COUNCIL OF EUROPE CONSEIL DE L'EUROPE

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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

28th meeting, Lausanne, 13-14 September 2004

List of items discussed and decisions taken

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 28th meeting in Lausanne on 13 and 14 September 2004. The meeting was open by Ambassador Michel (Switzerland), the outgoing Chair of the CAHDI and chaired by Ms Dascalopoulou-Livada, Vice-Chair of the CAHDI. The list of participants can be consulted in the meeting report (document CAHDI (2004) 27 prov.) and the agenda appears in Appendix I to the present report (the references of the documents submitted in the meeting appear in Appendix II to document CAHDI (2004) 27 prov.).

2. The Director of Legal Co-operation, Mr Lamponi informed the CAHDI about developments concerning the Council of Europe since the last meeting of the Committee.

3. The CAHDI was informed about the decisions of the Committee of Ministers concerning the CAHDI and the requests for CAHDI's opinion.

a) Regarding Parliamentary Assembly Recommendation 1602 (2003) on immunities of the Members of the Parliamentary Assembly, further to its preliminary opinion on adopted at the 26th meeting, the CAHDI pursued its consideration of this Recommendation in the light of the comments submitted by delegations and the proposal prepared by the Dutch delegate, Mr Lammers and agreed to propose to the Committee of Ministers to ask member states, *where national legislation permits,* to acknowledge unilaterally as an official document the laissez-passer issued by the competent Council of Europe authorities to the members of the Parliamentary Assembly.

b) Regarding Parliamentary Assembly Recommendation 1650 (2004) - Links between Europeans living abroad and their countries of origin, the CAHDI considered that this Recommendation raised policy questions rather than legal issues and therefore did not require an opinion by the CAHDI.

4. In the context of its activity as *European Observatory of Reservations to International Treaties*, the CAHDI considered:

a) a list of outstanding declarations and reservations to international treaties and several delegations informed the Committee about the follow-up they envisaged to give to some of them.

b) reservations to international treaties applicable to the fight against terrorism in accordance with the decision of the Committee of Ministers of 21 September 2001 (CM/Del/Dec (2001) 765 bis, Item 2.1). In particular, the CAHDI examined the list of possibly problematic reservations which appears in Appendix II. The CAHDI decided to transmit it to the Committee of Ministers, asking it to consider these reservations and to invite the member states concerned to consider withdrawing their respective reservations. It furthermore asked the Committee of Ministers to invite member states to volunteer to approach the non-member states concerned with regard to their respective reservation.

5. The CAHDI considered the progress made in the preparation of an analytical report on the Pilot-Project of the Council of Europe on State practice regarding Immunities of States, held an exchange of views with Prof. Hafner of the University of Vienna, Mrs Breau of the British Institute of International and Comparative Law, Mr Saba Rangel do Carmo of the Graduate Institute of International Studies and examined the

contributions submitted by their institutions. The CAHDI welcomed the progress achieved and expressed the wish that it could consider the finalized version of this report at its next meeting; and asked delegations to submit any additional comments or contributions by 30 October 2004.

6. The CAHDI examined replies from delegations to a questionnaire on the structure and functioning of the Legal Adviser of the Ministry of Foreign Affairs in the member and observer states and agreed on the usefulness of pursuing the collection of information. The CAHDI agreed to pursue consideration of this item at its next meeting and invited delegations not having done so to submit their replies by 31 January 2005.

7. The CAHDI considered the implementation at national level of UN sanctions and respect for human rights on the basis of contributions submitted by the delegations of Greece and Sweden and agreed to collect information concerning the situation in member and observer states of the Council of Europe and in the EU on the basis of the questionnaire which appears in Appendix III to the present document and asked delegations to submit their replies by 31 January 2005.

8. The CAHDI considered the work of the International Law Commission (ILC) at its 56th session and held an exchange of views with Professor Gaja, member of the ILC. The CAHDI also considered the working methods of the Sixth Committee of the UN General Assembly.

9. Further to that, the CAHDI considered developments concerning the implementation of international instruments protecting the victims of armed conflicts and had an exchange of views with Mr Kellenberger, President of the International Committee of the Red Cross. The text of his statement appears in Appendix IV to the present report.

10. The CAHDI considered developments concerning the functioning of the Tribunals established by UN Security Council Resolutions 827 (1993) and 955 (1994); and developments of the International Criminal Court (ICC).

11. The Secretariat informed the members of the CAHDI about the Council of Europe activities against terrorism and about a proposal for a new procedure of notification of acts related to Council of Europe's treaties. The CAHDI welcomed this proposal.

12. In accordance with statutory regulations, the CAHDI elected Ms Dascalopoulou-Livada Chair of the CAHDI for one year and Sir Michael Wood Vice-Chair for the same period.

13. The CAHDI adopted the draft specific terms of reference for 2005-2006 as they appear in Appendix V to the present document and decided to submit them to the Committee of Ministers for adoption.

14. The CAHDI decided to hold its next meeting in Strasbourg from 17 to 18 March 2005 and adopted the preliminary draft agenda in Appendix VI to the present document.

APPENDIX I

AGENDA OF THE 28TH MEETING OF THE CAHDI

A. INTRODUCTION

1. Opening of the meeting by the Chairman, Ambassador Nicolas Michel

2. Adoption of the agenda and approval of the report of the 27th meeting (Strasbourg, 18-19 March 2004)

3. Communication by the Director for Legal Cooperation, Mr Roberto Lamponi

B. ONGOING ACTIVITIES OF THE CAHDI

4. Decisions by the Committee of Ministers concerning the CAHDI and requests for CAHDI's opinion

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

   a. List of outstanding reservations and declarations to international Treaties

   b. Consideration of reservations and declarations to international Treaties applicable to the fight against terrorism

6. Pilot Project of the Council of Europe on State practice regarding State immunities - Draft analytical report: Presentation by Professor Hafner, Dr Breau and Mr Saba Rangel do Carmo

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

8. National implementation measures of UN sanctions, and respect for Human Rights

C. GENERAL ISSUES ON PUBLIC INTERNATIONAL LAW

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

   a. 56th Session of the International Law Commission: Exchange of views with Professor GAJA, member of the ILC

   b. Revitalisation of the General Assembly of the United Nations

10. Implementation of international instruments protecting the victims of armed conflicts: Exchange of views with Mr Jakob Kellenberger, President of the International Committee of the Red Cross (ICRC)

11. Developments concerning the International Criminal Court (ICC)

12. Implementation and functioning of the Tribunals established by United Nations Security Council Resolutions 827 (1993) and 955 (1994)

13. Fight against Terrorism - Information about work undertaken in the Council of Europe and other international bodies

D. OTHER

14. Election of the Chair and Vice Chair

15. Adoption of the specific terms of reference of the CAHDI for 2005-2006

16. Date, place and agenda of the 29th meeting of the CAHDI

17. Other business: Proposals for a new procedure of notification of acts related to Council of Europe's treaties

APPENDIX II

EUROPEAN OBSERVATORY OF RESERVATIONS TO INTERNATIONAL TREATIES :

LIST OF PROBLEMATIC RESERVATIONS AND DECLARATIONS TO INTERNATIONAL TREATIES APPLICABLE TO THE FIGHT AGAINST TERRORISM – COMPILED ON THE BASIS OF CONTRIBUTIONS FROM DELEGATIONS

Convention	Reservation/Declaration by		Comments by delegations
	Country/Date	**Content/Notes**	
Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23 September 1971	Venezuela 21 November 1983	Reservation upon ratification, regarding Articles 4, 7 and 8 of the Convention: “Venezuela will take into consideration clearly political motives and the circumstances under which offences described in Article 1 of this Convention are committed, in refusing to extradite or prosecute an offender, unless financial extortion or injury to the crew, passengers, or other persons has occurred". The Government of the United Kingdom of Great Britain and Northern Ireland made the following declaration in a Note dated 6 August 1985 to the Department of State of the Government of the United States: "The Government of the United Kingdom of Great Britain and Northern Ireland do not regard as valid the reservation made by the Government of the Republic of Venezuela insofar as it purports to limit the obligation under Article 7 of the Convention to submit the case against an offender to the competent authorities of the State for the purpose of prosecution". With reference to the above declaration by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of Venezuela, in a Note dated 21 November 1985, informed the Department of State of the Government of the United States of the following: "The reserve made by the Government of Venezuela to	**United Kingdom (UK):** Reservation is contrary to the paragraph 3(g) of UNSCR 1373 (2001) in so far as it purports to permit the Venezuelan authorities to take the political motives of offenders into consideration deciding whether to permit extradition of an offender. **Finland:** This reservation is not as problematic as the other ones in the list since it concerns minor offences. The thrust of the reservation is the discrimination clause which is the corollary to the political exception clause.

		Articles 4, 7 and 8 of the Convention is based on the fact that the principle of asylum is contemplated in Article 116 of the Constitution of the Republic of Venezuela. Article 116 reads: 'The Republic grants asylum to any person subject to persecution or which finds itself in danger, for political reasons, within the conditions and requirements established by the laws and norms of international law.' It is for this reason that the Government of Venezuela considers that in order to protect this right, which would be diminished by the application without limits of the said articles, it was necessary to request the formulation of the declaration contemplated in Art. 2 of the Law approving the Convention for the Suppression of Unlawful Acts Against the Security (sic) of Civil Aviation".	
Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, New York, 14 December 1973	Burundi 17 December 1980	In respect of cases where the alleged offenders belong to a national liberation movement recognized by Burundi or by an international organization of which Burundi is a member, and their actions are part of their struggle for liberation, the Government of the Republic of Burundi reserves the right not to apply to them the provisions of article 2, paragraph 2, and article 6, paragraph 1.	**UK:** Reservation purporting to reserve to Burundi the right not to apply the aspects of the Convention to members of national liberation movements is contrary to the objects and purpose of the Convention.
	Malaysia 24 September 2003	The Government of Malaysia understands Article 7 of the Convention to include the right of the competent authorities to decide not to submit any particular case for prosecution before the judicial authorities if the alleged offender is dealt with under national security and preventive detention laws.	**Greece (Gr):** Declaration by Malaysia concerning article 7 runs contrary to the substance of this article which expressly provides that the case will be submitted to the competent authorities “without exception whatsoever and without undue delay”. By the same token, the declaration seems to violate rules of due process.
Convention on the Physical Protection of Nuclear Material, Vienna, 3 March 1980	Pakistan 12 September 2000	1. The Government of the Islamic Republic of Pakistan does not consider itself bound by paragraph 2 of Article 2, as it regards the question of domestic use, storage and transport of nuclear material beyond the scope of the said Convention.	**UK:** Reservation, which purports to exclude the effect of paragraph 2 of Article 2, appears to be contrary to object and purpose of the Convention.
	France	The French Government declares that the jurisdiction	**Gr:** Concerning the declaration by France with regard to

	6 September 1991	referred to in Article 8, paragraph 4 may not be invoked against it, since the criterion of jurisdiction based on involvement in international nuclear transport as the exporting or importing State is not expressly recognized in international law and is not provided for in French national legislation (Original in French)	article 8 paragraph 4 we doubt whether a jurisdiction established by another State Party on the basis of that paragraph may be rebutted by the State against which it is invoked, unless such jurisdiction is not consistent with international law in the particular case. However, the Greek delegation doubts whether the declarations made by France are of such fundamental importance as to run contrary to the object and purpose of the Convention.
	Oman 11 June 2003	1. Reservation with respect to Article 8; paragraph 4; the text of which states that “each State Party may, consistent with international law, establish its jurisdiction over the offences set forth in Article 7 when it is involved in international nuclear transport as the exporting or importing State”. 2. In accordance with Article 17; paragraph 3 of the Convention; the Sultanate does not consider itself bound by the dispute settlement procedure provided for in Article 17; paragraph 2 of the Convention” (Original in Arabic) Upon a request by the Secretariat, the following specification of the nature of the reservation made with respect to Article 8, paragraph 4; was received from the Sultanate of Oman. “The reservation to Article 8, paragraph 4, made by the Sultanate of Oman is due to the fact that it is inconsistent with the principle of sovereignty of national jurisdiction; as well as with the principles of international law. This is because it establishes jurisdiction by importing and exporting States over offences committed outside their territories when they are involved in international nuclear transport” (Original in Arabic)	**Gr:** regards the reservation by Oman, it is clear that Oman does not accept the ground of jurisdiction which is enshrined, although in a facultative way, in paragraph 4 of article 8. However, the Greek delegation doubts whether the declarations / reservations made by Oman are of such fundamental importance as to run contrary to the object and purpose of the Convention.

International Convention for the Suppression of Terrorist Bombings, New York, 15 December 1997	Israel 10 February 2003	Declaration: The Government of the State of Israel understands that the term "international humanitarian law" referred to in Article 19, of the Convention has the same substantive meaning as the term "the laws of war"("jus in bello"). This body of laws does not include the provisions of the protocols additional to the Geneva Conventions of 1977 to which the State of Israel is not a Party. The Government of the State of Israel understands that under Article 1 paragraph 4 and Article 19 the Convention does not apply to civilians who direct or organize the official activities of military forces of a state.	**Gr:** The declaration by Israel concerning reference to article 19 is problematic insofar as it considers that the provisions of the Protocols Additional to the Geneva Conventions do not form part of international humanitarian law. As such and to the extent that such Protocols reflect customary international law, this declaration/reservation is contrary to the object and purpose of the Convention.
	Malaysia 24 September 2003	Declaration: The Government of Malaysia understands Article 8 (1) of the Convention to include the right of the competent authorities to decide not to submit any particular case for prosecution before the judicial authorities if the alleged offender is dealt with under national security and preventive detention laws.	**Gr:** Same considerations as in the case of the Malaysian reservation to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.
	Turkey 20 May 1999	Declarations upon signature: The Republic of Turkey declares its understanding that the term international humanitarian law referred to in article 19 of the Convention for the Suppression of Terrorist Bombings shall be interpreted as comprising the relevant international rules excluding the provisions of additional Protocols to Geneva Conventions of 12 August 1949, to which Turkey is not a Party. The first part of the second paragraph of the said article should not be interpreted as giving a different status to the armed forces and groups other than the armed forces of a state as currently understood and applied in international law and thereby as creating new obligations for Turkey. Upon ratification:	**Gr:** Same as above concerning Israel.

	30 May 2002	The Republic of Turkey declares its understanding that the term international humanitarian law referred to in Article (19) of the Convention for the Suppression of Terrorist Bombings shall be interpreted as comprising the relevant international rules excluding the provisions of Additional Protocols to Geneva Conventions of 12 August 1949, to which Turkey is not a Party. The first part of the second paragraph of the said article should not be interpreted as giving a different status to the armed forces and groups other than the armed forces of a state as currently understood and applied in international law and thereby as creating new obligations for Turkey.	
	Pakistan 13 August 2002	Declaration: The Government of the Islamic Republic of Pakistan declares that nothing in this Convention shall be applicable to struggles, including armed struggle, for the realization of right of self-determination launched against any alien or foreign occupation or domination, in accordance with the rules of international law. This interpretation is consistent with Article 53 of the Vienna Convention on the Law of Treaties 1969 which provides that an agreement or treaty concluded in conflict with existing jus cogen or peremptory norm of international law is void and, the right of self-determination is universally recognized as a jus cogen. Note of the UN Secretariat: With regard to the declaration made by the Government of Pakistan upon accession, the UN Secretary-General received the following communication from Russian Federation: "The Russian Federation has considered the declaration made by the Islamic Republic of Pakistan upon accession to the International Convention for the Suppression of Terrorist Bombings, of 1997.	**Gr:** Pakistan's reservation is of a general nature and its application would lead to inoperativeness of the Convention. As such it runs counter to the object and purpose of the Convention. **UK:** Reservation purporting not to apply the Convention in respect of "struggles, including armed struggles, for the realization of the right of self-determination launched against any alien of foreign occupation or domination" is incompatible with the object and purpose of the Convention. **Russian Federation (RU):** 1. In the Russian Federation the procedure of making objections to reservations under the Federal Law of 1995 "On International Treaties of the Russian Federation" is set as follows. An objection to, as well as acceptance of a reservation to a treaty, can be made by a State organ that expressed consent of a State to be bound by that treaty. Such organs are the President, the Government and the Parliament. The last one decides upon the question when the treaty concerned has been ratified (or the Russian Federation has acceded to it by adopting a federal legislative act – Federal Law). 2. Human rights treaties as well as anti-terrorist conventions under Russian legislation are subject to ratification by the Parliament of the Russian Federation. Objections to reservations to such treaties, therefore, require the same procedure as treaties themselves. As usual this process takes much time. This

		The Russian Federation takes the position that every State which has agreed to the binding nature of the provisions of the Convention must adopt such measures as may be necessary, pursuant to article 5, to ensure that criminal acts which, in accordance with article 2, are within the scope of the Convention, in particular where they are intended or calculated to provoke a state of terror in the general public or in a group of persons or particular persons, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature and are punished by penalties consistent with their grave nature. The Russian Federation notes that the realization of the right of peoples to self- determination must not conflict with other fundamental principles of international law, such as the principle of the settlement of international disputes by peaceful means, the principle of the territorial integrity of States, and the principle of respect for human rights and fundamental freedoms. The Russian Federation believes that the declaration made by the Islamic Republic of Pakistan upon accession to the International Convention for the Suppression of Terrorist Bombings is incompatible with the object and purpose of the Convention. In the view of the Russian Federation, the declaration made by the Islamic Republic of Pakistan may jeopardize the fulfilment of the provisions of the Convention in relations between the Islamic Republic of Pakistan and other States Parties and thereby impede cooperation in combating acts of terrorist bombing. It is in the common interest of States to develop and strengthen cooperation in formulating and adopting effective practical measures to prevent terrorist acts and punish the perpetrators. The Russian Federation, once again declaring its unequivocal condemnation of all acts, methods and practices of terrorism as criminal and unjustified, regardless of their motives and in all their forms and	was the main consideration taken into account when it was decided to make not an objection to the declaration made by Pakistan to the International Convention for the Suppression of Terrorist Bombings but rather a declaration of political nature. Russian declaration of 22 September 2003 in response to the Pakistan's declaration unlike an objection does not entail any legal effects; its aim was to persuade Pakistan to reconsider its declaration.

		manifestations, wherever and by whomever they are perpetrated, calls upon the Islamic Republic of Pakistan to reconsider its position and withdraw the declaration."	
International Convention for the Suppression of Financing of Terrorism, New York, 9 December 1999	Democratic People's Republic of Korea 12 November 2001	Reservation upon signature: 1. The Democratic People's Republic of Korea does not consider itself bound by the provisions of article 2, paragraph 1, sub-paragraph (a) of the Convention. 2. The Democratic People's Republic of Korea does not consider itself bound by the provisions of article 14 of the Convention. 3. The Democratic People's Republic of Korea does not consider itself bound by the provisions of article 24, paragraph 1 of the Convention.	**UK:** Reservations purporting to exclude Articles 2(1) (a) and 14 of the Convention are contrary to the object and purpose of the Convention and to UNSCR 1371(2001). **Gr:** Article 14 of the Convention is a fundamental provision of the Convention and the reservation of Democratic People's Republic of Korea to it runs counter to the object and purpose of the Convention.
	Jordan 28 August 2003	Declarations: 1. The Government of the Hashemite Kingdom of Jordan does not consider acts of national armed struggle and fighting foreign occupation in the exercise of people's right to self-determination as terrorist acts within the context of paragraph 1(b) of article 2 of the Convention. 2. Jordan is not a party to the following treaties: A. Convention on the Physical Protection of Nuclear Material, adopted in Vienna on 3 March 1980. B. Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, done at Rome on 10 March 1988. C. Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, done at Rome on 10 March 1988. D. International Convention for the Suppression of Terrorist Bombings, adopted in New York on 15 December 1997.	**UK:** Reservation, which does not consider "acts of national armed struggle and fighting foreign occupation in the exercise of people's right to self-determination" as terrorist acts, is contrary to the object and purpose of the Convention. **Gr:** Same commentary as regards to the Pakistani reservation to the International Convention for the Suppression of Terrorist Bombings.

		Accordingly Jordan is not bound to include, in the application of the International Convention for the Suppression of the Financing of Terrorism, the offences within the scope and as defined in such Treaties.	
	Russian Federation 3 April 2000 27 November 2002	Declaration upon signature: It is the position of the Russian Federation that the provisions of article 15 of the Convention must be applied in such a way as to ensure the inevitability of responsibility for perpetrating the crimes falling within the purview of the Convention, without prejudice to the effectiveness of international cooperation with regard to the questions of extradition and legal assistance." Declarations upon ratification: It is the position of the Russian Federation that the provisions of article 15 of the Convention must be applied in such a way as to ensure the inevitability of responsibility for perpetrating crimes falling within the purview of the Convention, without prejudice to the effectiveness of international cooperation with regard to the questions of extradition and legal assistance.	**Gr:** The Russian declaration raises some doubts as to the applicability of a fundamental rule protecting human rights (*clause française*) which should in all cases be respected.
Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome 10 March 1988 / Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Rome 10 March 1988	Egypt 8 January 1993	The instrument of ratification was accompanied by the following reservations: 1. A reservation is made to article 16 on the peaceful settlement of disputes because it provides for the binding jurisdiction of the International Court of Justice, and also with regard to the application of the Convention to seagoing ships in internal waters which are scheduled to navigate beyond territorial waters. 2. A reservation is made to article 6, paragraph 2, of the Convention and article 3, paragraph 2, of the Protocol because those articles permit the optional jurisdiction of blackmailed States (which are asked by the perpetrator	**Gr:** The reservation of Egypt insofar as it refers to seagoing vessels in internal waters which are scheduled to navigate beyond territorial waters, seems to restrict the scope of application of the Convention as defined in article 4 although such article is not explicitly referred to in the text of the reservation. The reservation of Egypt to article 6 paragraph 2 of the Convention and article 3 paragraph 2 of the Protocol could be problematic in accordance with what was said concerning the reservation of Oman although the Egyptian reservation is less explicit.

		of an act of terrorism to do or abstain from doing any act). This is in compliance with the provision of paragraph 4 of each of the two articles.	
International Convention against the taking of Hostages, New York, 17 December 1979	Lebanon 4 December 1997	Declaration: 1. The accession of the Lebanese Republic to the Convention shall not constitute recognition of Israel, just as the application of the Convention shall not give rise to relations or cooperation of any kind with it. 2. The provisions of the Convention, and in particular those of its article 13, shall not affect the Lebanese Republic's stance of supporting the right of States and peoples to oppose and resist foreign occupation of their territories.	**Gr:** The declaration made by Lebanon although seemingly of political nature may nonetheless in our view indicate an understanding by Lebanon that the Convention may not apply even when there is an international element to the offence.

APPENDIX III

QUESTIONNAIRE ON NATIONAL* MEASURES TO IMPLEMENT UN SANCTIONS

Deadline for reply: 31 January 2005

1. Which are the procedures for the incorporation of Security Council Resolutions imposing sanctions into the internal legal order of your State? Are they incorporated through legislation, regulations or in any other way? Has the implementation given rise to any constitutional or other legal problems at national level? Is there any relevant case law?

2. Does the choice depend on the content and the legal nature of the Security Council Resolution?

3. When sanctions are imposed for a fixed period of time which is not renewed, are they tacitly repealed within your domestic legal order or is any normative action required?

4. When a Security Council Resolution imposing an export embargo provides for exceptions while not establishing a committee to authorize such exceptions, does the incorporating act appoint a national authority which is competent to authorize export?

5. Are Sanctions Committee decisions specifying Security Council sanctions or setting conditions for their activation incorporated into domestic law?

6. Have there been cases where the act incorporating sanctions in the domestic legal order was challenged in court for being in violation of human rights? For example, have national courts assumed jurisdiction in cases where sanctions are challenged by individuals affected by sanctions:
   a. if implemented through EU-regulations;
   b. if implemented directly at national level?

7. Are there decisions of national courts or state practice concerning the relationship between sanctions directed towards individuals and Human Rights of these individuals?

(*) Or European Union.

APPENDIX IV

INTERVENTION BY DR JAKOB KELLENBERGER
PRESIDENT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS
THE RELEVANCE OF INTERNATIONAL HUMANITARIAN LAW
IN CONTEMPORARY ARMED CONFLICTS

Madam Chair, Excellencies, Ladies and Gentlemen,

Let me begin by saying how pleased I am to be here with you today and to be able to share some thoughts with you about the relevance of international humanitarian law (IHL) in contemporary armed conflicts. I would also like to thank all of you for having granted the International Committee of the Red Cross (ICRC) observer status, giving it the opportunity to contribute to the debate in this important forum.

As I am sure you know, the promotion and strengthening of international humanitarian law are key activities of the ICRC. These activities in the legal field are closely linked to its humanitarian work in over 80 countries with around 12'000 staff members throughout the world. They try to protect and assist people affected by armed conflicts and situations of internal violence and contribute to respond to one of the most pressing challenges today, which is respect for IHL by all the parties to armed conflicts. With all you hear about "new" wars you may be surprised when I tell you that, unfortunately, you see very little "newness". Non-international armed conflicts, most of the time characterised by low intensity of fighting and high intensity of suffering by the civilian population, have been the main feature of the conflicts landscape for many years. As you would guess, they cost much more human lives than international terrorism which does not mean I am not aware of the horrible human consequences of terrorism.

The ICRC's largest humanitarian operation at present is in Darfur. The ICRC, cooperating closely with the Sudanese Red Crescent and other National Red Cross and Red Crescent Societies, is providing non-food assistance to 300 000 internally displaced persons in 30 locations in Darfur. As you know, the ICRC has a special responsibility for IDP's as a consequence of armed conflicts. The ICRC provides also food to more than 50 000 persons, a figure that may go up to 400 000 by the end of 2004. Among the many other activities I would like to mention the rehabilitation of four hospitals with 860 beds.

Sudan is at present the largest humanitarian operation of the ICRC. 175 Delegates and almost 1 200 Sudanese ICRC staff are working in Sudan, more than 90 Delegates and 400 Sudanese staff directly for the operation in Darfur. The Institution has the ability to cross the lines and is in contact with all parties to the conflict.

The tragedy in Sudan is just one example of the ICRC's involvement worldwide. More generally, its activities range from protection and assistance work in close contact with those affected by armed conflict, internal disturbances and other situations of violence, to the promotion, clarification and development of humanitarian law. For the ICRC, protection and assistance activities are very closely linked. They are in fact the two sides of the same coin, mutually reinforcing each other.

What I propose to do in this brief presentation is to first outline some current challenges to the relevance of IHL in contemporary armed conflicts, to then speak about the issue of weapons and war, and to finally address the question of national implementation of IHL.

While IHL was, for many decades, considered to be a field for specialists, the importance of its application in practice has, over the past few years, become a focus of public attention in a way that can only be welcomed.

It must be admitted that the current visibility of IHL is in large measure due to what is known as the "war against terrorism". The horrific attacks of 11 September 2001 and the response thereto brought about a fairly widespread questioning of the adequacy of international humanitarian law to deal with current forms of violence. The main question asked was whether the existing body of IHL rules is indeed capable of addressing "terrorism".

Where the level of armed conflict has been reached, whether it be international or non-international armed conflict, the rules of IHL, which aim primarily to protect persons not or no longer participating in hostilities, must be fully respected. Thus, the rules of international armed conflict were fully applicable to the war in Afghanistan, just as they were later applicable to another armed conflict - waged for different reasons - in Iraq.

In fact, it may be said that the problem we have faced and are still facing in terms of IHL application to the "war against terrorism" has been twofold. On the one hand, we have witnessed situations in which the applicability of specific IHL rules has been contested even though the general application of IHL to the situation was not. This has led to troubling denials of some of the protections provided by IHL to specific categories of persons, an issue which the ICRC has been attempting to rectify. On the other hand, we have heard interpretations according to which IHL covered situations that did not amount to an armed conflict in the legal sense and in which the persons affected should have been protected by domestic law and international human rights law instead. Once again, this is an area that the ICRC has strived to clarify.

In our view, international humanitarian law and human rights law must both be respected in the fight against terrorism: IHL when the violence has reached armed conflict level, in addition to human rights law, and human rights law when it has not. IHL and human rights law are distinct, but complementary bodies of law whose application, along with refugee law where appropriate, provides a framework for the comprehensive protection of persons in situations of violence. It is of some concern, therefore, that IHL and human rights are sometimes claimed to be mutually exclusive.

As we know, the fight against terrorism has not only led to an examination of the adequacy of IHL, but also to a re-examination of the balance between state security and individual protections, in many cases to the detriment of the latter. The ongoing debate on the permissibility of torture is an example. After decades of improvements in international standards governing the treatment of people deprived of liberty, discussions on whether torture might in some situations be allowed have resurfaced, despite the fact that this abhorrent practice is a crime under IHL and other bodies of law and is prohibited in all circumstances.

Extra-judicial killings and detention without application of the most basic judicial guarantees have proven to be another consequence of the fight against terrorism. Other examples could be cited as well, such as the recent queries on whether the rules on the questioning of detainees depend on their legal status. We should be perfectly clear on this point: there is only one set of rules for the interrogation of persons detained, whether in international or non-international armed conflict, or, indeed, outside of armed conflict.

The balance between legitimate security requirements and the respect of human dignity is particularly fragile with respect to methods of interrogation. The key issue is not whether a detainee can be interrogated, but rather, what means may be used in the process. Neither a prisoner of war, nor any other person protected by humanitarian law can be subjected - it must be stressed - to any form of violence, torture, inhumane treatment or outrages upon personal dignity. These acts, and others, are strictly prohibited by international law, including humanitarian law. Under the laws of war it is the detaining authority that bears full responsibility for ensuring that no interrogation method crosses the line. I do not think that it is a naive assumption that the respect for human dignity can be seen and is a long-term security investment.

The ICRC, in its report "International humanitarian law and the challenges of contemporary armed conflicts" concluded that international humanitarian law, in its current form is, on the whole, adequate as a legal basis for responding to the challenge of contemporary international armed conflicts. The 28th International Conference of the Red Cross and Red Crescent shared this conviction in its final declaration.

This is not to say that there is not or will not be scope or need for development of this body of law in new situations. But if situations or developments are being qualified as "new", at least two questions have to be answered clearly: what is "new"? what is the legal regime applicable to the new situation?

In closing this portion of my presentation, I would like to reiterate that the legal and moral challenge presently facing the international community is to find ways of dealing with new forms of violence while preserving existing standards of protection provided by international law, including international humanitarian law.

The biggest challenge of all is improving compliance with the rules of IHL in non-international armed conflict, especially by non-State armed groups because the vast majority of contemporary armed conflicts are waged within the boundaries of States and the respect for IHL is particularly poor in these contexts. The ongoing conflict in Darfur is a brutal reminder of the consequences of non-respect for those rules in internal armed conflicts. And while most attention has in recent years been directed, in terms of IHL adequacy to the so-called "war on terror", it is particularly important and urgent from a humanitarian point of view to work on mechanisms and tools that can lead to better respect for IHL in non-international armed conflicts. This does and must include some serious thinking on how armed groups might be provided with incentives to comply with humanitarian law.

I turn now to some issues related to weapons and IHL.

The regulation of weapons is the field of IHL that has evolved most rapidly in the last decade. In less than ten years, the use of blinding laser weapons and anti-personnel landmines has been banned. The Convention on Certain Conventional Weapons has been extended to cover non-international armed conflicts and a new protocol on explosive remnants of war has been added.

While these developments are remarkable, they also reflect the necessity of ensuring that IHL keeps up with both the rapid development of technology and humanitarian problems on the ground. However, preserving fundamental norms governing weapons requires not only adopting new norms, when necessary, but also defending old norms from new challenges.

One of the most ambitious and successful efforts in this field has been the adoption and implementation of the Convention on the Prohibition of Anti-personnel Mines and on their Destruction - the Ottawa Treaty - a process in which the ICRC has been deeply involved from the outset. 143 States are now party to the Convention. The global use of anti-personnel mines has decreased dramatically. States Parties have destroyed over 37 million anti-personnel mines, and mine clearance is taking place in most of mine-affected States Parties. Where the Convention's norms are being fully applied, the number of new mine victims has decreased significantly, in some cases by two thirds or more.

However, the scourge of landmines is far from over. The most crucial phase in the life of the Convention will be the next five years leading up to mine-clearance deadlines that begin to fall in 2009. The Convention's first Review Conference — referred to as the *Nairobi Summit on a Mine Free World* — is a critical moment for political leaders from all States Parties to *reaffirm* their commitment to this unique Convention, to *commit* the resources needed to ensure that its promises are kept and to *adopt* plans to address the remaining challenges.

I encourage those few European States that have not yet joined this Convention to do so before the Nairobi Summit or to announce there a date by which they intend to adhere.

You as Legal Advisors to States Parties can also play an important role by lending your efforts to developing common understandings by the Nairobi Summit that will promote consistent State practice on issues related to articles one to three of the Convention. The issues in question include the level of mines permitted for training purposes, mines with sensitive fuses and joint military exercises.

In contrast to the progress on anti-personnel mines the broader humanitarian problems caused by a range of explosive remnants of war are set to get worse if urgent action is not taken. Each new conflict is adding to the already huge burden of clearance in affected communities — a burden which existing resources are already inadequate to address. The recently adopted Protocol on Explosive Remnants of War to the Convention on Certain Conventional Weapons provides a framework for both preventing and addressing the problem of explosive remnants of war. I urge all member States of the Council of Europe to ensure that its ratification is high on their legislative agendas in the coming year. Sweden was the first State to ratify the Protocol.

New norms are also slowly evolving in the field of arms transfer controls with important implications for IHL. The easy access to arms, particularly access to small arms and light weapons, by those who violate international humanitarian law has severely undermined its respect and caused a major part of the civilian suffering in conflicts throughout the world in recent decades.

Last year States at the 28th International Conference of the Red Cross and Red Crescent recognised that, to "respect and ensure respect" for IHL, controls on arms availability and transfers must be strengthened. They supported the inclusion of criteria on respect for this law by recipients of arms in national laws and policies on arms transfers. I appeal to you to ensure that these commitments are followed up — both at the national level and, for Member States of the European Union, in the current review of the EU Code of Conduct on arms transfers.

One of the most ancient norms in war has been the prohibition on poisoning and the deliberate spread of disease. The prohibition of the use of chemical and biological weapons is enshrined in the 1925 Geneva Protocol and reinforced by the Biological and Chemical Weapons Conventions. However, in the face of stunning advancements in the life sciences and increasing interest in certain types of so-called "non-lethal" weapons, vigilance is needed to ensure that current norms are respected and reinforced. Two years ago,

the ICRC launched a public appeal on "Biotechnology, Weapons and Humanity" calling on governments, the scientific community and industry to reaffirm existing norms and take a wide range of preventive actions. The ICRC has followed this up with an extensive program of outreach to these constituencies. All of these actors together bear responsibility to ensure that the "biotechnology revolution" is not harnessed for hostile purposes.

In response to the growing interest in chemical incapacitants for both law enforcement and military purposes the ICRC has also encouraged States Parties to the Chemical Weapons Convention to begin a process of clarifying precisely what is permitted under the Convention's law enforcement provisions. We again invite you to engage with the ICRC and with other States Parties in addressing these concerns.

Finally, let me address some issues that are, in the view of the ICRC, of particular relevance to the implementation of IHL, mainly at the national level.

At the *international* level States must not only respect but also "ensure respect" for humanitarian law: They must act, whether through bilateral or multilateral channels, to ensure that parties to an armed conflict comply with the law. They are also encouraged to accept the competence of the International Fact-Finding Commission established under the first Additional Protocol of 1977 to enquire into violations of humanitarian law. More recently, with the establishment of the International Criminal Court, an important step has been taken to punish war crimes at the international level.
However, humanitarian law focuses above all on effective implementation at the *national* level. All States have the obligation to disseminate its rules as widely as possible — both within the armed forces and to the public. Many would argue that this is the most important, and effective, means of promoting compliance.

Humanitarian law also seeks to ensure that individuals are held responsible for their action. The most serious violations are considered "war crimes" — criminal acts for which individuals should be tried and punished. Some war crimes — the grave breaches of the Geneva Conventions and their first Additional Protocol — entail particular obligations. States must enact criminal legislation punishing grave breaches, regardless of the offender's nationality or the place of their offence. Moreover they must search for those offenders and either try them before their own courts or extradite them for trial elsewhere.

States are obliged to take action to prevent the misuse of the red cross, red crescent and other protective emblems and signals prescribed by humanitarian law. This is likely to require not only a strict system of control, but also the imposition of penalties on those who misuse the emblems and thereby undermine their protective value. Humanitarian law also sets out a range of fundamental guarantees — including rules on humane treatment, legal procedures and conditions of detention — and States must ensure that these guarantees are reflected in their national law.

Furthermore, States must take a range of administrative measures to ensure that they are able to give full effect to humanitarian law in the event of conflict. Civilian and military planning procedures must take full account of the rules of humanitarian law. Protected persons and sites must be properly identified. Personnel qualified in humanitarian law must be recruited. Provision must be made for materials, specialists units and other arrangements that may be required in the event of conflict.

The implementation of humanitarian law covers a wide range of areas. As such, it falls within the responsibility and expertise of a variety of government ministries and national institutions. It is essential to ensure that there is adequate coordination between these bodies and that full use is made of the expertise available at the national level. To this end, a number of States have established national committees on humanitarian law. Today 68 national IHL committees exist worldwide. These bodies are an efficient measure for the implementation of IHL obligations at the national level. In order to promote an interactive discussion, the ICRC's *Advisory Service on International Humanitarian Law* has created an Electronic Forum for these National Committees.

22 Member States of the Council of Europe have established national committees for the implementation of humanitarian law. The work of these committees has proved very useful and the ICRC cooperates closely with them.

The ICRC's Advisory Service – with experts in Geneva and in several delegations - is committed to help the national authorities adopt and implement the legislative, regulatory and administrative measures required to ensure respect for the law at the national level. One of the activities of the Advisory Service is to promote the ratification of IHL treaties, in particular the four Geneva Conventions and their Additional Protocols. If all

States members of the Council of Europe are party to the 4 Geneva Conventions, a few States are still not bound by the 2 Additional Protocols of 1977. 34 States have accepted the competence of the International Fact-Finding Commission.

Many of the Member States are also party to other treaties, including the 1998 Statute on the International Criminal Court, the 1997 Ottawa Convention on anti-personnel landmines and the 1980 Conventional Weapons Convention. The 25th anniversary of this Convention in 2005 will be an excellent opportunity to ensure the widest possible participation in that Convention and its five Protocols, as well as in its amended Article 1, which extends its scope of application to non-international armed conflicts.

An important anniversary is also the 50th anniversary of the 1954 Hague Convention for the protection of cultural property in the event of armed conflict which we are celebrating this year. Half a century after the adoption of this treaty much remains to be done to ensure universal ratification of the Convention and of its Second Protocol of 1999.

I would like to appeal to the member States of the Council of Europe to consider favourably participation in these treaties in order to render them universal. As we all regrettably know, this is not a guarantee for respect, but we also know that it is an essential precondition for respect.

The importance of national implementation of IHL was reaffirmed by the 28th International Conference of the Red Cross and Red Crescent. The Agenda for Humanitarian Action adopted by the Conference and numerous pledges of States and National Societies focused on participation in IHL treaties and on their implementation at the domestic level.

Towards the end of an address which I gave beginning of September in Sanremo, I asked myself whether the global environment had become more favourable or more hostile in terms of respect for international humanitarian law and other bodies of law protecting human life and human dignity. These were my personal thoughts and I would be most interested in knowing how you feel about the one or other element.

On the one hand, the environment has become more hostile in terms of respect for international humanitarian law because the number of armed groups that simply do not care, about others or about their own members seems to be on the increase;
- it is more hostile, because of a growing tendency to dehumanise or demonise the adversary. The link with the rise of fundamentalism – not only Islamic fundamentalism – is obvious. Nor am I thinking only of religious fundamentalism. Fundamentalists, as you know, think they are always right. They reduce the richness and complexity of human beings to some very few features – or even to a single one – and they are very good at explaining the world in very simple terms, which is what makes them so successful. Their horror vision is a complex human being who takes on many different identities;
- it is more hostile because some people continue to have serious difficulties in achieving a decent balance between legitimate security concerns and the obligation to respect human dignity;
- it is more hostile, because expectations of reciprocity in terms of respect for international humanitarian law no longer play an important disciplining role. Which measures could compensate for this loss is one of the interesting questions we have to ask ourselves. Among such measures, I would include training and educational programmes, and the determined fight against impunity;
- it is more hostile, because the High Contracting Parties not parties to an armed conflict may be less inclined to take the potentially awkward steps of approaching Parties to an ongoing armed conflict with a view to securing their respect for the Geneva Conventions, when doing so might result in losing their support in connection with other, mainly security-related issues.

On the other hand, the environment has become more favourable to progress in terms of respect for international humanitarian law
- because international humanitarian law has a visibility and attracts a level of attention one would not have dreamed of ten or fifteen years ago. Debates related to Iraq, Sudan and other places have contributed to underline the intrinsic value of this body of law. The interest in the ICRC's educational programme for young people aged between 13 and 18 to help them embrace humanitarian principles, to give but one example, is amazing – all the more so when one considers that the States that have introduced the programme belong to different civilizations;
- it is more favourable, because the normative development in the field of international humanitarian law over the last ten years has been quite remarkable, the adoption of the Rome Statute of the International Criminal Court standing out as particularly important;
- it is more favourable, because the space for impunity, even if a lot of tenacity and some patience are needed, will gradually narrow, thanks to the ICC, thanks to the ad hoc tribunals, thanks to progress being

done in the different national legal orders in order to have the basis for prosecuting crimes under the Rome Statute and other legal instruments;
- it is more favourable, because persons whose lives and dignity are under threat can make their voices heard better than in the past;
- it will be more favourable if the commitment contained in the Declaration to the 28th International Conference of the Red Cross and Red Crescent "to protect human dignity in all circumstances by enhancing respect for the relevant law and reducing the vulnerability of populations to the effects of armed conflicts" will be taken seriously.

I thank you for your attention and look forward to our discussion.

APPENDIX V

DRAFT SPECIFIC TERMS OF REFERENCE FOR 2005-2006

1. Name of Committee:

Committee of Legal Advisers on Public International Law (CAHDI)

2. Type of Committee:

Ad hoc Committee of Experts

3. Source of terms of reference:

Committee of Ministers

4. Terms of reference:

Under the authority of the Committee of Ministers, the Committee is instructed to examine questions of public international law, to exchange and, if appropriate, to co-ordinate the views of member states at the request of the Committee of Ministers, Steering Committees and Ad Hoc Committees and at its own initiative.

5. Membership of the Committee:

a. The Committee is composed of experts appointed by member states, preferably chosen among the Legal Advisers to the Ministries of Foreign Affairs. Travel and subsistence expenses of one expert per member state (two for the state assuming the Chair of the Committee) are borne by the Council of Europe budget.

b. The European Community may send representatives to meetings of the Committee, without the right to vote or to a refund of expenses.

c. The following observers with the Council of Europe may send a representative to meetings of the Committee, without the right to vote or to a refund of expenses:
- Canada
- Holy See
- Japan
- Mexico
- United States of America.

d. The following observers with the Committee may send representatives to meetings of the Committee, without the right to vote or to a refund of expenses:
Australia
Israel[1]
New Zealand
The Hague Conference on Private International Law
NATO[2]
The Organisation for Economic Co-operation and Development (OECD)
The United Nations and its specialised agencies[3]
International Committee of Red Cross (ICRC)
European Organisation for Nuclear Research (CERN)[4]
International Criminal Police Organisation (INTERPOL).

6. Structures and working methods:

The CAHDI may set up working parties and have recourse to consultant experts.

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[1] Admitted as observer « for the whole duration of the Committee » by the CAHDI, March 1998. The same is valid for subordinated committees. Decision confirmed by the Committee of Ministers (CM/Del/Dec(99)670/10.2 and CM(99)57, para.D15).
[2] See CM/Del/Dec/Act(93)488/29 and CM/Del/Concl(92)480/3.
[3] For specific items at the request of the Committee.
[4] For specific items at the CERN's request and subject to the Chair's approval.

7. Duration:

The present terms of reference expire on 31 December 2006.

APPENDIX VI

PRELIMINARY DRAFT AGENDA OF THE 29TH MEETING OF THE CAHDI

A. INTRODUCTION

1. Opening of the meeting by Ms Dascalopoulou-Livada, Chair of the CAHDI

2. Adoption of the agenda and approval of the report of the 28th meeting (Lausanne, 13-14 September 2004)

3. Communication by the Director General of Legal Affairs, Mr de Vel

B. ONGOING ACTIVITIES OF THE CAHDI

4. Decisions by the Committee of Ministers concerning the CAHDI and requests for CAHDI's opinion

5. The law and practice relating to reservations and interpretative declarations concerning international treaties: European Observatory of Reservations to international Treaties
a. Consideration of outstanding reservations and declarations to international Treaties
b. Consideration of reservations and declarations to international Treaties applicable to the fight against terrorism

6. Pilot Project of the Council of Europe on State practice regarding immunities of States – Presentation of the Analytical report and follow-up

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

8. National implementation measures of UN sanctions, and respect for Human Rights

C. GENERAL ISSUES ON PUBLIC INTERNATIONAL LAW

9. Exchange of views with the Bureau of the Court of Conciliation and Arbitration within the OSCE

10. Consideration of current issues in the area of international humanitarian law

11. Drafting of the new Convention on jurisdictional immunities of States and their property

12. Developments concerning the International Criminal Court (ICC)

13. Implementation and functioning of the Tribunals established by United Nations Security Council Resolutions 827 (1993) and 955 (1994)

14. Fight against Terrorism – Information about work undertaken in the Council of Europe and other international Fora

D. OTHER

15. Date, place and agenda of the 30th meeting of the CAHDI

16. Other business