fin de la Présidence française et c'est pour cette raison que j'aimerais commencer par remercier chaleureusement la Présidente.

Chère Edwige,

Les deux années qui viennent de s'écouler ont été très riches pour le CAHDI. Vous avez mené les débats avec dynamisme et enthousiasme et permis au CAHDI d'asseoir encore davantage sa position de Comité indispensable au travail des Délégués des Ministres. Et pour cela, je vous exprime toute ma reconnaissance.

Ce fut également un réel plaisir pour le Secrétariat du CAHDI de travailler avec votre équipe. Je pense notamment à Claude CHAVANCE, à Céline FOLSCHÉ et également à votre nouvelle équipe. Au nom de tout le Secrétariat du CAHDI, j'aimerais donc vous remercier ainsi que vos collègues pour ces deux années de coopération.

Si ces deux années de présidence française ont été riches en activités, les derniers mois l'ont également été pour le Conseil de l'Europe. J'aimerais donc saisir cette occasion pour vous faire part de développements importants survenus depuis la dernière réunion du CAHDI et plus particulièrement des évènements qui touchent au droit international public.

1. Fonctionnement et réforme de l'Organisation

Tout d'abord, il me semble important de vous faire part brièvement des dernières actualités relatives au fonctionnement du Conseil de l'Europe et plus particulièrement des priorités des deux présidences successives du Comité des Ministres, qui suivent depuis l'année dernière une logique de continuité.

L'Albanie, qui préside le Comité des Ministres depuis le mois de mai, s'efforce de maintenir cette logique de continuité et a repris à son compte une partie des priorités du Royaume-Uni dont je vous avais fait part lors de notre dernière rencontre.

C'est la raison pour laquelle la question de la réforme politique de l'Organisation reste au cœur de l'action du Comité des Ministres.

L'un des thèmes phare de cette politique de réforme est bien évidemment la question du passage en revue des Conventions. A cet égard, je tiens à vous informer que les Observations que vous aviez adoptées lors de votre dernière réunion et qui ont été prises en compte dans le rapport du Secrétaire général ont été largement saluées par les Délégués des Ministres lorsque ce rapport leur a été présenté en juin dernier.

À présent, ce rapport est examiné par le Groupe de rapporteur du Conseil de l'Europe sur la coopération juridique. Le Groupe a décidé le 6 septembre dernier d'élaborer une feuille de route afin de poursuivre les discussions en son sein sur ce rapport. En effet, il a été retenu lors de cette réunion que les avis diffèrent sur les propositions du Secrétaire général qu'il convient d'examiner en premier lieu. De ce fait, le Groupe décidera de l'ordre des priorités à fixer entre les diverses mesures proposées lors de sa prochaine réunion le 9 octobre.

Enfin, pour terminer sur ce point relatif au fonctionnement du Conseil de l'Europe, j'aimerais vous informer que Mme Gabriella Battaina-Dragoni a été élue nouvelle Secrétaire générale adjointe du Conseil de l'Europe le 26 juin 2012 par l'Assemblée parlementaire du Conseil de l'Europe. Elle succède à Mme Maud de Boer-Buquicchio, qui occupait ces fonctions depuis juin 2002.

2. Adhésion de l'Union européenne à la Convention européenne des droits de l'homme

J'aimerais à présent vous faire part des derniers développements s'agissant d'un sujet qui est également au cœur des priorités de l'Organisation. Il s'agit de la question de l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme.

Comme vous le savez, un Groupe de travail informel composé de 14 experts d'États membres du Conseil de l'Europe (7 d'États membres de l'UE et 7 d'États non membres de l'UE) a été chargé de discuter et d'élaborer en collaboration avec la Commission européenne, les instruments juridiques pour l'adhésion. Ce groupe a tenu 8 réunions avec la Commission européenne entre juillet 2010 et juin 2011. A l'issue de la dernière réunion de juin 2011, le Groupe a transmis au Comité directeur pour les droits de l'Homme (CDDH) :

- le projet d'Accord d'adhésion ;
- le projet d'amendement aux Règles du Comité des Ministres pour la surveillance de l'exécution des arrêts et des termes des règlements amiables ; et
- le projet d'accord explicatif de l'Accord d'adhésion.

Lors de sa réunion extraordinaire du 12 au 14 octobre 2011, le CDDH a décidé de transmettre au Comité des Ministres un rapport sur l'état des discussions, avec les projets d'instruments, pour examen et orientations complémentaires.

Le Comité des Ministres a ainsi décidé le 13 juin 2012 de charger le CDDH de poursuivre les négociations sans délai avec l'Union européenne dans le cadre d'un groupe *ad hoc* 47+1 (Etats membres du Conseil de l'Europe + Commission européenne) afin de finaliser les instruments juridiques fixant les modalités d'adhésion. S'agissant de la composition du Groupe, le CDDH a convenu d'appliquer la même solution adoptée dans l'ancien groupe CDDH-UE et de limiter la présence des observateurs aux représentants du Greffe de la Cour européenne des droits de l'Homme et du CAHDI. Vous avez ainsi décidé de nommer M. Erik WENNERSTRÖM, membre de la délégation suédoise au CAHDI, en tant qu'observateur auprès de ce Groupe.

M. WENNERTSTRÖM, qui était déjà observateur du CAHDI auprès du CDDH-UE, participera ainsi aux prochaines réunions de ce Groupe et c'est d'ailleurs pour cette raison qu'il n'est pas parmi nous aujourd'hui. En effet, la deuxième réunion se tient actuellement à Strasbourg, la première s'étant déroulée au mois de juin et ayant porté sur les aspects procéduraux liés à l'organisation des réunions futures.

M. WENNERSTRÖM, bien que ne pouvant pas être présent parmi nous aujourd'hui, a néanmoins indiqué vouloir vous faire parvenir une note faisant état des discussions et qui sera présentée demain, lors des débats sur cette question.

3. Actualités juridiques – Bureau des traités

Je tiens à présent à vous faire part des avancements relatifs à certaines conventions récentes ou

projets de conventions du Conseil de l'Europe mentionnés lors de notre dernière rencontre.

a. La Convention « Medicrime »

Sachez tout d'abord que s'agissant de la Convention dite « Medicrime » (qui compte à ce jour 1 ratification et 16 signatures), le Conseil de l'Europe et l'Agence danoise du médicament ont organisé le 16 mai dernier une Conférence sous la Présidence danoise du Conseil de l'Union européenne visant à créer un mouvement de sensibilisation sur l'importance de signer et de ratifier cette convention, qui entrera en vigueur suite à 5 ratifications, incluant au moins 3 Etats membres du Conseil de l'Europe. Une stratégie a été mise en place en vue de la mise en œuvre des deux instruments complémentaires que sont la Convention « Medicrime » du Conseil de l'Europe et la Directive de l'Union européenne sur les médicaments falsifiés.

Par ailleurs, je tiens à vous informer que le Conseil de l'Europe a présenté cette Convention le 21 juin dernier, lors d'une conférence organisée par la Fondation Chirac, et l'Institut de Recherche Anti-Contrefaçon de Médicaments (IRACM) en partenariat avec le Ministère français des Affaires étrangères.

b. Protocoles additionnels à la Convention européenne d'extradition

Sachez également que le Comité des Ministres a adopté le Quatrième protocole additionnel à la Convention européenne d'extradition (STE n° 24) le 13 juin 2012. Ce protocole modifie et complète un certain nombre de dispositions de la Convention afin de l'adapter aux besoins modernes. En effet, il est apparu nécessaire de moderniser cette Convention qui date de 1957 et qui a un impact direct sur les droits et libertés des individus. L'objectif a entre autre été de renforcer la coopération internationale dans ce domaine.

Les dispositions de ce Protocole additionnel concernent, en particulier, les questions :

- de prescription,
- de requêtes et pièces à l'appui,
- de la règle de la spécialité,
- du transit,
- de la ré-extradition à un Etat tiers et
- des voies et moyens de communication.

Il sera ouvert à la signature demain, le 20 septembre 2012, à l'occasion de la 31ème Conférence du Conseil de l'Europe des Ministres de la Justice qui se tiendra à Vienne (Autriche) les 19-21 septembre 2012.

Sachez aussi que le Troisième Protocole additionnel à la Convention européenne d'extradition est entré en vigueur le 1er mai 2012. Ce protocole a été rédigé dans le but de remédier au problème suivant : alors même que dans un grand nombre de cas, les personnes concernées consentent à leur remise en vue de leur extradition, la procédure selon la Convention demeure longue et peut durer plusieurs mois.

Le Protocole s'efforce ainsi de simplifier et d'accélérer la procédure d'extradition lorsque l'individu recherché consent à l'extradition.

4. Réunions et conférences de haut niveau

Avant ma conclusion, je souhaiterais mentionner très brièvement la célébration d'une série de réunions et conférences de haut niveau organisées au sein du Conseil de l'Europe cette année.

Tout d'abord, une Conférence de haut niveau sur l'avenir de la Cour européenne des droits de l'homme s'est tenue à Brighton les 18 et 20 avril 2012 à l'initiative de la présidence britannique du Comité des Ministres. Elle a permis de faire le bilan des progrès accomplis depuis les Conférences

d'Izmir et d'Interlaken et a notamment proposé :

- une réduction du délai de 6 mois à 4 mois pour accepter les requêtes individuelles définitivement complétées ;
- d'introduire dans la Convention un pouvoir supplémentaire de la Cour – que les Etats pourraient accepter à titre exceptionnel – de rendre sur demande des avis consultatifs sur l'interprétation de la Convention dans le contexte d'une affaire particulière au niveau national.

Enfin, comme je viens de l'annoncer, la 31ème Conférence du Conseil de l'Europe des Ministres de la Justice se tient actuellement à Vienne. Elle a pour thème *« Les réponses de la justice à la violence urbaine »* et traite notamment des questions relatives :

- aux groupes organisés et leurs nouveaux moyens de communiquer ; et
- aux mineurs, en tant qu'auteurs et victimes

5. Coopération avec d'autres organes ou organisations internationales

Pour finir, j'aimerais réitérer l'importance que nous attachons à la coopération avec d'autres organes ou organisations internationales.

Tout d'abord avec la Commission du droit international. Mme Belliard et moi-moi avons en effet été invités à avoir un échange de vues avec ses membres le 4 juillet dernier, un échange de vues très fructueux dont je vous ferai part sous le point 13 de l'ordre du jour. Nous aurons également le plaisir d'accueillir Sir Michael WOOD à cet effet, qui a également accepté d'être le modérateur de la Conférence sur « Le juge et la coutume internationale », un thème qui est indéniablement d'un intérêt pour nos deux instances.

Sachez également qu'en qualité d'observateur auprès de l'Assemblée générale des Nations Unies, le Conseil de l'Europe contribue régulièrement aux activités des Nations Unies. Le dernier exemple en date sont les Observations formulées par la Direction du Conseil juridique et du droit international public (DLAPIL) sur l'étendue et l'application de la compétence universelle en matière criminelle suite à l'invitation de l'Assemblée générale. Tout comme nous l'avions fait par le passé s'agissant de la contribution de la DLAPIL sur le thème de la responsabilité des organisations internationales, nous avons estimé nécessaire de vous consulter sur ce point. Nous vous remercions pour les commentaires qui nous ont été parvenus et je ne manquerai pas de vous informer en temps utile des suites qui auront été données à cette contribution.

Enfin, sachez que le Conseil de l'Europe poursuit bien évidemment sa coopération avec l'Union européenne sur des questions d'intérêt commun et notamment sur la question de la politique de voisinage, domaine dans lequel le Conseil de l'Europe tient un rôle de référence pour l'Union.

J'en ai terminé avec ce tour d'horizon des activités récentes de l'Organisation. Il ne me reste plus qu'à vous souhaiter une très agréable réunion et vous rappeler que le Secrétariat se tient toujours à votre disposition pour toute information supplémentaire.

Je vous remercie pour votre attention.

APPENDIX IV

OBSERVATIONS ON THE SCOPE AND APPLICATION OF THE UNIVERSAL CRIMINAL JURISDICTION IN THE WORK OF THE COUNCIL OF EUROPE

I. The Council of Europe's Conventions

Ten Conventions of the Council of Europe[1] contain provisions calling upon States to ensure that their internal law establishes the jurisdiction of their criminal courts to judge a given conduct, but none of them foresees the establishment of the so-called "universal' criminal jurisdiction. Notwithstanding the foregoing, the Council of Europe Conventions do not limit the possibility for the internal law of States Party to establish other types of jurisdiction[2] than that/those contemplated in the Conventions. The latter do not therefore prevent States Party whose internal law do so from making use of the so-called "universal" jurisdiction.

The explanatory memoranda of the Conventions containing provisions of this nature, but also of other Conventions, provide additional information in this respect and at times include direct references to the concept of "universal jurisdiction".[3] The explanatory memoranda are available on the Internet website of the Treaty Office of the Council of Europe: http://conventions.coe.int.

II. The work of the Committee of Ministers

The Committee of Ministers recently adopted a reply to Recommendation 1953 (2011) of the Parliamentary Assembly of the Council of Europe entitled "The obligation of member and observer states of the Council of Europe to co-operate in the prosecution of war crimes". Its reply makes reference to the issue of the "universal jurisdiction".

Reply of the Committee of Ministers to the Recommendation 1953 (2011) "The obligation of member and observer states of the Council of Europe to co-operate in the prosecution of war crimes" (Extracts)

Adopted at the 1145th meeting of the Ministers' Deputies (13 June 2012)

"(...) 5. With respect to the Assembly's recommendation that the Committee of Ministers instruct the European Committee on Crime Problems and the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters to assess – in transparent consultation with civil society – the application of the *aut dedere aut iudicare* principle (extradite or prosecute) and arrangements to transpose into domestic law the principle of universal jurisdiction over war crimes and crimes against humanity, the Committee of Ministers recalls that the principle "extradite or prosecute" is already enshrined in the European Convention on Extradition. According to Article 6 paragraph 2 of the Convention, a requested Party that refuses to extradite a national, shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken.

[1] European Convention on the Transfer of Proceedings in Criminal Matters (Council of Europe Treaty Series No. 73), Part II; European Convention on the Suppression of Terrorism (CETS No. 90), Article 6.1; Convention on the Protection of Environment through Criminal Law (CETS No. 172) Articles 5.1 and 5.2; Criminal Law Convention on Corruption (CETS No. 173) Article 17.1; Convention on Cybercrime (CETS No. 185) Article 22.1; Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) Articles 14.1 and 14.2; Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) Articles 31.1 and 31.2; Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201) Articles 25.1 to 25.6; Council of Europe Convention on preventing and combating violence against women and domestic violence (CETS No. 210) Articles 44.1 to 44.4; Council of Europe Convention on the counterfeiting of medical products and similar crimes involving threats to public health (CETS No. 211) Articles 10.1 and 10.2.

[2] CETS No. 73, Art. 5; CETS No. 90, Art. 6.2; CETS No. 172, Art. 5.3; CETS No. 173, Art. 17.4; CETS No. 185, Art. 22.4; CETS No. 196, Art. 14.4; CETS No. 197, Art. 31.5; CETS No. 201, Art. 25.9; CETS No. 210, Art. 44.7; CETS No. 211, Art. 10.6.

[3] See the explanatory memoranda of Conventions CETS No. 172 and 173, as well as that of the European Convention on the International Validity of Criminal Judgments (CETS No. 70).

6. The Committee of Ministers furthermore notes that several member States of the Council of Europe have acknowledged the principle of universal jurisdiction. However, there is no international consensus on the definition and scope of this principle, as the exercise of universal jurisdiction is in practice often subject to legal limitations defined in national legislation. Considerable challenges therefore remain for domestic legal systems to ensure the exercise of universal jurisdiction efficiently and effectively.

7. The Committee of Ministers therefore considers that the Council of Europe could reinforce the application of the principle of *aut dedere aut judicare* as a means of prosecuting war crimes effectively in cases where universal jurisdiction cannot be exercised. It also encourages enhancing co-operation between the member and observer States. The Committee considers that the standard-setting work in progress on the subject is already addressing the criminal law and criminal procedural law questions which arise in relation to the prosecution of war crimes.(…)"

III. The case-law of the European Court of Human Rights

The jurisdiction of the European Court of Human Rights extends "to all matters concerning the interpretation and application of the [European] Convention [on Human Rights] (hereafter ECHR) and the protocols thereto"[4] which are referred to it. Accordingly, the Court is not in a position to examine *in abstracto* the question of "universal jurisdiction".

The Court can only therefore verify the application of "universal jurisdiction" by the authorities of a State Party to the Convention in relation to the examination in a concrete case of the conformity of such an application with the rights and freedoms guaranteed by the Convention and the protocols thereto. The Court has for instance been called upon to conduct such a review in the cases *Jorgic v. Germany*[5] and *Ould Dah v. France*,[6] respectively in light of the provisions of Article 6 of the Convention which guarantees the right to a fair trial and the provisions of Article 7 of the Convention which guarantees the principle that offences and penalties must be defined by law.

Judgment in the case *Jorgic v. Germany* (Extracts)

" (…) **THE FACTS**

(…) 7. In 1969 the applicant, a national of Bosnia and Herzegovina of Serb origin, entered Germany, where he legally resided until the beginning of 1992. He then returned to Kostajnica, which forms part of the city of Doboj in Bosnia, where he was born.

8. On 16 December 1995 the applicant was arrested when entering Germany and placed in pre-trial detention on the ground that he was strongly suspected of having committed acts of genocide.

(…) **THE LAW**

55. The applicant complained that his conviction for genocide by the Düsseldorf Court of Appeal, as upheld by the Federal Court of Justice and the Federal Constitutional Court, which he alleged had no jurisdiction over his case, and his ensuing detention amounted to a violation of Article 5 § 1 (a) and Article 6 § 1 of the Convention (…)

64. The Court finds that the case primarily falls to be examined under Article 6 § 1 of the Convention under the head of whether the applicant was heard by a "tribunal established by law". It reiterates that this expression reflects the principle of the rule of law, which is inherent in the system of protection established by the Convention and its Protocols. "Law", within the meaning of Article 6 § 1, comprises in particular the legislation on the establishment and competence of judicial organs (see, inter alia, Lavents v. Latvia, no. 58442/00, § 114, 28 November 2002). Accordingly, if a tribunal does not have jurisdiction to try a defendant in accordance with the provisions applicable under domestic law, it is not "established by law" within the

[4] Article 32 ECHR
[5] ECtHR, *Jorgic v. Germany*, No. 74613/01, judgment of 12 July 2007.
[6] ECtHR, *Ould Dah v. France*, No. 13113/03, decision on admissibility of 17 March 2009.

meaning of Article 6 § 1 (compare Coëme and Others v. Belgium, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, §§ 99 and 107-08, ECHR 2000-VII).

65. The Court further reiterates that, in principle, a violation of the said domestic legal provisions on the establishment and competence of judicial organs by a tribunal gives rise to a violation of Article 6 § 1. The Court is therefore competent to examine whether the national law has been complied with in this respect. However, having regard to the general principle according to which it is in the first place for the national courts themselves to interpret the provisions of domestic law, the Court finds that it may not question their interpretation unless there has been a flagrant violation of domestic law (see, mutatis mutandis, Coëme and Others, cited above, § 98 in fine, and Lavents, cited above, § 114). In this respect the Court also reiterates that Article 6 does not grant the defendant a right to choose the jurisdiction of a court. The Court's task is therefore limited to examining whether reasonable grounds existed for the authorities to establish jurisdiction (see, inter alia, G. v. Switzerland, no. 16875/90, Commission decision of 10 October 1990, unreported, and Kübli v. Switzerland, no. 17495/90, Commission decision of 2 December 1992, unreported).

(…) 66. The Court notes that the German courts based their jurisdiction on Article 6 no. 1 of the Criminal Code, taken in conjunction with Article 220a of that Code (in their versions then in force). These provisions provided that German criminal law was applicable and that, consequently, German courts had jurisdiction to try persons charged with genocide committed abroad, regardless of the defendant's and the victims' nationalities. The domestic courts had therefore established jurisdiction in accordance with the clear wording of the pertinent provisions of the Criminal Code.

67. In deciding whether the German courts had jurisdiction under the material provisions of domestic law, the Court must further ascertain whether the domestic courts' decision that they had jurisdiction over the applicant's case was in compliance with the provisions of public international law applicable in Germany. It notes that the national courts found that the public international law principle of universal jurisdiction, which was codified in Article 6 no. 1 of the Criminal Code, established their jurisdiction while complying with the public international law duty of non-intervention. In their view, their competence under the principle of universal jurisdiction was not excluded by the wording of Article VI of the Genocide Convention, as that Article was to be understood as establishing a duty for the courts named therein to try persons suspected of genocide, while not prohibiting the prosecution of genocide by other national courts.

68. In determining whether the domestic courts' interpretation of the applicable rules and provisions of public international law on jurisdiction was reasonable, the Court is in particular required to examine their interpretation of Article VI of the Genocide Convention. It observes, as was also noted by the domestic courts (see, in particular, paragraph 20 above), that the Contracting Parties to the Genocide Convention, despite proposals in earlier drafts to that effect, had not agreed to codify the principle of universal jurisdiction over genocide for the domestic courts of all Contracting States in that Article (compare paragraphs 20 and 54 above). However, pursuant to Article I of the Genocide Convention, the Contracting Parties were under an erga omnes obligation to prevent and punish genocide, the prohibition of which forms part of the jus cogens. In view of this, the national courts' reasoning that the purpose of the Genocide Convention, as expressed notably in that Article, did not exclude jurisdiction for the punishment of genocide by States whose laws establish extraterritoriality in this respect must be considered as reasonable (and indeed convincing). Having thus reached a reasonable and unequivocal interpretation of Article VI of the Genocide Convention in accordance with the aim of that Convention, there was no need, in interpreting the said Convention, to have recourse to the preparatory documents, which play only a subsidiary role in the interpretation of public international law (see Articles 31 § 1 and 32 of the Vienna Convention on the Law of Treaties of 23 May 1969).

69. The Court observes in this connection that the German courts' interpretation of Article VI of the Genocide Convention in the light of Article I of that Convention and their establishment of jurisdiction to try the applicant on charges of genocide is widely confirmed by the statutory provisions and case-law of numerous other Contracting States to the Convention (for the Protection of Human Rights and Fundamental Freedoms) and by the Statute and case-law of the ICTY. It notes, in particular, that the Spanish Audiencia Nacional has interpreted Article VI of the Genocide Convention in exactly the same way as the German courts (see paragraph 54 above). Furthermore, Article 9 § 1 of the ICTY Statute confirms the German courts' view, providing for concurrent jurisdiction of the ICTY and national courts, without any restriction to domestic courts of particular countries. Indeed, the principle of universal jurisdiction for genocide has been expressly acknowledged by the ICTY (see paragraphs 50-51 above) and numerous Convention States authorise the prosecution of genocide in accordance with that principle, or at least where, as in the applicant's case, additional conditions – such as those required under the representation principle – are met (see paragraphs 52-53 above).

70. The Court concludes that the German courts' interpretation of the applicable provisions and rules of public international law, in the light of which the provisions of the Criminal Code had to be construed, was not arbitrary. They therefore had reasonable grounds for establishing their jurisdiction to try the applicant on charges of genocide.

71. It follows that the applicant's case was heard by a tribunal established by law within the meaning of Article 6 § 1 of the Convention. There has therefore been no violation of that provision.

72. Having regard to the above finding under Article 6 § 1, namely, that the German courts had reasonably assumed jurisdiction to try the applicant on charges of genocide, the Court concludes that the applicant was also lawfully detained after conviction "by a competent court" within the meaning of Article 5 § 1 (a) of the Convention. Accordingly, there has been no violation of that Article either. (…)"

Decision in the case *Ould Dah v. France*

"(…) **THE FACTS**

The applicant, Mr Ely Ould Dah, is a Mauritanian national, who was born in 1962. (…).

A. The circumstances of the case

(…) On 8 June 1999 the International Federation for Human Rights (Féderation Internationale des Ligues des Droits de l'Homme) and the Human Rights League (Ligue des droits de l'homme) lodged a criminal complaint against the applicant, together with an application to join the proceedings as civil parties, for acts of torture allegedly committed by him in Mauritania in 1990 and 1991. These criminal proceedings were based on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations on 10 December 1984, which was ratified by France and came into force on 26 June 1987.

(…) On 1 July 2005 the Assize Court delivered two judgments. In the first one it sentenced the applicant to ten years' imprisonment for intentionally subjecting certain persons to acts of torture and barbarity and, in addition, causing such acts to be committed against other detainees by abuse of his official position or giving instructions to servicemen to commit such acts. The Assize Court referred, inter alia, to Articles 303 and 309 of the former Criminal Code, Article 222-1 of the Criminal Code, and to the New York Convention of 10 December 1984. In the second judgment it awarded damages to the various civil parties. (…)

COMPLAINTS

Relying on Article 7 of the Convention, the applicant complained that he had been prosecuted and convicted in France for offences committed in Mauritania in 1990 and 1991, whereas he could not have foreseen that French law would prevail over Mauritanian law; that French law did not classify torture as a separate offence at the material time; and that the provisions of the new Criminal Code had been applied to him retrospectively.

THE LAW

The applicant complained that he had been prosecuted and convicted by the French courts. He relied on Article 7 of the Convention (…)

The Court (…) notes that the applicant did not dispute the jurisdiction of the French courts, which is a question that does not fall within the scope of Article 7 of the Convention, but complained that they applied French law rather than Mauritanian law, in conditions that contravened the requirements of Article 7.

The Court observes that in its judgment Achour v. France it held that "the High Contracting Parties [are free] to determine their own criminal policy, which is not in principle a matter for it to comment on" and that "a State's choice of a particular criminal justice system is in principle outside the scope of the supervision it carries out at European level, provided that the system chosen does not contravene the principles set forth in the Convention" (see Achour v. France [GC], no. 67335/01, §§ 44 and 51 respectively, ECHR 2006-IV). (…)

Article 7 of the Convention embodies, in general terms, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and prohibits in particular the retrospective application of the criminal law where it is to an accused's disadvantage (see Kokkinakis v. Greece, judgment of 25 May 1993, Series A no. 260-A, § 52). (…)

The Court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision (see Coëme and Others v. Belgium, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII, and Achour, cited above, § 43). (…)

In the present case the Court notes that the French courts enjoy, in certain cases, universal jurisdiction, the principle of which is laid down in Article 689-1 of the Code of Criminal Procedure. They may thus try the perpetrator of an offence regardless of his of her nationality or that of the victim and the place of the offence, subject to two conditions: the perpetrator must be on French territory and must be tried in application of certain international conventions.

The Court notes that these two conditions were met in the present case. Firstly, the applicant – an officer in the Mauritanian army and a Mauritanian national – was prosecuted in France and arrested when he was in France in 1999 and ultimately convicted in absentia on 1 July 2005 for having committed acts of torture and barbarity in Mauritania in 1990 and 1991. Secondly, the Court notes that at the material time the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations on 10 December 1984, was already in force and had been since 26 June 1987, including in France, which had previously incorporated that Convention into domestic law by Law no. 85-1407 of 30 December 1985, inserting a new Article 689-2 into the Code of Criminal Procedure to that end.

Furthermore, the prohibition of torture occupies a prominent place in all international instruments on the protection of human rights, such as the Universal Declaration of Human Rights, or the African Charter on Human and Peoples' Rights which is of particular applicability on the continent from which the applicant originates. Article 3 of the Convention also prohibits in absolute terms torture or inhuman or degrading treatment. It enshrines one of the basic values of democratic societies, and no derogation from it is permissible even in the event of a public emergency threatening the life of the nation (see Aksoy v. Turkey, of 18 December 1996, Reports 1996-VI, § 62; Assenov and Others v. Bulgaria, judgment of 28 October 1998, Reports 1998-VIII, § 93; and Selmouni v. France [GC], no. 25803/94, § 95, ECHR 1999-V).

The Court considers, concurring with the case-law of the ICTY, that the prohibition of torture has attained the status of a peremptory norm or jus cogens (see Al-Adsani v. the United Kingdom, 21 November 2001, § 60, Reports 2001-XI). Whilst it has accepted that States may nonetheless claim immunity in respect of civil claims for damages for torture allegedly committed outside the forum State (ibid., § 66), the present case does not concern the question of a State's immunity in respect of a civil claim by a victim of torture, but the criminal liability of an individual for alleged acts of torture (see, conversely, Al-Adsani, § 61).

Indeed, in the Court's view, the absolute necessity of prohibiting torture and prosecuting anyone who violates that universal rule, and the exercise by a signatory State of the universal jurisdiction provided for in the Convention against Torture, would be deprived of their very essence if States could exercise only their jurisdictional competence and not apply their legislation. There is no doubt that were the law of the State

exercising its universal jurisdiction to be deemed inapplicable in favour of decisions or special Acts passed by the State of the place in which the offence was committed, in an effort to protect its own citizens or, where applicable, under the direct or indirect influence of the perpetrators of such an offence with a view to exonerating them, this would have the effect of paralysing any exercise of universal jurisdiction and defeat the aim pursued by the Convention of 10 December 1984. Like the United Nations Human Rights Committee and the ICTY, the Court considers that an amnesty is generally incompatible with the duty incumbent on the States to investigate such acts.

It has to be said that in the present case the Mauritanian amnesty law was enacted not after the applicant had been tried and convicted, but specifically with a view to preventing him from being prosecuted. Admittedly, the possibility of a conflict arising between, on the one hand, the need to prosecute criminals and, on the other hand, a country's determination to promote reconciliation in society cannot generally speaking be ruled out. In any event, no reconciliation process of this type has been put in place in Mauritania. However, as the Court has already observed, the prohibition of torture occupies a prominent place in all international instruments relating to the protection of human rights and enshrines one of the basic values of democratic societies. The obligation to prosecute criminals should not therefore be undermined by granting impunity to the perpetrator in the form of an amnesty law that may be considered contrary to international law. In addition, the Court notes that international law does not preclude a person who has benefited from an amnesty before being tried in his or her originating State from being tried by another State, as can be seen for example from Article 17 of the Statute of the International Criminal Court, which does not list this situation among the grounds for dismissing a case as inadmissible.

Lastly, it can reasonably be concluded (as did the Nîmes Court of Appeal) from Articles 4 and 7, read together, of the Convention against Torture, which provide for an obligation on States to ensure that acts of torture are offences under their own law and that the authorities take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State, that not only did the French courts have jurisdiction but French law was also applicable. The Court notes, moreover, that the United Nations Committee against Torture, in its conclusions and recommendations relating to France dated 3 April 2006, expressly welcomed the judgment of the Nîmes Assize Court convicting the applicant.

Having regard to the foregoing, the Court considers, in the present case, that the Mauritanian amnesty law was not capable in itself of precluding the application of French law by the French courts that examined the case by virtue of their universal jurisdiction and that the judgment rendered by the French courts was well founded. (…)

It follows that the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention. (…)"

The judgments and decisions can be consulted in their entirety on the website of the European Court of Human Rights: www.echr.coe.int

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APPENDIX V

COMMENTS OF THE COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

ON RECOMMENDATION 1995 (2012) OF THE PARLIAMENTARY ASSEMBLY "THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE"

1. On 28 March 2012, the Ministers' Deputies communicated to the Steering Committee for Human Rights (CDDH) and the Committee of Legal Advisers on Public International Law (CAHDI), for information and possible comments, Recommendation 1995 (2012) of the Parliamentary Assembly on "*The International Convention for the Protection of All Persons from Enforced Disappearance*".

2. Under the terms of this Recommendation, the Parliamentary Assembly:

- reiterated its support for the *International Convention for the Protection of All Persons from Enforced Disappearance*;

- nevertheless recalled that the United Nations Convention notably:

  - fails to fully include in the definition of enforced disappearances the responsibility of non-State actors;
  - remains silent on the need to establish a subjective element (intent) as part of the crime of enforced disappearance ;
  - refrains from placing limits on amnesties or jurisdictional and other immunities ;
  - severely limits the temporal jurisdiction of the Committee on Enforced Disappearances ;

- invited the Committee of Ministers to:

  - urge all the Council of Europe member States which have not yet done so to sign, ratify and implement this Convention;

  - consider launching the process of preparing the negotiation, in the framework of the Council of Europe, of a European Convention for the Protection of All Persons from Enforced Disappearance.

3. At its 44th meeting (Paris, 19-20 September 2012), the CAHDI examined the aforementioned recommendation and adopted the following comments.

4. From the outset, the CAHDI welcomes the entry into force of the *United Nations International Convention for the Protection of All Persons from Enforced Disappearance* as well as the setting up of its monitoring mechanism, and in particular the Committee on Enforced Disappearances.

5. Moreover, the CAHDI notes that at its 75th meeting, the CDDH adopted an "Opinion on Recommendation 1995 on the International Convention for the Protection of All Persons from Enforced Disappearance" (Appendix III to its report of 1 July 2012, document CDDH(2012)R75), stating that it "*does not recommend at this stage carrying out new normative work in this field*". The CDDH considered that it was "*premature at this stage to assess the effectiveness of the United Nations Convention system*". The CAHDI agrees with the CDDH on this point, considering that it is too early to judge the effectiveness of the United Nations Convention, which came into force on 23 December 2010.

6. The first three points listed in the recommendation are (1) extending the definition of the crime of enforced disappearance to acts committed by non-State actors – on this point, the CAHDI

underlines that an Article 3 imposing obligations on States where acts of enforced disappearance are committed by non-State actors was added at the request of a number of States during the negotiations on the United Nations Convention, (2) including a subjective element (intent) in the definition, and (3) adding a provision to preclude amnesties and jurisdictional immunities. The CAHDI considers that it would be inappropriate to reopen the debate on these questions during any negotiations to be held in the framework of the Council of Europe. Indeed, the analysis of the *travaux préparatoires* of the United Nations Convention clearly demonstrates that these points have already been discussed in depth and the text of the United Nations Convention is the result of the consensus reached under these negotiations. It is not established that any new negotiations at the European level could produce any significant changes on these points.

7. In connection with the fourth point concerning the temporal jurisdiction of the Committee on Enforced Disappearances, this restriction would seem to have been prompted by the concern not to unduly burden the Committee right from the outset. The Committee can consequently only deal with cases of enforced disappearance emerging after the entry into force of the United Nations Convention, even where the causes of the disappearance have not yet been determined at the date of its entry into force. The CAHDI notes that this monitoring mechanism held its first session in November 2011. It has not yet examined any communications, but should receive, by the end of the year, the reports on implementation of the Convention by some twenty States having ratified it. It is therefore difficult for the moment to assess its functioning. Furthermore, the CAHDI stresses that the restriction on the temporal jurisdiction of the Committee on Enforced Disappearances is counterbalanced by the existence of mechanisms responsible for dealing with situations emerging before the entry into force of the United Nations Convention. These bodies operate both at the international level (in its reports, the Working Group on Enforced or Involuntary Disappearances, set up under Resolution 20 (XXXVI) of the Human Rights Commission of 18 December 1992, sets out observations on the individual communications submitted to it) and at the European level. In particular, the European Court of Human Rights has already ruled in cases of enforced disappearances, and declared itself competent *ratione temporis* to examine, under Article 2 in its procedural aspect, an allegation of enforced disappearance occurring prior to the entry into force of the ECHR in respect of the country in question (see *inter alia* the case of *Varnava et al. v. Turkey* [Grand Chamber], No. 16064/90, judgment of 18 September 2009).

8. The CAHDI notes that the United Nations Convention has only 34 States Parties to date, including only 11 Council of Europe member States. It is important to invite "*all the Council of Europe member States which have not yet done so to sign, ratify and implement this convention*", as Recommendation 1995 (2012) of the Parliamentary Assembly suggests, and to invite them to consider recognising the competence of the Committee on Enforced Disappearances. It would therefore be useful to focus efforts primarily on the universalisation of the United Nations Convention.

9. At this stage, the CAHDI considers that it is too early to assess the effectiveness of the United Nations Convention and its monitoring mechanism. It will only become possible to conduct such an assessment in light of the manner in which the States Parties implement this Convention as well as the practice adopted by the Committee on Enforced Disappearances.

APPENDIX VI

STATEMENT BY SIR MICHAEL WOOD, MEMBER OF THE INTERNATIONAL LAW COMMISSION, ON THE WORK OF THE INTERNATIONAL LAW COMMISSION AT ITS SIXTY-FOURTH SESSION, 7 MAY-1 JUNE AND 2 JULY-3 AUGUST 2012

Paris, 20 September 2012

Madam Chair, distinguished Members of CAHDI and Observers, Mr. Director,

1. It is a great pleasure to address CAHDI on the International Law Commission's 2012 session. As Mr. Lezerutua has just explained, you made your annual visit to the Commission to address it on the work of the CAHDI, and on the work of the Council of Europe as it relates to public international law. This visit is much appreciated by the members of the Commission.

2. I should make it clear that I am not here to represent the Commission. Instead, I shall give my own personal impressions as an individual member of the Commission. In doing so I shall of course try to be balanced, not too subjective.

3. I shall not speak for too long – leaving, I hope, plenty of time for discussion. I shall try to describe the Commission's latest session in a way that is helpful for you when preparing for the Sixth Committee debate in October, and preparing written comments on certain matters.

4. The Commission's 2012 session might best be described as 'transitional': transitional between quinqunnia, between topics, between Special Rapporteurs. As such it had the potential to be difficult to organize, and – before we began the session - there were fears that because of the lack of reports we would not have enough to do to fill the nine weeks allocated to us. In fact, the opposite was the case. We ran out of time to deal with all the matters that we wanted to cover.

5. In fact, under Professor Caflisch's very effective chairmanship, the session went well; and thanks to the hard work of the Special Rapporteurs, old and new, and the chairs of the various groups, there was more than enough work to keep us busy. Sensible decisions were taken about future work. The new members of the Commission played a full and constructive role. The Commission members from the countries represented here, both from the Council of Europe and from observer States, continued to play a leading role. In fact, all four of the new Special Rapporteurs are from countries, members and observers, represented at this meeting. The return, after five years, of a member from the United States was a big plus, not least because of Professor Sean Murphy's high qualities.

6. I shall first summarise the work and principal outcomes of the session. Of course this is already very well done in Chapter II of the Commission's report. I shall then go into a little more detail on three topics, those where States are asked for information or comments.

Overview

7. The Commission added two new topics to its current programme of work, appointing Special Rapporteurs. The first is **Provisional application of treaties,** with Juan Manuel Gómez-Robledo of Mexico as Special Rappporteur. There was much interest in the topic, and we had an interesting informal debate which is summarised in Chapter VII of the

report.[7] Mr. Gómez-Robledo will produce a report for next year's session. This is a topical and increasingly important matter, one on which both the Council of Europe and the European Union have recent experience, and one which has played a major role in some recent investment treaty arbitrations.[8]

8. The second new topic added to the current agenda is **Formation and evidence of customary international law**, to which I shall return.

9. The Commission also appointed a new Special Rapporteur for the topic **Immunity of State officials from foreign criminal jurisdiction,** Professor Concepción Escobar Hernández of Spain, the first woman Special Rapporteur in the history of the Commission. She replaced Mr. Roman Kolodkin of the Russian Federation, who is no longer a member of the Commission. I shall come back to this topic as well.

10. You may recall that there were three other topics included in the Long-term programme of work in 2011. These were not, this year at least, added to the Commission's current programme of work.

11. The first of these, Professor Shinya Murase's topic on **Protection of the atmosphere**,[9] proved controversial at two informal meetings that were organized to see if there was enough support, or put another way to see if there was a lack of strong opposition. There was in fact strong opposition from a number of members, and no decision was taken one way or another.

12. The proposed topic on the **Fair and equitable treatment standard in international investment law**[10] was not raised during the session. Its proponent, Mr. Stephen Vasciannie of Jamaica, did not attend the session: he has just taken up the position of his country's ambassador to Washington, and has since resigned from the Commission. The Commission will need to elect a successor, in a by-election early in the next session.

13. Towards the very end of the session, there were brief but very positive informal consultations on the topic proposed by Ms. Marie Jacobsson on the **Protection of the environment in relation to armed conflicts**, which had also been included by the Commission on its long-term programme of work at its session in 2011.[11] This may well be taken up next year, in some shape or form, in Ms. Jacobsson's very good hands.

14. The main output of the Commission this year was the first reading draft articles, with commentaries, on **Expulsion of aliens**, to which I shall come back. This draft, together with the **Guide to practice on reservations to treaties**, left over from 2011, will, I suppose, be the main focus of the ILC debate in the Sixth Committee in the autumn. It takes up half of this year's report.

15. Further progress was made on **Protection of Persons in the Event of Disasters**.[12] The Special Rapporteur, Mr. Eduardo Valencia-Ospina, produced an interesting fifth report proposing three new draft articles, which led to a useful debate. The Drafting Committee provisionally adopted five further articles, 5*bis* and 12 to 15. It is still unclear what exactly will emerge from this topic[13]. The Special Rapporteur plans a further report, to be

[7] See also A/CN.4/SR.3151.
[8] For a recent study, see Annaliese Quast Mertsch, *Provisionally Applied Treaties: Their Binding Force and Legal Nature* (Brill, 2012)
[9] Annual Report 2011, annex B.
[10] Annual Report 2011, annex D.
[11] Annual Report 2011, annex E.
[12] Annual Report 2012, Chapter V.
[13] Annual Report 2012, para. 79.

submitted next year, to cover among other things disaster risk reduction, including the prevention and mitigation of disasters.[14]

16. In commenting on this topic in the Sixth Committee, it is important to note that the current drafts are not the three in Mr. Valencia-Ospina's fifth report, but the five draft articles adopted by the Drafting Committee in 2012 and taken note of by the Commission. They are reproduced in footnote 275 in the Commission's Annual Report. A similar situation occurred last year, and led to some confusion in the Sixth Committee with some delegates commenting on draft articles in the Special Rapporteur's report that had already been superseded. However, in commenting on the five new articles, it needs to be borne in mind that they are so far without commentaries, so it is not necessarily easy to understand the full background.

17. I now turn to the **Obligation to extradite or prosecute (*aut dedere aut judicare*).**[15] As you know, the Special Rapporteur for this topic, Professor Galicki, is no longer a member of the Commission. No new Special Rapporteur was appointed. A working group, chaired by Mr. Kriangsak Kittichaisarie, held inconclusive consultations on the future of the topic. The group met several times, and the chairman produced four informal reports. There were strong doubts, on the part of a good number of members of the Commission, about the usefulness of continuing with the topic. But we felt we had to await the judgment of the International Court of Justice in the *Belgium* v. *Senegal* case. That judgment was given on 20 July 2012, towards the end of the session, so we were not able to take full account of it this year. [16] Mr. Kittichaisarie plans to produce a further paper next year indicating the options for future work. Termination of the topic is a real possibility.

18. Work on **Treaties over time** continued, but there is to be a change of focus. Professor Georg Nolte has been appointed Special Rapporteur, with effect from the next session. The topic was renamed **Subsequent agreements and subsequent practice in relation to the interpretation of treaties**.[17] The topic has been more narrowly defined so as to encompass only subsequent practice and subsequent agreements in the interpretation of treaties (VCLT, art. 31(3)(a) and (b)), though the Special Rapporteur may also distinguish such interpretation from the modification of treaties. In short, the topic has is now much closer to what Professor Nolte originally proposed.

19. Work on the topic of **MFN clauses** also continued.[18] Further interesting discussions were led by the chair of the Study Group, Professor Donald McRae. Professor McRae proposed an outline of a possible final report, which will focus on providing guidance in the interpretation of MFN clauses in investment agreements particularly in relation to their application to dispute settlement provisions.

Action for States

20. In addition to comments on all aspects of the report, the Commission is looking for three specific things from States this year:

- Initial comments on the first reading draft articles on **Expulsion of aliens**, with final comments by 1 January 2014;

- Responses to its request for information on the topic "**Immunity of State officials from foreign criminal jurisdiction**"; and

[14] Annual Report 2012, para. 80.
[15] Annual Report 2012, Chapter IX.
[16] *Questions relating to the obligation to prosecute or extradite (Belgium* v. *Senegal)*, judgment of 20 July 2012.
[17] Annual Report 2012, Chapter X and para. 269.
[18] Annual Report 2012, Chapter XI.

- Responses to its request for information on the topic "**Formation and evidence of customary international law**".

21. A major part of the Sixth Committee debate on the report of the ILC this year will no doubt concern the **Guide to practice on reservations to treaties.**[19] As you will recall, the main debate on the Guide to Practice was postponed until this year since, given its length, it was only published at the beginning of 2012, too late for the Sixth Committee's debate last year. The Commission has recommended that the former Special Rapporteur on this topic, Professor Alain Pellet, be invited to attend the Sixth Committee debate on reservations this autumn.[20]

22. I would just note one thing about reservations, of particular interest to the CAHDI. Among the Commission's recommendations is one for reservations 'observatories'. This proposal is clearly inspired by, and could draw inspiration from, the activity of the 'European Observatory on Reservations to Multilateral Treaties' carried out by the CAHDI. It remains to be seen if this idea will find favour with the Sixth Committee. But in any event, Council of Europe member States may wish to explain in more detail, in the Sixth Committee, for the benefit of the wider UN membership, what is entailed in its reservations observatory, since this seems not to be fully understood.[21]

23. I shall now say a few words about each of the three topics on which the Commission has this year specifically asked for comments and information.

Expulsion of aliens

24. Having worked on the topic since 2004, the Commission adopted, on first reading, a set of 32 draft articles on **Expulsion of aliens**, with commentaries.[22] These will be taken up for second reading in 2014, in light of the written and oral comments of States.

25. The first reading draft articles are more coherent than the texts that the Commission has prepared on this topic in previous years, and in my view are not a bad outcome overall. They are unlikely, I think, to become a convention. But they have value in setting out some basic principles in the area, some of which are uncontroversial and others, while debatable, do not generally amount to unreasonable burdens on States.

26. The draft articles adopted on first reading differ in major respects from those proposed by the Special Rapporteur, Professor Maurice Kamto, in his various reports. This reflects doubts on the part of some members of the Commission (and States) regarding his initial proposals. It also reflects a refreshing flexibility on the part of the Special Rapporteur, who was willing to made radical changes where Commission members insisted.

27. The draft articles are relevant for any State that wants to apply immigration rules to force an alien to leave its territory. It is important to note that the draft articles identify obligations with respect to *all* aliens present in a State's territory, whether they are legally or illegally present,[23] including all refugees and all displaced persons. In only a few places does the draft distinguish between those legally nd illegally present. The emphasis is on the human rights of persons subject to expulsion. The case-law of the European Court of

[19] Annual Report 2011, Add.1. A series of articles on the Guide to Practice will be published in a 'Symposium' in the *European Journal of International Law*.
[20] Annual Report 2012, para. 299.
[21] Some information may be gleaned from the reports of the CAHDI meetings, which are available, once approved (that is, with a half year's delay), on the CAHDI website. For the most recent, see Meeting Report, 42nd meeting, Strasbourg, 22-23 September 2011 (CAHDI (2011) 17), paras. 33-36.
[22] Annual Report 2012, Chapter IV.
[23] Draft article 1.

Human Rights and the Court of Justice of the European Union seems to have been a major influence on the Special Rapporteur and on the Commission, even though this case-law has its own context and, particularly in the case of Luxembourg, is not necessarily relevant worldwide. Some of the most sensitive provisions cannot be said to reflect existing international law, but are progressive development/*lex ferenda*. An example is the wide understanding of the term refugee for the purposes of *non-refoulement*, according to paragraph (2) of the commentary to draft article 6.

28. I shall not go into the substance of the draft articles. They are complex, and require detailed study by States, which I hope they will receive. Instead, I shall touch on three procedural points.

- First, the report of the Drafting Committee this year covered the whole set of draft articles. It is helpful for anyone interested in how we got where we are with the individual provisions. The verbatim report is available on the website, and is also effectively reproduced in the summary records, also on the website.[24]

- Second, the commentaries on the draft articles are a little thin in places. Given the fact that the draft articles were much altered from those proposed in the Special Rapporteur's various reports, the reports themselves are not always particularly relevant. The commentaries nevertheless contain many references to the reports by way of further background, which should not be treated as necessarily representing the views of the Commission. I made two comments on this, which will be reflected in the summary record of, I think, the meeting on 31 July 2012[25]: (i) that the fact that the Commission referred to the reports in footnotes did not mean the Commission necessarily agreed with what the reports said; and (ii) that on second reading the commentaries should so far as possible be self-contained.

- Third, there will now be a pause with this topic until 2014, when the Commission will begin its second reading. We shall then take into account of all the comments and observations from Governments: those made already, and those that will now be made. I therefore encourage you all to look most carefully at the first reading draft articles on **Expulsion of aliens**, and let us have your comments. This can be done in the Sixth Committee this autumn, or in writing by 1 January 2014 at the latest or preferably both orally and in writing. (I know from personal experience how difficult it can be, for busy legal offices, to find the time to prepare speeches and written comments. But I can assure you that members of the Commission study all speeches and written comments very carefully, and take them into account. It is also an important opportunity to place your State's views on the record, which could be particularly important on a topic like this where the Commission's draft articles, even first reading draft articles, may well be cited in the domestic courts.)

Immunity of State officials from foreign criminal jurisdiction

29. The new Special Rapporteur, Professor Escobar Hernández, produced a Preliminary Report, which was subject of a debate in the Plenary of the Commission in July. You can find the interventions of the Special Rapporteur and other members of the Commission in the Summary Records, which are on the website.[26] The debate is also summarised in Chapter VI of the Commission's Annual Report. Before submitting the Preliminary Report, the Special Rapporteur conducted an informal meeting on 30 May. Her plan of work is included in the Preliminary Report, and aims at the completion of a set of draft articles on the first reading by the end of the quinquennium in 2016.

[24] A/CN.4/SR.3134
[25] A/CN.4/SR.3166.
[26] A.CN.4/SR.3143-3147.

30. The new Special Rapporteur, on the basis of the survey of the work of the former Special Rapporteur, the previous debates in the ILC and the previous debates in the Sixth Committee, identified a list of issues which remain open and without agreement. These elements are included in the Preliminary Report, and the Special Rapporteur proposes a plan of work which will address these issues in her future substantive reports.

31. Professor Escobar Hernández sought to distance herself somewhat from the former Rapporteur, while taking into account his previous work. She stressed that the work should take into account the "values and principles" of contemporary international law, referring to "trends" (which others pointed out are more in the minds of various writers than courts and States). It remains to be seen what this will mean in practice. The Special Rapporteur seems to have in mind a balancing of the need for stability in international relations with the need to avoid impunity for the most heinous crimes.

32. The Commission has requested States –
"to provide information on their national law and practice on the following questions:
(a) Does the distinction between immunity *ratione personae* and immunity *ratione materiae* result in different legal consequences and, if so, how are they treated differently?
(b) What criteria are used in identifying the persons covered by immunity *ratione personae*?"[27]

33. It will be noted that the Commission is not seeking information on the provision of immunities to diplomats, consular officials, officials of international organizations, or to persons on special mission, in that such immunities are regulated under existing treaty or customary regimes which will not be touched. The present topic is concerned with customary international law relating to State officials who fall outside those regimes. The Commission seeks information at this stage not on the topic as a whole but on two specific issues.

34. The first question concerns whether, in national law and practice immunity, *ratione personae* and immunity *ratione materiae* are treated differently. In other words, what are the legal consequences within each State's national law or practice of the distinction between immunity *ratione personae* and immunity *ratione materiae.* There seems to be general agreement within the Commission that the basic distinction between 'personal' immunity and 'official act' immunity is important. We seek confirmation of that from States in the context of their national systems. But what I think we would particularly like to know is what legal consequences flow from that basic distinction within each State's national system.

35. The second question asks about the criteria used, in national law and practice, to identify the persons covered by immunity *ratione personae*. Who enjoys personal immunity: Heads of State? Heads of Government? Foreign Ministers? Other senior government officials, and if so based on which criteria?

36. What the Commission seeks is information on *national law and practice*. The Commission is not asking States to tell it what they believe international law currently is, or what it should be. It is for the Commission itself to make proposals with respect to international law based, among other things, on the information it receives from States or can otherwise discover regarding national laws and practices.

[27] Annual Report 2012, para. 28.

Formation and evidence of customary international law[28]

37. The Commission decided to include this topic in its current programme of work and appointed me a Special Rapporteur. Between the two parts of the session I prepared a short preliminary Note.[29] There was a plenary debate[30] on the basis of this Note, which was for the most part very constructive. We shall have an opportunity to consider this matter tomorrow at the Conference on Judges and International Custom. Some documents concerning the ILC's work so far are on the Conference website. These include the statement I made at the end of the plenary debate, which summarises and responds to the debate, and sets out my plans for the coming years.

38. The Commission has requested States –

"to provide information on their practice relating to the formation of customary international law and the types of evidence suitable for establishing such law in a given situation, as set out in:

(a) official statements before legislatures, courts and international organizations; and

(b) decisions of national, regional and subregional courts."[31]

39. Here again the Commission at this early stage seeks information from States derived from their own particular practice relating to this topic, with the emphasis on existing law, and not an opinion as to what the law ought to be. I also note that the request covers both information on the "formation" of customary international law, meaning the rules on how a customary norm emerges as a part of international law, and also on the "types of evidence" deemed relevant when establishing whether those rules have been met in a given case.

Possible new topics

40. The Commission now has a good number of topics on its current programme of work. Nevertheless, suggestions for new topics are always welcome. It is unfortunate that neither States individually nor the General Assembly has come up with proposals of their own in recent years.

41. I have already mentioned the topic **Protection of the environment in relation to armed conflict**, which is already in the Commission's Long-Term Programme of Work and may well soon be taken forward as part of the current programme. Other possible new topics are considered first by the Working Group on the Long-term programme of work, which is chaired this quinquennium by Professor McRae. The Annual Report of the Commission does not contain details of the work of this Group, which is not therefore formally before you in the Sixth Committee, until the Commission has added proposals to the Long-term programme.

The International Law Seminar[32]

42. Let me mention the International Law Seminar. As you know, the Seminar takes place on an annual basis and aims to enable postgraduate students or young university teachers specialized in international law, as well as young lawyers working in the international law

[28] Annual Report 2012, Chapter VIII.
[29] A/CN.4/653.
[30] A/CN.4/SR.3149-3152.
[31] Annual Report 2012, para. 29.
[32] Annual Report 2012, paras. 301-314.

field, including those in government service, to widen their knowledge of both the work of the International Law Commission and of the status of codification and progressive development of international law. It also provides an opportunity for lawyers coming from different legal systems and cultures to exchange views regarding items on the agenda of the Commission. The Seminar was held again in July this year, for the forty-eighth time since its inception in 1965. Members of the Commission devote a considerable amount of their own time to lecturing or holding workshops for the Seminar participants. Some act as facilitators of the study groups in which Seminar participants work together to deal with topical issues on the Commission's agenda.

43. It is surprising how many members of the International Court of Justice, the Commission, Secretariat members, and MFA Legal Advisers have taken part in past sessions of the Seminar over the years, and look back on the experience as an important step in their careers. Worldwide participation depends on the active efforts of you, the Legal Advisers, especially those represented in this room, to persuade your Ministries to find the very modest sums needed for a scholarship (about 2500 to 3000 Euros). For this year's Seminar contributions were made by Finland, India, Sweden and Switzerland. The contributions assisted participants from Mexico, Haiti, Guinea, China, Brazil, India, South Africa, Costa Rica, Georgia, Sri Lanka, Argentina, Nigeria, Philippines, Eritrea and Colombia.

44. I would like to urge each of you to see whether you can persuade your authorities to contribute a modest sum to fund scholarships to assist participants from developing countries to attend. That would be a very cost-effective contribution to the rule of law at the international level.

Other matters

45. You may recall that in 2011 the Commission reviewed its working methods, and agreed a number of useful points.[33] These were followed up in 2012. One of these was that the Commission should set out a tentative schedule for the development of the topics, over a number of years as may be required, as it had previously done in 2007. The schedule is in paragraph 273 of this year's report.

46. It is sometimes suggested that the Commission should occasionally meet in New York, so as to have more interchange with members of the Sixth Committee. This is, frankly, unlikely to achieve that aim, and would have serious disadvantages in terms of the efficiency of the Commission's work. The UN facilities in Geneva are well-suited to the work of the Commission, not least the excellent library services, to which the Commission gives special mention in this year's report to the Assembly.[34]

47. Madam Chair, as I have said, your visit to the Commission was much appreciated. As usual, we also had visits from bodies from other parts of the world, which are themselves conducting interesting work in the field of public international law. These included the Inter-American Juridical Committee and the Asian-African Legal Consultative Organization. And this year, for the first time, we had a visit from the African Union's Commission on International Law, whose representatives made an impressive introduction to the very interesting work of this recently established body. It seems to me that it might well be worth the CAHDI making contact with the AU Commission if you have not already done that.

48. As this was Mr. Václav Mikulka's last session before his retirement at the end of the year, it is appropriate to note what an important role he and the Secretariat has played in the work

[33] Annual Report 2011, paras. 370-388.
[34] Annual Report 2012, para. 286.

of the Commission, and the high quality of their output. The Annual Report contains a warm tribute to him.[35] Václav has experience of the Commission from a broad range of perspectives: as an MFA legal adviser, from within the Sixth Committee, as a member of the Commission and as one of its Special Rapporteurs, and as Secretary. He will be a hard act to follow.

Madam Chair, that concludes my brief survey of the Commission's 2012 session.

[35] Annual Report 2012, para. 300.

APPENDIX VII

STATEMENT BY PROFESSOR FAUSTO POCAR, PRESIDENT OF THE INTERNATIONAL INSTITUTE OF HUMANITARIAN LAW, ON THE OCCASION OF THE 44TH MEETING OF THE COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW

Bilingual

Paris, 19 septembre 2012

Madame le Président,

D'abord, permettez-moi de vous exprimer mon remerciement le plus sincère – et de l'étendre aux honorables membres du Comité – pour l'invitation faite à l'Institut international de droit humanitaire, dont j'ai récemment assumé la présidence, de présenter à cette réunion du Comité les résultats les plus importants de l'activité de l'Institut. C'est un honneur pour l'Institut et pour moi-même que de pouvoir m'adresser à cette enceinte juridique prestigieuse et compétente.

Je suis conscient que mon prédécesseur, l'ambassadeur Moreno, vous a déjà entretenu récemment sur les programmes scientifiques et de formation de l'Institut de Sanremo et ne reviendrai donc pas sur ces aspects, sauf pour vous indiquer qu'à côté des cours militaires de caractère plus général, des cours spécifiques ont été destinés aux forces militaires et de police de pays en transition vers la démocratie, tels l'Iraq, l'Afghanistan et l'Egypte, dans le but de contribuer à l'établissement d'un état de droit dans lequel le droit humanitaire et les droits de l'homme soient pleinement respectés.

Sans insister sur ces aspects, malgré leur importance, je voudrais me concentrer sur les résultats de la dernière table ronde que l'Institut organise chaque année sur des sujets actuels du droit international humanitaire (DIH), en coopération avec le Comité international de la Croix-Rouge (CICR). Cette Table ronde – la 35e – a eu lieu à Sanremo du 6 au 8 septembre 2012, et portait sur les « compagnies militaires et de sécurité privées » : un sujet qui soulève à la fois des problèmes spécifiques et des thèmes grande envergure, se rapportant au phénomène de la « privatisation » de la guerre. Aujourd'hui, de nombreux États engagent de plus en plus des entreprises militaires et de sécurité privées (EMSP) pour gérer des services militaires et de sécurité. La multiplication de ces entités a été spectaculaire et le recours à leurs services s'impose pour des raisons techniques, politiques et financières. Avec la contribution de représentants de gouvernements, d'organisations internationales, d'éminents experts provenant de plusieurs pays et du secteur privé concerné, la table ronde promue par l'Institut a été l'occasion de partager points de vue et expériences sur l'utilisation croissante des EMSP avec toutes les parties intéressées. Alors que les discussions ont compris plusieurs thèmes, je me limiterai à un bref aperçu des discussions tenues au cours des trois jours de réunion, des conclusions principales de la table ronde, ainsi que de quelques recommandations proposées dans le cadre du débat.

Madame le Président,

L'ampleur sans précédent et la portée des activités menées aujourd'hui par les EMSP a conduit à l'élaboration et à l'adoption d'un certain nombre de mesures, tant au niveau international que national, en vue de clarifier ou de réaffirmer les normes juridiques qui régissent les activités des EMSP. Les trois initiatives principales au niveau international, à savoir le Document de Montreux préparé sur l'initiative de la Suisse et du CICR, le Code de Conduite International également élaboré sur l'initiative de la Suisse, et le Projet des Nations Unies d'une Convention sur les Sociétés Militaires et de Sécurité ont constitué la première base pour une analyse juridique du problème. En outre, une attention particulière a été consacrée à quelques-unes des plus récentes normes d'autorégulation mis au point par l'industrie, comme les standards ANSI/ISO, les Principes

volontaires sur la Sécurité et les Droits de l'Homme et la politique des entreprises dans le domaine des contrats à conclure avec des Compagnies de Sécurité Privées et les Normes de Sécurité Maritime.

Une des conclusions du débat vise la nécessité absolue du respect du droit international par les EMSP et leur personnel. Dans cette perspective le cadre juridique actuel applicable à des entrepreneurs privés représente une réalisation importante et constitue une étape fondamentale vers une réglementation d'ensemble du phénomène des EMSP. Quelle que soit la responsabilité attachée à ces entreprises privées, il est d'abord nécessaire que ces acteurs se conforment au droit international et en particulier au DIH, lorsque ces sociétés sont impliquées dans des situations de conflit armé ou de violence armée.

La nécessité de différents niveaux de réglementation en ce qui concerne les EMSP a été un autre point crucial du débat. La réglementation internationale, contraignante ou composée de règles de *soft law*, doit être complétée par les législations nationales. Alors que la plupart des normes et des politiques élaborées par les États ou par l'industrie ont construit sur les principes et bonnes pratiques énoncées dans le Document de Montreux, et que des approches encourageantes ont été récemment adoptées, ou sont en cours d'examen, par une variété d'États et d'entreprises privées, il reste beaucoup à faire pour affiner le régime juridique actuel. Par exemple, au niveau national, les États dans lesquels de telles entreprises sont enregistrées ou sur le territoire desquels elles mènent leurs activités devraient élaborer une règlementation plus complète non seulement des activités effectuées par les EMSP dans leur propre territoire, mais aussi à l'étranger. En outre, un certain degré d'uniformité des normes en vigueur est certainement souhaitable et nécessaire, afin de renforcer le mouvement vers un cadre réglementaire universel et obligatoire des activités des EMSP.

Les questions juridiques principales découlant du recours croissant à des EMSPs pour effectuer des tâches traditionnellement accomplies par les forces armées et le personnel de sécurité dans les situations de conflit armé, d'occupation militaire, dans les opérations de *law enforcement*, ainsi que dans le cadre de la lutte contre le piraterie, ont été largement débattues à la lumière du DIH. Il s'agit du statut des EMSP et de leurs employés, du lien entre les employés des EMSP et le mercenariat, de l'emploi de la force par les EMSP et leurs implications dans les activités de détention. Notamment, l'avis a été exprimé qu'en principe la participation directe aux hostilités ou à toute autre opération de nature militaire ne doit pas être sous-traitée. On a est généralement fait valoir que ces activités sont des fonctions intrinsèquement étatiques qui doivent être remplies par les forces armées ou la police, conformément au principe du monopole de l'État sur l'emploi légitime de la force. Or, il est vrai que la majorité des EMSPs opérant dans les conflits armés ne participent pas directement aux hostilités et que par conséquent, du point de vue du DIH, leur activité ne devrait pas poser de problèmes particuliers. Toutefois, l'éventail des activités menées aujourd'hui par les EMSP dans un scénario de conflit exige que la détermination de ces activités soit faite soigneusement, compte tenu de la proximité organisationnelle et opérationnelle de leur personnel dans les forces armées et les hostilités. De nombreux participants ont appelé à une réflexion plus approfondie sur certaines questions clés qui sont encore en suspens dans le respect de l'application du DIH, en particulier sur le terrain, lorsque les EMSP exercent des fonctions qui pourraient avoir des conséquences sur l'application du principe fondamental de distinction entre civils et combattants.

Une attention particulière a également été consacrée aux conséquences de l'utilisation des EMSP dans le secteur de la sécurité maritime. Des zones d'ombre restent à cet égard, comme l'incertitude juridique qui entoure les règles applicables en matière de défense légitime, de responsabilité du capitaine, de règles d'engagement, d'arrimage des armes, du statut des gardes armés dans les ports d'escale, et de garde et remise des pirates capturés.

La discussion a également porté sur la juridiction et la responsabilité. On a souligné que les États doivent établir leur juridiction et prendre toutes les mesures nécessaires pour leur permettre d'enquêter et de poursuivre efficacement les EMSP et leur personnel lorsque des violations du DIH

et des Droits de l'Homme sont signalées. Sans doute, cela permettrait aux États non seulement de faire valoir la responsabilité en cas de violation, mais prévoirait également des recours efficaces pour les victimes. À cet égard, on a souligné qu'il serait essentiel de renforcer la coopération interétatique pour surmonter les limites de la juridiction et de promouvoir une assistance juridique mutuelle dans ce domaine.

Madam Chair,

Another critical theme under discussion was the challenge of effectively controlling compliance on the ground. A number of monitoring and certification mechanisms and standards have been recently adopted or are currently under examination. However, while the variety of solutions proposed so far constitutes precious attempts to provide solutions to existing problems, a certain degree of harmonization in this field is necessary. This is especially true if we think that the verification and monitoring of activities outside the reach of the home or contracting State may prove to be very difficult in practice. As a consequence, many participants, including representatives coming from the industry, underlined the necessity of finding more convincing solutions in order to improve the credibility and transparency of the current system.

In addition to that, different activities to implement compliance by PMSCs with International Humanitarian Law (IHL) were discussed. Above all, training appeared certainly as an important aspect that needs to be further developed. Interestingly, a more comprehensive approach on training – ensuring that PMSCs personnel are appropriately made aware of their legal obligations under international humanitarian law or other relevant international norms, and that the responsibility that the standards are met lies on both sides, States and the industry – is actually already required by all the regulatory attempts I have mentioned above. Nevertheless, the issue of training was called for further reflections and actions with respect to: a) the appropriate form and content of an effective training for and by PMSCs; indeed, specific training programs especially designed according to the diversity of the activities carried out by private contractors, appear to be necessary; b) the kind of criteria of certification that these training activities would provide for PMSCs; c) the possible role of States, international organizations, NGOs or qualified training institutions, such as the International Institute of Humanitarian Law, in this respect.

In conclusion, Madam Chair, the debate of the 35th Round Table demonstrated that, notwithstanding the significant steps recently achieved, the activities of PMSCs raise important and delicate issues that have not yet been addressed. Four points summarize the main conclusions reached by the participants as well as issues on which further reflection and action were recommended.

Firstly, in light of the current existence of a relevant international legal framework, the often cited misperception of a lawless and unregulated phenomenon should vanish. However, further efforts need to be made to widen the circle of States and private companies which adhere to the current instruments, in particular the Montreux Document and the International Code of Conduct.

Secondly, considering that many PMSCs act outside the military chain of command and that coordination of their operations with contracting States has frequently proven to be deficient, there is a need for accountability for wrongdoings. In addition, it is necessary to ensure effective remedies to victims.

Thirdly, there is a need to restrict the direct participation of civilian contractors in hostilities as well as to clarify the legal regime applicable to private contractors, if involved in operations of a military nature or in law enforcement activities.

Fourthly, it is necessary to enhance and reinforce the current monitoring and certification procedures. In this respect, a certain degree of uniformity and universality is certainly desirable. Furthermore, particular attention should be directed towards the development of appropriate

training programs, in order to enable the PMSCs operating on the ground to comply effectively with their obligations.

Let me conclude by saying that the Institute of International Humanitarian Law of San Remo will continue to carry out studies on the status and use of PMSCs and is looking forward to give its contribution both to the clarification of the standards to be applied under IHL and to their dissemination and enforcement through appropriate information and formation programs.

Thank you for your attention.