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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

31st meeting
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MEETING REPORT

Secretariat Memorandum
prepared by the Directorate General of Legal Affairs

Tel. 33 (0)388413479 - Fax 33 (0)388412764 - dg1.cahdi@coe.int - www.coe.int/cahdi

A. INTRODUCTION

1. Opening of the meeting by the Chair

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 31st meeting in Strasbourg on 23 and 24 March 2006. The meeting was opened by Ms Dascalopoulou-Livada, Chair of the CAHDI.

2. Ms Dascalopoulou-Livada welcomed all the participants to the meeting. The list of those who took part is set out in **Appendix I**.

2. Adoption of the agenda and approval of the report of the 30th meeting

3. The Chair suggested that the CAHDI first approve the report of the 30th meeting (document CAHDI (2005) 19 prov). In this regard, changes were submitted by the delegations of Switzerland and the United Kingdom. With these changes, the report was adopted unanimously.

4. The agenda, as set out in **Appendix II**, was adopted unanimously.

3. Communication by the Secretariat

5. The Secretariat reported on developments at the Council of Europe since the CAHDI's last meeting (Strasbourg, 19-20 September 2005), including those relating to the European Treaty Series, now known as the Council of Europe Treaty series. In this regard, he referred to document CAHDI (2006) Inf 1, which listed all the signatures and ratifications to Council of Europe conventions having taken place since September 2005. He went to mention that as far as the conventions relating to terrorism were concerned, a significant effort had been deployed by the Council of Europe in general and the Committee of Ministers in particular, to urge states to see that the most recently adopted conventions in this field, namely the Council of Europe Convention on the Prevention of Terrorism and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, entered into force as soon as possible.

6. As regards the Council of Europe Treaty Series, the Secretariat referred to the recent adoption by the Committee of Ministers of the Council of Europe Convention on the avoidance of statelessness in relation to State succession. He recalled that the Director General of Legal Affairs, Mr Guy De Vel, had given the CAHDI background information on the drawing up of this Convention at its last meeting. This Convention, which bears number 200 and in this way marks the success of the Treaty Series, would be open for signature on the occasion of the 116th session of the Committee of Ministers which would take place in Strasbourg on 18 and 19 May.

7. Further to that, the Secretariat informed the CAHDI of the Secretary General's report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies, reproduced in document CAHDI (2006) Inf 5. In this connection, he mentioned the Venice Commission opinion on the international legal obligations of Council of Europe member states in respect of secret detention facilities and inter-state transport of prisoners, drawn up in response to a request from Mr Dick Marty, Chair of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe and published on 22 March. He went on to inform the CAHDI that the Secretary General would be discussing follow-up measures with the Ministers' Deputies in the near future and that he would report to the CAHDI on the follow-up given at its next meeting.

8. The Chair thanked the Secretariat for this information and added that the Secretary General's report had in fact revealed that existing procedures to monitor flights through European airspace did not provide adequate safeguards against abuse and that his inquiry would continue in the case of individual countries which had provided incomplete or inadequate replies. She went on to suggest that this issue be looked at in conjunction with agenda item 8.

B. ONGOING ACTIVITIES OF THE CAHDI

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

9. The Chair stated that there had been no requests for the CAHDI's opinion, but merely a decision taken by the Committee of Ministers which took note of the abridged report of the CAHDI's 30th meeting (document CAHDI (2006) 1). The CADHI took note of the information provided.

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

10. In its capacity as European Observatory of Reservations to International Treaties, the CAHDI considered a list of declarations and reservations to international treaties on the basis of information supplied by the Secretariat.

11. The CAHDI examined the **declarations and reservations to treaties concluded outside the Council of Europe** (document CAHDI (2006) 2 Part I).

12. With regard to the reservations and declarations entered by Egypt on 1 March 2005 to the International Convention for the suppression of the financing of terrorism, New York, 9 December 1999, the delegation of Portugal reiterated the statement it made at the last meeting of the CAHDI, namely that Portugal had objected to this declaration. The delegations of Denmark, Finland, Germany, Italy, the Netherlands and the observer of the United States of America stated that their countries had also objected to this declaration. The delegations of Poland, Spain, the United Kingdom and the observer of Canada stated that their countries intended to object to the Egyptian declaration.

13. With regard to the reservations and declarations entered by the Syrian Arab Republic on 24 April 2005 to the International Convention for the suppression of the financing of terrorism, New York, 9 December 1999, the delegations of Denmark, Finland, Germany, Italy, the Netherlands, Norway, Portugal and the observer of the United States of America stated that their countries had already objected to this reservation. The delegations of Poland, Spain, the United Kingdom and the observer of Canada stated that their countries intended to object to the Syrian reservation.

14. With regard to the reservation and understanding entered by Bangladesh on 26 August 2005 to the International Convention for the suppression of the financing of terrorism, New York, 9 December 1999, the delegation of the United Kingdom informed the CAHDI that the United Kingdom had tried to obtain clarifications from the Bangladeshi authorities of this understanding, but had not been successful. It hoped, however, that other states would try to pursue the matter with the Bangladeshi authorities. In principle, it stated that the understanding that the "Convention shall not be deemed to be inconsistent with its

international obligations under the Constitution of the country" was wholly unclear and potentially far-reaching. It is for this reason that failing the provision of satisfactory clarifications, the United Kingdom would no doubt lodge an objection before the given deadline.

15. In the framework of the Austrian Presidency of the European Union, the delegation of Austria stated that it had tried to follow this matter up by initiating diplomatic contacts with Bangladesh, but was still awaiting the outcome of these consultations. Any information obtained in this regard would be forwarded to the Secretariat for onward transmission to CAHDI members.

16. The delegation of Germany agreed with the delegations of Austria and the United Kingdom regarding the very unclear wording used in the understanding.

17. With regard to the declaration made by Belgium on 20 May 2005 to the International Convention for the suppression of terrorist bombings, New York, 15 December 1997, the delegation of Belgium stated that this declaration was the result of its current legislation. A new draft law had been submitted to the *Conseil d'Etat* and would probably be adopted/voted by parliament during the first half of 2006. This would subsequently lead Belgium to withdraw the said declaration.

18. With regard to the reservation made by Egypt on 9 August 2005 to the International Convention for the suppression of terrorist bombings, New York, 15 December 1997, the observers of Canada and the United States stated that it was likely that they would object to this reservation. The delegations of Germany and Portugal stated that they had not yet come to a decision.

19. With regard to the declaration and reservation made by Turkey on 14 September 2005 to the International Convention for the suppression of acts of nuclear terrorism, New York, 13 April 2005, the delegation of Sweden considered that this declaration narrowed down Turkey's obligations under international humanitarian law to the legal instruments to which Turkey was a party and that this would therefore exclude customary law in this area. The delegations of Greece, France and the observer of Canada also voiced their concerns and the delegation of the Netherlands asked for clarifications in this regard. The delegation of Portugal reiterated what it had already said to its COJUR partners, namely that due to Portugal's limited resources and the fact it had only recently started to make objections, it would not object to reservations made upon signature.

20. In response, the delegation of Turkey stated that by its declaration with regard to Article 4(2) of the International Convention for the suppression of act of nuclear terrorism, Turkey reiterated the concern it had already expressed with respect to similar conventions on the fight against terrorism. Its intention was merely to avoid any interpretation of the said article as giving a different status to armed groups (for instance terrorist groups) as opposed to the armed forces of a state, which was a crucial security issue for Turkey. It therefore interpreted this article as referring to the legal instruments to which Turkey was already a party, and not as creating new obligations for Turkey in this field. It went on to say that, as a country which had suffered from terrorism for a long time, Turkey's declaration in no way affected negatively its obligations under the provisions of the said Convention. Consequently, it was not incompatible with the object and the purpose of the Convention, since the main object and purpose of the Convention was the suppression of acts of nuclear terrorism. As regards the observations of some delegations with regard to customary international law, the declaration of Turkey was not intended to open a discussion on whether certain instruments had become part of customary international law or not.

21. The delegation of Norway stated that this statement only reinforced its doubts as to the declaration.

22. With regard to the reservation made by Egypt on 20 September 2005 to the International Convention for the suppression of acts of nuclear terrorism, New York, 13 April 2005, the delegation of the United Kingdom observed that it was similar to that formulated by Egypt with respect to the International Convention for the suppression of terrorist bombings and considered that this declaration extended rather than narrowed the scope of application of the Convention.

23. The delegation of Germany shared the concerns expressed by the delegation of the United Kingdom. It referred to the unclear working of the reservation and stated that Germany was also uncertain as to when it should object to this reservation. It suggested trying to persuade Egypt not to repeat this reservation upon ratification. In this connection, it stated that it was interested in other delegations' views as to what to do with reservations made upon signature.

24. The delegation of Austria reminded those countries belonging to the European Union that it had undertaken to seek clarifications from the Egyptian authorities, but had had no answer yet. It added that if it had not received a reply by May, it would seriously consider objecting. The delegations of France and Norway stated they were also considering objecting.

25. During the discussion, the delegation of the United Kingdom suggested that the Secretariat might prepare a chart with a list of reservations and declarations on the one side and a list of member and observer states on the other, indicating (by means of a cross) which states were going to object, which ones would not and which ones had not stated their position. The delegation of the United Kingdom stated that such a tool had proved useful within the COJUR, which undertakes a similar exercise at each one of its meetings.

26. The Chair thanked the delegation of the United Kingdom for this proposal, which she felt might serve a useful purpose, particularly as it would help states to reach a final decision on whether to object or not; she nevertheless stressed that the value of any such chart would be limited in time. In this connection, the delegation of Austria offered to provide the Secretariat with the information available as far as the 25 member states of the European Union were concerned. The Secretariat was entrusted with the task of preparing a chart for the CAHDI's next meeting.

27. The CAHDI then turned its attention **to the declarations and reservations to Council of Europe treaties** (document CAHDI (2006) 2 Part II).

28. With regard to the reservations and declarations made by Monaco on 30 November 2005 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5), 4 November 1950, the delegation of Monaco stated that these reservations were linked to Monaco's geography and demography. With respect to the latter, it mentioned that Monegasque nationals were in fact a minority on the Principality's territory. It stressed, however, that these reservations and declarations had been submitted in advance to the Council of Europe's Legal Advice Department and Treaty Office.

29. With regard to the declaration made by Monaco on 30 November 2005 to Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and the First Protocol thereto (ETS No. 46), 16 September 1963, the delegation of Monaco stated that this was meant to address a territorial security problem.

30. With regard to the declarations made by Belgium (11 May 2005) and Monaco (30 November 2005) to Protocol No. 7 to the European Convention on Human Rights (ETS no. 117), 22 November 1984, the Chair observed that it was up to the Court to decide on such declarations/reservations.

31. With regard to the reservations and declarations made by Serbia and Montenegro (15 February 2006) to the European Charter for Regional or Minority Languages (ETS No. 148), 5 November 1992, the delegation of Sweden stated that it was uncertain whether the position with respect to Article 1.b was a declaration or reservation given that it made the application of the Convention subject to national law.

32. The delegation of the Netherlands shared the concerns expressed by the delegation of Sweden. It stated that Article 2 provides that "Each party undertakes to apply the provisions of Part II to all the regional or minority languages spoken within its territory and which comply with the definition in Article 1". However, Article 1.b gives a definition of what is to be understood by regional or minority languages in the territory and makes no reference to a limitation of the sort contained in the declaration by Serbia and Montenegro, which only takes into account of "areas in which regional and minority languages are in official use in line with the national legislation". The delegation of the Netherlands saw this as a clear restriction and therefore supported the delegation of Sweden's request for clarifications.

33. In response, the delegation of Serbia and Montenegro indicated that the declaration was in accordance with its constitution and would seek clarifications from its national authorities in time for the next meeting of the CAHDI.

34. With regard to the reservation made by Bulgaria (7 April 2005) to the Convention on Cybercrime (ETS No. 185), 23 November 2001, the Chair pointed out that Article 14-3).a, there is a provision which states that "Each party may reserve the right to apply the measures […] only to offences or categories of offences specified in the reservation". As the Bulgarian reservation did not specify such offences or categories of offences, the reservation was rather vague and needed to be further specified. She requested that the delegation of Bulgaria look into the matter.

35. With regard to the declaration and the reservations made by France (10 January 2006) to the Convention on Cybercrime (ETS No. 185), 23 November 2001, the Chair was unsure as to the exact meaning of the second reservation, which states that "France reserves the right not to establish jurisdiction when the offence is committed outside the territorial jurisdiction of any state", in view of Article 22–1.d) which states that "by one its nationals, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State." She would welcome a clarification from the delegation of France at a future CAHDI meeting before the given deadline of 21 February 2007.

36. With regard to the declaration made by France (10 January 2006) to the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189), 28 January 2003, the Chair stated that, in her opinion, the expression "established under its domestic law" was unclear. She requested that the delegation of France provide the CAHDI with clarifications in this regard.

37. With regard to the declarations by Turkey (19 January 2006) to the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196), 16 May 2005, the Chair stated that, in her opinion, the first two declarations were similar to those already made by Turkey with respect to other anti-terrorist conventions and would probably lead to the same observations. No comments were made with respect to the third declaration. However, the Chair considered the fourth declaration, which refers to understanding of the term

"settlement of the dispute", to be repetitive in so far as the article to which Turkey refers, namely "Article 29 – Settlement of disputes", said precisely what was in the declaration.

38. In view of what was said, the delegation of Turkey thought that a clarification was necessary. It stated that Turkey's declaration with regard to Article 29 of the Convention reiterated its position that in the settlement of disputes with regard to this Convention, consent of both parties to the dispute must be given before the arbitration procedure may be started.

39. The CAHDI then looked at document CAHDI (2006) 9, which contained an explanatory note submitted by the delegation of Poland concerning Protocol No. 14 to the ECHR amending the control system of the Convention. In fact, during the 30th meeting of the CAHDI, the delegation of the United Kingdom had stated that the subject of the declaration fell under the control of the European Court of Human Rights and requested an explanation and clarification from the delegation of Poland (paragraph 35 of document CAHDI (2005)19).

40. The delegation of Poland underlined that by means of this declaration Poland did not intend to change in any way the existing extent of application of the Convention towards Poland. The purpose of the declaration was to prevent possible doubts as regards the *ratione temporis* of the European Court of Human Rights with respect to Poland. In its opinion, such doubts may arise as a result of the entry into force of Protocol No. 14 to the ECHR, bearing in mind that it did not contain a clause similar to that included in Article 6 of Protocol 11. Poland therefore wished to confirm, by means of this declaration, that it recognised the competence of the European Court of Human Rights to deal with individual applications only in regard to acts, decisions and events which occurred after 30 April 1993, i.e. after the entry into force of the initial declaration of recognition of the competence of the Court.

41. The delegation of the United Kingdom thanked the delegation of Poland and took note of what had been said. It added, however, that reservations and declarations to the ECHR were always subject to the eventual consideration by the European Court of Human Rights and the CAHDI should therefore refrain, where possible, from analysing these reservations and declarations.

42. The delegation of Portugal thanked the delegation of Poland for the clarifications provided for this declaration, which it did not think would be problematic.

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

43. The Chair introduced this item by recalling that the consideration of reservations and declarations to international treaties applicable to the fight against terrorism was now a regular item on the CAHDI's agenda. In this framework, she referred to two very informative Secretariat documents (document CAHDI (2006) 6 and CAHDI (2006) 7). The Chair went on to mention document CAHDI (2006) 3, which contained a letter from the Deputy Prime Minister and Minister of Foreign Affairs of Turkey addressed to the Secretary General of the Council of Europe and related to Turkey's declarations with regard to the International Convention for the Suppression of Terrorist Bombings. The letter was sent in reply to the Secretary General's letter of 14 February 2005 inviting governments to consider withdrawing declarations with regard to this Convention.

44. The Secretariat recalled that reservations and declarations to international treaties applicable to the fight against terrorism had been the subject of several reviews in past CAHDI meetings, the last of these during its 30th meeting. In line with its request, the list of

reservations and declarations was systematically submitted to the Committee of Ministers for endorsement and in the event of any new reservations being included in the list, the Secretary General, acting upon the Committee of Ministers' request and as per the CAHDI's suggestion, issued letters to the reserving states asking them to consider the possibility of withdrawing such reservations. In this regard, the Secretary of the CAHDI stated that the Secretary General had not received any replies to the latest letters he had sent out.

45. The Chair closed the discussion on this item by reminding CAHDI members that this was an ongoing exercise and that the Secretariat would include any new reservations or declarations to international treaties applicable to the fight against terrorism in a revised version of the aforementioned documents for consideration by the CAHDI at its next meeting.

6. State Practice regarding State Immunities

46. In presenting this item, the Secretary of the CAHDI referred to a printout of the online database set up by the Secretariat in response to the request made by the CAHDI at its last meeting (document CAHDI (2006) Inf 3 bil). He mentioned the advantages of having an online database, which could be regularly updated.

47. Document CAHDI (2006) Inf 3 bil contained the cover page proof of the forthcoming publication on State Practice regarding State Immunities. The Secretary of the CAHDI reported that the proofs had now been checked by the various institutes involved, that they included the comments which stemmed from the exchange of views the CAHDI had had on this subject and that the printing was foreseen for the beginning of June. He also stated that more information could be obtained from the publisher's website[1] and that each CAHDI delegation would receive a copy of this publication free of charge.

48. As for the follow-up to this issue, he informed the CAHDI that an introduction to the database had been added to reflect the origins and development of this project, with a view to promoting it as widely as possible. The table reflected the replies received to date and any new replies would be posted on the website upon receipt.

49. Finally, the Secretary of the CAHDI pointed out that with respect to the Secretary General's report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, one of the areas that had been singled out as the subject of follow-up proposals was that of state immunities. He stated that he would report back to the CAHDI on this at a later stage.

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

50. The Chair introduced this item by reminding the CAHDI that the proposal to have a database on the Office of the Legal Adviser of the Ministry of Foreign Affairs had been made by the delegation of the United Kingdom, which agreed to prepare a draft introductory note for the database (document CAHDI (2006) 13 addendum 2).

51. The delegation of the United Kingdom suggested that the CAHDI approve the text at its next meeting, once members had had time to look at it in more detail. It was destined to go on the website and was a brief factual introduction to the material that followed, which simply drew attention to the salient points that arose from the various contributions made and highlighted the distinctions/differences in the organisation of various offices.

[1] http://www.brill.nl/m_catalogue_sub6_id24812.htm

52. This delegation welcomed the number and quality of the contributions that had been received, but stressed the need for this information to be kept up to date. To this end, it suggested that the database remain on the website and the Secretariat send out regular reminders on updating to CAHDI members. In this connection, the United Kingdom had just updated its entry as the Legal Office had now taken responsibility for the Treaty Section of the Foreign Office and the part of the library dealing with legal matters.

53. It then suggested that the CAHDI might have a discussion of a more substantial nature at its next meeting, for instance, on what the role of the Foreign Ministry Legal Adviser really was and how it could be encapsulated. This could be seen as part of the current debate in various fora about the rule of law in international affairs. It suggested that the CAHDI might start by considering the special qualities of the international legal system and of international law and from there go on to discuss the particular features that distinguish a legal advisor in a foreign ministry in the field of public international law from legal advisors generally. To this end, the delegation of the United Kingdom said it might be prepared to propose some outline thoughts in advance of the next meeting.

54. The delegation of Portugal thanked the delegation of the United Kingdom for its initiative and subscribed to all the proposals put forward. Portugal was currently reforming its administration and the Office of the Legal Advisor would be restructured in the process. The information contained in the database had proved particularly valuable in this context. As regards more substantive issues, the major question for Portugal today was whether to place community law issues with international law issues or keep them separate from one another.

55. The observer of Canada stated that the introductory note did not contain anything problematic and suggested that the CAHDI agree on the text before the end of the meeting.

56. The delegation of Norway reported on a major restructuring of the Norwegian Foreign Ministry which would in no way affect key functions of the Office of the Legal Advisor.

57. To sum up, the Chair encouraged states having not yet submitted contributions to do so at their earliest convenience and invited those states having already submitted contributions to update them, should this be necessary. As regards the substantial discussion proposed by the delegation of the United Kingdom, she welcomed the idea and the suggestion it made to produce some lines in advance of the next meeting, which would help structure the discussion.

58. The CAHDI went on to agree to the text of the draft introductory note, as submitted by the delegation of the United Kingdom, and entrusted the Secretariat with putting it on the website.

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

59. In introducing this item, the Chair referred to working documents CAHDI (2006) 12, CAHDI (2004) 7, 9 and 13 and noted that a decision as to what to do with the papers submitted concerning national implementation measures of UN sanctions was still pending as the discussion that took place at the last meeting had been inconclusive.

60. The delegation of France expressed doubts as to the possible publication of the reports submitted by member states.

61. The Chair recalled that the replies would be compiled in a database, to be published on the CAHDI's restricted website. The CAHDI agreed to proceed in this way.

62. The Chair welcomed Professor Iain Cameron from the University of Upsala (Sweden) to present his report entitled “The ECHR, due process and UN Security Council Counter-Terrorism Sanctions”.

63. Professor Cameron’s statement is reproduced in **Appendix III** to this meeting report

64. The Chair thanked Professor Cameron for his presentation, which stressed that the problems associated with targeted sanctions were very real and very acutely felt in domestic legal systems, especially when national authorities were called to freeze assets without any judicial guarantee or remedy. She added that Professor Cameron had also indicated the existing inconsistencies in the international system, had made an assessment of the value of sanctions and outlined certain solutions. She went on to say that although one may or may not agree with his assessment or the solutions he proposed, he was making a significant contribution to promoting what was at the epicentre of the political and legal thinking of today.

65. The delegation of the United Kingdom suggested another starting point for dealing with such a difficult issue: the Charter of the United Nations and in particular Article 24 which inter alia provided that “In order to ensure prompt and effective action by the United Nations, its Member States confer on the Security Council primary responsibility for the maintenance of international peace and security”. That central principle of the Charter conferred heavy responsibilities upon all the members of the Security Council under the Charter and the delegation of the United Kingdom emphasised that it was to ensure “prompt and effective action” that these powers had been given to the Council. In the World Summit Outcome document, the General Assembly, at the level of heads of state and government, underscored that sanctions “are an important tool to maintain international peace and security without the use of force” and they further resolved “to ensure that sanctions were carefully targeted in support of clear objectives.”

66. This delegation disagreed with Professor Cameron’s assessment of the usefulness of sanctions. The General Assembly, in that same document, called the Security Council “to ensure that fair and clear procedures exist for placing individual and entities on the sanctions lists and for removing them, as well as for granting for humanitarian exemptions”. It stressed that in the United Kingdom and in all the other members of the Security Council and governments and members of the United Nations, one would fully subscribe to that call.

67. The delegation of the United Kingdom went on to state that it remained fully in favour of making improvements to sanctions procedures which have implications for individuals. However, the basic approach the delegation of the United Kingdom advocated would be to look for concrete, pragmatic measures which could bring about practical improvements in the system.

68. This delegation underlined that it fundamentally disagreed with some of central legal points Professor Cameron made both as regards the ECHR and as regards the UN Charter, Article 103, among other things. Professor Cameron stated that these were issues which could come before the European Court of Human Rights. In reply to this, the delegation of the United Kingdom stated that there were very active ongoing discussions going on in New York and that there were proposals being put forward by partners in the Security Council and by other UN members as to how to improve the sanctions machinery in very concrete ways. It concluded by saying that it was of the opinion that New York was the place for discussing these issues and that it looked forward to them being taken forward by the experts there.

69. The delegation of Germany felt that due process and the so-called targeted sanctions by the United Nations Security Council was an issue that merited the CAHDI’s attention. It stated that Germany, together with Sweden and Switzerland, had devoted considerable time

and effort to a “mini-process” for the strengthening of targeted UN sanctions and for fair and clear procedures. It referred to the last stage of the process, which was an extra round organised by the German mission in New York in January 2006, a workshop on the independent study of the Watson Institute. It believed that addressing due process ultimately meant strengthening UN targeted sanctions.

70. This delegation agreed with Professor Cameron’s findings as to which provisions of the Convention and its Additional Protocols were relevant when examining this issue. It also agreed that the Security Council, under the UN Charter, was bound to observe human rights as falling under the purposes and principles of the UN Charter. It disagreed, however, that those state parties to the Convention that sat in the Security Council could be held responsible under the Convention for their actions in that UN body.

71. The delegation of Switzerland agreed with Professor Cameron’s conclusions, i.e. that the conflict between UN Security Council resolutions and international law of human rights was harmful as it undermined the integrity of the system of international law and weakened the legitimacy of the action of the UN Security Council as a whole. It was convinced that it was necessary and possible to develop new mechanisms to prevent incompatibility between the obligations under international law in the field of human rights and Security Council sanctions. It agreed with Professor Cameron that such a system would have the advantage of making the sanctions regime more efficient and its legitimacy would reinforce states’ willingness to implement sanctions. Four elements should be taken into account in such a system: to define, in a transparent and thorough way, standards to establish the facts; to make sure that targeted persons and entities were informed in due time that they were on a list; to limit the duration of sanctions and their punitive effects and more importantly, to establish the right to appeal against the fact that a name of a person/entity was on a sanctions list. It concluded by saying that the delegations of Germany, Sweden and Switzerland were pursuing their discussions with the Watson Institute in New York and that the three delegations would soon be presenting the results of its work.

72. The delegation of the Russian Federation considered that the Security Council was not only about politics but also about international law and one should avoid separating the one from the other. States may and did entrust international organisations and in particular the UN with the functions and rights they did not possess individually under international law. It mentioned in particular the function of coercion, including the use of force, in cases other than self-defence. The Security Council was in a position to derogate from the vast majority of general international law rules, including rules on human rights, except rules establishing non-derogable rights. In this connection, it considered that more thought should have been given in the paper not only to Article 103 of the UN Charter but also, as said previously by the delegation of the United Kingdom, to Article 24, to which it added Article 25.

73. Regarding Article 103 and the obligations stemming from the UN Charter prevailing over obligations from other rules of international law, the effect of this article was different; obligations conflicting with those stemming from the Charter were still legally valid, but they were suspended for the period during which obligations stemming for the Charter were in force.

74. This delegation concluded by challenging the basic idea of the paper, i.e. the legal responsibility of states members of the Security Council and parties to the ECHR for their voting in the Security Council. It stated that the Security Council had to be more efficient and that a more balanced system of sanctions should be introduced. There was of course room for improvement, but hard work to this effect was underway in New York and in capitals.

75. The delegation of Sweden stated that the Swedish government shared many of the concerns expressed by Professor Cameron and Sweden, together with Germany and

Switzerland, had embarked on looking at this issue, which was felt to be extremely problematic. It then made specific reference to a sentence in Professor Cameron's report (page 9, paragraph 2, last sentence) that it had been struck by and could relate to, which stated that "without wanting to exaggerate, I would say that, for a lawyer trained in the idea of the *Rechtsstaat*, blacklisting strikes at such a basic level of his or her understanding of what *is* law that it calls into question why it should be obeyed". This delegation further referred to the Watson Institute's excellent report which would be made public at the end of the month during a seminar in New York. This report contained similar concerns as those expressed by Professor Cameron and also provided a number of possible solutions to these different problems.

76. This delegation concluded by highlighting that it could it be argued that the Security Council actually acted *ultra vires* when it imposed sanctions on particular individuals where they were exposed to the direct effects of the decisions of the Security Council without having access to any sort of remedy, and it was therefore absolutely necessary that some sort of supervisory system or some additional advisory body be created to bring about a solution to this problem.

77. Professor Scheinin intervened by adding something that was related to his current UN function as Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism. As regards the UN Charter, he stated that references had been made to Article 24, which also contained other elements: that the Security Council shall respect the principles of the United Nations Charter itself and in this way, human rights "came into the picture". When the UN was established, the idea was that peace and security must not be hindered by the law in the sense of legalism becoming an obstacle for effective work for the maintenance of peace and security. The UN had delegated powers from the states and could not go further than what the states had the power to do. In the area of terrorism, this issue had been resolved in the Security Council Resolutions because states were mandated to take effective measures, but at the same time the Security Council emphasised that when implementing these measures, states were bound by their obligation to respect international law including human rights law, refugee law and humanitarian law. Thus the Security Council could very well call for far-reaching measures in the fight against terrorism, but it also left it to the member states to make sure that any action to implement those resolutions nevertheless happened within the framework of international law including human rights.

78. The delegation of Austria referred to the legitimacy of action of the Security Council, and stressed that apart from taking into account the principles of the Charter, which was relatively unlimited in its powers, one had to think of the practical means to ensure that the Security Council took care of the principles of the Charter in its actions and as there was no real supervisory body, applied, to the extent possible, legal and procedural safeguards. It suggested the practical inroad for ensuring this was via the legal advisers of the members of the Security Council who in designing the necessary decisions, even under political pressure, could influence the shaping of the systems of sanctions, for example, decided upon by the Security Council. The setting up of an assistance unit for the rule of law within the Secretariat could be extremely helpful and effective.

79. The delegation of Greece stated that one could agree or disagree on these issues, but the problems existed and one was therefore bound sooner or later to deal with them. As to the proposal to establish a kind of advisory committee on legal questions raised by targeted sanctions, it felt the problem was how to reconcile the fact that two subsidiary organs of the same organ, the Security Council, the CTC and this proposed advisory panel, would at the same be/share the role of actor and judge and how the separation of powers would be guarded in this respect.

80. The observer of the United States stressed the importance of ensuring that the list of individuals and entities that are targeted for sanctions be as fair as possible. Improvement of sanctions should not hinder their effectiveness. Targeted sanctions were in many ways a reaction to untargeted sanctions that preceded them, which had very detrimental effects on people who were caught up in the middle, i.e. innocent third parties. Furthermore terrorism sanctions were an important tool, short of the use of force. It referred to two primary sets of fairness issues: ensuring the right of individuals and entities seeking to be delisted to have a forum in which their petitions would be considered, and improving notice to sanctioned individuals and entities. These two concerns could and should be addressed in a manner that preserved the essential elements of the current system so that sanctions could remain an effective tool. It felt there was also the need to avoid any unattended consequences in improving fairness and transparency. It then stated that one had to allow for the fact that in cases like that of Al Qaeda, inevitably sanctions could only be effective if the decision-making was able to test intelligence information. If they could not do that, they would not be effective. The system could indeed be improved but stressed that the Security Council was an organisation of member states and that member states were therefore the proper actors to bring issues before it. Individuals should interact with member states and member states should have to take responsibility for screening out frivolous petitions. One should focus on what could be done to improve the mechanisms by which individuals can, through member states, maybe by providing for greater access to member states, provide a safety net against their concerns not being heard.

81. Professor Cameron thanked the various delegations for their interventions. He stated that the issue was not a choice between legitimacy or effectiveness, but was increased effectiveness through increased legitimacy. There were many challenges facing the Security Council and of course fully agreed for the need for the Security Council to take prompt and effective action under Article 24. However, if the Security Council was forcing states to act against the very fundamental values that exist in their domestic legal systems then the legitimacy of these measures was severely undermined. In order for the Security Council to perform the role that it needed to perform in the world, the states which were not members of the Security Council had to accept its leadership. Amongst the states that are very important in supporting the important role of the Security Council were the Council of Europe states. He supported the view that in constitutional terms “one could not give away something that one did not have” and therefore the argument that the Security Council had some sort of supreme power was debatable.

82. Council of Europe member states were in some way bound by the residual obligations at the international level when acting in the Security Council. He made it clear that he was not certain this was a good solution either. The reason it was taken up was because there had not been sufficient action at the UN level. In his opinion, the necessary action was not going to be taken at the Security Council level unless there was some sort of pressure and that pressure, he said, must come, among other things, from judicial proceedings in Europe. If some form of equivalent protection were created at the UN level, then the European Court of Human Rights would not have to intervene. However, it was difficult to predict how the Court would rule on this issue. He felt that measures must and could be put in place at UN level.

83. Professor Cameron was grateful to hear about the ongoing work of the Watson Institute. He also mentioned that the UN Office of Legal Affairs had commissioned a report by Professor Fassbender from Germany, who conceded that within the UN Charter, there was such a right to a fair hearing, a right which is fundamental, a general principle.

84. As regards the workability of solutions, the Watson Institute report sketched out different solutions and different concrete proposals. There was a complication, the problem of intelligence material and establishing a body with states to which one would not want to

give access to such material. However, solutions could be found if there was sufficient willingness.

85. The Chair closed the discussion on this issue by thanking Professor Cameron for his thought-provoking report and presentation and for having replied to the questions put to him by the CAHDI.

9. Digest of state practice on international law, proposal for a new activity

86. The Chair referred to the relevant working document (document CAHDI (2005) 10), which contained a letter from Oxford University Press (OUP) proposing that the CAHDI participate in the creation of an online digest of state practice on international law.

87. The delegation of Austria stated that Austria had already had some experience in this regard and mentioned the publishing practice of the Austrian Ministry of Foreign Affairs with the Austrian Yearbook. However, it felt that a survey of the scope of this publication would show that over the last few years the substance had dried out a little and thought it might be interesting to find out why. In this context, it had itself always heavily relied on the academic sector and had contacts with institutes of international law which were keen to obtain and publish such material. It also thought that more substantial information was required on this particular project and that informal contacts with different law departments might help establish what type of practice should be included or not, and what was publishable or not.

88. The delegation of the United Kingdom stated that it thought that OUP had a hugely ambitious project, an enormous one if it were done effectively and comprehensively. It agreed with the delegation of Austria in so far as it was not sure either as to what OUP had in mind: would it be in contact with CAHDI or individual legal advisors? It stipulated, however, that the situation in the United Kingdom was the opposite to that in Austria: the British Yearbook of International Law published a section called “United Kingdom Materials in International Law” (which was not necessarily state practice, but materials international lawyers may find useful), which was getting longer and longer by the year and now made up to half of the British Yearbook. In this regard, the role of the Foreign Office had been kept very informal. It had suggested not including so much to avoid repetitions, but this was difficult to do in a uniform way. In this connection, it thought that the OUP would have to take difficult decisions, based of very expert advice.

89. This delegation suggested that CAHDI members might, in time for the next meeting, each send a brief description of what happens in their own countries as regards the publication of state practice: How was state practice published? How much was published? What was published? What was the role of the Foreign Ministry? Was it an official publication? It thought this could be useful for both the CAHDI and OUP.

90. The delegation of Norway thought the CAHDI instead of asking itself what it could do for the publishing house should be asking itself what the publishing house could do for the CAHDI. It stated that it had experience of various ways of trying to identify state practice and making legal materials available. It pointed out that for countries like Norway there was the added difficulty of translation with a view to making material available to the broader international community. It stated that the Nordic countries, when putting together the Nordic Journal of International Law, also had lengthy discussions on content. In addition, they consulted a number of eminent yearbooks and journals published in different countries, which were all very useful, but showed that there were very different concepts and notions on how to publish state practice.

91. This delegation went on to suggest that individual projects of the kind the CAHDI had dealt with with regard to state immunity were useful for Council of Europe member states

because they had a clear focus, which was not the case here. It thought it important for the CAHDI to ask itself if it had the necessary resources to do something in line with what OUP was suggesting. Another point it made was that it would be difficult for Norway to do anything which might undermine the position of the Nordic Journal of International Law, for instance, with regard to providing a reflection of legal materials which it believed were interesting for the broader public, a task which, it stated, was in itself large enough.

92. The observer of Canada agreed with the approach of the delegations of Norway and the United Kingdom on this issue. It had already been spending quite a lot of time preparing materials to be incorporated in the Canadian Yearbook of International Law and in view of the annual conference of the Canadian Council of International Law, for which it usually put together a compendium of international legal materials. In this connection, it pointed out that selecting, revising and editing material was a very labour-intensive job.

93. The delegation of the Netherlands stated that for the Netherlands Yearbook of International Law, it collected state practice/practice of courts on issues of public international law in English as well as any literature written and published in the Netherlands on topics of international law (a simple list of references with titles, authors, etc.). However, if research were to be carried out on one of these topics, this would require going through all the yearbooks that existed. The delegation of the Netherlands understood, however, that not every country was in a position to have its own yearbook and therefore an online system, which could be easily updated, would allow these countries to contribute to the survey of state practice. It went on to say that if the latest state practice of a number of countries were put together, this would be very interesting from a scientific point of view. It thought OUP should be encouraged to provide more concrete information. If the project were pursued, however, this would raise the question as to whether the Netherlands should keep producing what in fact made up a substantial part of its yearbook.

94. The delegation of Sweden referred to the experience it had gained with the Nordic Journal of International Law. It had found it quite difficult to find materials as well as the time and resources necessary to make an adequate contribution to this publication. It therefore suggested that if the project were to go ahead, that work be directed not to states themselves but rather to law faculties and research centres, which had the time and the resources to carry out the in-depth analysis required and thus make a quality contribution to the project.

95. The delegation of the European Commission stated that the European Commission's Legal Service was in contact with a publisher and a research institute about the publication of materials. It had, however, immediately met the resources problem and the project had not yet been implemented for this reason. It agreed, as one of the editors of the Netherlands Yearbook, with the note of caution sounded by the delegation of the Netherlands. It thought it essential to bear in mind that this project might undermine national collections.

96. The delegation of Greece echoed the concerns expressed by other delegations. Since the late 1940s, Greece published a Hellenic Review with materials and lists of decisions, which were not limited to public international law but also included private international law. This review, however, was always the prerogative of the academic community and was not directed by the Ministry of Foreign Affairs. It is for this reason that the delegation of Greece would be inclined to see this project as a prerogative of each state's academic community.

97. The delegation of Italy stated that Italy had the Italian Yearbook of International Law, which contained some practice translated into English. This work was carried out by academics without any institutional formal link with the Ministry for Foreign Affairs. The Italian Yearbook was very selective in the state practice included, even though it increased

in size every year. The delegation of Italy thought that OUP was very clear as to what type of state practice it wanted to include, “a complete range of materials”, i.e. everything. As far as the subject matter was concerned, it felt it would be important to clarify what OUP meant by international law. If everything was included, it felt the project was not only huge, not only ambitious but hardly feasible. The delegation of Italy endorsed the proposal made by the delegation of Norway to first define the subject of the state practice they were interested in.

98. The delegation of Germany agreed with the delegation of the Netherlands. It felt it was an ambitious project, which presented certain advantages. The exchange of letters between the Secretary of the CAHDI, Mr Benitez and OUP clearly pointed out the difficulties and merits of such a project. It referred to a smaller project, YURIS, run in Germany and organised by the publisher BECK in conjunction with German courts, lawyers’ societies and so on. This publication only contained decisions in the field of civil law for use by lawyers, practitioners, etc. It went on to say that the dimension of the project under discussion was enormous, unique and therefore merited the CAHDI’s attention. It thought it important, however, to take up OUP’s offer for a continued dialogue and that the Secretariat should report back to the CAHDI at one of its next meetings. It referred to the experience of the Max Planck Institute with OUP for an encyclopaedia on public international law, a smaller-scale project as compared to the state practice of Council of Europe member states. In this connection, it expressed reluctance as far as Germany’s capacity was concerned.

99. The delegation of Denmark considered that this would be a very useful tool but shared the delegation of the United Kingdom uncertainty as to what was being asked of the CAHDI and of individual CAHDI members. It suggested the Secretariat might contact OUP in order to obtain more detailed information in time for the next meeting. It supported the suggestion made to try to get an overview of how this was being done in member states and suggested producing a short note on the Nordic Journal.

100. The delegation of the Czech Republic stated that it thought this project was even more ambitious for the Czech Republic than for those countries which already had national projects of this kind. It echoed the reluctance expressed by some states in terms of internal capacities. It considered the discussion on this topic very useful, however, because it enabled CAHDI members to have an exchange of views on the practice of individual countries.

101. The delegation of Finland expressed its concern as to the question of resources, notably for translations. It stated that even for the Nordic Journal gathering materials and translating was difficult. It also requested more information on the economic strings attached to this proposal in time for the next meeting.

102. The delegation of Hungary stated that it could see the advantages of having an online database, but felt it would be important to know what expenses this would entail for individual states. It also raised the question of intellectual property rights and felt clarifications were needed in this regard.

103. The Chair listed some of the misgivings expressed by delegations: existence of other national projects; proposed field too large, too vague, too vast; too ambitious a project, too taxing from the point of view of resources/work involved; that the project should be academia-oriented; that it overlapped with national yearbooks, which would entail having to make a choice which may not be likeable to national yearbooks and that the CAHDI might be put in a difficult situation if it had to select a publisher.

104. The delegation of the United Kingdom acknowledged the difficulties, but considered the whole question of the publication of state practice/materials in international law an important one, one where the Council of Europe had played a leading role historically. It

recalled that it was the Council of Europe which had initially come up with the framework for the publication of state practice and that it was the Council of Europe which some 40 years ago encouraged states to publish their state practice in a compatible form.

105. This delegation wondered whether an item of a more general nature entitled "publication of state practice" should not be placed on the agenda. It proposed taking up the suggestion that CAHDI members each prepare a short note on the current situation in their own country on the publication of state practice and include to what extent they used the Council of Europe's framework and to what extent this was done by governments or private universities (with or without help from governments). It suggested keeping in dialogue with OUP or indeed any other publisher which might have an interest in this matter. However, it thought that OUP had already invested quite a bit of money into this project and that it may have quite detailed materials that could be explained to the CAHDI.

106. The delegation of the United Kingdom reminded the CAHDI that the Council of Europe's initial idea was just that: to encourage the publication of state practice, to have it mutually intelligible and easily retrievable and, thanks to modern technology, more could be done in this regard. It thought it would have to be based on organisations within individual states as it would be quite impossible to do it centrally. Initially, therefore, the publisher would have to rely on each existing publisher in the states concerned. It suggested the Secretariat convey to OPU the gist of the discussion it had had to see if it wished to present any more materials, or come and give an oral account to the CAHDI.

107. The delegation of the Netherlands expressed support in favour of the proposal made by the delegation of the United Kingdom. It understood, however, that a number of delegations were uncertain as to the scope of the project and that this would require too great an effort on behalf of the Ministries of Foreign Affairs. It stressed therefore that the ministries could contribute to the exercise, but that the main responsibility should lie with academics.

108. The delegation of Austria supported the proposal made by the delegation of the United Kingdom to continue discussing the project. In this way the CAHDI would be implementing the political will expressed by the Committee of Ministers in this regard. It stated, however, that OUP should demonstrate the added value of this publication vis-à-vis existing publications and possible lacunae in this context. It thought it important that other publishers should also have the chance to submit their proposals in this respect.

109. The Chair concluded by suggesting that an item be included on the agenda of the next meeting on state practice in international law on the basis of the texts adopted by the Council of Europe. She made specific reference to Resolution (64) 10 on publication of digests of state practice in the field of public international law, Resolution (68) 17 concerning a model plan for the classification of documents concerning state practice in the field of public international law and Recommendation No. R (97) 11 of the Committee of Ministers to member states on the amended model plan for the classification of documents concerning state practice in the field of public international law. As regards the proposal from OUP, she thought it only fair to communicate the CAHDI's misgivings and to make known to OUP that the CAHDI wished to have more information as regards the substance of its request.

C. GENERAL ISSUES ON PUBLIC INTERNATIONAL LAW

10. Peaceful settlement of disputes

110. In introducing this item, the Chair referred to documents CAHDI (2006) 4 and CAHDI (2006) 5.

a. Compulsory jurisdiction of the International Court of Justice (ICJ) (Article 36(2))

b. Jurisdiction of the ICJ under other agreements, including the European Convention on the Peaceful Settlement of Disputes

111. The delegation of Romania recalled that at the last meeting of the CAHDI, it had stated that it was considering the withdrawal of certain reservations concerning its acceptance of the ICJ jurisdiction in accordance with the settlement mechanisms of certain conventions. It reported that an internal procedure was underway to accede to the Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes and the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes and to withdraw certain reservations as regards dispute settlement mechanisms providing for the possibility of accepting the compulsory jurisdiction of the ICJ.

c. Overlapping jurisdiction of international tribunals

112. The delegation of Portugal presented its paper, document CAHDI (2006) 5, and expressed its concern as to the proliferation of international jurisdictions. It suggested that other CAHDI members might contribute to the discussion on both a practical and a theoretical level and share any information they might have on any new situations of overlapping jurisdiction of international tribunals. The delegation of Portugal offered to develop the ideas contained in its paper and to this end proposed that the item on international jurisdictions be kept on the CAHDI's agenda.

113. The delegation of the European Commission expressed interest in the Portuguese proposal, if only because the European Commission had been involved in two of the three cases mentioned in the Portuguese paper. It wondered whether the CAHDI was expected to find solutions to this problem and suggested that in some instances this may not be all that complicated.

114. It stated that the Swordfish cases before the International Tribunal for the Law of the Sea and the World Trade Organization were suspended and that they had been brought in a fairly co-ordinated way by the two parties to these two disputes so as to minimise the risks of overlapping or conflicting jurisdiction.

115. The Chair considered that this issue merited the CAHDI's attention as the CAHDI's aim was to try to encourage states to accept the compulsory jurisdiction of the ICJ. The interest of this exercise was demonstrated, for instance, by Romania's statement regarding the withdrawal of certain reservations. She considered that the Portuguese proposal had the merit of putting in writing a certain number of concrete questions and asked the CAHDI what follow up should be given to this paper.

116. The delegation of Netherlands felt that the delegation of Portugal had set out a number of fundamental questions, some of which were of real concern and for which solutions may be difficult to find due to a number of existing judicial institutions with specific mandates. It thought that if a remedy to this situation were to be found, it would require looking at a number of constitutions and judicial institutions to see how they relate to one another and how they could be adjusted to make sure they didn't overlap and lead to different outcomes that could be rebutted. This was a difficult task as constitutions could not be changed as easily as judicial institutions. It suggested that if the CAHDI were to work on this, it should limit itself to some specific issues and situations.

117. The CAHDI agreed to keep this item on the agenda, but to simplify it by taking out sub-item b and just keeping the reference to the relevant working document(s). The delegation of Portugal was asked to work on its paper with a view to limiting the number of questions to be put to the CAHDI.

118. The Secretariat reminded the CAHDI that document CAHDI (2006) 4, which contained a table on the situation of Council of Europe member states in this regard, was a public document, which was posted on the website and accessible by the public. It called upon states to keep the Secretariat informed of any new developments with a view to ensuring that the table was always up to date.

11. UN Convention on Jurisdictional Immunities and European Convention on State Immunities

119. The Chair recalled that at the CAHDI's last meeting it was decided that there should be an informal consultation of the parties to the European Convention on State Immunities. She invited those states as well as any other Council of Europe member state who so wished to attend the open-ended meeting. She requested that the Vice-Chair, Sir Michael Wood, chair these consultations and report back to the CAHDI.

120. The meeting took place on 23 March and Sir Michael Wood presented an interim report of the meeting, which is reproduced in **Appendix V** to this report.

121. The CAHDI agreed that the 2nd informal meeting of the parties to the Convention be held in Athens during the 32nd meeting of the CAHDI, with a view to trying to agree on more definite conclusions.

12. Consideration of current issues of international humanitarian law

- 2nd Protocol to the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict

122. The representative of the International Committee of the Red Cross (ICRC) reported that there had been a steady increase in the number of states - currently 38 - having ratified the 2nd Protocol to the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict (2nd Protocol hereafter). It reported that a 1st Meeting of the Parties was held in October 2005. The ICRC was endeavouring to encourage universal participation to this treaty, but stressed that it was also important for those states having become parties to identify items which could be the subject of reinforced protection.

123. The delegation of the United Kingdom recalled that it had proposed that this item be discussed to encourage states to consider becoming parties to the Convention and its Protocol. As it had already said at the previous meeting of the CAHDI, the United Kingdom was committed to ratifying the Convention. It had to have primary legislation and an act of parliament before it was able to do so, but was still hoping this would take place during the next legislative programme 2006-2007. It then said that it would like to hear from colleagues to see whether they were actively considering becoming parties and if so, how long was this likely to take.

124. The delegation of Switzerland stated that it had ratified the 2nd Protocol. It also informed CAHDI members that at a conference in Geneva on 8 December 2005, the states party to the Geneva Conventions had voted a new emblem, commonly (but not legally) known as the red crystal. It had not been adopted by consensus, but this should be looked at in a wider political context. Fifty countries had now signed the Protocol, but there was no ratification to date. The Swiss parliament had approved the Protocol the previous week and

the delegation of Switzerland hoped that Switzerland would be in a position to ratify the 3rd Additional Protocol at the beginning of July. It reminded the CAHDI that the Protocol would enter into force after two ratifications. It therefore encouraged all states to ratify it. The adoption of the 3rd Additional Protocol was a prerequisite to hold a conference of the movement of the Red Crescent and the Red Cross in Geneva on 20-21 June. The aim of this conference was the adoption of the change in their statutes, to permit the introduction of a new emblem in the movement. This would open the path to allowing the Israeli national emergency medical service, the Magen David Adom, and the Palestinian Red Crescent Society into the movement, which would make it truly universal.

125. As regards private and military companies, the delegation of Switzerland informed the CAHDI of the work underway, which focused on trying to find solutions and identify best practices at an international level. To this end, Switzerland organised an informal workshop in January to see whether there was a general interest in pursuing the examination of this issue, the ultimate aim being to try and adopt common “rules”/minimum standards on an international level. This discussion would probably be pursued during the second half of the year and the circle of participants widened. This issue might also be discussed during the major Red Cross conference in December 2007.

126. The delegation of Denmark stated that it had ratified the treaty and 1st Protocol in 2003 after having signed it in 1954. It was now working of the ratification of the 2nd Protocol, but this required a change in legislation.

127. The delegation of Germany stated that it had signed the 2nd Protocol in May 1999 and hoped to ratify it by the end of the year. It informed the CAHDI that Germany had signed the 3rd Protocol during the ceremony event in Geneva. It also looked forward to the next conference and hoped that the recognition of the Magen David Adom would be achieved.

128. The observer of Canada advised CAHDI members that Canada had adhered to the 1st and 2nd Protocols on 29 November 2005 and that these Protocols came into force on 1 March 2006.

129. The delegation of Poland stated that it had been one of the first signatories of the 1954 Convention and was now studying the possible ratification of the 2nd Protocol, which could be initiated in 2007. With respect to general issues of international humanitarian law, the delegation of Poland informed CAHDI that an international seminar on custom in international humanitarian law of armed conflicts, organised by the Polish Red Cross, the International Committee of the Red Cross, Warsaw University in co-operation with the Ministry for Foreign Affairs, was held in Warsaw on 24 March 2006.

130. The delegation of the Czech Republic was pleased to report that the Czech government was about to instruct its Ambassador in Bern to sign the 3rd Protocol. It would also be signing the 2nd Protocol very soon and was actively working on ratification in co-operation with the Ministry of Defence and the Ministry of Culture. It hoped that the intergovernmental commentary procedure would soon come to an end so as to ratify in 2007.

131. The delegation of Hungary stated that it had ratified the 2nd Protocol and was now working on domestic legislation for implementation of this instrument.

132. The observer of Japan stated that it was in the final stage of preparing to conclude The Hague Convention and the two relevant Protocols and might submit them to the current Diet’s session, which would finish in June.

133. The delegation of Norway stated that it was actively engaged in seeing to the ratification of the 2nd Protocol.

134. The delegation of Armenia stated that a few days prior to this meeting, the parliament of Armenia had ratified the 2nd Protocol and was going to sign the 3rd Protocol in a few weeks' time.

135. The delegation of Sweden reported that this question had become hostage to the current general overview of international criminal law legislation at national level, so unfortunately it was not going to be able to ratify the 2nd Protocol before 2007. As regards the 3rd Protocol, a government decision had just been taken to sign it and it hoped this would be done in Bern.

136. The Chair considered that this had been a very fruitful *tour de table* and that there had been a number of positive developments. She suggested keeping this item on the agenda of the next meeting.

13. Relationship between human rights law and international humanitarian law

137. The Chair welcomed Professor Scheinin to present his views on the relationship between human rights law and international humanitarian law.

138. Professor Scheinin started by saying he was grateful for the opportunity of an interactive dialogue with the CAHDI. He had chosen not to present a report but instead had offered speaking notes in advance of the meeting, which contained materials which he considered relevant for a discussion on the relationship between human rights law and public international law, in particular international humanitarian law (document CAHDI(2006)14).

139. Professor Scheinin's statement is reproduced in Appendix IV to this meeting report

140. The Chair thanked Professor Scheinin for his presentation. She particularly appreciated that he had chosen to examine the relationship between human rights and international law first as opposed to what was usually done, i.e. to look at the relationship between human rights and international humanitarian law alone. She thanked him for keeping the CAHDI abreast of developments within the International Law Association. The analysis of the case-law of the European Court of Human Rights (the Court hereafter) had helped demonstrate that the tendency was to find more points of convergence between human rights law and humanitarian law. The Chair also stated that Professor Scheinin had rightly placed emphasis on the cumulative approach as regards the application of these two sets of norms of law. Finally, she mentioned the subject touched upon at the end of his presentation, human rights law and counter-terrorism, which was of perennial interest to international lawyers and felt that Professor Scheinin's views was particularly valuable in so far as he was a specialist on the protection of human rights while countering terrorism in the context of the Human Rights Commission, which has now being turned into a Human Rights Council.

141. The representative of the European Commission agreed that as regards international humanitarian law, it was increasingly harmoniously interpreted. In this respect, he asked for clarifications as regards Article 2 of the ECHR, i.e. whether the general conclusion of harmonious interpretation was really adequate. In fact, Article 2, paragraph 2, had a requirement of strict proportionality and did not consider the deprivation of life as a contravention of this article when it resulted from the use of force which was no more than absolutely necessary. The recent case-law, and in particular Isayeva, Yusupova and Bazayeva v. Russian Federation, seems to reveal that the Court construed Article 2.2 using

strict proportionality as its yardstick and thereby prevailing over international humanitarian law.

142. In reply, Professor Scheinin noted that it was necessary to read the judgments by the Court that relate to the loss of life in Chechnya very closely. One way of reading them would be that Article 2 of the ECHR was applied without looking into humanitarian law and simply focusing on the rules contained in the ECHR itself. He did not think it was necessarily the case because the Chechnya case, on a more general level, spoke about the interaction between humanitarian law and human rights law. What he had pointed out was that reconciliation was possible but simply somewhat more difficult under the ECHR than under the UN Covenant, which in his view related more to the existence of ECHR Article 15.2 than the formulation of Article 2. Under the ECHR we have one set of rules about the right to life in peacetime in Article 2 itself, and then a modification in 15.2, applicable during wartime. This brought a lawyer, he added, to the conclusion that in order not to apply exactly the same rules in times of war, you had to derogate formally and invoke Article 15 as justification for taking measures that were lawful under humanitarian law. Under the UN Covenant, Article 6.1 regarding arbitrary deprivation of life would be applied together with the relevant rules of humanitarian law related to the protection of civilians, distinction, collateral damage, etc. Hence, the state of emergency clause in ICCPR Article 4 need not be invoked in order to bring in humanitarian law. In the case-law concerning Chechnya, he did not see anything which clearly departed from humanitarian law and so even the quote in footnote No. 6, a quote from the applicant, could be read in a way that the ECHR obligations were also informed by international humanitarian law. Under humanitarian law use of force resulting in the death of certain civilian individuals might be proportionate in respect of a legitimate military objective and this might affect the application of the proportionality test under ECHR Article 2. If read under the ECHR alone, the answer might be different. He did not think that the answer to the delegation of the European Commission's question could be found in this case.

143. The delegation of Germany referred to the differences and similarities between human rights and international humanitarian law. In case of violations, particularly violations of international humanitarian law, the remedy was more in the direction of having a state-to-state reparation system, and asked Professor Scheinin about developments in this regard.

144. Professor Scheinin stated that under human rights law, public international law and humanitarian law, it was true that the individual-centred nature of human rights law had resulted in revolutionary steps in the field of remedies. At universal level, there were independent expert bodies dealing with individual complaints from the majority of the countries in the world, which was unheard of in 1948 when the Universal Declaration was adopted. He did not think this was the "full story" of remedies within human rights law and there was also an important dimension of collective responsibility of states in the field of human rights. This may relate to human rights clauses in bilateral or multilateral agreements about trade and investment for instance and was also reflected in the existence of interstate complaint procedures under human rights treaties. Under UN human rights treaties, no state had yet resorted to these interstate complaint procedures, but the experience under the ECHR showed that these clauses were meaningful, that there were situations where the normal remedies of human rights treaties failed because the situation was not normal. It is then that more traditional mechanisms typical of public international law may be needed in order to enforce human rights treaties in a situation where human rights are hit.

145. In other areas of international law, Professor Scheinin stated that developments could be seen towards solutions different to those under human rights treaties, particularly towards review by expert committees. For instance, in environmental law, one did not usually speak about victim requirement as to who was to bring the information to the attention of the expert body, but nevertheless there was considerable civil society input

which resulted in structures similar to the remedies of human rights law, namely independent expert review which could be abstract in relation to legislation, but could also be concrete in relation to individual cases and possible breaches of state obligations in respect of the treaties in question. In the field of humanitarian law, there was not only state responsibility but also criminal responsibility of individuals. International criminal law had evolved in the sense that there were now new remedies for grave human rights violations beyond the context of an armed conflict. In some situations, international criminal law and individual criminal responsibility as a mechanism to enforce human rights treaties could be invoked.

146. He stressed that the limited case-law of the ICJ made explicit reference to human rights treaties. Such references made it clear that human rights treaties also constituted part and parcel of public international law and could be relied up on by the ICJ, for instance, in the context of an advisory opinion.

14. Developments concerning the International Criminal Court (ICC)

147. In introducing this item, the Chair informed the Committee that a Congolese national and alleged founder and leader of the Union des Patriotes Congolais (UPC) had been the first person to be arrested and transferred to the International Criminal Court (ICC) in The Hague since the entry info force of the Statute in July 2002. She hoped that other arrant warrants would soon be fulfilled.

148. She then referred to the success of the Multilateral Consultations organised by the Council of Europe. She went on to announce that the Council of Europe would so far be organising a 4th Multilateral Consultation on the implications for Council of Europe member states of the ratification of the Rome Statute of the ICC to be held in conjunction with the 32nd meeting of the CAHDI in Athens, Greece.

149. The Secretariat thanked the Greek authorities for offering to host both events. He also expressed the Council of Europe's appreciation for the Finnish and Swiss voluntary contributions, thanks to which the Council of Europe was in a position to organise the 4th Multilateral Consultation.

150. Further to that, the Secretariat informed the CAHDI that the invitations for the next meeting and for the 4th Multilateral Consultation would be issued at the beginning of June. The CAHDI would be held on the 13th and the 14th in the morning and the consultations would be held on the 14th in the afternoon and on the 15th.

151. The Chair proposed that CAHDI members put forward their suggestions as regards possible issues to be discussed by written communication to the Secretariat.

152. In this connection, the Secretariat referred to the suggestions made by the Bureau of the European Committee on Crime Problems (CDPC): bilateral agreements on witnesses and on the execution of the Court's decisions, and the application of the subsidiarity principle.

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

153. The Chair referred to the phasing out of the Tribunals established by the United Nations Security Council Resolutions 827 (1993) and 955 (1994) and referred in this connection to a UN OLA paper.

154. The observer of Japan took the floor to reiterate its position i.e. that it was in favour of terminating the mandates of ICTR and ICTY as scheduled so as to assign funds to join the

ICC. It had already made a statement to this effect to the parties in The Hague, but called upon CAHDI members to try to persuade their capitals to support the Japanese proposal. It was aware, however, that the situation in the capitals was different as the funding for the ICC came from the funds allotted to international organisations, which was not the case for the ICTR and the ICTY. It was also concerned about the current rules that govern contributions to the UN applying to Japan's contribution to the ICC.

155. The Chair proposed to discuss this item at the next meeting on the basis of the aforementioned paper.

16. Outcome document of the 2005 U.N. World Summit

156. In introducing this item, the Chair referred in particular to the question of the rule of law and the distinction between the rule of law as a national concept and as a rule of international law. In this respect, she referred to the relevant working document, CAHDI (2006) 11, submitted by the delegation of Switzerland. This document was split into two parts: a general part and an annex giving concrete steps to advance the international rule of law. In this respect, the delegation of Switzerland outlined the reasons for issuing this paper. The Outcome document of the 2005 World Summit frequently mentioned the principles of the rule of law and the international rule of law as a core element of international relations. The delegation of Switzerland felt that this message was all-important, particularly in view of the fact that international law had recently been put into question.

157. With respect to the concept of the international rule of law, it had attempted, in its paper, to try to identify elements of what this concept actually meant. It had not intended, however, to present a legal definition of the international rule of law. It proposed, on the basis on commonly agreed views on the concept, to embark on a discussion on how to promote respect for international law on a regional, national and international level and identify the areas where a link could be established and concrete proposals through practical action put forward.

158. It concurred with the distinction made by the Chair between the rule of law on a national level and the rule on an international level even though the two concepts were intertwined in the sense that law-obedient states on a national level were more inclined to respect law on an international level and vice-versa. However, the concept of national rule of law was not identical to the concept of international rule of law. It had translated it into French as *pré-eminence du droit*, but was not fully satisfied with the translation. To conclude, it stated that its aim was to focus on the promotion of the international rule of law as a whole with the elements it proposed for a definition and to then give it some concrete operational shape and action. It invited states from all regions to participate in this exercise.

159. The delegation of the United Kingdom recalled that the Summit Outcome document contained a lot of references to international law and the rule of law, which it supported. However, these references were made in specific contexts/paragraphs. It stressed that a lot of time had been spent agreeing on words and it was therefore concerned by the reformulation of the Summit Outcome document. As an example, it stated that the "responsibility to protect" did not correspond to paragraphs 138 and 139 of the Summit Outcome document which had been so carefully worked out. It was hesitant about any commitment to the overall paper, but suggested that the delegation of Switzerland may take out particular aspects/individual points where the CAHDI's contribution could be of added value. On this basis, the CAHDI could have a *tour de table* and once concrete proposals had gained adequate support, it could take them forward.

160. The delegation of Denmark agreed with the delegation of the United Kingdom and did not consider that a lengthy discussion on the international rule of law would be particularly useful and thought it best to focus on concrete steps. It also considered it important not to touch the language already agreed upon as this might create more problems than solutions. It was, however, very supportive of the approach proposed by the delegation of Switzerland and suggested that this item be kept on the agenda. Lastly, as a member of the Security Council, it informed the CAHDI that it was trying to promote the international law and was seeing to organising a thematic debate in the Council on these issues. Some of the items identified could be items for the Council to discuss in June when Denmark had the Presidency of the Council.

161. The delegation of Sweden considered that in essence the Swiss paper was close to an initiative taken by Sweden in the context of the European Union to promote the rule of law. It appreciated the effort made by Switzerland to define the constitutive elements in a constructive manner and thought that coming to a common understanding/common definition was an excellent starting point. As far as the concrete steps were concerned, it felt this would need to be discussed in detail and was more of a long-term project.

162. The delegation of Germany said that the Swiss paper added substance to the discussion at hand and included concrete proposals. In this regard, it outlined its main features: concretisation of the rule of law and attributing substance to it and the impact of the rule of law in five areas for international legal action, which it could easily agree to. What was less concrete, it thought, was the institutional consequences of this discussion. It seemed that this would create more international bodies/fora, which it felt should be avoided. It also asked whether this was not a task for the International Law Commission.

163. The delegation of Poland wholeheartedly supported the Swiss initiative to promote the rule of law in international relations. It went on to say that it thought the Council of Europe was the appropriate forum to initiative and lead the discussion on this subject. In order to ensure stability in international relations and legitimacy for actions taken by states or international organisations, it considered it necessary to ensure the centrality of the rule of law in urgent, global problems and to develop a shared vision and co-ordinated strategy to promote the rule of law globally. It also stated that the United Nations should be at the core of the efforts to achieve this objective.

164. The delegation of Austria thought the Swiss paper had a lot of merit and it liked the practical approach proposed. It also considered the annex to be very helpful as it provided a good structure to which ideas could be added. From its point of view, the issue of identifying customary law and avoiding lacunae of international law in this field of human rights/humanitarian law was of particular concern. The delegation of Austria therefore welcomed this initiative - the structure of the paper was excellent - and would join others in sending feedback to the delegation of Switzerland on how to complement it.

165. The delegation of Portugal thanked the delegation of Switzerland for its excellent paper. It agreed with the delegation of Austria, but thought it important to adopt a progressive approach taking the Outcome document into account. It felt that the CAHDI, as legal advisers, were entitled to study and propose legal measures related with the subject of the issues raised and explained in the Outcome document. At the level of the size of its country and its resources, it stated that it wished to support and assist the Swiss delegation.

166. The observer of the United States thought it necessary to think more about the relationship between the concept of promoting respect for international law and promoting the international rule of law. As regards the annex, it identified different categories: promoting respect for international law; getting adherence to particular treaties; issues in the human rights area, and other policy issues. It considered that the CAHDI needed to think

about tactical issues as well as the substance and stressed that elements grouped together as one project might encourage, in an unfortunate way in the political process, trade-offs between elements. With respect to the tactical side of this question, others had questioned whether it was advantageous to put back into play things that have been settled in the Outcome document. It agreed that this may result in losing rather than gaining ground.

167. The delegation of Hungary expressed support in favour of a common understanding on the notion of the international rule of law although it thought the nine elements listed should be scrutinised. Principles 3, 4 and 6 might be grouped together. Focusing on the annex, it thought the objectives should be carefully examined too. In this connection, it said it would be happy to see a few words on the rights of national minorities in the chapter on human rights. It spoke in favour of keeping this item on the agenda.

168. The delegation of Switzerland thanked wholeheartedly all the delegations which took the floor and was grateful for the very positive general feedback received and the substantive and useful comments that had been made. It had not intended, however, to embark on issues such as the "responsibility to protect" which had been negotiated and defined quite clearly within the UN.

169. As regards the issues or elements proposed for a common understanding – what the idea of the international rule of law meant and the question of continuing with an action-oriented approach - it had the impression that one would not hinder the other. There were two methodological approaches to defining what international rule of law was: the deductive and the inductive approach. One could either see in which areas to go ahead and from thereon shape concepts or go from general concept to specific actions.

170. As regards the reading of the annex, this document was a long list of possible actions which implied that a large number of countries was required. These countries could pick and chose the areas they were particularly interested in, for instance the ICJ or terrorism.

171. The delegation of Switzerland agreed with the concern voiced by Germany, that it was important to try and focus on implementing existing law and existing institutions and strengthening them rather than creating new institutions. The problem on an international level with regard to international law was due to a lack of respect, not a lack of norms. The delegation of Switzerland concluded by saying that it welcomed any further comments and proposals from delegations. It thought it was a good idea to continue discussion in this forum, but not limit the discussion within the Council of Europe.

172. The Chair thanked the delegation of Switzerland for reviewing the discussion and providing the necessary clarifications. For her part, the Chair thought the paper was thought-provoking, both on a conceptual level and on an "operational" level (annex). She shared the concerns expressed with regard to terminology, given that the Outcome document was the result of delicate compromises. As far as the annex was concerned, the Chair suggested that this forum focus on certain items. The CAHDI had already concentrated on the peaceful settlement of disputes and it was very characteristic that objectives 1 and 2 corresponded to specific items being examined in the context of the CAHDI. She suggested prioritising as far as the other items were concerned. One could argue because human rights were the focus of the Council of Europe's work, discussion should focus on human rights or terrorism for instance.

173. The Chair reminded the CAHDI that the question of the international rule of law was only part of the World Summit Outcome document, which also contained other elements that pertained to international law, such as peaceful settlement of disputes, use of force, terrorism, peace building, peace keeping and so on. The CAHDI did not have time to address these issues at this meeting, but would keep this item on the agenda together with

the Swiss paper. The Chair concluded by encouraging delegations to come up with papers which were connected to the other items in the Outcome document and which concerned international law.

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

174. The Secretariat presented the working document containing an update on the developments at the Council of Europe in this field (CAHDI (2006) Inf 2). He emphasised that the fight against terrorism continued to be a priority area for the Council of Europe and was endorsed as such by the Third Summit of Heads of State and Government. The Committee of Experts on Terrorism (CODEXTER) continued to be the key committee under the authority of the Committee of Ministers in charge of co-ordinating the overall action of the Council of Europe in this field.

175. The Secretariat then stated that a number of international instruments had been adopted in pursuance of the Council of Europe Action Plan for the fight against terrorism. He made reference to the Council of Europe Convention on the Prevention of Terrorism and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. Both Conventions required six parties for their entry into force and the Committee of Ministers was closely following the matter. One was particularly important as it contained specific follow-up mechanisms.

176. With respect to the other conventions in this field, reference was made to the 1977 European Convention on the Suppression of Terrorism and the Protocol amending this Convention. For the latter to enter into force, it was therefore necessary for all the parties to the mother convention to become parties to the Protocol. To date, only 21 states had ratified the Protocol whereas 44 had signed it.

177. As regards future areas of work, the focus at present was on ensuring the effective implementation of the various set of standards adopted in this field (listed in document CAHDI (2006) Inf 2) and the drawing up, by the CODEXTER, of country profiles on legislative and institutional counter-terrorism capacity. In this respect, some 20 country profiles had been produced already and the Secretariat has been approached by the UN Counter-Terrorism Committee, who saw a lot of value in these country profiles in the context of its own work in monitoring compliance with UN Security Council Resolution 1373. The Secretariat had also been approached by the UN Counter-Terrorism Committee Executive Directorate with a view to contributing to on-site visits to Council of Europe member states and also because the Counter-Terrorism Committee had received a mandate to follow the application of Security Council resolution 1624 regarding indirect incitement to terrorism.

178. At its last meeting in November 2005, the CODEXTER identified a number of additional priority areas which should be the focus of work by the Council of Europe (contained in document CM(2005)172 add).

179. The Secretariat then made reference to the work of the CAHDI relating to possibly problematic reservations to international treaties applicable to the fight against terrorism and its ongoing activity on the implementation of UN sanctions and respect for human rights, which were singled out by the CODEXTER as activities that should be pursued as a matter of priority.

180. The Secretariat went on to refer to a possible activity on nationality issues arising in connection with the fight against terrorism. At this juncture, the European Committee on Legal Co-operation (CDCJ) was discussing the matter and already endorsed the pursuance

of two priority areas that concerned them, namely denial of residence to foreign terrorists and insurance schemes to cover terrorist related damages.

181. Regarding the activities of the Steering Committee for Human Rights (CDDH), the Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER) has been conducting work on diplomatic assurances in cases involving expulsion of presumed terrorist offenders. However, this work was discontinued due to the absence of agreement on its pursuance.

182. The Secretariat finished by saying that a number of publications had seen the light, the most recent one entitled "Terrorism: Protection of witnesses and collaborators of justice". More information on the publications, country profiles and status of signatures of various Council of Europe instruments could be found on the website devoted to the fight against terrorism[2].

D. OTHER

18. Date, place and agenda of the 31st meeting of the CAHDI

183. The Chair announced that the 31st meeting of the CAHDI would take place in Athens on 13 and 14 September, to which a third day would be added to deal with the 4th Multilateral Consultation on the International Criminal Court.

184. The CAHDI adopted the preliminary draft agenda of the 31st meeting, as set out in **Appendix VI** to this report.

19. Other business

185. The Chair informed the CAHDI that it had been invited to send a representative to take part in the Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER).

186. The Secretary of the CAHDI reported that another committee, the CODEXTER, was represented in the working party currently dealing with diplomatic assurances in the context of the fight against terrorism by Mr Martin SØRBY and proposed that he would also represent the CAHDI subject to his and the Committee's agreement. The CAHDI agreed to proceed in this way.

187. The Committee adopted the abridged report of the meeting as it appears in **Appendix VII** to the present report.

[2] http://www.coe.int/gmt.

APPENDIX I

LIST OF PARTICIPANTS

ALBANIA / ALBANIE:
Mme Ledia HYSI, Director of Legal Affairs and Treaties Department, Ministry of Foreign Affairs

ARMENIA / ARMENIE:
Mr Ani KOCHARYAN, Ministry of Foreign Affairs

AUSTRIA / AUTRICHE:
Mr Ferdinand TRAUTTMANSDORFF, Ambassador, Legal Advisor, Federal Ministry of Foreign Affairs

AZERBAIJAN / AZERBAIDJAN:
Mr Emin EYYUBOV, Deputy Head of the Department of International Law and Treaties, Ministry of Foreign Affairs

BELGIUM / BELGIQUE:
M. Jan DEVADDER, Directeur Général des Affaires Juridiques, Service public fédéral des Affaires Etrangères, du Commerce extérieur et de la Coopération au développement

M. Patrick DURAY, Conseiller, Direction Générale des Affaires Juridiques, Service public fédéral des Affaires Etrangères, du Commerce extérieur et de la Coopération au développement

BOSNIA AND HERZEGOVINA / BOSNIE-HERZEGOVINE:
Mrs Gildzana TANOVIC, Counsellor, Ministry of Foreign Affairs

BULGARIA / BULGARIE:
Mr Krassimir BOJANOV, Deputy to the Permanent Representative of Bulgaria to the Council of Europe

CROATIA / CROATIE:
Mrs Andreja METELKO-ZGOMBIĆ, Head of the International Law Department, Ministry of Foreign Affairs

CYPRUS / CHYPRE:
Mrs Georghia EROTOKRITOU, Attorney of the Republic, Law Office

CZECH REPUBLIC / REPUBLIQUE TCHEQUE:
Mr Jan CIZEK, Director of the International Law Department, Ministry of Foreign Affairs

Mr Milan DUFEK, Counsellor-Minister, International Law Department, Ministry of Foreign Affairs

DENMARK / DANEMARK:
Mr Peter TAKSOE-JENSEN, Head of the Legal Service, Ministry of Foreign Affairs

ESTONIA / ESTONIE:
Mrs Kristi LAND, Attaché, Legal Department, Ministry of Foreign Affairs

FINLAND / FINLANDE:
Mrs Irma ERTMAN, Ambassador, Director general for Legal Affairs, Ministry of Foreign Affairs

Mr Juha RAINNE, Legal Officer, Unit for Public International Law, Legal Department, Ministry for Foreign Affairs

FRANCE:
M. Claude CHAVANCE, Sous-directeur du droit international public général, Direction des Affaires Juridiques, Ministère des Affaires Etrangères

GEORGIA / GEORGIE:
Mrs Khatuna TOTLADZE, 1st Secretary, Ministry of Foreign Affairs, International Law Department

GERMANY / ALLEMAGNE:
Dr Thomas LÄUFER, Legal Adviser, Director General for Legal Affairs, Federal Foreign Office

Mrs Suzanne WASUM-RAINER, Head of Division, Public International Law Department

GREECE / GRECE:
Mrs Phani DASCALOPOULOU-LIVADA, Legal Adviser, Head of the Section of Public International Law, Ministry of Foreign Affairs **(Chair/Présidente)**

Mr Michael STELLAKATOS-LOVERDOS, Member of the Legal Service, Ministry of Foreign Affairs

HUNGARY / HONGRIE:
Mr Istvan HORVÁTH, Head of Department, International and European Law Department, Ministry of Foreign Affairs

ICELAND / ISLANDE: Apologised/Excusé

IRELAND / IRLANDE:
Mrs Patricia 0'BRIEN, Legal Adviser, Department of Foreign Affairs

ITALY / ITALIE:
M. Ivo Maria BRAGUGLIA, Chef du Service du contentieux diplomatique et des traités, Ministère des Affaires Etrangères

Dr Annalisa CIAMPI, Professeur, Université de Verona

LATVIA / LETTONIE:
Ms Evija DUMPE, Legal Department, Ministry of Foreign Affairs

LIECHTENSTEIN: Apologised/Excusé

LITHUANIA / LITHUANIE:
Mr Andrius NAMAVICIUS, Director of Law and International Treaties Department, Ministry of Foreign Affairs

LUXEMBOURG:
Mme Anne KAYSER, Attachée d'administration, Ministère des Affaires Etrangères et de l'Immigration

MALTA / MALTE:
Dr. Cynthia SCERRI DEBONO, Counsel for the Republic, Office of the Attorney General

MOLDOVA:
Mr Lilian MORARU, Head of the EC Law Directorate, International Law Department, Ministry of Foreign Affairs and European Integration

MONACO:
M. Bernard GASTAUD, Conseiller pour les Affaires Juridiques et Internationales, Ministère d'Etat

NETHERLANDS / PAYS-BAS:
Mr Johan LAMMERS, Legal Adviser, International Law Division, Ministry of Foreign Affairs

NORWAY / NORVEGE:
Mr Rolf Einar FIFE, Director General, Department for Legal Affairs, Ministry of Foreign Affairs

Ms Linn ECKHOFF DOLVA, Executive Officer, Ministry of Foreign Affairs

POLAND / POLOGNE:
Mr Remigiusz HENCZEL, Director of Legal and Treaties Department, Ministry for Foreign Affairs

PORTUGAL:
Mr Luis SERRADAS TAVARES, Director, Ministry of Foreign Affairs, Department of Legal Affairs

Mrs Patricia GALVAO TELES, Consultant, Ministry of Foreign Affairs, Department of Legal Affairs

ROMANIA / ROUMANIE:
Mr Cosmin DINESCU, General Director, General Directorate for Legal Affairs, Ministry of Foreign Affairs

Ms Alina PAPUC, Third secretary, Ministry of Foreign Affairs

RUSSIAN FEDERATION / FEDERATION DE RUSSIE:
Mr Roman KOLODKIN, Director of the Legal Department, Ministry of Foreign Affairs

Mr Vladimir TARABRIN, Deputy Director, Legal Department, Ministry of Foreign Affairs

SERBIA AND MONTENEGRO / SERBIE ET MONTENEGRO:
Mr Milan PAUNOVIC, Chef Legal Advisor, Ministry of Foreign Affairs

SLOVAK REPUBLIC / REPUBLIQUE SLOVAQUE:
Mr Igor GREXA, General Director, Direction of International Law and Consular Affairs, Ministry of Foreign Affairs

SPAIN / ESPAGNE:
Mme Concepción ESCOBAR HERNÁNDEZ, Chef du Département Juridique International, Ministère des Affaires Etrangères

M. Maximiliano BERNAD ALVAREZ DE EULATE, Professeur de Droit international public et d'Institutions et droit communautaire européens, Université de Zaragoza

SWEDEN / SUEDE:
Mr Carl Henrik EHRENKRONA, Director General for Legal Affairs, Ministry for Foreign Affairs

Mr Bosse HEDBERG, Deputy Director General, International Law and Human Rights Department, Ministry for Foreign Affairs

Ms Marie JACOBSSON, L.L.D., Principal Legal Adviser, International Law, Human Rights and Treaty Law Department, Ministry for Foreign Affairs

SWITZERLAND / SUISSE:
M. Jürg LINDENMANN, Suppléant du Jurisconsulte, Direction du Droit international public, Département fédéral des affaires étrangères

M. L'Ambassadeur Paul SEGER, Directeur, Direction du droit international public, Département fédéral des affaires étrangères

"THE FORMER REPUBLIC YUGOSLAV OF MACEDONIA" / "L'EX-REPUBLIQUE YOUGOSLAVE DE MACEDOINE":
Ms Natasa DESKOVSKA, Department for International Law, Ministry of Foreign Affairs

TURKEY / TURQUIE:
Mr Cinar ALDEMIR, Ambassador, Chief Legal Adviser, Ministry of Foreign Affairs

UKRAINE:
Mr Volodymyr KROKHMAL, Director for Legal Affairs, Ministry of Foreign Affairs

UNITED KINGDOM / ROYAUME-UNI:
Sir Michael WOOD, LONDON

Mr Daniel BETHLEHEM, Foreign and Commonwealth Office

Mr Jonathan DRAKEFORD, Legal Researcher, Foreign and Commonwealth Office

EUROPEAN COMMISSION / COMMISSION EUROPEENNE

M. Pieter Jan KUIJPER, Conseiller Juridique Principal, Service juridique de la Commission européenne

M. Frank HOFFMAISTER, Membre du Service Juridique de la Commission Européenne

OBSERVERS / OBSERVATEURS

CANADA:
Mr Alan KESSEL, Legal Adviser, Department of Foreign Affairs and International Trade

HOLY SEE / SAINT-SIEGE:
Mme Odile GANGHOFER, Mission du Saint Siège auprès du Conseil de l'Europe

JAPAN / JAPON:

Mr Takeo AKIBA, Director, International Legal Affairs Division, Ministry of Foreign Affairs

Mr Junichi HOSONO, Official, International Legal Affairs Division, Ministry of Foreign Affairs

Mr Yasushi FUKE, Consul, Consulat Général du Japon

MEXICO / MEXIQUE:
Sr Victor Manuel URIBE AVINA, Consultor Juridico Adjunto de la Secretaria de Relaciones Exteriores

UNITED STATES OF AMERICA / ETATS-UNIS D'AMERIQUE:
Mr Todd BUCHWALD, Assistant Legal Adviser for United Nations Affairs, US Department of State

ISRAEL / ISRAËL:
Mr Ehud KENAN, Legal Adviser, Ministry of Foreign Affairs

UNITED NATIONS / NATIONS UNIES:
Mr Markus PALLEK, Associate Legal Office, United Nations, Office of Legal Affairs, Office of the Legal Counsel

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

EUROPEAN ORGANISATION FOR NUCLEAR RESEARCH (CERN) / ORGANISATION EUROPEENNE POUR LA RECHERCHE NUCLEAIRE (CERN):
M. Jean-Michel FAVRE, Service Juridique

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

INTERPOL: Apologised/Excusé

INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) / COMITE INTERNATIONAL DE LA CROIX ROUGE (CICR):
Mme Maria Teresa DUTLI, Chef des Services consultatifs en droit international humanitaire, CICR

NORTH ATLANTIC TREATY ORGANISATION (NATO) / ORGANISATION DU TRAITE DE L'ATLANTIQUE NORD (OTAN):
Ms Laura MAGLIA, Legal Assistant, Office of the Legal Service

SPECIAL GUESTS / INVITES SPECIAUX

Professor Iain CAMERON, SWEDEN

Professor Martin SCHEININ, Professor of Constitutional and International Law, Director of the Institute for Human Rights, FINLAND

SECRETARIAT GENERAL

CAHDI SECRETARIAT / SECRETARIAT DU CAHDI:

Mr Rafael A. BENITEZ, Secretary of the CAHDI/Secrétaire du CAHDI, Deputy Head of the Public Law Department/Chef adjoint du Service du droit public

Mme Albina LACHERET-OVCEARENCO, Administrative assistant/Assistante administrative, Public Law Department/Service du droit public

Ms Lara DAVIS-BAVOUX, Administrative assistante / Assistante administrative, Public Law Department / Service du droit public

Mme Francine NAAS, Assistant/Assistante, Public Law Department / Service du Droit public

OTHER REPRESENTATIVES OF THE SECRETARIAT / AUTRES REPRESENTANTS DU SECRETARIAT:

M. Giovanni PALMIERI, Head of the Public Law Department/Chef du Service du droit public

M. Paul DEWAGUET, Head of Legal Advice Department and Treaty Office / Chef du Service du Conseil Juridique et Bureau des Traités

M. Patrick TITIUN, Deputy Head of the Legal Advice Department and Treaty Office / Adjoint au Chef du Service du Conseil Juridique et Bureau des Traités

Mme Elise CORNU, Legal Advice Department and Treaty Office / Service du Conseil Juridique et Bureau des Traités

Mr Guillaume LIEGEOIS, Trainee/stagiaire, Public Law Department / Service du droit public

Mlle Magalie ROUECHE, Trainee/stagiaire, Public Law Department / Service du droit public

APPENDIX II

AGENDA

A. INTRODUCTION

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

2. Adoption of the agenda and approval of the report of the 30th meeting (Strasbourg, 19-20 September 2005) CAHDI (2006) OJ1 & CAHDI (2005) 19 prov

3. Communication by the Secretariat CAHDI (2006) Inf 1 & Inf 5

B. ONGOING ACTIVITIES OF THE CAHDI

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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 CAHDI (2006) 2

      - *Observations submitted by Poland* CAHDI (2006) 9

   b. Consideration of reservations and declarations to international Treaties applicable to the fight against terrorism CAHDI (2006) 6 & 7

      - *Observations submitted by Turkey* CAHDI (2006) 3
      CAHDI (2004) 16

6. State practice regarding State immunities CAHDI (2006) Inf 3

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   CAHDI (2006) Inf 4
   CAHDI (2004) 19

8. National implementation measures of UN sanctions and respect for Human Rights CAHDI (2006) 12 & CAHDI (2004) 7*, 9* & 13*

   - Presentation of a report by and Exchange of views with Professor Iain Cameron, University of Upsala (Sweden) Report

9. Digest of state practice on international law, proposal for a new activity CAHDI (2005) 10

C. GENERAL ISSUES ON PUBLIC INTERNATIONAL LAW

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    b. Jurisdiction of the ICJ under other agreements, including the European Convention on the Peaceful Settlement of Disputes CAHDI (2006) 4

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11. UN Convention on Jurisdictional Immunities and European Convention on State Immunity 

    - Report on the Informal Consultation of the Parties to the European Convention on State Immunity

12. Consideration of current issues of international humanitarian law:

    - 2nd Protocol to the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict 

13. Relationship between human rights law and international law, including international humanitarian law: Exchange of views with Professor Martin Scheinin, Åbo Akademi University, Finland CAHDI (2006) 14

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

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D. OTHER

18. Date, place and agenda of the 32nd meeting of the CAHDI

19. Other business

    - Participation of a representative of the CAHDI in the Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER)

APPENDIX III

STATEMENT BY PROFESSOR IAIN CAMERON

THE ECHR, DUE PROCESS AND UN SECURITY COUNCIL COUNTER-TERRORISM SANCTIONS

May I first begin by saying I was delighted to be asked to write this report and to present it today before CAHDI.

My interest in the subject of targeted sanctions dates from autumn 2001 when the Swedish government asked me to look at the issue in the context of the Stockholm process, as it was called. The Swedish government had undertaken to carry on the process begun by the Swiss and German governments, the Interlaken and Bonn-Berlin processes, on targeted sanctions with the emphasis on making legal sanctions more effective.

While this process was just beginning in Sweden, the issue arose rather dramatically of legal safeguards for people placed on the blacklists. Three Swedish citizens of Somalian origin were placed on the blacklists. This became something of a *cause célèbre* in Sweden and it became very important to deal with the issue. The original idea was this would be part of the Stockholm process, because this was the obvious thing to do.

I should mention an incident that occurred here because it is illustrative of the problems in the area. When the issue of legal safeguards for people suspected of terrorism placed on the United Nations' blacklists was raised, the representative from the United States - who was not, I should add, a lawyer, one of his saving graces – stated that "if this issue of legal guarantees is even discussed, my government will reconsider its commitment to the Stockholm process and leave it." I mention this not to illustrate how naïve professors in international law are. Obviously I was aware that legal arguments do not always win the day in public international law. I was rather shocked, however, at the lack of willingness to even enter into a dialogue, to even accept that there were legal issues involved at all in the subject of targeted sanctions. This unwillingness to discuss these issues persists, I regret to say, today.

The point of my paper can be summarised very simply. There are legal difficulties involved in targeted sanctions regimes, particularly human rights problems. These have not yet been solved by the improvement in the sanctions regimes, which have undoubtedly occurred. There have been improvements but the legal difficulties remain. These legal difficulties are not insurmountable. They can be solved relatively simply and targeted sanctions can be retained as a useful policy tool primarily against governments and quasi-governmental bodies. However, if the problems are not dealt with, we would soon be facing a "lose lose" situation and this "lose lose" situation applies in particular to Council of Europe states which become members of the Security Council and obviously the Council of Europe states which are permanent members of the Security Council. I will explain this later.

I am sure I do not have to go into details as to how the system works. Basically a sanctions body, a subordinate organ I should stress of the Security Council, is established. This body draws up a list of people. In relation to sanctions against governments or quasi-governmental bodies which are engaged in activities threatening to international peace and security, the list is drawn up largely on the basis of diplomatic information. In relation to the anti-terrorism sanctions, that is the Al Qaeda sanctions under Resolution 1267, intelligence material is the basis for many listings. There were 203 names on the Resolution 1267 list in January 2006. Now this is a relatively small number of people and one could say that in terms of issues of priority for the Security Council, this is an unimportant matter.

As we all know, the Security Council has many issues, very burning issues, in front of it: weapons of mass destruction, genocide and so on. These are very significant challenges and one can say: what is all the fuss about such a small number of people, who are terrorist suspects after all? There are two reasons: the first is that these people are terrorist suspects, which is not the same thing as saying they are terrorists. The second is that the issue has great symbolic importance for future Security Council's actions in this field. If the legal problems are not satisfactorily solved, then further use of the sanctions weapon will be jeopardised.

The human rights problems which I identify in my report apply to all the targeted sanctions regimes, but finding solutions is easier for the sanctions regimes directed against governments or quasi-governmental bodies. There is a qualitative difference between bandit governments, if I can use that term - and we all know who the bandit governments are - and sanctions directed against terrorists or terrorist suspects. Identifying governments is obviously a relatively simple matter. The function of anti-government sanctions is behavioural modifications, getting them to change their activities. But if, for the sake of argument, Usama Bin Laden suddenly announced tomorrow that he was retiring, he would not be removed from the sanctions list, I can tell you.

The anti-terrorist sanctions will be **very** long term since the war against terrorists is a forever war. Now, there are improved criteria that have been elaborated for the listing of people. There is also the possibility of humanitarian exceptions and this has undoubtedly improved the system. There is a delisting procedure. However, the delisting procedure is, as I explained in my report, not a legal procedure in any way. There are no legal safeguards whatsoever.

One of the arguments against introducing more legal procedures and safeguards is that the sanctions system is political in nature. I had the benefit of being in New York to try to explain the problems of the system to members of the Security Council and it was explained to me patiently, since I was a lawyer, that "this isn't about law, this is about politics". They gently explained that international lawyers were always trying to make political things more legal. I said "in the bad old days of the Middle Ages, the king – it was usually the king – when somebody was not pleasing to him, simply said 'take this person away and cut his head off and his lands are forfeit'". And I said that this was politics too, but nowadays we have something called human rights and when a political decision infringes human rights then you can not simply say "it's a political decision". It is not an argument that is acceptable.

Would improved criteria for listing solve the problem? The focus of the monitoring team which has been established to assist the 1267 Committee is on improving effectiveness and the monitoring team considers that, yes, there may be some problems, however, this can be dealt with by making better statements of case, that is better criteria for listing somebody, and secondly by requiring states to forward complaints by individuals to the Security Council. But these improvements would not solve the problem. Why not, in other words, what is the difficulty? It is essentially that the sanction body itself decides which people should be on the list. As we all know intelligence material is of a limited reliability. It is graded, usually on the basis of the reliability of the information and the source. On the basis of the grading, a risk-assessment has to be made whether a particular person is or is not a security risk. The job of intelligence agencies, as we say in English, is to err on the side of caution. Now, if you have no safeguard on putting somebody on the list apart from the political negotiations that go on in the Security Council, then quite simply people will be put on the list who should not be put on the list. Admittedly, the 1267 Group has refused putting certain people on the list. A number of names proposed have not been listed. However, there are people still on the list who it is very doubtful whether they should be on the list at all. And there is no body there to

check the proportionality and appropriateness of this political decision to put people on the list.

One can say, well, do states not already have such blacklisting systems in their national legal orders? The answer is yes, some democratic states do, although these are subject to judicial controls. Other states provide for the possibility of freezing assets. Here I should point out that it is primarily the freezing of assets that raises human rights problems, not travel sanctions, or arms embargoes. But in national systems, the freezing of assets is an interim measure taken by the prosecutor or the police pending a judicial determination of a person's involvement in criminality. It is an interim measure that can be challenged in court before an independent and impartial judge. At the UN level, these sanctions are not interim measures pending a judicial determination, they are alternatives to judicial determinations and as I said, they are not temporary measures.

Now an argument that is also made against improving safeguards is that the concept of the separation of powers does not exist at the international level and so the Security Council should not be subject to it. This concept, which is regarded as fundamentally important in all Council of Europe states, means that the activities of the executive must be capable of being scrutinised by the courts. But the Security Council is no longer simply acting in the international sphere. By engaging in targeted sanctions, the Security Council has entered into the domestic sphere. It has started doing something that it has not done before. You see this both in the legislative resolutions (1373 Resolution dealing with terrorism and the weapons of mass destruction Resolution 1540) but we also see it in taking administrative decisions which enter directly into the national sphere. The question then arises: the safeguards that we have painstakingly built up through 200 years of evolution in the democratic states of the Council of Europe, these dearly won safeguards, can they really be dismissed by a sort of wave of an international law magic wand, by a body called the Security Council?

In essence I would say that the arguments that are made in defence of the present system come down to the following: the Security Council's word is law, the Security Council's word is to be obeyed and that we can trust it not to abuse its power. We in Europe know where such arguments lead us.

Now I won't go into on the case law of the European Court of Human Rights on the substantive rights concerned because I don't think that is a subject on which there will be too much disagreement. One point can be stressed. I state in my report that there must be a right of access to court and right to effective remedies. This can be misunderstood to mean a traditional court applying a traditional adversarial procedure. This would probably not, I accept, be appropriate for a review body established for targeted sanctions. But it is important to stress that in the European system, the concept of a Court, is a variable concept. It does not have to be a court in the traditional fashion. The court in question can have very different procedures, procedures designed to protect the security of security information and the security of the judges themselves. I do not set out in detail in the present report the solutions which can be devised for fairer procedures, but these are developed in other reports.

No, I thought that what I would do in the time remaining to me is to deal with probably the most controversial aspect of my paper, namely the idea that Council of Europe states acting in the Security Council or implementing sanctions are under some form of residual responsibility to comply with their Human Rights obligations.

Before I deal with this in detail, I would like to mention one more thing that is noted in my paper namely whether the anti-terrorist sanctions (as opposed to anti-government sanctions) actually work. I haven't developed this in my paper but I have developed this in other papers

that I have looked at and I am happy, if anybody is interested in this, to distribute them. If you give me your e-mail addresses, I can send them to you in PDF form.

Basically, as we all know, terrorism is largely low tech. It doesn't cost a great deal to commit a terrorism outrage. The main cost for a bomb is the detonator. It is true that terrorists need training camps and so on, but there is **no evidence** that these blacklisting sanctions have **any** significant effect on terrorist financing networks. And if you think this is me speaking as some sort of human rights fundamentalist, I would like to say that that is the opinion of the 9/11 Commission established by Congress and the President of the United States. The 9/11 Commission considers that these sanctions have only a symbolic, or diplomatic, importance. In terms of detection of terrorist financing networks, blacklisting has a negative effect. It makes it more difficult to detect terrorist financing networks. So, I posed the question in my paper: are we getting value for money? I was being very diplomatic there. I think these sanctions are expensive and dysfunctional. They have a purely symbolic importance. And that should be borne in mind when we speak about the remedies that should be available.

To turn now to the issue of state responsibility under the European Convention system. I think it is very important here to begin with the famous Bosphorus case and stress what the Court did and did not say in the Bosphorus case. The Court stated in the Bosphorus case that when delegating power to an international organisation, in this case the EU acting to implement UN sanctions, but the same principle applies even to the UN directly, that it is possible to do this for the sake of international law and co-operation in international affairs. The Court accepted that this is a good idea. However, the Court insisted that the organisation should have a system of protection for human rights which is **equivalent** to that of the Council of Europe system.

However, any such findings of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection. There is a presumption that an organisation established to promote international co-operation and to which member states have delegated their powers, that is, there is a presumption that it is acting legally. However, such a presumption can be rebutted if, and I quote, "in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient." The court did not explain what "manifestly deficient" means, however, one judge, Judge Reiss, did in a separate opinion. The example he gives is of the UN targeted sanctions system. He gives that as an example of a situation where there is lack of European Court of Justice jurisdiction to review the measure and therefore a "manifest deficiency" in protection.

I should stress here that this issue, European states implementing or acting in furtherance of Security Council measures where the level of protection is much less than applicable European standards, is not unique to the target sanctions regimes. The Venice Commission has on at least two occasions raised the problems that exist in Bosnia and Herzegovina and in Kosovo. Here there are similar problems where the Security Council Resolution seems to require conduct which is not in accordance with basic human rights obligations undertaken by the states in question. The Kosovo issue has been very recently solved by an establishment of an Advisory Panel on Human Rights for UNMIK. So the criticism by the Parliamentary Assembly and the Venice Commission has borne fruit in this area and this establishment of the UNMIK Advisory Panel is an interesting example of how a solution can be reached which is acceptable to all the parties.

I would say that the residual responsibility of Council of Europe states for compliance with the Convention is relatively clear. This may be regarded as controversial by some countries, which consider that UN obligations are hierarchically superior to other treaty obligations. However, the important point here with the residual responsibility argument, is that Article 103 of the UN Charter does not provide a definitive answer to this; it is not the complete

answer to the question of whether rights under the UN Charter should be preferred over other rights.

Now, as I state in my report it is difficult to predict how the European Court of Human Rights would decide in a concrete case, if it ever receives such a case. However we have the judgment of the Court of First Instance of the Al Barakaat case dealing with this issue. The Court of First Instance stated that there was no possibility of reviewing Security Council Resolutions and the only limitation on this was *jus cogens* norms. Since the Security Council was not ordering systematic torture or genocide then there was no possibility for the Court of First Instance to interfere with this. However, I do not feel that this is the approach that will be taken by European Court of Human Rights. The European Court of Human Rights is admittedly not interested in causing problems for the Security Council. This I must stress. However, if the issue comes up, the Court might very easily be, as we say in English, painted in a corner. The judges might feel that they must take some action and the question is what action will they take? They may decide that there are residual responsibilities and remind states of their obligations, under the ECHR to respect this convention when they are acting in New York or in implementing sanctions in their territories. In many ways this would be a difficult, problematic resolution of the issue because it will encourage more litigation and it may be seen as putting obstacles in the way of the important work of the Security Council. So the Court will be reluctant to come to such a decision. At the same time, if it doesn't deliver that judgement, then it is likely to say the same as the Court of the First Instance did in the Yusuf case. The Security Council can do whatever it likes as long as it does not order genocide or systematic torture. I ask everyone in this room to reflect over that, is that what we want?

The government of the United Kingdom, for example, which intervened in the Al Barakaat Yusuf case, argued strongly that Articles 25 and 103 provide a complete answer to this problem. The government of the United Kingdom has, in other contexts, been keen to promote the idea of a rule-based international order. And you really have to pose the question: what sort of victory would it be to get established a principle in the European Court of Justice or the European Court of Human Rights that states acting together in Security Council have no obligations whatsoever to consider their human rights obligations? Basically, they have undertaken these obligations but somehow their obligations have disappeared when they go to the United Nations. They put on their "United Nations Security Council hat", adopt a resolution and return to Europe and say "I'm sorry but we have absolutely no choice but to enforce this resolution adopted by the UN Security Council." This, I think, is cynical. It is not in accordance with the long-term aims of the international order and, although it is easier to accept near-absolute power when you are one of the states which wields it, I don't think it in accordance with these states' long-term interests either.

A solution can be found to this problem. It is relatively simple to establish a body which would look at such decisions by the Security Council Sanctions Committee. It would not, I should stress, involve questioning the determination by the Security Council that a particular incident involved a threat to international peace and security. It would rather be one subordinate body of the Security Council looking at the work of another subordinate body, in this case, a Sanctions Committee. So it would be two subordinate bodies looking at each other's work. The UNMIK Advisory Panel is an example of such a solution and as I said, there are various models that could be used: an arbitral body, an ombudsman and so on. The important thing is the body actually established has a **genuine ability** to evaluate the intelligence material which is behind the decision to list a particular person. The body would probably not have a great deal to do; there would be very few complaints to the body. The main function of the body would be to act as a preventive control. Quite simply, a state would have to think twice about proposing a name, because it knows there will an independent and competent body which is able to look at the information behind the blacklisting. This might,

exceptionally, mean, in particularly sensitive cases, that a state chooses not to propose blacklisting of a particular person. In most cases, however, there will be available public information indicating, for example, that the person in question has taken responsibility for a terrorist act. There is no problem in such cases when there has been a public acceptance of responsibility.

So basically, workable solutions can be reached. If these workable solutions are not reached soon, then the European Court of Justice and then perhaps later the European Court of Human Rights will be painted into a corner and will have to deliver a judgment which, either way it goes, will not be a good thing. However, if the solution is reached to the problem before either Court is in a position to deliver a judgment, then it can, quite reasonably, wash its hands of the problem. “No, there is an equivalent system of protection in the UN system and therefore there is no need for us to interfere.”

I will end on this note. Basically, academic international lawyers can be accused of wanting more certainty in all sorts of areas whereas legal advisors, I think, have learned to live with uncertainly to a far greater extent. They can even see the advantages in uncertainty, in not pushing an issue to a legal conclusion. This is such an area where it is better to leave open the question of who or what has the final word. The way to do it this is to establish a system of equivalent protection and thus avoid the need for a confrontation in the judicial instances of the European Court of Justice and the European Court of Human Rights.

Thank you. I am happy to answer any questions you may have.

APPENDIX IV

STATEMENT BY PROFESSOR MARTIN SCHEININ

RELATIONSHIP BETWEEN HUMAN RIGHTS LAW AND INTERNATIONAL LAW, INCLUDING INTERNATIONAL HUMANITARIAN LAW

I deal with this issue by looking at three different levels. The first one is the general question of whether human rights law has some specific status within the framework of public international law. Here I am simply referring to two ongoing projects in that field. The Venice Commission is working on a publication based on a Coimbra seminar that was held last fall, related to the issue whether human rights treaties have special status. The issue was looked in respect of constitutional law where we of course have specific provisions in many constitutions about the direct applicability and priority within the sphere of domestic law of human rights treaties. But mainly the Venice Commission event in Coimbra focused on the international law issue, whether human rights treaties bear some specific status in that sphere. The question was addressed from different perspectives including the issue of reservations, or the status of *jus cogens* norms. No specific conclusions were reached, but the event will result in a publication which in my view will be quite useful.

The second project I want to refer to is a more long-lasting exercise within the framework of the International Law Association where we have a specialized Committee working on international human rights law and practice. That Committee is working towards a final report to be presented in 2008 on the relationship between human rights law and public international law. The first workshop by the Committee was held in January this year at Maastricht University in the Netherlands, where, *inter alia* different approaches to the relationship between human rights law and public international law were discussed. What I want to report here is that very little support was given to what was described as a fragmentation approach; which would say that similarly to some other specific regimes, human rights laws is something special, something separate and governed by its own rules. There was much more support to a mainstreaming of human rights into the body of public international law, mainly through a reconciliation approach, meaning that there are certain specificities related to human rights law but this does not mean that human rights law would be on a course towards separation from the body of public international law. Rather one should look how human rights law informs the evolution of public international law. This, inter alia, will mean that state practice under human rights treaties should be seen as state practice also under other treaties, for instance the Vienna Convention on the Law of Treaties. Some people have tended to see contradictions between the human rights treaty regime and the Vienna Convention on the Law of Treaties but those tensions can to a large extent be resolved by taking the view that practice that emanates under human rights treaties is actually simultaneously subsequent practice under the Vienna Convention itself.

There were discussions about issues of hierarchy which mainly relate to the notion of *jus cogens* and the category of non-derogable norms within human rights law. The question is whether these types of norms do enjoy certain priority in respect of other parts of public international law. And of course we are back to the issue of the special status of *jus cogens* norms as reflected for instance in Article 53 of the Vienna Convention on the Law of Treaties and in scholarly work around Article 103 of the United Nations Charter.

At the Maastricht workshop it was, however, pointed out that on some occasions the reconciliation approach might not be sufficient. This would be the reason why one also would have to revert to what was described as a constitutionalisation approach, meaning that there is something in the evolution of public international law itself which is on the path towards international law not only meaning inter-state law but that there is a body of objective norms binding on individual states and even the community of states, irrespective of their reciprocal

duties and rights in respect of other states. Human rights law could in the substantive sense of the term have constitutional importance within the framework of international law. This view is not identical to saying that any human rights norm would have hierarchical superiority in respect of other parts of international law. Nevertheless, human rights law in substance could be a special case, a symbol of the evolution of public international law towards an objective normative framework. The ultimate criterion for the existence of what I have here described as objective norms would be their bindingness irrespective of the consent of a particular state.

The ILA Committee on International Human Rights Law and Practice is working towards a doctrinal statement which would formulate a position in respect of the relationship between human rights law and public international law.

Moving to the second part of my paper, I would at the outset note that this dimension is perhaps the most important for your purposes, namely the specific application of general relationship issues into the relationship between human rights law and international humanitarian law. In my speaking notes, I reflect quickly on the similarities and dissimilarities between the two bodies of law. There is no need to emphasize those. Just couple of points: the common substantive elements of humanitarian law and human rights law are well known and they are at the background of the project on fundamental standards of humanity, a project that is still alive; not proceeding very well but nevertheless existing on the agenda of relevant United Nations bodies with the idea of trying to crystallise what are the common elements of the two bodies of law. The added value of such a project is in striving for a doctrinal understanding of what norms pertaining to the field of the fundamental rights of the individual, are binding in all circumstances (war, peace and whatever is in between) and binding upon all actors, including non state actors.

There are differences between human rights law and humanitarian law, differences in their historical background, in the scope of protected persons between the universalist approach of human rights law as contrasted with the protected persons approach of humanitarian law. There are differences as to what comes to monitoring obligations and also in the role of the applicability of the substantive norms in respect of other than state actors.

By and large, it has been approved that the cumulative approach is the correct one in describing the relationship between human rights law and humanitarian law. Human rights law and humanitarian law are applicable simultaneously, parallel to each other and should both be respected at times when humanitarian law is applicable. The existence of derogation clauses in some of the central human rights treaties is the most important testimony to this cumulative approach and its correctness. There would not be a need for derogation clauses if we were in a world where human rights treaties became ineffective or inapplicable as soon as the threshold of humanitarian law is reached.

Beyond this general agreement of a cumulative approach, there are many differences in the details. Even one and the same body does not necessarily look in a coherent way into the intricate relationship between humanitarian law and human rights law. Here, I am referring to certain practice by the European Court of Human Rights. There has been discussion whether there is incoherence or contradictions within the case-law. As to the substance perhaps not, but as to the approach or way of argumentation, I would say yes, there are differences from case to case. I am highlighting this by reference to the Bankovic and Issa cases. In Bankovic, one could infer that the European Court of Human Rights was taking a distinction approach saying that because human rights treaties are different from humanitarian law, then human rights law was not applicable as humanitarian law was applicable. The question was about the formulation of the jurisdiction clause in Article 1 of the Convention and the European Court of Human Rights explicitly argues that had the drafters of the Convention wished to ensure jurisdiction as extensive as that advocated by

the applicants, they could have adopted a text the same as or similar to the contemporaneous Articles 1 to 4 of the Geneva Conventions of 1949. This is what I would call a distinction approach which results in a e contrario conclusion: Because humanitarian law was applicable, then human rights law was not. In the Issa case, the argument is the opposite one. Because Turkey was exercising some powers in respect of certain civilian persons within the territory of Iraq during a military operation, then this means that because the persons were protected persons in the light of humanitarian law, they fell also within the jurisdiction of Turkey in the sense of Article 1 of the European Convention. This is a different approach that could be called the interdependence approach. Because there was applicability of humanitarian law in respect of a category of persons, this applicability brought the persons within the jurisdiction of a state party also under the European Convention.

A third approach reflected in the practice of the European Court of Human Rights is what I would call harmonization, which simply means reading specific substantive provisions of the ECHR in the light of provisions in international humanitarian law treaties. I am referring to the Akkum and others vs Turkey case and the Isajeva, Yusupova and Bazayeva v. Russia case. In both of these instances the European Court has built upon specific provisions of humanitarian law in order to interpret whether there was a violation of the European Convention or not. For instance, in the Akkum case, the issue was whether the mutilation of a dead body by soldiers constitutes inhuman or degrading treatment in respect of the relatives. The European Court argued that because this is explicitly prohibited in the strictest of terms in the Geneva Conventions, it was indeed inhuman treatment in respect of the father of the deceased who was mutilated by soldiers. This is an example of the interpretive effect or harmonizing interpretation, i.e., reading humanitarian law to inform specific provisions of human rights law. There would be ample opportunity for this kind of an approach under Article 15 of the European Convention, the derogation clause, because it explicitly refers as one of the conditions for derogations that they are not in conflict with the other international obligations of a state party. One could read this clause as a direct reference to humanitarian law in situations where a state of emergency simultaneously amounts to an armed conflict. But to my knowledge the European Court has not really made use of this direct reference to humanitarian law for the purpose of interpreting the limits of the power to derogate from the Convention.

Now I move to another body, the United Nations Human Rights Committee on which I had the privilege to serve at the time when the Committee adopted its general comment No. 29 which is an interpretative document in relation to the derogation clause, Article 4 of the Covenant on Civil and Political Rights. Here the Committee is very explicit in reading the reference to other obligations under international law as primarily referring to treaties on international humanitarian law. The Committee applies this reference to argue that not only those rights that are explicitly listed as non-derogable ones under Article 4, paragraph 2 are not subject to derogation. There are such dimensions even in other provisions that are not subject to derogation because they are protected under international humanitarian law. Furthermore, the Committee provides in the general comment a list of non-derogable dimensions of rights that as such are subject to derogation during a state of emergency: prohibition against arbitrary deprivation of liberty, fundamental principles of fair trial, etc. Some of these nonderogable dimensions of derogable rights are derived from humanitarian law.

At the doctrinal level, the Human Rights Committee returned to the issue of the relationship between human rights law and humanitarian law in its general comment No. 31, where it says that “the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.” The cumulative application is here the main point but another

important point is that the Human Rights Committee does not use the notion of *lex specialis*. It refers to more specific rules of international humanitarian law. This was a deliberate choice of words in order to avoid the full use of the Latin expression *lex specialis derogat legi general.* People who use the *lex specialis* notion in discussing the relationship between humanitarian law and human rights law do not always make that conclusion. They simply mean to say that rules of humanitarian law are often more specific than human rights norms. However, the original meaning of the *full lex specialis rule* may mislead to a perceived necessity to make a choice between the two bodies of law, instead of striving for their simultaneous and harmonizing application.

In certain specific cases not only humanitarian law informs the understanding of provisions of human rights law but also human rights law informs the application of humanitarian law. One such case is the issue of judicial review of detention where we have in the body of the Geneva Convention rules about some sort of review by a tribunal for prisoners of war in an international armed conflict but no rules of general application as to the position of other interned persons or persons detained in non-international armed conflict. The Human Rights Committee takes a very clear position that the right to judicial review of any form of detention is a non-derogable right. Hence it can be said that in this specific field, we have two levels of more specific rules. We have first human rights law referring to humanitarian law, but then in order to apply the rules of humanitarian law in the light of present-day international standards we also need to look into human rights law. When the third Geneva Convention refers to a competent tribunal, the Human Rights Committee says that under the ICCPR this must be a review by a court of the lawfulness of the detention, if not for any other purpose then at least to determine whether the person indeed is a prisoner of war.

Another delicate issue is the question of the right to life. Human rights treaties prohibit the arbitrary deprivation of life and of course humanitarian law can then inform, through for instance the principle of distinction, whether a specific instance where life was lost during an armed conflict amounts to an arbitrary deprivation of life in the meaning of human rights treaties. We see that humanitarian law provisions and human rights provisions inform each other and what results is harmonising interpretation. Under the ICCPR, this exercise is easier than under the European Convention because of the specific reference in Article 15, paragraph 2, in the European Convention to derogations in respect of the right to life: by way of derogation a state may qualify deaths resulting from lawful acts of war as not being prohibited under Article 2. It seems to suggest that in order to conduct warfare one would necessarily have formally to derogate from the European Convention. This is not the understanding under the Covenant on Civil and Political Rights where one can simply apply the prohibition against arbitrary deprivation of life and interpret it in the light of humanitarian law, irrespective of whether the country in question has invoked the derogation clause.

The International Court of Justice has at least in two cases referred to the notion of *lex specialis* when dealing with the relationship between humanitarian law and human rights law. I am speaking of the advisory opinions on the legality of the threat or use of nuclear weapons and on the legal consequences of the construction of a wall in the occupied Palestinian territory. Although the International Court of Justice uses the notion of *lex specialis* it does not draw the conclusion of *derogate legi generali.* Rather, it uses the word *lex specialis* in order simply to say that in certain situations humanitarian law provisions are more specific and should inform the understanding of human rights law. I would see no difference in the approach between the Human Rights Committee and the International Court of Justice. When you look at the advisory opinion on the wall in the Palestinian territory, it is quite clear that the theory behind the advisory opinion is that both bodies of law will be simultaneously applicable and applied in a cumulative fashion.

Finally, in my paper there is a third part related to human rights, humanitarian law and counter-terrorism. As I said something about that issue in the previous discussion, I shall be

very brief. In the paper, I am quoting various resolutions from different UN bodies, emphasizing the need to comply with international law, in particular international human rights, refugee and humanitarian law, in the fight against terrorism. I think these resolutions are important. They do not create new law but they declare the principle of the simultaneous application of the three bodies of law also in the fight against terrorism. And what is even more important is that they emphasize the responsibility of member states when implementing their obligations to fight against terrorism nevertheless to comply with international law, including human rights, refugee and humanitarian law.

Such clauses are not a complete answer to all the questions that pertain to the issue of respecting humanitarian law and human rights law while countering terrorism. There are detailed and difficult open issues. Nevertheless I would say that a sound foundation has been laid in the clauses expressing the obligation of member states to comply with human rights and humanitarian law also when applying Security Council resolutions on countering terrorism.

Thank you, Madam Chair.

APPENDIX V

INTERIM REPORT OF THE INFORMAL MEETING OF THE PARTIES TO THE EUROPEAN CONVENTION ON STATE IMMUNITY STRASBOURG, 23 MARCH 2006

PRESENTED BY THE CHAIR OF THE MEETING, SIR MICHAEL WOOD, VICE-CHAIR OF THE CAHDI

This is an interim report of the informal meeting of parties to the European Convention on State Immunity, which took place on 23 March 2006 in the margins of the 31st meeting of the CAHDI. The participants had a useful initial discussion and agreed that there should be a further meeting in the margins of the next CAHDI.

There are eight parties to the European Convention (Austria, Belgium, Cyprus, Germany, Luxembourg, the Netherlands, Switzerland and the United Kingdom) and one state that has signed but not ratified (Portugal).

The participants in the informal meeting included seven of the eight parties, the signatory, other interested Council of Europe member states (which included states where the European Convention had been referred to by the courts as reflecting customary international law), as well as the Council of Europe Secretariat.

The meeting had three documents before it: a document submitted by Portugal giving a comparative analysis of the European Convention on State Immunity and the United Nations Convention on Jurisdictional Immunities of States and their Properties (CAHDI (2005) 16); a document submitted by Austria containing a draft of a supplemental agreement between the States Parties to the European Convention (CAHDI (2006) Misc 1); and a document submitted by Belgium assessing the compatibility between the European Convention and the UN Convention (CAHDI (2006) Misc 2).

The Secretariat described the very limited practice of the Council of Europe in respect of the termination of European Conventions.

Most of the participants from the parties to the European Convention confirmed that they were proceeding towards ratification of the UN Convention in due course. One such participant said they would no doubt consider the question if others proceeded in this way. Portugal confirmed that they no longer intended to ratify the European Convention. It was recalled that the UN Convention would enter into force only when it had been ratified by thirty states.

The participants from the parties to the European Convention all considered that in due course the UN Convention regime should supersede that of the European Convention. They noted that this should be seen as a mark of the success of the European Convention, the first multilateral treaty to cover the field, which had been very influential in shaping the world-wide regime established by the UN Convention.

The participants noted that there were at least two broad options for achieving this objective:

First, each of the parties to the European Convention and its Additional Protocol could simply proceed to denounce the Convention (in accordance with its Article 40) and Protocol as and when the UN Convention entered into force for it. Portugal would make it clear that it no longer intended to proceed to ratification (see Article 18 of the Vienna Convention on the Law of Treaties).

Second, the parties to the European Convention could agree among themselves (possibly in some kind of declaration) that the European Convention and, if applicable, the Additional Protocol, would cease to be applied as between those of its parties which had become parties to the UN Convention from the date on which the UN Convention entered into force. It could thus be made clear that the UN Convention, as a subsequent treaty, superseded the earlier European Convention (in accordance with the Vienna Convention), notwithstanding the provisions of Article 26 of the UN Convention.

The Chairman of the meeting undertook to circulate in the near future a draft of a possible declaration illustrating the second option.

The possible need to make upon ratification of the UN Convention some kind of a reservation or declaration concerning its Article 26 was also raised.

The second option might achieve in substance what was proposed in the Austrian draft supplemental agreement. The form of the Austrian proposal was considered by some to require an unnecessary and possibly lengthy process.

The informal meeting agreed to consider further these two options, and any others that might be proposed, at a further informal meeting in the margins of the next CAHDI.

APPENDIX VI

PRELIMINARY DRAFT AGENDA OF THE 32nd MEETING OF THE CAHDI

A. INTRODUCTION

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

2. Adoption of the agenda and approval of the report of the 31st meeting (Strasbourg, 23-24 March 2006)

3. Communication by Mr Roberto Lamponi, Director of Legal Co-operation of the Council of Europe

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

   HDI (2004) 16

6. State practice regarding State immunities

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

CAHDI (2004) 19

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

9. Digest of state practice on international law

C. GENERAL ISSUES ON PUBLIC INTERNATIONAL LAW

10. Peaceful settlement of disputes: Compulsory jurisdiction of the International Court of Justice (ICJ) and Overlapping jurisdiction of international tribunals

11. UN Convention on Jurisdictional Immunities and European Convention on State Immunity - Report on the 2nd Informal Consultation of the Parties to the European Convention on State Immunity

12. Consideration of current issues of international humanitarian law

13. Developments concerning the International Criminal Court (ICC) – 4th Council of Europe multilateral consultation on the implications of the ratification of the Rome Statute, 14-15 September 2006

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

15. Outcome document of the 2005 U.N. World Summit

    - *Document submitted by Switzerland*

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

    - Report by the CAHDI representative within the Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER)

17. The work of the Sixth Committee of the General Assembly of the United Nations and 58th session of the International Law Commission (ILC)

D. OTHER

18. Adoption of the draft specific terms of reference of the CAHDI for 2007-2008

19. Election of the Chair and Vice-Chair

20. Date, place and agenda of the 33rd meeting of the CAHDI

21. Other business

APPENDIX VII

LIST OF ITEMS DISCUSSED AND DECISIONS TAKEN AT THE 31st MEETING OF THE CAHDI

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 31st meeting in Strasbourg on 23 and 24 March 2006, with Ms Phani Dascalopoulou-Livada (Greece) in the chair. The list of participants is appended to the meeting report (document CAHDI (2006) 17 prov.) and the agenda is set out in Appendix I to this report (the references of the documents submitted in advance or in the course of the meeting are listed in Appendix II to document CAHDI (2006) 17 prov.).

2. The Secretariat informed the CAHDI of developments concerning the Council of Europe since its last meeting. Specific reference was made to developments concerning the Council of Europe Treaty series and the Secretary General's report under Article 52 ECHR on the question of secret detention and transport of detainees suspected of terrorist acts, notably by or at the instigation of foreign agencies.

3. The CAHDI was informed of the decisions of the Committee of Ministers of interest to its work.

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

a) a list of outstanding declarations and reservations to international treaties: the Committee considered delegations' observations as well as the follow-up certain delegations have given or are likely to give to these declarations and reservations.

b) reservations to international treaties applicable to the fight against terrorism in accordance with the Committee of Ministers' decision of 21 September 2001 (CM/Del/Dec (2001) 765 bis, item 2.1).

The CAHDI agreed to pursue the examination of this issue at its next meeting.

5. The CAHDI took note with satisfaction of the forthcoming publication of the book "State Practice Regarding State Immunities".

6. The CAHDI welcomed the publication of two databases on the CAHDI's website: one on the Office of the Legal Adviser of the Ministry of Foreign Affairs and the other on State Practice Regarding State Immunities. With respect to the first of these databases, the Committee agreed on the inclusion of the introductory note submitted by the United Kingdom. Delegations were invited to review their contributions on a regular basis with a view to keeping the databases up to date. Those delegations having not yet submitted a contribution were invited to do so at their earliest convenience.

7. The CAHDI examined delegations' replies to a questionnaire on national implementation measures of UN sanctions and respect for human rights and agreed to a publication of the replies received to date on the CAHDI's restricted website. Furthermore, the CAHDI took note with interest of Professor Iain Cameron's (University of Upsala, Sweden) presentation on "The ECHR, Due Process and UN Security Council Counter-Terrorism Sanctions", and held an exchange of views further to this presentation. Professor Cameron's statement is set out in Appendix III to document CAHDI (2006) 17 prov.

8. The CAHDI discussed the proposal by a publishing house to create a database of state practice on international law. The CAHDI expressed certain queries as to the exact scope of the proposal. However, it took the opportunity to remind its members of Resolution (64) 10 on publication of digests of state practice in the field of public international law, Resolution (68) 17 concerning a model plan for the classification of documents concerning state practice in the field of public international law and Recommendation No. R (97) 11 of the Committee of Ministers to member states on the amended model plan for the classification of documents concerning state practice in the field of public international law. It furthermore invited delegations to submit information on the implementation of these instruments on a national level. It agreed to include this item on the agenda of its next meeting.

9. The CAHDI considered issues relating to the peaceful settlement of disputes. It agreed to pursue the discussion on compulsory jurisdiction of the International Court of Justice and on overlapping jurisdiction of international courts and tribunals at its next meeting, on the basis of working documents CAHDI (2006) 4 and 5, which were to be revised in the light of contributions to be submitted by delegations.

10. The CAHDI considered developments related to the UN Convention on Jurisdictional Immunities and its implications as far as the European Convention on State Immunity is concerned. It was informed of the outcome of an informal meeting of the Parties to the Convention held on 23 March 2006. The interim report of the meeting is set out in Appendix II to this report. It agreed to discuss this item at its next meeting following the 2nd informal meeting of the Parties to the Convention which will be held during the 32nd CAHDI meeting.

11. The CAHDI discussed current issues of international humanitarian law, namely the protection of cultural property in the event of armed conflict and the adoption of an additional distinctive emblem. Given the importance of these issues, the CAHDI agreed to keep them on the agenda of its next meeting. Furthermore, it held an exchange of views with Professor Martin Scheinin (Abo Akademi University, Finland) on the relationship between human rights law and international law, including international humanitarian law. Professor Scheinin's statement is set out in Appendix IV to document CAHDI (2006) 17 prov.

12. The CAHDI took stock of recent developments concerning the functioning of the Tribunals established by UN Security Council Resolutions 827 (1993) and 955 (1994) and the International Criminal Court (ICC). In this connection, the CAHDI was informed of the organisation by the Council of Europe of the 4th Multilateral Consultation on the implications for Council of Europe member states of the ratification of the Rome Statute of the ICC. The Multilateral Consultation will be held at the close of the 32nd meeting of the CAHDI in Athens, Greece, on 14 and 15 September 2006.

13. The CAHDI considered the outcome document of the 2006 UN World Summit and in this connection discussed a paper presented by the Swiss delegation concerning the issue of "advancing the international rule of law". It agreed to pursue its discussions on this topic at its next meeting.

14. The Secretariat informed the CAHDI of the Council of Europe's activities against terrorism and referred in particular to those of the Committee of Experts on Terrorism (CODEXTER) and to the progress in the number of signatures and ratifications of the new Council of Europe conventions on the prevention of terrorism and on money laundering and the financing of terrorism. Specific reference was made to the progress report on future priority areas for the work of the Council of Europe in the fight against terrorism.

15. The CAHDI agreed that Mr Martin Sørby (Norway) act as its representative in the Group of Specialists on Human Rights and the Fight against Terrorism (DH-S-TER).

16. The CAHDI decided to hold its next meeting in Athens, Greece, on 13 and 14 September 2006 and adopted the preliminary draft agenda which is set out in Appendix III to this report. Moreover, the Secretariat informed the CAHDI that the 4th Multilateral Consultation on the implications for Council of Europe member states of the ratification of the Rome Statute of the ICC would be held in Athens, Greece, in the afternoon of the14th and on 15 September 2006.