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**COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW
(CAHDI)**

**36th meeting
London, 7-8 October 2008**

MEETING REPORT

Document prepared by the Secretariat of the CAHDI

A. INTRODUCTION

1. Opening of the meeting by the Chair, Sir Michael Wood

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 36th meeting in London on 7 and 8 October 2008. The meeting was opened by Sir Michael Wood, Chair of the CAHDI. The Chair welcomed all the participants, a list of whom is set out in **Appendix I**.

2. Adoption of the agenda

2. The draft agenda was adopted without comment as it is set out in **Appendix II**.

3. Approval of the report of the 35th meeting

3. The CAHDI adopted the report of its 35th meeting (document CAHDI (2008) 15), taking into account the suggestions made by the Chair on paragraph 99 and by the delegation of the United States of America on paragraphs 36, 96 and 136. The Committee instructed the Secretariat to publish it on the CAHDI's webpage.

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

4. Mr Manuel Lezertua, Director of Legal Advice and Public International Law, briefed delegations about developments within the Council of Europe since the CAHDI's 35th meeting. His statement is set out in **Appendix III** to the present report.

5. He presented the priorities of the Swedish Chairmanship of the Committee of Ministers of the Council of Europe. In particular, its aims with respect to reinforcing the principle of the rule of law and achieving greater coherence in the rule of law area.

6. He highlighted the state of relations between the Council of Europe and the European Union and underlined the importance of the agreement signed on 18 June 2008 between these two institutions on cooperation between the European Union Agency for Fundamental Rights and the Council of Europe. Concerning the relations between the United Nations and the Council of Europe, he informed the Committee about the draft Resolution that the UN General Assembly was due to adopt on this matter.

7. Referring to the Council of Europe Treaty Series, Mr Lezertua informed the Committee about the latest developments concerning a number of legal instruments and referred the Committee to the document CAHDI (2008) Inf 9 containing information on the latest signatures and ratifications. He also stressed the efforts of the Swedish Chairmanship to reinforce the implementation of the European Convention on Human Rights at national level.

8. Finally, Mr Lezertua referred to the main conferences organised by the Council of Europe since the last CAHDI meeting.

B. ONGOING ACTIVITIES OF THE CAHDI

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

9. The Chair presented the document CAHDI (2008) 17 rev 2, compiling the relevant decisions of the Committee of Ministers since the last CAHDI meeting.

10. The Chair drew the attention of the CAHDI to Item 1b) of this document relating to his meeting with the Committee of Ministers' Deputies for an exchange of views on 2 July 2008. He referred to this meeting as a very positive exchange during which all the members of the Committee of Ministers expressed appreciation for the work of the CAHDI.

11. The Chair recalled that, at the same meeting, the Ministers' Deputies adopted the CAHDI's two reports on the International Criminal Court and the nomination of arbitrators and conciliators. The Chair invited the Swedish Chairmanship to consider disseminating the document to the General Assembly under the item on the Rule of Law.

12. The Secretariat informed the Committee that it handed over the adopted recommendations to the Permanent Representative of Sweden to the United Nations in New York, with whom it had a meeting, and took the opportunity to express the wish of the CAHDI to have them widely disseminated in the United Nations. The reply by the Swedish delegation was very positive.

13. The Chair then drew particular attention to document CAHDI (2008) Inf 10 containing the recent study "on the efficiency and effectiveness of intergovernmental committees with a view to rationalising and simplifying their working methods" and the study "on staff/activities ratio and working methods of the Secretariat with a view to establishing a consolidated approach for future discussions on staff costs". The Chair noted the contents of the study on behalf of the CAHDI.

a. 'Disconnection clause': adoption of the draft report of the CAHDI

14. The Chair turned to the draft report on the "Disconnection Clause" prepared by the Chair and the Vice-Chair, as in document CAHDI (2008) 1 rev. He also presented two other documents listed on the agenda which were already before the Committee at the last meeting (documents CAHDI (2008) 2 and CAHDI (2008) 3).

15. The Chair recalled that a first draft of the report was prepared by the Vice-Chair and himself with the help of the Secretariat and circulated in January, before being discussed at the 35th meeting in March. On that occasion, the Committee agreed that the Chair would conduct informal consultations and that delegations could put forward written proposals for changes in the draft report if they so wished. The Chair and Vice-Chair prepared the revised version of the draft, which was circulated in July. No suggestions for textual amendments were received. The Chair then presented the draft report itself and invited delegations to make general comments.

16. The delegation of France, on behalf of the Chairmanship of the Council of the European Union and in particular of the COJUR, welcomed the draft report. It described it as useful, precise and well-balanced. It supported, in particular, the analysis on the validity of the clauses (paragraphs 22 and 23) as well as the precise elements on the scope of the clauses, which are of utmost importance to non-EU member States which might be parties to Conventions containing such clauses. The French Chairmanship suggested an amendment to paragraph 35 and then referred to the last conclusion, considering that the term

“transparency” does not reflect the object and definition of the clause but the way in which it should be implemented. It proposed to delete the last conclusion and, subsequently, to reformulate paragraph 44.

17. The delegation of the Russian Federation welcomed the draft report which adequately reflected most of the concerns regarding “disconnection clauses” and which may serve as a good basis within the Committee of Ministers and expert committees for elaborating new Council of Europe conventions. The delegation recognised the report as evidence of another contribution made by the CAHDI to the smooth running of the Council of Europe and in European standard setting activities and shared the scepticism expressed as to the term “transparency clause” and proposed to delete this recommendation.

18. The delegation of Switzerland agreed with the whole document, being only sceptical as to the use of the term “transparency clause”.

19. The delegation of Canada welcomed the fact that the report avoided the confusion that arose out of using, at some point, the term “Federal clauses” which are considered by Canada as somewhat different from “disconnection clauses” and which remain a useful tool for Federal States.

20. The CAHDI accepted the suggestions concerning paragraph 35 and the last conclusion (paragraph 45). As for the suggestion that paragraph 44 should be made more neutral or deleted, the Chair suggested that it could read, “one possibility that has sometimes been mentioned and that would reflect the effect of the clause without the unnecessarily negative implications of the term ‘disconnection clause’ is ‘transparency clause’.”

21. The CAHDI adopted the report as set out in **Appendix IV** to the present report.

b. Draft opinion of the CAHDI on Parliamentary Assembly Recommendation 1842 (2008)

22. Finally, the Chair turned to Item 1a of the document CAHDI (2008) 17 rev 2, on the Parliamentary Assembly Recommendation 1842 entitled ‘Activities of the ICRC’. The Ministers’ Deputies referred this Recommendation to the CAHDI for its opinion and the Secretariat provided the Committee with a draft (CAHDI (2008) 21).

23. The Committee adopted its draft opinion without any comment. This document appears in **Appendix V** to the present report.

6. State Immunities

a. State practice and case-law

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

24. The Chair invited delegations to take these two sub-items together and introduced the documents CAHDI (2008) Inf 11 and CAHDI (2008) Inf 12, noting that there had been no updates since the last meeting. He then encouraged States to keep the database updated as and when they have state practice or case law in the field. He also noted that there had been no further ratifications or accessions to the 2004 United Nations Convention on State Immunity since the last meeting. The Chair invited delegations with news on the subject of ratification of the United Nations Convention of 2004 to take the floor.

25. The delegation of Finland informed the Committee that its authorities were working to put a proposal before Parliament on the ratification of the United Nations Convention during the first half of 2009.

26. The delegation of Sweden informed the Committee that its relevant authorities had already drawn up a report on how to pass legislation in order to be able to ratify. The legislative procedure had started and Sweden hoped to present something to Parliament in 2009. Once this bill is passed it will then be possible for Sweden to ratify.

27. The delegation of Switzerland recalled that Switzerland signed the Convention in 2006 and consulted the *cantons* in 2007. The Parliament could, in the best case, decide to ratify in 2009.

28. The delegation of Belgium recalled that Belgium had signed the Convention. An explanatory memorandum, to be presented with the ratification draft law, was being elaborated.

29. The observer of Japan informed the Committee that it was in the final process of ratification. Apart from producing implementation law, Japan sent instructions to all Japanese Embassies overseas to check the status of work of each host country. Graciously, 101 countries responded to the request and many of those were the members of the Council of Europe. The delegation of Japan was grateful to those States. The results were that four countries had ratified, eight countries were in the process of ratification, 19 countries were examining the possibility of ratification and 12 countries had no timescale for ratification but supported the cause of the Convention. Japan saw this as encouraging news for getting the Convention to enter into force in the near future.

30. The observer of the United States of America informed the Committee that it would follow up on two recent judicial decisions. Firstly, the Minister Bo case involving the Chinese Commerce Minister. He had been sued in a civil action in the United States for his alleged participation in the oppression of some Falun Gong members when he was the Mayor of Beijing or in one of his previous capacities. He was served when he was in the United States in 2004, as part of an official trade delegation. The government argued to the Court in a brief, as accepted by the Court in a written opinion in August, that members of a foreign government who come to the USA as part of an official mission enjoy under customary international law a special missions immunity. The government argued that there was in fact a customary international law of immunity for individuals on special missions and the court accepted this, dismissing the case and accepting Minister Bo's immunity. In addition, in August, the Second Circuit Court of Appeals, in a case against Saudi Arabia as a government and a number of Princes of Saudi Arabia for alleged involvement in the 9/11 attacks, dismissed the action against Saudi Arabia and the Saudi Princes under the Foreign Sovereign Immunities Act.

31. The delegation of Iceland informed the Committee that Iceland's plan was to ratify the Convention early next year and hoped to be in a position to confirm this next time the CAHDI meets.

32. The delegation of Slovenia informed the CAHDI that it was examining the possibility of ratifying the Convention. It was under the review of the Ministry of Justice which was making thorough research of the existing legislation and of the need for probable amendments. Slovenia expected further procedures in this respect during the first half of next year but it was difficult to give a final date for ratification.

33. The delegation of the Netherlands commented on news concerning State practice regarding immunity of states and immunity of international organisations. It referred to an important case in the Dutch courts concerning the immunity of the United Nations in the so-called Srebrenica Case. In July 2008, there was a judgement in the Hague District Court which dealt with the immunity of the United Nations. A number of relatives of victims of the

Srebrenica genocide brought civil actions firstly against the Netherlands and secondly against the United Nations before the Hague District Court. They argued that the Netherlands and the United Nations failed to prevent the genocide in Srebrenica. The United Nations did not appear in Court but explicitly claimed immunity in a letter to the Dutch Permanent Representation to the United Nations. The Court concluded that the United Nations has absolute immunity and the Court did not want to test whether the actions or omissions of the United Nations in this case were necessary for the fulfilment of the United Nations' purposes. Otherwise, the Court said, it would go into the merits and this would be contrary to the ratio of the immunity. The Court also checked whether other international law rules could restrict the United Nations' immunity. The conclusion of the Court was that the United Nations had full immunity and the case was dismissed. The claimants appealed so the Netherlands will keep the CAHDI informed on any progress. This case was brought not only against the United Nations but also against the Netherlands and, in September 2008, a judgement was delivered dismissing the case against the Netherlands because the acts of the Dutch troops in Srebrenica should be attributed exclusively to the United Nations and not to the Netherlands.

34. The delegation of the United Kingdom reported on a case before its domestic courts regarding the immunities of UNESCO. A claim was brought by an English company called Entico against UNESCO, concerning a commercial dispute for about £80,000. It was a claim brought under a contract which had an arbitration clause in it but UNESCO had refused to cooperate in constituting an arbitration tribunal under the contract and, in fact, denied the existence of the contract. Entico therefore chose to commence proceedings before the English courts. UNESCO failed to appear and claimed immunity. Entico argued that UNESCO's immunity was in contravention of Article 6 of the European Convention on Human Rights. Entico made an application under the Human Rights Act for an interpretation of the relevant UK legislation which implemented UNESCO's immunities under UK law. Entico asked for an interpretation of that legislation which would be compatible with the European Convention on Human Rights. At this stage the Foreign and Commonwealth Office chose to intervene to defend the Order in Council under the International Organisations Act. In its judgement (March 2008), the High Court held that the United Kingdom legislation was not incompatible with Article 6 of the Convention and that the provisions of the Convention on the Privileges and Immunities of United Nations Specialised Agencies, the underlying international treaty which gave the immunity to UNESCO, did confer absolute immunity on UNESCO and Entico's claim was therefore dismissed.

35. The delegation of the Russian Federation recalled that its country has signed the Convention and that there was no major progress with respect to ratification. The delegation of the Russian Federation also informed the Committee that, on the initiative of the Ministry of Foreign Affairs of the Russian Federation, a new version of the provision on immunities of individuals had been introduced into the Code of Criminal Procedure. The previous version of Article 3 of the Code provided that criminal procedural actions with respect to persons enjoying diplomatic inviolability may be carried out upon the request of those persons or with their consent. This was a very unfortunate provision and the new version provides that criminal procedural actions may be carried out with the consent of the relevant State or relevant international organisation. It was important that the new provision speaks not only of persons enjoying diplomatic inviolability but of all persons enjoying immunity from criminal procedural actions under international law - general international law and treaty law. Further, it reflected the possibility for the immunity to continue even if the person concerned is no longer a state or international official. It may be of particular interest to the legal advisors that the Article provides that information on the immunity and its scope shall be provided to the relevant law enforcement authorities or courts by the Foreign Minister of the Russian Federation. When supplying information for the database, Russia will also supply the Secretariat with the English version of the Article.

36. The delegation of Italy mentioned a series of decisions by the Italian Constitutional Court and the Court of Cassation, according to which the respondent State, Germany, did not enjoy immunity in relation to war crimes. This judgement was given by the Court of Cassation in a preliminary ruling. Following which the Court will have to decide whether the claims are inadmissible under different grounds, including alleged waiver by the State of Italy to bring those claims by way of a bilateral peace agreement with Germany. Court of Cassation's judgements were not final as there was the possibility to pursue them in court. There was another criminal case in which Germany was called to intervene as the subject which was civilly responsible in connection with the crime. A new development, it is a peculiarity under Italian law, the possibility to bring a civil action within the criminal trial. It was in connection thereof that for the first time a foreign state was called to intervene as the person civilly responsible for the criminal action. The claim of immunity was put forward and it was rejected at the first stage and also rejected by the Military Court of Appeal of Rome and it was pending before the Court of Cassation. The delegate expected further developments by the 37th meeting.

37. The delegation of Germany informed the Committee that it had followed these cases very closely and was extremely concerned and believed that the decisions taken by the Court did violate international law and did clearly violate Germany's state immunity. It believed the same was true with regard to the other pending case mentioned by the Italian delegation. Italy had been very helpful by intervening before the Supreme Court in writing, and had done so in some related cases before lower courts which dealt with the execution of judgements of a foreign court. The delegation of Germany underlined that there was a very close and serious cooperation between Italy and Germany. However, it was clear that these decisions were a violation of international law, there was neither any rule, nor customary law, nor any decision of any court that Germany was aware of which would allow for an exception to state immunity for war crimes or crimes against humanity committed during World War II. Germany expressed its gratitude to Italy for its intervention even if it was not a successful one.

38. The Chair encouraged all delegations to send judgements of interest in the field to the Secretariat as soon as a copy was available and recalled that the importance of keeping delegations up-to-date on developments in all member States' countries.

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

a. Situation in member and observer States

b. The role of the OLA in national implementation of international law

39. The Chair presented the document CAHDI (2008) Inf 13, which refers to the OLA database, containing 43 responses, available on the website of the Council of Europe. There are still 9 Member States which have not responded: Andorra, Bosnia and Herzegovina, Georgia, Liechtenstein, Moldova, Monaco, Montenegro, San Marino and Spain. The Chair underlined the importance of the database and called upon delegations to update their responses as and when there are significant changes.

40. The Chair then opened the floor for discussion under this item.

41. The observer of Mexico recalled that, two years ago, Mexico proposed to include, as part of this agenda item, a presentation by any interested legal advisor on any subject matter regarding his or her practice that they wanted to share with the CAHDI members. The idea is still on the table and Mexico thinks that it would be very useful to choose in the future a particular sub-item to be discussed by members of the group in which any interested legal

advisor could share a national experience on how they handle particular subject matters. For example, the way that they are handling the national implementation of international treaties.

42. The Chair agreed and suggested that delegations submit a paper ahead of the meeting if there was a topic that they wished to be discussed.

43. The delegation of Finland presented the organisational reform at the Ministry for Foreign Affairs of Finland, which took effect as of 1 September 2008. The former legal department had been divided into two separate entities - the legal service and the consular service. The delegate is therefore no longer responsible for consular services or the Schengen Visa policy but for public international law, European Union and treaty law, European Union litigation and human rights courts and conventions.

44. The Chair suggested that this is an item which could be drawn to the attention of the United Nations and perhaps the UN could have a similar database, which would encourage colleagues not represented at the CAHDI meetings to have information available about the role of legal advisors.

45. The delegation of Greece supported the proposal put forward by Mexico. The list of topics proposed normally appear on the agenda, however there is room for including this as a regular agenda item, under functions of the Office of the Legal Adviser, and see if this stimulates members of the Committee to examine matters which are at any given time of interest to legal advisers. It would be good, for at least a period of time, to insert this item into the agenda.

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

46. The Chair introduced this agenda item by presenting three new documents, CAHDI (2008) inf 14, CAHDI (2008) inf 16 and CAHDI (2008) inf 18 and gave the floor to the representative of the United Nations Analytical Support and Sanctions Monitoring Team for Al Qaida and the Taliban.

47. The representative of the UN Monitoring Team underlined that interaction and cooperation with key regional and sub-regional organisations is vital. There is a need to cooperate in order to better assist the Member States to incorporate the sanctions.

48. The Al Qaida - Taliban Sanctions Committee is the only one UN Sanctions Committee that has a list of names against whom the arms embargo applies. In terms of cooperation this is very important, especially in the light of the UN SC Resolution 1822. This resolution is very important as much as it is consistent with what the UN Secretary General has said about the need to ensure fair and clear procedures. In the representative's opinion, Resolution 1822 satisfied three of the basic elements outlined by the Secretary General and at least four of the basic recommendations outlined in the UN SC Resolution 1824, following the Senator Marty Report.

49. The representative of the UN Monitoring Team then gave a very brief outline of the new tools and measures in the Resolution. In paragraph 28 of UN SC Resolution 1822, the Security Council itself directed the Sanctions Committee to continue to ensure that fair and clear procedures exist for both placing and removing individuals and entities from a list. There is a list of 495 names - 382 individuals and 113 entities. The Committee had made a lot of strides in its cover sheet and on its website to help Member States understand what tools and fair procedures exist. Resolution 1822 crystallised some of these mechanisms. For example, in paragraph 12, what was previously a voluntary act of Member States in deciding whether to publicly release a statement of case is now mandatory. Secondly, in line with

paragraph 13, the Sanctions Committee is now working on narrative summaries of the reasons for listing. The bulk of the names were placed for listing in 2001 and 2002 and, at the time, many of the concerns had not been addressed by the Sanctions Committee. Now, the Sanctions Committee is working with the designating States to ensure that every single name will eventually have a narrative summary of the reasons for listing.

50. The third development referred to in Resolution 1822 was paragraph 15 and the notification process. In addition, there was the notification process under paragraph 23 when an individual or entity was removed from the list. In relation to review, in the Sanctions Committee's guidelines there is a provision under 6i for an annual review of all names on the list which have not been reviewed in the last four years or more. This has been taken forward in relation to Resolution 1822 and there are now three types of review. The first is a review of all names currently existing on the list and this review must be done by 30 June 2010. The next review is an annual review of all names on the list that have not been reviewed for the last three years. Paragraph 22 was also highlighted, where the Sanctions Committee had been asked to consider an annual review of the names of deceased persons that currently exist on the list. There were only about 36 names on the list being reportedly deceased. In 2008, a Swiss national died in May and was removed from the list in June. Moreover, the Sanctions Committee, through the Focal Point process removed a Malaysian national from the list.

51. Lastly, the representative of the UN Monitoring Team informed the CAHDI that the Sanctions Committee was also doing a lot to improve the user-friendliness of its website in order to increase the transparency of its work. There already exists an explanation of terms papers on the scope and obligation of member States in relation to the arms embargo, also available on the website. The Sanctions Committee has just approved in September an explanation of terms paper on the scope and obligation of member States in relation to the travel ban, which is waiting for translation into the six languages of the UN and will then be published on the Sanctions Committee's website, and the Committee has just been given a draft of the explanation of terms paper for the assets freeze. Once approved, this would go onto the website as well. Lastly, in addition to all these measures, there are fact sheets on how Member States can use the humanitarian exception for both the assets freeze and the travel ban.

52. The delegation of Germany, addressing the *Kadi* decision delivered by the European Court of Justice, agreed that on the surface the Court did not intend to put into question or criticise the decisions of the Security Council, but it also thought that the UN Charter could not have the effect of prejudicing the constitutional principles of the EC Treaty which includes the principle that all Community acts must respect Fundamental Rights. This is quite a far reaching and fundamental decision which might be welcomed on the one hand, because it is improving individual rights, but which, on the other hand, puts a major burden on the European Union institutions - the Commission, Council, Secretariat and Members - and which involves a risk of a disconnect between the European Union and the United Nations in terms of implementation of universal sanctions regimes. Reading the decision one was inclined to believe that the Court was requiring something from the European Union bodies and institutions that those bodies could not deliver, namely proper information on why somebody had been listed and the rights of the defendants, the right to be heard and the right to effective judicial review, which were patently not respected. The delegation of Germany wondered how the European Union institutions will afford these rights since they are not in possession of the full information and not in a position to change any listing or delisting decision taken by the UN. Therefore, and looking at the major developments at the UN, such as a number of informal processes which Germany initiated with Sweden, Switzerland, Denmark and Belgium together with the Watson Institute on legal protection against individual sanctions, looking at Resolution 1730 and 1822 there had been some progress with regard to listing and de-listing, the information to be submitted and the annual

review. This was all very important but, unfortunately, not sufficient. Therefore, Germany would encourage all UN members to work hard and swiftly to not only deal with reforming the delisting procedures at the UN level but to ensure better transparency of the listing procedure and the right to be heard by some body, an ombudsperson, within the Security Council. The delegate was conscious that this was a difficult step but one must recognise both the danger of a disconnect and the role of the Security Council. In addition, the sanctions regime has completely changed over the last 10 to 15 years from comprehensive sanctions to individually targeted sanctions, so there is a need to add some kind of ombudsperson that a targeted person or entity can direct him or herself to. It is indeed a new step but the time has come for it.

53. The Chair highlighted that the European Union institutions have been given three months, until 2 December 2008, to come up with a solution to this problem. Although, as the delegate mentioned, it was a solution which required consideration in New York as well as in Brussels.

54. The delegation of Belgium recalled that it held the Chairmanship of several sanctions Committees within the UN. It considered that sanctions such as those imposed by the "Al-Qaïda-Taliban" Committee should be defended and consolidated. The scope of this kind of instrument depends, however, on the will of states to implement it and such will depends on the credibility of the system as a whole. The factors mentioned in the reports of the Parliamentary Assembly of the Council of Europe and in the *Kadi* judgement are delicate issues. Important advances have been realised these last years in terms of transparency, the quality of lists and procedural guarantees. One has to keep reflecting on possible ameliorations of the sanctions system, in order to fight efficiently against terrorism while respecting fundamental rights. The delegation of Belgium concluded by underlining that the CAHDI appears relevantly placed to reflect on this matter.

55. The delegation of Portugal informed the CAHDI that Portugal was currently preparing its law on sanctions to respond to a request from the Ministry for Defence and the Ministry for Justice. Then, referring to the *Kadi* decision, it agreed very much with the German delegation and expressed some concerns about the content of the decision. Namely, the way that the Court put the relationship between Community law and United Nations Security Council resolutions. The delegate expressed concern that the Court was trying to set up a dualistic system between Community law and general international law.

56. The Chair noted that countries with a dualist system might not find this so surprising.

57. The delegation of the United Kingdom said that, from its perspective, these issues need to be addressed in New York and indeed before the *Kadi* decision was given in Luxembourg, through its Ambassador in New York, the United Kingdom had been engaging with others precisely to try and identify relevant principles that should operate - due process, transparency - and to begin a discussion which would build on the Focal Point initiative of a while ago. From the United Kingdom's perspective, these issues are important and do need to go ahead but with a very clear view that sanctions and the integrity of the sanctions system is very important as a counter-terrorism tool and it is necessary to ensure that Security Council decisions are capable of effective application and implementation.

58. The delegation of Norway welcomed the discussion and introduction. It saluted the adoption of United Nations Security Council Resolution 1822 as a significant step towards increased transparency, but joined those who called for effectiveness on the one hand and basic standards for ensuring fairness, clarity and legitimacy, on the other hand. Following with great interest developments referred to in the *Kadi* case and the follow-up to the judgement delivered, it echoed the German delegation in recalling that the Security Council holds the key and has enormous responsibility in striving further towards reconciling any

contradictions that might exist. In that context, the Nordic countries made a statement before the Security Council in August highlighting this need.

59. The delegation of France recalled that the *Kadi* judgement did not go as far as requested by the Conclusions of the Advocate General. It is obvious that Brussels cannot ignore New York and vice versa. The Court cautiously laid down factors to be taken into account. The existence of an EU legal order distinct from the international legal order is not new. Resolution 1822 constitutes a sensible and considerable evolution and will help to implement the *Kadi* judgement.

60. The observer of the United States of America echoed some of the comments made regarding the breadth of the *Kadi* judgement. But underlined that there really had been significant progress across the board on all of the concerns raised by the Court. Its principle concerns were inadequate notice to the persons listed, inadequate statement of the reasons or criteria for listing and inadequate opportunity to be heard and, whether or not one agrees with those concerns, it is indisputable that since that time there had been enormous progress on all of those points. The delegate called attention to operative paragraphs 13, 15 and 17 of Resolution 1822, which is an important text that addresses the notice and criteria concerns. As discussed at past CAHDI meetings, there was also the new Focal Point system which allowed listed individuals to bring their concerns to a focal point. All this showed that there had been significant progress across the board, substantively with respect to the concerns raised by the Court in this case.

61. The delegation of Italy raised the question of making the CAHDI database public. It considered that this would be an interesting exercise and that it would be in line with current practice of the CAHDI in relation to its other databases.

62. The Netherlands recalled that it had participated in the group of countries that wanted to suggest proposals for further improvements to the sanctions procedures. Concerning the *Kadi* judgement, the delegate felt there was a risk of disconnect between not only UN sanctions and European Union implementation but also broader, the international legal order at large and the Community legal order. In his opinion, earlier that year Advocate General Maduro had made a nice comparison saying that the Community legal order and the international legal order do not pass each other like ships in the night and that indeed had become very clear in the judgement of the European Court of Justice. The main issue from a legal perspective is that the procedure is reviewed by the same body that decides to put such persons on the list and that is the more fundamental question to be addressed.

63. The Chair welcomed this valuable discussion and proposed to agree, in principle, to make the database public but to give a delay until the beginning of December which would allow any delegation to update, review or remove their entry before such time. As there were no objections it was so decided.

9. Cases before the ECtHR involving issues of public international law

64. The delegation of France informed the Committee about the case *Medvedyev and others v. France*, delivered by the Fifth Section of the Court on 10 July 2008, concerning the apprehending of a ship on the high seas by the French authorities in the framework of the fight against the traffic of narcotics. The Court concluded that there had been a breach of Article 5 § 1 of the Convention, considering that the applicants had not been deprived of their liberty in accordance with a procedure prescribed by law, and that there had not been a breach of Article 5 § 3, considering that the length of that deprivation of liberty had been justified by the “wholly exceptional circumstances” of the case, in particular the inevitable delay entailed in having the ship tugged to France. Taking into account the potential impact of such a case on interventions on the high seas, in the framework of the fight against

narcotics but also with regard to piracy, the delegation of France informed the Committee of its intention to ask for this case to be referred to the Grand Chamber of the Court.

65. The delegation of Slovenia gave a brief update on the case of *Kovacic and others v Slovenia*. It informed the CAHDI that on 4th October 2008 the Grand Chamber delivered a judgement in that case involving issues of human rights, state succession and foreign currency deposits. The Grand Chamber noted that two of the applicants had received the full amount of their foreign-currency deposits plus accrued interest and found no justification for continuing with the examination of the third applicant complaint where proceedings were simultaneously pending in a court of a Contracting Party (Croatia) to recover foreign-currency deposits which were the very subject-matter of the application. Therefore, the Court decided to strike the case out of its list.

66. The Chair encouraged all delegations, as and when they have cases, to submit a brief note in writing. It would be useful to know about these cases in real time so that other states can decide whether to seek to intervene or can at least follow the cases.

10. Peaceful settlement of disputes

- Compulsory jurisdiction of the ICJ (Article 36(2))

67. The Chair recalled the adoption of the CAHDI's recommendation by the Committee of Ministers and presented the document CAHDI (2008) 7 rev, which contains information about acceptances of the International Court of Justice's jurisdiction under selected international treaties and documents. He called upon delegations to keep the Secretariat up-to-date on changes or errors.

- Compulsory dispute settlement provisions in international conventions**
- Overlapping jurisdiction of international tribunals**
- Follow-up to Recommendation CM/Rec (2008) 9 of the Committee of Ministers to member states on the nomination of international arbitrators and conciliators**

68. The Chair then mentioned the other sub-items and in particular the possible follow-up to the Committee of Ministers recommendation on the nomination of international arbitrators and conciliators. He noted that this was meant to be a very practical recommendation and hoped that each of the legal offices would try to develop their own list of treaties to which they are a party where there is a right to appoint arbitrators and conciliators to lists. Concerning UNCLOS, The Chair expressed his hope that between now and the next meeting the CAHDI could concentrate on this and encouraged all delegations that were parties to UNCLOS, and those soon to become so, to check whether they had made nominations to the various lists and, if not, at least to consider doing so. For those that had, he suggested updating any nominations that were out-of-date. The Chair then proposed to take all the sub-items together and asked whether any delegation had a particular point to raise under them.

69. The delegation of Greece mentioned that in the Appendix on the appointment of arbitrators to the UNCLOS, Greece is mentioned as among those countries which had not nominated arbitrators. As a matter of fact, Greece had. Subsequently, when returning to Greece, the delegate would see why this nomination did not appear on the website.

70. The delegation of Germany expressed its satisfaction in being able to inform the CAHDI that Germany had made a declaration last May recognising as compulsory, *ipso facto* and without special agreement, the jurisdiction of the ICJ in conformity with Article 6 paragraph 2.

71. The delegation of Portugal informed the Committee that Portugal was currently looking through all the conventions that might allow it to nominate arbitrators and conciliators. Subsequently, in the previous week, names were submitted to the Minister to be approved for nomination as conciliators for the Vienna Convention on the Law of Treaties. Names for the Law of the Sea were being considered for submission to the Minister.

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

a. List of outstanding reservations and declarations to international treaties

72. The Chair presented the relevant documents CAHDI (2008) 20 rev and CAHDI (2008) 20 Add rev.

73. The Secretariat informed the delegations of the many possibilities for them to comment on these tables. First, the table is attached to the report which has a deadline for modifications after the meeting of about 10 days. The second possibility is in the shape of the table attached to the draft meeting report which is published in advance until the next CAHDI meeting on the CAHDI restricted website and, of course, the possibility of modifying the draft report before the next meeting. The Secretariat invited the delegations to utilise all such opportunities and welcomed any suggestions.

74. Regarding the reservation made upon signature by El Salvador to the Convention on the Rights of Persons with Disabilities and the Optional Protocol thereto, also considered at the CAHDI's last meeting, the delegation of Germany informed the CAHDI that Germany is in the process of ratifying the Convention and will at that moment object to the reservation made by El Salvador.

75. The delegation of the Netherlands also expressed its intention to object to this reservation.

76. Regarding the reservation made upon signature by Mauritius to the Convention on the Rights of Persons with Disabilities and the Optional Protocol thereto, there were no comments from the delegations.

77. Regarding the interpretative declaration made by Thailand to the Convention on the Rights of Persons with Disabilities and the Optional Protocol thereto, the delegation of Sweden expressed the opinion that this was a de facto reservation with reference to national law-making, the true meaning of the reservation unclear and uncertain and gave priority to national law. Sweden was considering objecting.

78. The delegation of Norway was reluctant to express views with regard to prior reservations in the light of the fact that Norway is yet to become a party to the Convention. However, it could not fail to comment that even though the scope of Thailand's declaration seemed to be narrow, since it related to one Article; it nevertheless pertained to some of the fundamental rights of persons with disabilities, namely the right to freedom of movement and the right to nationality. Since the requirement is one of non-discrimination, it could not fail to note that it seems to be a declaration worthy of the CAHDI's attention.

79. The Chair noted that the reservations on the list were somewhat selective. Looking at the UN website, the CAHDI should perhaps also be considering the declarations or reservations made by Egypt, Malta, the Netherlands and Poland.

80. Regarding the declaration made by Bahrain to the Covenant on Economic, Social and Cultural Rights, the Chair recalled that at the last meeting France said that they had sought an explanation from Bahrain as to the meaning of essential utilities.

81. The delegation of France informed the CAHDI that, following its request for information, it received a note from the Ministry for Foreign Affairs of Bahrain. It contained the applicable Bahraini domestic laws, which do not particularly protect the right to strike.

82. The delegation of the Netherlands thanked the French delegate and noted the usefulness of gathering further information from states on the meaning of reservations or declarations, particularly in this case since it seems that “essential utilities” may also encompass a *boulangerie*. It was unfortunate that there was so little time as the deadline to object to the reservation had already expired.

83. Regarding the reservation made by Pakistan to the International Covenant on Economic, Social and Cultural Rights, the Chair underlined that it says nothing other than what is in Article 2 of the Covenant, which provides that each state party undertakes to take steps to the maximum of its available resources with a view to the full realisation of the rights recognised in the Covenant.

84. The delegation of Sweden agreed that the CAHDI should not object to this.

85. The delegation of Norway noted that Pakistan had originally issued a declaration that was broader in that it had a reference to its Constitution. That part seems to have been removed upon ratification and may possibly denote a reflection that a few states had reacted in time and that the reactions had been listened to.

86. Regarding the reservation made by the Bahamas to the United Nations Convention against Corruption, the Chair expressed the view that it seemed that this was expressly permitted by the terms of the Convention and so probably did not need to be on the list.

87. Regarding the declaration made by Israel to the Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the adoption of an additional distinctive emblem (Protocol III), the delegation of Switzerland, as depositary, informed the Committee that a dialogue had been pursued with Israel since the last CAHDI meeting in order to obtain clarifications on the scope of this declaration. Discussions were, at that time, about to reach a satisfying solution.

88. Regarding the reservation made upon signature by Egypt to the International Convention for the Suppression of Acts of Nuclear Terrorism, the observer of the United States of America reiterated the view that its authorities do not consider this to be a reservation. It planned to issue an interpretative declaration which would treat it as a unilateral declaration incapable of extending the obligations of other parties, including the USA, beyond the obligations set out in the Convention without their express consent. The delegate did not think that it ought to be accepted as a reservation, encouraged other parties to take similar measures and was willing to share the text of its interpretative declaration.

89. The delegation of the Russian Federation expressed its intention to react in the same way as the USA to this declaration.

90. Regarding the two declarations made by Uzbekistan to the International Convention for the Suppression of Acts of Nuclear Terrorism, the Chair considered that the second reservation did not raise any problems since it was expressly provided for in the Convention. However, the first declaration seemed rather unclear.

91. The delegation of Greece believed that this declaration was rather problematic since it seemed to set aside the essence of Article 16, which contains the well-known 'clause française', an important element of extradition treaties and anti-terrorist treaties. The delegate noted that it is worded in such a way that it could be argued that it referred to domestic legislation which would, of course, be rather redundant since the Article in question referred to extradition. The part of the phrase that was problematic to Greece was "without prejudice to the effectiveness of international cooperation, extradition, legal assistance". It could either be redundant or, if not, a contradiction in terms.

92. The observer of Japan felt that the meaning of the first declaration was not clear and Japan was still discussing and examining this declaration although it would tend to believe that the declaration was basically compatible with the object and purpose of the Convention. Article 16 dealt with the exception to the extradition obligation in Article 15. If the declaration purported to narrow the scope of the exception contained in Article 16 then it may be considered as being incompatible with the object and purpose of the Convention. Japan expressed its desire to see other countries' views on this issue, and also Russia's view since the Russian Federation made a similar reservation to this Convention in 2007.

93. The delegation of the Russian Federation viewed the text not as a reservation by Uzbekistan but as a declaration of policy statement. Russia's declarations of the same kind, almost the same text, were discussed in the CAHDI several times and the delegate reminded colleagues that it is a long time policy of Russia to make such policy statements. The declaration was formulated with the help of the experts of the Council of Europe and the CAHDI considered it several times and it was decided that the text raised no problems and finally the declaration was deleted from the compendium of problematic reservations and declarations. Russia had no problem with the text and stressed to colleagues that, before objecting to this reservation, they would do better to engage in the reservation dialogue with Uzbekistan to ask them what they meant by their declaration.

94. The observer of the United States of America agreed with the representative of Greece that the reservation or declaration was unclear but, before objecting, the observer would seek clarification as to its meaning.

95. The delegation of Belgium supported the delegations wishing for clarification from Uzbekistan as to the scope and content of this declaration.

96. Regarding the declaration upon signature made by Turkey to the International Convention for the Suppression of Acts of Nuclear Terrorism, there were no comments from the delegations.

97. Regarding the declaration made by Singapore to the Convention on the Prevention and Punishment of Crimes against Internationally protected Persons, including Diplomatic Agents, relating to Article 7 (1) of the Convention, the delegation of Japan expressed the view that this declaration should be regarded as a reservation that is incompatible with the object and purpose of the Convention. As far as Japan understood, the declaration relates to the right of competent authorities to decide not to submit any particular case for prosecution before the judicial authorities if the alleged offender is dealt with under national security and preventive detention laws. The delegate understands that in the Singaporean legal system, under the Internal Security Act, suspects who allegedly endanger national security may be arrested without judicial proceedings. There is, of course, the question of whether this kind of law is politically or legally correct.

98. The delegation of the United Kingdom, having reviewed the chart in Document CAHDI (2008) 20 add rev, underlined that the Chart appeared to indicate that the United Kingdom has stated that it does not intend to object. The delegate wanted to clarify that it

has not yet reached any decision with regard to this reservation as it has only recently been received in the last months and the United Kingdom was, in fact, still examining the content and effect of the reservation by Singapore. The delegate kindly asked if the Chart could be corrected to reflect this.

99. The delegation of Sweden expressed its difficulty in finding that it runs against the object or purpose of the Treaty. Although it could be discussed whether the true meaning of the reservation does not violate possible human rights undertakings, in that context it should be borne in mind that Singapore has not ratified and is not party to the International Covenant on Economic, Social and Cultural Rights. Sweden indicated that it would probably not object but no final decision had been taken.

100. The delegation of the Netherlands had not taken a final decision, although it noted that a similar declaration had previously been made by Malaysia and the Netherlands objected to that reservation and therefore could well object to this reservation too.

101. Regarding the declaration made by Colombia to the Comprehensive Nuclear Test-Ban Treaty, the observer of Mexico informed the CAHDI that Colombia has a constitutional problem which prevents it from making financial expenses before ratification. Essentially, it wants to say that whatever financial obligation arises from the Treaty would only be binding upon ratification. In the delegate's view, it went without saying that obligations arise from the moment that the Convention enters into force for that country so rather an unnecessary declaration but important for Colombia to make it in order to get ratification by its parliamentary body.

102. The Chair proceeded to the reservations and declarations to Council of Europe Conventions. Concerning the reservations and declarations made by the Russian Federation to the European Convention on the Transfer of Proceedings in Criminal Matters, no questions or comments were made by the CAHDI.

103. Regarding the four reservations or declarations made by Poland to the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights, again, no comments were made by the CAHDI.

104. Regarding the declarations made upon signature by Azerbaijan to the Convention on Cybercrime, the delegation of Armenia did not consider that the 7th paragraph of the declaration was in conformity with the relevant provisions of the Convention and found its content more political than legal.

105. The Chair recalled that these declarations were made upon signature so there would still be time to object, but agreed that that reservation remained a matter of concern.

106. A table summarising the position of delegations on this sub-item is set out in **Appendix VI** to the present report.

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

107. The Chair then referred to document CAHDI (2008) 10 on reservations and declarations to international treaties applicable to the fight against terrorism. The Chair recalled that a few years ago the CAHDI was specifically asked by the Committee of Ministers to look at problematic reservations in the field of terrorism to contribute towards the Council of Europe's work in the fight against terrorism. He expressed the idea that the Committee might think about updating this list.

C. GENERAL ISSUES ON PUBLIC INTERNATIONAL LAW

12. Exchange of views with Ms Patricia O'Brien, UN Under-Secretary-General for Legal Affairs and UN Legal Counsel

108. The Chair congratulated Ms O'Brien, on behalf of the Committee, on her appointment as the Under Secretary-General at the United Nations for Legal Affairs and Legal Counsel. The Chair also offered congratulations to Peter Taksoe-Jensen, who had become Deputy Legal Adviser in New York.

109. Ms O'Brien discussed three issues – the Responsibility to Protect, the Proliferation of International Courts and Tribunals and the conundrum of the Peace and Justice debate (See **Appendix VII** to the present report) – and held an exchange of view with the Committee.

110. The delegation of Sweden noted that Kofi Annan recently gave a speech on the Responsibility to Protect where he expressed a wish that it be transformed into something more like a legal norm. Sweden supported that concept, underlining that it did not only refer to military action. The delegate noted the problematic nature of the discussions regarding the Responsibility to Protect within the International Law Commission and thought it highly appropriate to consider the possibility of transforming this norm into a legal instrument. Such an initiative would have Swedish support.

111. The delegation of the United Kingdom recalled the speech of the then Secretary General, Kofi Annan, talking about the responsibility to protect before that concept had achieved consolidation, where he described it as a responsibility on the part of the international community to act multilaterally to ensure that states do not need to act unilaterally. Hereto, the United Nations has a responsibility to ensure that it is not too cautious, since concern about caution at a multilateral level will be to spill over the multilateral boundary into the unilateral. Regarding the proliferation of international courts and tribunals, the delegate stressed that such courts must have a sense of responsibility to render coherent justice. They should not be unduly possessive of cases that come before them when such issues could be more appropriately adjudicated in other fora, such as in the Mox Plant Case between the United Kingdom and Ireland where the tribunal deferred to the European Court of Justice. Equally, courts and tribunals should be responsible not to go beyond what is necessary, i.e. in the Guyana / Suriname case where the tribunal felt it necessary to talk about Art.2(4) and the use of force when it was wholly unnecessary to do so. He concluded that courts and tribunals should be aware of their place within a holistic legal order and to be systemic in the way in which they approach things. Regarding peace and justice, the delegate agreed with the speaker but emphasised that the pursuit of peace cannot be at the expense of justice. There may be alternatives to any given legal process but there cannot be a pragmatic accommodation without the necessary accountability. How that accountability is achieved may be a matter of discussion and a matter of flexibility but the international community cannot do without accountability; the pursuit of peace cannot be at the expense of justice.

112. The delegation of Germany noted Kofi Annan's intention to develop the responsibility to protect into harder law. It considered this desirable but noted the very strong reservation and distrust in developing countries, the Arab world, Africa and elsewhere, where the responsibility to protect is seen as merely a disguise for intervention by developed countries. These reservations have not yet been overcome and so more state practice and more practice from the United Nations is needed in order to make the concept a more well-known and accepted instrument. It can then be developed into harder law at a later stage. The delegate encouraged the Committee to look at the Nuremberg Declaration which highlighted the tension between Peace and Justice on the one hand but also the possibility for making them complementary. The delegation referred to the relationship between tribunals and the

Security Council as well. For example, the reluctance of the International Court of Justice to recognise that non-state actors can trigger an armed attack against a state and thus trigger the right to self-defence, where the Security Council has seemingly gone much further. It recalled the recent decision of the European Court of Justice in the *Kadi and Al-Barakaat* case. The Court did not directly criticise the United Nations, it lambasted the European Union institutions, but in the end it looked as if the Court had criticised the European Union but really meant the United Nations. It will be difficult for the Council or the Commission to deliver what the Court required but what only the Security Council knows. The Security Council is not a court but a political body, nevertheless it plays a significant role in the development of law and in influencing the jurisdiction of courts.

113. The delegation of Norway commented that the delegations are well placed to keep a spotlight on the development of the responsibility to protect. There is a common duty in keeping a very precise understanding of what it is about. There is a possible need to steer a path between two cliffs. One is merely to consider this as a policy matter: responsibility without consequences. The delegation of Norway considered it a mistake to refer to the individual elements behind responsibility to protect. It is more than just policy. It is a reflection of a number of existing obligations, including a duty to act in a prudent manner in accordance with the United Nations Charter and to use the procedures that are available. At the same time, an exact analysis of how far these duties and obligations go under classic international law can be challenging and there is a need to move forward in discussing this. It remains to be seen whether the road ahead will involve new legal instruments and it would be important to keep a common language which is acceptable, founded on the outcome document of 2005. It also agreed that the concept of sovereignty is to be linked to the concept of responsibility. The delegate remarked that there exists a link between the prevention of cultures of impunity and the maintenance of rule of law cultures. Norway's view was that to sacrifice principles of international criminal justice on the altar of swift peace would be dangerous. There is a need to reconcile these two ideas and to prevent fertile ground for renewed conduct. Sustainable peace depends on the rule of law culture which depends on removing cultures of impunity.

114. The delegation of the Russian Federation expressed its concern to hear that, with respect to the responsibility to protect, everything should be done in accordance with international law *including* the United Nations Charter. The delegate felt that it would be dangerous to put the United Nations Charter on the same footing as other norms of international law. For some, humanitarian intervention is already a norm of international law. After the *Kadi* decision, it appeared to the Russian delegation that, the EC Treaty is an 'utmost' legal system which may not be prejudiced by an international agreement which includes the United Nations Charter despite Article 103 of the Charter. It would be preferable if it could be said that the responsibility to protect be implemented in accordance firstly, with the United Nations Charter and also with other instruments of international law. The delegate echoed the Norway delegation in recognising that the attitude to responsibility to protect is different even within the Council of Europe and more so throughout the rest of the world. The responsibility to protect *per se* was not discussed within the International Law Commission although several aspects of the concept were discussed including the non-action of the United Nations with respect to Rwanda. Some members of the Commission spoke of the legal responsibility of the United Nations for such non-action; the United Nations or the Security Council being held legally responsible in this particular situation. Thinking about the responsibility to protect as a legal concept will require thinking about legal responsibility on the part of the subject which has a responsibility to protect.

115. The delegation of Portugal has tried to have an active voice on the responsibility to protect. The delegate expressed the view that it is a promising subject on the future of international law. There is a need to be cautious and the United Nations Charter should form

the basis of any future discussions, but the responsibility to protect has the potential to be a very useful tool for the future.

116. Ms O'Brien echoed those members which called for conceptual clarity. She reiterated the misunderstanding and the anxiety about the use of military force. At this stage, for purposes of simplicity, the United Nations would keep the definition of the responsibility to protect narrow, in being restricted to the four crimes, and deep, in that it spreads across the spectrum of the three pillars. For the reasons of the need to be cautious it would be premature to consider how the responsibility to protect could be crystallised in legislative form at this stage. The next step would be the report of the Secretary General which was due to be released shortly. It will, of course, be necessary to have courage in taking this issue forward. Every time that the responsibility to protect is used or fails to be used, there will be an effect on the principle. The United Nations Charter is of course at the heart of all the international law that is applicable when discussing the concept and should be at the forefront of all discussions. It permeates through all thinking at the United Nations on the emergence of this concept. Despite a slight emphasis on peace more than justice, this does not diminish the importance that the United Nations places on the pursuit of justice and accountability. These issues must move in parallel which gives certain flexibility to the movement without getting into the topic of timing or sequencing. Regarding the need for courts not to be too possessive and not to go beyond what is necessary. Ms O'Brien considered it an edict which applies not just to the international judiciary and legal regimes but to every court and every tribunal in every context.

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

117. The Chair invited Mr Kolodkin to provide the CAHDI with an update of the work of the ILC's 60th session.

118. Mr Kolodkin began with topics that were on the current agenda of the ILC. At the outset he clarified that his comments reflected his personal view of the ILC's work which did not necessarily coincide with the position of the ILC itself.

119. During its 60th session, the ILC completed its work on shared natural resources. Professor Yamada presented his 5th report on transboundary aquifers and 20 draft articles with commentaries were considered and adopted at the second reading. The most interesting exchange of views concerned the final form of the draft articles. The ILC favoured a two-step approach proposed by the Special Rapporteur to recommend the United Nations General Assembly first, to take note of the draft articles by its resolution and to recommend to states concerned to enter into appropriate arrangements on the basis of the principles provided for in the draft articles. And second, to consider at a later stage the elaboration of a legally binding instrument on that topic.

120. The first reading of 18 draft articles on "effects of armed conflict on international treaties" was successfully completed. In this respect, Mr Kolodkin recognised the professional efforts of the Special Rapporteur, Mr Ian Brownlie and extended his congratulations to Sir Michael Wood for his appointment to the ILC. Internal armed conflicts were included within the scope of the draft articles, which state that outbreak of an armed conflict does not necessarily entail termination or suspension of treaties and that the intention of the parties to a treaty should not be used as the main indicator of whether the treaty is susceptible to termination, withdrawal or suspension in the event of an armed conflict. Instead, the ILC elaborated several criteria to be applied in such a situation, including Articles 31 and 32 of the VCLT (the object and purpose test), as well as the nature and extent of the armed conflict, the subject matter of the treaty and the number of parties to the treaty. In Mr Kolodkin's opinion, a controversial issue was the indicative list of categories of treaties the subject matter of which implies that they continue to operate in the event of an armed

conflict, which would be next to the draft articles. The ILC agreed that the articles should reflect the different positions of an aggressor state and a state resorting to self defence with respect to their rights regarding withdrawal from treaties.

121. The ILC rejected the position that termination and suspension of treaties in the event of an armed conflict take place in accordance with the Vienna Convention regime. Mr Kolodkin pointed out that the Vienna regime explicitly excludes armed conflict from its scope and, moreover, the application of its procedures in the event of an armed conflict would be problematic.

122. Particular reference was made in the draft articles indicating that they would be without prejudice to the legal effects of decisions of the Security Council under Chapter 7 of the Charter. Finally, the ILC decided to ask the Secretary General to transfer the draft articles to governments for their assessment.

123. Regarding reservations to treaties, the ILC had provisionally adopted 85 draft guidelines and the commentaries thereto. The consideration of the consequences of reservations and objections to reservations would begin the following year by Special Rapporteur Professor Pellet. The work so far had concerned reactions to interpretative declarations and the procedure of making reservations and objections to them.

124. The ILC discussed the rights of states or international organisations not contracting parties to a treaty to react to reservations through declarations. In the opinion of Professor Pellet, such declarations would be objections in the full meaning of the word even though they would only become effective as from the start of the author's participation in the treaty. The respective draft guideline reflects his position.

125. In the context of this topic, Mr Kolodkin noted that the intention of the ILC was to compose a non-binding instrument which would compliment the Vienna Convention regime as a guide to practice. As such, he suggested a review of the language and terminology used in the 85 draft guidelines adopted so far.

126. Regarding responsibility of international organisations, at the past session the ILC received a set of draft articles proposed by Professor Gaja dealing with responsibility and countermeasures. With respect to the latter, the Working Group concluded that whenever the rules of the international organisation provide reasonable means to ensure compliance of the international organisation with its obligations under the draft articles, an injured State may not invoke countermeasures against that international organisation. Upon the recommendation of the Working Group, the ILC adopted the draft article on the admissibility of claims, covering nationality of claims and exhaustion of local remedies. Since all the substantive provisions were in place with respect to this topic, the ILC would finalise the draft articles in the first reading in the following year.

127. On the two topics, "expulsion of aliens" and the obligation to extradite or prosecute, the ILC did not make much progress. The Working Group decided that the principle of non-expulsion of nationals should apply to persons having dual or multiple nationality and suggested clarifying in the commentary that states should not use de-nationalisation to circumvent the obligation not to expel their own nationals. The ILC had seven draft articles remaining in the drafting committee which had decided to retain them until further development.

128. With regard to the obligation to prosecute or extradite, the Special Rapporteur informed the ILC that his next report would be dedicated to the source of the obligation to extradite or prosecute, the relationship of the obligation with universal jurisdiction, crimes that would be subject to the obligation and the so-called triple alternative. The ILC decided to

establish a special working group at the next session in order to consider some procedural and content-specific matters.

129. Study also began on two new topics - the protection of persons in the event of disasters and the immunity of state officials from foreign criminal jurisdiction. Special Rapporteur, Mr Valencia-Ospina, presented his preliminary report on the first topic. The issue that was intensively discussed was the human rights based approach to the study, suggested by the Special Rapporteur. Another proposal made was to apply a problem-orientated approach driven by the analysis of particular problems resulting from a disaster. A somewhat intermediate view was also expressed, applying both human rights based and problem-orientated approaches.

130. The issue of the relationship between the concept of protection in the case of a disaster and the principles of sovereignty and non-intervention, received considerable attention. The relevance of the concept of Responsibility to Protect was also discussed. Mr Kolodkin noted the outstanding research conducted by the Secretariat of the ILC on this topic and on the topic of immunity of state officials from foreign criminal jurisdiction.

131. With respect to the latter, Mr Kolodkin, as the Special Rapporteur, submitted the first part of the preliminary report. The second part would be delivered the following year. The main issues of discussion were the scope of the topic *ratione personae* and the non-recognition of entities claiming statehood with regard to the issue of immunity of their officials. The scope of, and exceptions to immunity would be presented to the ILC next year. Broadly speaking, there were two schools of thought. One supported progressive development of the law in this area (disregarding the Arrest Warrant judgement), and the other supported cautious codification (as reflected in the Arrest Warrant judgement). The Special Rapporteur was in favour of the second approach.

132. Next year, the ILC would begin work on two new topics – the most-favoured-nation clause and treaties over time. The special Working Group established for consideration of the most-favoured-nation clause suggested that the topic responds to the needs of states and that practice had developed sufficiently to allow for some progressive development and codification in the area. Regarding the second issue, Mr Nolte (who initially presented the topic) contended that the extensive practice of states as well as their willingness to have guidance on treatment of subsequent agreements and practice provided a basis for the ILC to take up the topic. Both codification and progressive development were possible in his view.

133. Finally, Mr Kolodkin recalled that the ILC held its 60th session in 2008. A Solemn Meeting was convened on 19 May to commemorate the anniversary, which was followed by a meeting with legal advisors and other international law experts. There was also an informal exchange of views with legal advisors concerning the ways to improve the functioning of the ILC and its interaction with the General Assembly's Sixth Committee. In the context of yearly events concerning cooperation with other bodies, a meeting was held with Mr Lezertua and Sir Michael Wood, as Chairman of the CAHDI, as well as exchanges of views with representatives of other legal organs.

134. The Chair thanked Mr Kolodkin on behalf of the CAHDI members for a substantial report on what was clearly a busy year for the ILC and opened the floor for comments.

135. The observer of the United States of America had been closely following all of the subjects but drew the CAHDI's attention to the work of the Commission on the immunity of state officials which really impacts on the work of all legal advisors. The delegate was yet to have an issue presented to him regarding transborder aquifers, maybe other states had a

different experience, but was constantly presented with very difficult, political and legal issues involving immunities of state officials.

136. The delegation of Portugal commented on the effects of armed conflict on treaties, believing that the topic was proceeding in the right direction. Concerning reservations to treaties, the delegate underlined that the topic would need to come to some result, being unsure whether it was a field requiring any further study. On expulsion of aliens, Portugal would like to study further the issue of de-nationalisation and on natural disasters is very interested to see how the topic will interact with the responsibility to protect. Finally, with regard to immunity of state officials, Portugal welcomed very much the first report of Roman Kolodkin.

137. The delegate of Greece agreed with the observer of the USA that indeed the most interesting subject seemed to be that of the immunity of state officials from foreign jurisdiction. It would be a very useful report and also very relevant to the work of legal advisors, who very often come into close contact with the question of immunity of officials. Greece had one such close encounter during the Olympic Games but other than that the relevance derives from the development of international criminal jurisdictions such as the International Criminal Court and also from the rise of the concept of universal jurisdiction to prominence. There exists a vast field of possible overlapping rules or tendencies in the law, evidenced by a host of decisions on a domestic level, the most prominent among those being the Pinochet Case. And also by the International Court of Justice, in which respect the Arrest Warrant decision had already been mentioned. This is a field which should be explored. The delegate, without militating such a move, noted that it is surprising that, at this stage and with all these questions, nothing has been done on a convention level.

138. The delegation of Norway indicated that the recent topics that merit the most in-depth consideration were those on the extent of immunities and the issue of disaster relief, so as to fully take into account what the United Nations Legal Counsel said, namely that sovereignty is not only translatable into non-intervention but also into responsibility. In this respect, Norway would favour output from the ILC that can be of concrete value to relief activities, where there are certainly problems in the field. With regard to the issue of immunities, the delegate underlined that the work of the Special Rapporteur in this area was exemplary and that Norway would enjoy seeing how the work will proceed as increased clarity is needed in this field. The Special Rapporteur referred to the importance of the Arrest Warrant case in this field and the delegate noted that his report was issued just before the International Court of Justice delivered another very important judgement – Certain Questions of Mutual Assistance in Legal Matters (*Djibouti v. France*), delivered on 4 June 2008. The President of the Court, Dame Rosalyn Higgins, when meeting with the ILC in May, said that that particular judgement was being watched for what it might have to say on the subject and Norway believed that, *prima facie*, the judgement contained important clarifications on the subject. The delegate added that there have also been developments in international criminal justice that, although separable from the subject matter to be studied here, may merit further attention.

14. Consideration of current issues of international humanitarian law

139. The Chair presented a paper circulated by Switzerland on private military and security companies, document CAHDI (2008) 23.

140. The delegation of Switzerland informed the CAHDI about the process leading to the adoption of the *Montreux document*, a process in which several CAHDI member and observer states had participated. The delegate recalled, in particular, that the initiative and the document pertain to a strictly humanitarian purpose, with the aim of consolidating existing

obligations and not of creating new ones. He then presented the content of the *Montreux document*, emphasising its operational aspects, and referring to a possible follow-up.

141. The observer of the International Committee of the Red Cross (ICRC) began with the *Montreux document*. In terms of follow-up, the ICRC intended to disseminate its content as widely as possible and to engage in a dialogue with States on regulations as well as in dialogue with the industry itself in order to prevent violations of international humanitarian law. The second topic brought to the Committee's attention was the achievement of the Dublin Conference in May 2008, where 132 states successfully adopted a Convention on Cluster Munitions, banning the use, development, production, stockpiling and transfer of such weapons. The Convention prohibits all cluster munitions which have caused extensive casualties over the last 50 years, which means basically all cluster munitions which the ICRC has described as inaccurate and unreliable. It also sets an eight-year deadline for states parties to destroy their stocks and a 10-year deadline to clear national territory contaminated with unexploded sub-munitions. The ICRC welcomed the extensive list of acts that are prohibited and the inclusion of a strong provision on victim assistance and international cooperation and recalled that the Convention would be open for signature on 3 December 2008, with the ceremony in Oslo. The third topic, already presented to the CAHDI in March, concerned an update on the sanction project carried out by the ICRC. In this respect, sanction is focused more on criminal sanction linked to international humanitarian law and, in particular, grave breaches. The result of the three-year process of consultation and discussions would be published in the next issue of the International Review of the Red Cross. One important element of the project was that it produced a set of 14 guidelines with their proposed modality of implementation. In fact, these guidelines cover the effectiveness of sanctions in general, the specificity of sanctions for violations of international humanitarian law and guidelines relating to the perpetrators. The guidelines will be used by the ICRC and, in particular, its advisory service and its work for better implementation of international humanitarian law at the field level. Also, through the process, a number of issues were identified for further research. To name a few, the issue of sanctions for armed groups, better use of disciplinary measures in order to achieve better respect for international humanitarian law and the possible updating of the Commentary to the First Additional Protocol on common responsibility. Finally, it is important to stress that the ICRC is also following the process of phasing out the ad hoc international tribunals – Former Yugoslavia, Rwanda and also the Special Court for Sierra Leone. The observer found it important to recall that the ICRC is the inspecting authority for all persons awaiting trial before these international tribunals. The ICRC is also, for the vast majority of agreements concluded with third countries, the inspecting authority for persons transferred to third countries to serve their often very long sentences. Therefore, the observer hoped that particular attention would be given to the issue of detention, in particular to all the questions related to the proper supervision of such detention in third countries. The ICRC also stressed the importance of the tribunal's archives. In terms, for instance, of being able to make efficient use of the mass of information that has been gathered by these tribunals in order to find answers for families that have lost trace of their loved ones for reasons of the conflicts that have occurred in their countries.

142. The delegation of the Russian Federation expressed the view that the *Montreux document* has begun important work. However, it asked whether there is a need to reflect further on the legal status enjoyed by the personnel of private military and security firms in accordance with the document. As a general rule, there is a case-by-case mechanism for the determination of status. However, in paragraphs 25 and 26b on page nine of the document, the delegate felt that, in practical terms and in most cases, these persons will be protected as civilians during an armed conflict. Given the character of activities carried out by these so-called private and military companies, in most cases their personnel are not forming part of national military forces and the approach of giving them the status of civilians in armed conflict seems to be rather questionable. The delegate was also not sure about the term as such for private military companies. In many States, due to their legislation, the power to

conduct military action is the exclusive prerogative of the government, as is the situation in Russia for example.

143. The observer of the United States of America underlined the importance of the *Montreux document*. He explained that the USA is forced to rely on private security companies to protect its embassies and diplomats and aid workers around the world from attack. It does not have private militaries but does have security people and at the same time is very committed to their proper regulation and to good practices. On the legal point raised by the Russian Federation, the USA's view was that for a security contractor who is in an armed conflict simply defending diplomats or defending aid workers and who would not be using force offensively, even though they may be armed, they would in fact be considered to be a civilian and therefore immune from attack; there would be no lawful reason for an opposing force to lawfully attack that individual. They would clearly not be a combatant.

144. The delegation of Sweden welcomed the Swiss initiative and considered this to be a most useful and well elaborated document, touching on a very complex and important topic which deals with controversial issues and in areas of conflict. The delegate wished to recall that in the draft General Assembly Resolution on the status of the Protocols Additional to the Geneva Conventions, a reference is made to the Montreux document on pertinent legal obligations and legal practices, inviting states to consider adopting measures as are included in the document.

145. The delegation of the United Kingdom recognised that the phenomenon of private military security companies is one that has become increasingly important in recent years. The United Kingdom experience is that these companies have generally done a very good job and indeed in some fields they are indispensable. He also agreed that it is important that the legal position of these companies is clarified. As a contracting State, the United Kingdom had been considering carefully in the last couple of years whether its contracts with PMSCs were sufficiently tightly drawn and covered all the relevant issues. The delegate stated that it would be very important to engage in the follow-up to the initiative and, of course, industry and civil society should play a full role in this. There was also a need to consider both follow up with other States and international organisations as well as with other organisations which use the services of these companies.

146. The delegation of Canada said that whilst it did not impose any new legal obligations on Canada the *Montreux document* certainly underscored existing legal obligations and was consistent with current Canadian policy and practices relating to these companies. As to the cluster munitions issue, Canada was a strong advocate of the need to address the humanitarian and development impacts of cluster munitions and fully endorsed the final text of the Oslo Convention, as negotiated at the Dublin diplomatic conference and would hope that as many states as possible will join in addressing the harm of these weapons.

147. The delegation of France echoed the Swiss delegation in insisting that the document does not create any new legal obligations.

148. The delegation of Norway, regarding the Convention on Cluster Munitions, welcomed as broad as possible participation in, and follow-up to the conference that was going to take place in Oslo on 2 and 3 December. The delegate underlined the huge number of measures needed to be taken and hoped also that in the context of the CCW process and in the development field that it would be possible to work out really effective safeguards against unacceptable harm caused by cluster munitions, as described in the Convention.

149. The delegation of Finland recalled that this is a period for examining, monitoring and fulfilling the pledges and follow-ups to the 30th international conference of the ICRC in Geneva in November 2007, where one of the pledges was the training and education and

dissemination of international humanitarian law. The delegate thought that the *Montreux document* would fit very well into the agenda and also into its national working group on international humanitarian law that is composed of several Ministries and is conducted between the Ministry for Foreign Affairs and the national Red Cross Society.

150. The delegation of Switzerland thanked all delegations for their support and invited them to contact the Swiss delegation bilaterally if they had further questions regarding the *Montreux document*.

15. Developments concerning the International Criminal Court (ICC)

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

151. The Chair proposed to take agenda items 15 and 16 together and the Committee agreed.

152. The delegation of Finland brought to the attention of the CAHDI some recent legislative developments with regard to the Rome Statute. At the time when Finland ratified the Statute in December 2000, no major amendments were introduced in the Finnish penal code, although it was acknowledged that in order for the national courts to be able to fully exercise jurisdiction over the crimes within the jurisdiction of the Court such amendments would be needed. These were included in the work plan for both the Ministry of Foreign Affairs and the Ministry of Justice and, in September 2007, a Government bill was submitted to Parliament regarding the criminalisation of the relevant crimes in the Finnish penal code and on introduction of specific provisions on command responsibility. The amendments concerned were adopted in April 2008 and entered into force on 1 May. Finland demonstrably places a lot of importance on the full implementation of the Rome Statute.

153. The delegation of Portugal informed the Committee that an agreement between Portugal and the ICTY concerning the execution of sentences had come into force.

154. The delegation of Slovakia informed the Committee about an agreement between the ICTY and Slovakia on the enforcement of sentences that had also entered into force.

17. Follow-up to the outcome document of the 2005 UN World Summit - Advancing the international rule of law

155. The delegation of Switzerland noted the absence of initiatives within the CAHDI in relation to the concept of the *international rule of law* since 2006, and suggested that the CAHDI take a more operational step in order to give the concept a concrete basis and suggested that a few members of the Committee, particularly interested in the topic, could think about such an initiative for the next meeting.

156. The Secretariat suggested that this item remain on the agenda, particularly in the light of the work currently being carried out by the Committee of Ministers in relation to the rule of law.

157. The Chair suggested that the CAHDI could also consider under this item the progress or lack of progress in the Sixth Committee item on the rule of law.

158. The observer of Mexico agreed with the suggestion to keep the agenda item. He suggested that another item could be included under this section: the responsibility to protect. Once the report of the Secretary General is received, the CAHDI will have food for thought under this agenda item since it was precisely the 2005 outcome document which gave more focus to the responsibility to protect.

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

159. The Secretariat informed the Committee about the latest developments within the Council of Europe on this matter, referring mainly to the document CAHDI (2008) Inf 16 and stressed, in particular, the meetings held in New York in September 2008 in relation to the review of the implementation of the UN Global Counter-Terrorism Strategy.

19. Follow-up to the International Conference “International Courts and Tribunals – The Challenges Ahead” (London, 6-7 October 2008)

160. The Chair asked for the Secretariat to circulate the conclusions of the Conference. The item will be included on the agenda for the next meeting of the CAHDI.

161. The delegation of Slovenia was pleased to offer, on behalf of the Slovenian Government in its role as the incoming chairmanship of the Committee of Ministers as of May 2009, the follow-up to this important matter with the aim to address the issue of the rule of law and international justice as one of the Council of Europe priorities. Whilst open to further suggestions from the CAHDI, the Council of Europe and the Secretariat, Slovenia expressed its willingness to organise such a follow-up during its Council of Europe presidency.

162. The Chair suggested that in response to the Slovenian statement, the best way to progress would be for Slovenia to prepare a paper for the next CAHDI meeting in order to put forward a proposal in writing. The CAHDI could then consider the matter in March before the Slovenian Presidency which begins in May 2009.

20. Topical issues of international law

163. The observer of the United States of America referred to draft General Comment 33 which had been issued by the Human Rights Committee under the International Covenant on Civil and Political Rights. The observer recalled paragraphs 11, 13, 14, 15, 16, 18, 23 and 26 and expressed the view that since most countries had been saying for quite some time that they do not believe that the Committee's views have legal force, the Committee seems to be telling such countries that it regards their views as completely unfounded. The USA intended to provide a quite firm response. For those countries who had not provided comments on the draft, the delegate strongly urged them, and as many countries as possible, to provide their views back to the Committee.

164. The delegation of Sweden strongly agreed with the observer of the USA. It considered that the actual conclusion in paragraph 29 stated that the Committee was of the opinion that on a correct interpretation of the Covenant and the Optional Protocol, the views expressed by it are not merely recommendatory but constitute an essential element of the undertakings of states parties under Article 2(3) of the Covenant to afford an effective remedy to persons whose rights have been violated. Therefore, they do not explicitly conclude that their views are of a judicial character and directly legally binding upon states. But the whole reasoning in the document certainly indicates that that is the standpoint of the Committee and that is what motivated the substantial reaction in the Swedish paper (distributed by the Swedish delegation during the meeting).

165. The observer of Japan informed the CAHDI that Japan had already submitted its comments. The delegate indicated that Japan made a concrete drafting suggestion on nearly all paragraphs (the document was distributed during the meeting to all interested delegations).

166. The delegation of Norway indicated that the paragraph that worried Norway the most was paragraph 17, in relation to the general body of jurisprudence generated by the Committee, that it may be considered that the Committee's views constitute "subsequent practice in the application of the treaty which establishes agreement of the parties regarding its interpretation", in reference to the Vienna Convention on the Law of Treaties. Alternatively, the General Comment states, the acquiescence of states parties in those determinations constitutes such practice, meaning that if states do not react to such statements, they run a larger risk than ever of transforming views which may pertain more to the *lex ferenda* than to positive law. Furthermore, he referred to a unanimous judgement delivered on 16 April 2008 by the Supreme Court of Norway concluding that the Torture Committee's views in individual complaints could be not be considered as binding under international law and that there were no grounds under customary international law for so concluding. The delegate underlined the judgement as a rare case of almost pure analysis of international law. In which respect, the delegate did not find many national jurisdictions issuing authoritative views on interim measures from treaty bodies and invited members to look into that.

167. The observer of Canada echoed the observer of the USA and the delegation of Sweden.

168. The delegation of Germany informed the CAHDI that, in the light of the comments made by various delegations, Germany would submit a paper to the Human Rights Committee in its national capacity. The delegate expressed the view that the Committee, with this draft, has done a great disservice to the very useful work of the body.

169. The delegation of Italy pointed out to other delegations an inherent contradiction in the document contained in paragraphs 17 and 28. In paragraph 28, the Committee expressly states that the attitude of states parties is not to regard the views of the committee as legally binding. This statement is in clear contradiction with the statement in paragraph 17 according to which there would be acquiescence by States parties according to the different views of the Committee.

170. The delegation of Finland clarified that it does not view the findings of the Committee as legally binding even if approaching the determinations in good faith.

OTHER

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

171. Following the expiry of the second term of office of Sir Michael Wood (United-Kingdom) and in accordance with the statutory regulations, the CAHDI unanimously elected Mr Rolf Einar Fife (Norway), current Vice-Chair, as Chair and Mr Luis Serradas Tavares (Portugal) as Vice-Chair of the Committee for one year as of 1 January 2009.

172. The Chair-elect, on behalf of the CAHDI and the Secretariat paid tribute to the outgoing Chair for the excellent work he accomplished throughout the duration of his Chairmanship.

22. Adoption of Preliminary draft specific terms of reference for 2009-2010

173. The Secretariat presented the relevant document CAHDI (2008) 22.

174. The Chair clarified that the Committee was previously established for two years at a time and will now be established for three years at a time.

23. Date, place and agenda of the 37th meeting of the CAHDI.

175. The CAHDI decided to hold its next meeting on 19 and 20 March 2009 in Strasbourg and adopted the draft agenda of its next meeting as set out in **Appendix VIII** to the present report.

24. Other business:

▪ **Status of ratification of Protocol 14 to the ECHR**

176. The delegation of Sweden recalled that the European Court is now facing a very serious problem and the working situation for the Court is simply not acceptable. Recalling the state of ratification of Protocol 14, which has now been ratified by all States except one and there was no indication of a speedy ratification, Sweden therefore took the view that other means must be looked into in order to bring the essence of the content of the Protocol into force. Sweden was seriously looking into the possibility of introducing a draft resolution to the Committee of Ministers providing for the immediate application on a provisional basis of certain essential elements of the Protocol, for example, the possibility of having one single judge deciding on admissibility in cases of individual applications, adopting the provision allowing only three judges sitting in Chambers deciding cases and also the new, stricter admissibility criteria. The delegate explained that this could be done in the form of a resolution and could be done with respect to cases between states that accept or approve such a resolution. Sweden believed that a legal basis for such a method could be found in Article 25 of the Vienna Convention on the Law of Treaties and also referred to, what appeared to be, a precedent in the Council of Europe. Namely, the Protocol of Turin of 1991 which amended the European Social Charter and where a resolution was adopted by the Committee of Ministers setting the provisions of the Protocol into force at an earlier stage than according to the Treaty. The delegate acknowledged that there were issues as to whether a resolution of this character would require a unanimous vote or whether a majority would suffice. The announcement was only made to keep the CAHDI informed of the delegations ideas and with a view to receiving any preliminary comments or reactions.

177. The delegation of the Russian Federation recalled that the situation regarding Protocol 14 was not being taken lightly in the Russian Federation. The situation was being considered by different branches of power. With regard to the idea expressed by the Swedish delegation, the delegate made only a very preliminary remark which was that the idea of provisional application of some of the provisions of the Protocol on the basis of the decision of the Committee of Ministers was not a new idea, it had been floating around for some time, and the effort to implement this idea could entail, in Russia's view, some quite difficult legal issues. But, of course, the proposal would be considered in-depth when it was duly formulated.

178. The delegation of Norway recalled that when the Protocol was adopted in 2004, it was already defined as being an urgent matter in view of the caseload. There is said to be more than 99,000 pending cases. There is no question as to whether urgent steps are required to improve the working conditions and the situation of the Court as such which, through the monitoring of human rights violations, forms the centre piece of the Council of Europe. Norway would therefore consider in a favourable light any suggestions, including from the Russian Federation, for additional measures. The delegate noted that at the time it was adopted, Protocol 14 was identified as a series of relatively limited common sense steps which needed to be supplemented with much more. There was also an action plan which was under consideration and the Group of Wise Persons had also considered a number of comments. Norway would have a very open mind in considering any ideas on how to

proceed bearing in mind what is the common, overarching position which is to do whatever is possible to ensure that the Court can work effectively.

179. The delegation of Portugal was very much in favour of the Swedish idea of trying to progress the human rights system within the framework of the Council of Europe, although he stressed that concerning Portugal and regarding the provisional application of treaties, there were serious constitutional issues regarding such provisional application and it was possible that other states could have similar problems. Portugal would, of course, be open to alternative suggestions.

180. The delegation of Estonia said that it had been obvious for a long time that it was most important that Protocol 14 enter into force. Estonia had a very open mind regarding all suggestions and was grateful to Sweden for putting forward a suggestion on how to solve the problem. The delegate looked forward to getting more details on the suggestion and hoped that it would bare fruit considering the situation at the Court.

181. The delegation of Austria was also very supportive of the Swedish proposal as it was supportive of any initiative which would lead to improving the Court's procedures and provide a way to deal with its enormous workload. Provisional application would of course be one possibility. If some states have problems with provisional application, the question is to what extent measures can be taken within the powers of the Council of Europe without a treaty/legal basis. The delegate stressed that substantial measures would be needed to really facilitate the work of the Court and stressed the urgency of the matter.

182. The delegation of Finland recognised that something had to be done to address the situation of the Court. The delegate said that Finland was prepared to look upon and into all suggestions in a favourable light.

183. The delegation of Switzerland recalled that the best solution remains the ratification of Protocol 14 by the Russian Federation, and that it will keep following developments in this regard. It added that all suggestions were welcome in order to resolve the situation and that, whilst waiting for that ratification; any transitory situation should permit the application of all the provisions of Protocol 14 once ratified. Any solution in this respect must be legally sound, in order to ensure the legitimacy of the Court.

184. The CAHDI strongly encouraged the entry into force of Protocol 14.

- **List of items discussed and decisions taken**

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

APPENDIX I

LIST OF PARTICIPANTS

ALBANIA/ALBANIE:

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CROATIA/CROATIE: -

CYPRUS/CHYPRE:

Mrs Georgia EROTOKRITOU, Attorney of the Republic, Law Office

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

INTERPOL: Apologised/Excusé

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SECRETARIAT GENERAL

CAHDI SECRETARIAT / SECRETARIAT DU CAHDI

M. Manuel LEZERTUA, Director of Legal Advice and Public International Law/Directeur du Conseil Juridique et du Droit International Public

M. Alexandre GUESSEL, Secretary to the CAHDI / Secrétaire du CAHDI, Head of the Public International Law and Anti-Terrorism Division / Chef de la Division du droit international public et de la lutte contre le terrorisme, Directorate of Legal Advice and Public International Law/Direction du Conseil Juridique et du Droit International Public

Mme Albina OVCEARENCO, Administrator/Aministratrice, Directorate of Legal Advice and Public International Law/Direction du Conseil Juridique et du Droit International Public

M. Jean-Etienne KAUTZMANN, Lawyer/Juriste, Directorate of Legal Advice and Public International Law/Direction du Conseil Juridique et du Droit International Public

Mme Francine NAAS, Assistant/Assistante, Directorate of Legal Advice and Public International Law/Direction du Conseil Juridique et du Droit International Public

Ms Saskia DANIELL, Assistant/Assistante, Directorate of Legal Advice and Public International Law/Direction du Conseil Juridique et du Droit International Public

INTERPRETERS/INTERPRETES:

Carine KENNEDY

Barbara GRUT

APPENDIX II

AGENDA

A. INTRODUCTION

1. Opening of the meeting by the Chair, Sir Michael Wood
2. Adoption of the agenda
3. Approval of the report of the 35th meeting
4. Statement by the Director of Legal Advice and Public International Law, Mr Manuel Lezertua

B. ONGOING ACTIVITIES OF THE CAHDI

5. Decisions by the Committee of Ministers concerning the CAHDI and requests for the CAHDI's opinion
 - a. "Disconnection clause": adoption of the draft report of the CAHDI
 - b. Draft opinion of the CAHDI on Parliamentary Assembly Recommendation 1842 (2008)
6. State immunities
 - a. State practice and case-law
 - b. UN Convention on Jurisdictional Immunities of States and Their Property – *Tour de table* on the situation in each member and observer State
7. Organisation and functions of the Office of the Legal Adviser of the Ministry for Foreign Affairs
 - a. Situation in member and observer States
 - b. The role of the OLA in national implementation of international law
8. National implementation measures of UN sanctions and respect for human rights
9. Cases before the ECHR involving issues of public international law
10. Peaceful settlement of disputes
 - a. Compulsory jurisdiction of the ICJ (Article 36(2))
 - b. Compulsory dispute settlement provisions in international conventions
 - c. Overlapping jurisdiction of international tribunals
 - d. Follow-up to Recommendation CM/Rec(2008)9 of the Committee of Ministers to member States on the nomination of international arbitrators and conciliators
11. 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

C. GENERAL ISSUES ON PUBLIC INTERNATIONAL LAW

12. Exchange of views with Ms Patricia O'Brien, UN Under-Secretary-General for Legal Affairs and UN Legal Counsel

13. The work of the International Law Commission (ILC) and of the Sixth Committee
14. Consideration of current issues of international humanitarian law
15. Developments concerning the International Criminal Court (ICC)
16. Implementation and functioning of other international criminal tribunals (ICTY, ICTR, Sierra Leone, Lebanon, Cambodia)
17. Follow-up to the outcome document of the 2005 UN World Summit – Advancing the international rule of law
18. Fight against terrorism - Information about work undertaken in the Council of Europe and other international bodies
19. Follow-up to the International Conference “International Courts and Tribunals – The Challenges ahead” (London, 6-7 October 2008)
20. Topical issues of international law

D. OTHER

21. Election of the Chair and Vice-Chair of the CAHDI
22. Adoption of preliminary draft specific terms of reference for 2009-2010
23. Date, place and agenda of the 37th meeting of the CAHDI
24. Other business:
 - a. Status of ratification of Protocol 14 to the ECHR

APPENDIX III (in french only)

DECLARATION OF MANUEL LEZERTUA DIRECTOR OF LEGAL ADVICE AND PUBLIC INTERNATIONAL LAW

Monsieur le Président,
Mesdames et Messieurs,

C'est un plaisir et un honneur pour moi de vous retrouver aujourd'hui à Londres et de vous faire part, en tant que Directeur du Conseil juridique et du Droit international public du Conseil de l'Europe, des évolutions intervenues au sein de notre organisation depuis votre dernière réunion, en mars.

L'actualité politique de l'organisation a été en premier lieu marquée par le changement de présidence du Comité des Ministres. En mai dernier, la Slovaquie a transmis le flambeau à la Suède qui assure désormais pendant six mois la présidence de l'organe exécutif de notre organisation. L'Espagne prendra ensuite le relais, à compter du mois de novembre prochain.

La priorité pour le Conseil de l'Europe de la présidence suédoise sont bien sûr étroitement liées à la réalisation des objectifs principaux de notre organisation : la protection des droits de l'homme, de la démocratie et de l'Etat de droit. La question de l'Etat de droit occupe toutefois une place de choix.

Lors de la 118^e Session du Comité des Ministres qui ouvrait la présidence suédoise, le 7 mai 2008, le Groupe de rapporteurs du Comité des Ministres sur la coopération juridique (GR-J) a été invité à examiner les moyens permettant d'utiliser pleinement le potentiel du Conseil de l'Europe pour sauvegarder et promouvoir l'Etat de droit. Le GR-J a d'ores et déjà souligné le lien étroit qui existe entre cette notion, les droits de l'homme et la démocratie. La question est complexe mais il est nécessaire de réfléchir à une stratégie renforçant la promotion de cette notion-clé. Le rapport final sera présenté en novembre 2008, lors que la Suède cèdera la présidence du Comité des Ministres à l'Espagne.

Nous nous devons de souligner que la Conférence à laquelle nous venons d'assister est l'expression de la force de l'engagement de la présidence suédoise sur la question de la promotion de l'Etat de droit, en particulier au niveau international.

Quant aux activités de promotion de la démocratie, un soutien important est apporté à la préparation du forum du Conseil de l'Europe pour le futur de la démocratie. Ce forum aura lieu à Madrid du 15 au 17 octobre 2008, sous l'égide du Ministère espagnol de l'administration publique. Le thème principal proposé pour cette session est la « E-Gouvernance » (la gouvernance électronique).

Enfin, la présidence suédoise va mettre l'accent sur la promotion des **relations entre le Conseil de l'Europe et l'Union Européenne ainsi qu'avec d'autres organisations internationales**.

S'agissant des relations développées avec l'Union Européenne, il convient de signaler qu'elles continuent d'évoluer dans un sens très positif.

Une réunion quadripartite a eu lieu le 10 mars 2008, à peine quelques jours après la dernière réunion du CAHDI. Elle s'est concentrée sur le soutien accordé aux Etats dans leurs processus électoraux, sur le rôle des médias dans le contexte électoral et sur la situation dans les Balkans occidentaux.

L'actualité majeure de ce dernier semestre, c'est surtout la signature d'un accord de coopération, le 18 juin 2008, entre le Conseil de l'Europe et l'Agence des droits fondamentaux de l'Union européenne. Il vise à renforcer la complémentarité de l'action des deux organisations et à éviter les chevauchements inutiles d'activités dans le domaine de la protection des droits de l'homme en Europe.

La question de l'adhésion de l'UE à la Convention européenne des droits de l'Homme est également régulièrement abordée avec l'Union et favoriserait considérablement la cohérence dans ce domaine de coopération.

Concernant les relations entre le Conseil de l'Europe et les Nations Unies, un projet de résolution de l'Assemblée Générale des Nations Unies sur la coopération entre les deux organisations a été négocié ces derniers mois. Son examen sera effectué dans le cadre de l'actuelle session de l'Assemblée Générale. Il vise, entre autres points, à améliorer la coordination des activités et les échanges d'informations entre les deux organisations. Le Comité des ministres a convenu de laisser à la Présidence suédoise une certaine marge de manœuvre dans la négociation du texte à New York, en particulier en ce qui concerne la référence à la peine de mort, afin que le texte puisse être adopté par consensus, ce qui est la pratique habituelle.

J'en viens à présent à **l'actualité juridique de notre Organisation**. Je vous renvoie à ce titre au document CAHDI(2008)Inf 9 qui vous fournit une vision exhaustive des développements récents concernant la série des traités européens. Certaines informations méritent toutefois d'être soulignées.

Ainsi, comme je vous l'annonçais lors de notre dernière entrevue, la Convention relative au blanchiment, au dépistage, à la saisie et à la confiscation des produits du crime et au financement du terrorisme est entrée en vigueur au 1^{er} mai 2008, après le dépôt du 6^{ème} instrument de ratification. Elle prend en compte les derniers développements en la matière et en particulier les points de vue du GAFI, le Groupe d'action financière concernant la lutte contre le financement du terrorisme. Aujourd'hui le nombre total de ratifications est de 9. Nous comptons également 20 signatures non suivies de ratification.

Cette Convention est l'un des trois instruments ouverts à la signature lors du Sommet de Varsovie de 2005. Elle est d'une considérable importance pour les activités du Conseil de l'Europe et l'achèvement de ses objectifs. Elle est rédigée dans un esprit d'ouverture géographique, dans la mesure où, comme les autres Conventions signées à Varsovie, il s'agit d'un instrument ouvert, accessible aux Etats non membres du Conseil de l'Europe, ce qui est essentiel dans la lutte contre les réseaux internationaux du crime organisé.

Par ailleurs, le 7 mai 2008, le Comité des Ministres du Conseil de l'Europe a adopté la Convention européenne révisée en matière d'adoption des enfants qui met à jour la Convention européenne en matière d'adoption des enfants de 1967. Cet instrument, qui sera ouvert à la signature le mois prochain, vise à améliorer les procédures nationales d'adoption. Il complète au niveau européen les normes internationales existantes, notamment la Convention de la Haye de 1993 sur la protection des enfants et la coopération en matière d'adoption internationale.

Veuillez noter également que, le 11 juin dernier, le Comité des Ministres du Conseil de l'Europe a adopté une Résolution établissant la procédure d'élection des membres du Groupe d'experts sur la lutte contre la traite des êtres humains (GRETA). Il s'agit d'une première étape importante pour la mise en place d'un mécanisme efficace et indépendant de suivi de la mise en oeuvre de la Convention du Conseil de l'Europe sur la lutte contre la traite des êtres humains.

Cette procédure vise à garantir l'élection de 10 à 15 experts. L'objectif déclaré est la constitution d'un panel basé sur la multidisciplinarité, équilibré géographiquement, équilibré

également entre les femmes et les hommes, et représentant les principaux systèmes juridiques.

Les gouvernements des Etats Parties à la Convention avaient jusqu'au 1^{er} octobre pour désigner leurs candidat(e)s, avant que le Comité des Parties ne procède à l'élection des membres du GRETA, ce qui doit être fait avant le 1^{er} février 2009.

Tous ces développements s'inscrivent dans la mise en œuvre de ce qu'il est convenu d'appeler « l'agenda de Varsovie ». Cet agenda fixe **quatre axes principaux orientant les activités du Conseil de l'Europe**, déterminés lors du Troisième Sommet des Chefs d'Etat et de Gouvernement des Etats membres du Conseil de l'Europe tenu à Varsovie en 2005.

Ces quatre axes sont la réforme de la Cour Européenne des Droits de l'Homme, la lutte contre le terrorisme, la lutte contre le crime organisé et enfin la lutte contre le racisme.

La question de la réforme de la Cour Européenne des Droits de l'Homme est toujours d'actualité. Le protocole additionnel n° 14 à la Convention Européenne des Droits de l'Homme n'est toujours pas entré en vigueur et l'activité de la Cour en pâtit. Vous le savez tous, le protocole compte 46 ratifications et il ne manque plus qu'une ratification pour que ce texte n'entre en vigueur.

Par ailleurs, la présidence suédoise du Comité de Ministres a souhaité donné une nouvelle impulsion pour une mise en œuvre plus efficace de la Convention européenne des Droits de l'Homme dans l'ordre juridique interne des Etats membres.

C'est sous ce signe que la présidence suédoise a organisé le colloque *Vers une mise en œuvre renforcée de la Convention européenne des droits de l'homme au niveau national*, les 9 et 10 juin 2008, à Stockholm. Cette réunion traitait des questions telles que l'amélioration des voies de recours internes et l'importance de la jurisprudence de la Cour européenne des droits de l'Homme.

Dans le cadre de la lutte contre le terrorisme et le crime organisé, rappelons que Conseil de l'Europe a été à l'avant-garde de la lutte contre les crimes commis par le biais de l'Internet, notamment par le biais de l'adoption de la Convention sur la cybercriminalité le 23 novembre 2001.

L'événement marquant dans ce domaine est une conférence, organisée les 1^{er} et 2 avril 2008 par le Conseil de l'Europe, et portant sur la *Coopération contre la Cybercriminalité*. Cette Conférence s'est conclue par l'adoption de lignes directrices relatives à la coopération entre les services de répression et les fournisseurs de services, l'état et l'effectivité de la législation dans le domaine de la cybercriminalité. Ces lignes directrices mettent en évidence l'importance stratégique d'une coopération accrue entre le secteur public et le secteur privé et la promotion d'une assistance juridique mutuelle internationale pour les forces de l'ordre. Lors de la conférence, il a également été décidé de maintenir des points de contacts entre le Conseil de l'Europe et le sous-groupe sur le crime de haute technologie du G8.

En dehors des quatre grands axes de Varsovie, je souhaite vous faire part d'une tendance importante en ce qui concerne la coopération relative au droit constitutionnel et électoral. Il y a en effet lieu de souligner un intérêt accru du monde arabe pour le travail de la Commission de Venise du Conseil de l'Europe. Cet intérêt s'est développé grâce aux contacts entre la Commission de Venise et l'Union des Cours et des conseils constitutionnels arabes. En 2007, le Comité des Ministres du Conseil de l'Europe a invité le Maroc et l'Algérie à devenir membres de la Commission de Venise et, le 15 mai 2008, le Comité des Ministres a approuvé la demande de la Tunisie de devenir membre de ladite Commission. De plus, le Comité des Ministres a accordé le statut spécial de coopération à l'Autorité Nationale Palestinienne.

Permettez moi d'aborder enfin les activités spécifiques du CAHDI et en particulier les suites données à vos récents travaux. Le 2 juillet 2008, le Comité des ministres a en effet adopté le projet de Recommandation (2008)8 du Comité des Ministres aux Etats membres relatif à l'acceptation de la juridiction de la Cour internationale de Justice ainsi que le Projet de Recommandation (2008)9 du Comité des Ministres aux Etats membres sur la désignation d'arbitres et conciliateurs internationaux. Il a également pris bonne note des exposés des motifs relatifs à ces textes et préparés par le Secrétariat.

Les deux Recommandations ont été transmises aux Nations Unies par le biais de la Présidence suédoise, que nous remercions une fois de plus de son action. Ces travaux peuvent être analysés en une contribution du Conseil de l'Europe à la mise en œuvre du Document final du Sommet Mondial de 2005.

Pour finir, je voudrais vous fournir quelques informations sur les **conférences de haut niveau** qui ont eu lieu depuis votre dernière réunion :

- Les 2 et 3 juillet 2008 a eu lieu à Saint Petersburg, une Conférence européenne des procureurs. Il fut question du rôle du Ministère public dans la protection des droits de l'Homme et de l'intérêt général en dehors du domaine pénal. L'importance pour le Ministère public de respecter les principes de la Convention Européenne des Droits de l'Homme et la jurisprudence de la Cour européenne des Droits de l'Homme a été mise en avant.
- Les 4 et 5 septembre 2008, s'est tenue à Kiev la 8^e Conférence des Ministres européens responsables des questions de migration. Elle visait à relier les questions des migrations, de développement et de cohésion sociale. Ce fut une fenêtre de dialogue entre les Etats membres en vue d'examiner les possibilités de coopération bilatérale et multilatérale future dans le domaine des migrations.
- Enfin, du 8 au 10 septembre 2008, dans le cadre de la Présidence suédoise du Comité des Ministres et avec le soutien du Conseil Nordique des Ministres, le Conseil de l'Europe et le Gouvernement suédois ont organisé conjointement, à Stockholm, une conférence intitulée "Construire une Europe pour et avec les enfants – Vers une stratégie pour 2009-2011". Cette conférence a réuni des représentants de gouvernements, d'organisations et d'institutions internationales, des représentants d'organisations non gouvernementales, de collectivités locales et de réseaux professionnels, ainsi que des parlementaires, des médiateurs, des juges et des avocats pour enfants. Les thèmes abordés furent la violence contre les enfants, la participation effective et durable des enfants et l'adaptation de la justice aux enfants.

Comme vous pouvez le constater, les valeurs communes aux Etats membres du Conseil de l'Europe que sont la démocratie, les droits de l'homme et l'Etat de droit, restent indéfectiblement au cœur de nos activités.

Il me reste à vous souhaiter une réunion aussi captivante que fut la Conférence à laquelle nous venons d'assister.

Je vous remercie de votre attention.

APPENDIX IV

REPORT ON THE CONSEQUENCES OF THE SO-CALLED "DISCONNECTION CLAUSE" IN INTERNATIONAL LAW IN GENERAL AND FOR COUNCIL OF EUROPE CONVENTIONS, CONTAINING SUCH A CLAUSE, IN PARTICULAR

(The report hereunder is reproduced without its appendices. The full text of the report, including appendices, is available on the CAHDI website)

Introduction

1. In its decision of 12 July 2007, adopting the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, the Committee of Ministers' Deputies agreed to invite the Committee of Legal Advisers on Public International Law (CAHDI) to examine the consequences of the so-called "disconnection clause" in international law.¹

2. To this end, on 10 October 2007, the Committee of Ministers' Deputies adopted ad hoc terms of reference for the CAHDI² (see Appendix 1), calling upon the CAHDI:

To examine the consequences of the so-called "disconnection clause" as laid out in Article 43, paragraph 3 of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse and equivalent provisions of the Council of Europe Convention on the Prevention of Terrorism (CETS No. 196) (Article 26, paragraph 3), the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) (Article 40, paragraph 3) and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198) (Article 52, paragraph 4) in international law in general and for Council of Europe conventions, containing such a clause, in particular, and report back to the Committee of Ministers, including on consultations under paragraph 5.

Paragraph 5 of the terms of reference (*Working methods and structures*) states that:

In carrying out its work, the Committee shall consult the European Union/European Community and its Member States as well as the Council of Europe's relevant services.

3. At the 34th meeting of the CAHDI (10-11 September 2007), members and observers were informed about the decision of the Committee of Ministers' Deputies and requested the

¹ See CM/Del/Dec(2007)1002/10.1, 16 July 2007:

The Deputies

1. *adopted the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, as it appears at Appendix 13 to the present volume of Decisions;*¹
2. *took note of the declaration made by the European Community and the member states of the European Union;*
3. *decided to open the Convention for signature on the occasion of the 28th Conference of European Ministers of Justice (25-26 October 2007, Lanzarote, Spain);*
4. *took note of the Explanatory Memorandum to the Convention as it appears in document CM(2007)112 add;*
5. *agreed to invite the Committee of Legal Advisers on Public International Law (CAHDI) to examine the consequences of the so-called "disconnection clause" in international law and invited their Rapporteur Group on Legal Co-operation (GR-J) to elaborate ad hoc terms of reference for that purpose at one of its forthcoming meetings.*

² CM/Del/Dec(2007)1006/10.3, 10 October 2007.

Secretariat to collect relevant background material, in good time before the 35th meeting of the CAHDI (6-7 March 2008), including examples of treaty texts relating to "disconnection clause" used in both Council of Europe and other international instruments, extracts from the International Law Commission's Study on Fragmentation of International Law, references to any articles written on the subject, and any other material which they considered relevant in light of the terms of reference.

4. The CAHDI further agreed that the Chair and Vice-Chair, with the assistance of the Secretariat, would prepare a first draft of a response to the Committee of Ministers' Deputies' request, for circulation to all participants by the end of January 2008, in good time before the March 2008 meeting of the CAHDI.

5. On 24 October, the Secretariat informed the Committee of the Ad hoc terms of reference given to the CAHDI by the Committee of Ministers' Deputies at its 1006th meeting (10 October 2007) and invited all delegations, including the European Union (hereafter EU)/European Community (hereafter EC),³ to send to the Secretariat any observations as well as any relevant background materials. A contribution was received from the EU (CAHDI (2008) 3); and comments were received from the Russian Federation (CAHDI (2008) 1 Add).

6. The Chair and Vice-Chair together with the Secretariat prepared a draft report (document CAHDI (2008) 1 prov, paras. 4-39), which was circulated to delegations, including the EU/EC, on 30 January 2008 together with a compilation of background materials prepared by the Secretariat (document CAHDI (2008) 2). Delegations were invited to submit any comments with a view to the next meeting of the CAHDI.

7. The CAHDI considered the draft report at its 35th meeting. Following further consultations, including with the EU/EC and relevant Council of Europe services, the Chair and Vice-Chair circulated a revised draft report, (CAHDI (2008) 1 rev.), which was considered by the CAHDI at its 36th meeting (7-8 October 2008).

8. The CAHDI adopted the present report at its 36th meeting, in pursuance of the ad hoc terms of reference given to it by the Committee of Ministers' Deputies.

Background

9. As requested by the Committee of Ministers' Deputies, the present report deals with the consequences of so-called "disconnection clauses" in international law in general and for Council of Europe conventions in particular. The focus of the report is on their legal effects. Criticism of such clauses has usually been directed at their practical effects, which can only be considered on a case-by-case basis. Such policy issues are not within the scope of this report.⁴ However, criticism has also been generated by fears that indiscriminate and frequent use of such clauses may inadvertently lead to the erosion of the object and purpose of important standard-setting treaties, or inspire similar practices with regard to the relations *inter se* between States engaged in integration processes in other regions. Since the request by the Committee of Ministers' Deputies refers to consequences in international law in general, these aspects are also briefly addressed.

³ For the purpose of the present report the EC/EU terminology should be considered in the light of Paragraph 3, Article 1 of the Treaty on European Union: "The Union shall be founded on the European Communities, supplemented by the policies and forms of co-operation established by this Treaty".

⁴ Nor does the report examine *in abstracto* the relationship between EU/Community law and international law or between national and EU/Community law, but only to the extent that is relevant for this analysis. On these issues, please refer to document CAHDI (2008) 3 Part 1.

10. The term "disconnection clause" is commonly used to refer to a provision in a multilateral treaty allowing certain parties to the treaty not to apply the treaty in full or in part in their mutual relations, while other parties remain free to invoke the treaty fully in their relations with these parties. It is not a term of art in international law, and the legal and practical effect of each provision depends upon its wording and the context in which it appears. Thus, depending on how it is drafted, a "disconnection clause" may have an effect on the whole of a treaty or on a part thereof only. The question arises as to the extent to which the "disconnection" covers all or only certain aspects of a treaty (substantive law, procedural law, individual rights, monitoring, etc). Appendix 2 gives examples of different kinds of "disconnection clauses", many of which appear in Council of Europe conventions.

11. It should be noted that a number of Council of Europe governmental committees, in particular the CAHDI and its predecessor, the CJ-DI,⁵ and the Secretariat have considered "disconnection clauses" on earlier occasions.⁶

12. In particular, the CJ-DI concluded in 1989 that the "issues that the CJ-DI could usefully take up include notably the following:

- a. *admissibility of a "disconnection" clause in general, and in particular in the case of a standard-setting treaty or of a "residual" treaty;*
- b. *admissibility of a "disconnection" clause in respect of future or only of pre-existing instruments;*
- c. *impact of a "disconnection" clause on the substantive provisions of the treaty and on the procedural ones (communication of information, settlement of disputes, territorial application, etc.);*
- d. *impact of a "disconnection" clause on the application of another treaty referred to in the treaty containing the clause;*
- e. *degree of freedom of the Parties to "disconnect" from the treaty (specification of the alternative source of rules, or not);*
- f. *requirement to notify the other Parties, through the Secretary General, of any implementation of the "disconnection" clause, and, where appropriate, effect of a notification received from only one Party of, for example, an EEC rule binding also other Parties."*⁷

13. More recently, the Secretariat of the Council of Europe provided informal comments on this issue in response to an EU Presidency proposal to include the "disconnection" clause in the three Council of Europe conventions adopted in Warsaw in May 2005, namely, the Council of Europe Convention on the Prevention of Terrorism, the Council of Europe Convention on Action against Trafficking in Human Beings, and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism.

14. This resulted in an agreement by the EU member States that the need for, and scope of, the "disconnection clause" should be clarified. The EC and the EU states subsequently

⁵ The Committee of Experts on Public International Law (CJ-DI) operated under the authority of the European Committee on Legal Co-operation (CDCJ) until the setting up of the CAHDI in 1991.

⁶ See, for example, the following documents reproduced in CAHDI(2008)2:

CJ-DI(89)8, *The disconnection clause – Memorandum of the Secretariat General prepared by the Directorate of Legal Affairs,*

CDCJ(89)58, *Final Activity Report of the Committee of Experts on Public International Law (CJ-DI) – Question relating to public international law,* paragraphs 23-36,

CDCJ(89)66, *Meeting Report of the European Committee on Legal Co-operation (CDCJ),* paragraphs 36-40 relating to the work of the CJ-DI

⁷ CJ-DI(89)8, above, p. 5.

issued a declaration on the occasion of the adoption of the three above-mentioned conventions by the Council of Europe's Committee of Ministers (3 May 2005), explaining how the disconnection clause would work, particularly in relations between EU states and other, non-EU members of the Council of Europe. The declaration stated as follows:

The European Community/European Union and its Member States reaffirm that their objective in requesting the inclusion of a 'disconnection clause' is to take account of the institutional structure of the Union when acceding to international conventions, in particular in case of transfer of sovereign powers from the Member States to the Community.

This clause is not aimed at reducing the rights or increasing the obligations of a non-European Union party vis-à-vis the European Community/European Union and its Member States, inasmuch as the latter are also parties to this convention.

The disconnection clause is necessary for those parts of the convention which fall within the competence of the Community/Union, in order to indicate that European Union Member States cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves (or between themselves and the European Community/Union). This does not detract from the fact that the convention applies fully between the European Community/European Union and its Member States on the one hand, and the other Parties to the convention, on the other; the Community and the European Union Member States will be bound by the convention and will apply it like any party to the convention, if necessary, through Community/Union legislation. They will thus guarantee the full respect of the convention's provisions vis-à-vis non-European Union parties.⁸

15. There is a practice within the Council of Europe of producing detailed explanatory reports to accompany its conventions. These provide a good opportunity to set out the nature, scope and function of any disconnection clause. Examples are given in Appendix 2 to the present report.

16. The question of the "disconnection clause" was further considered by Prime Minister Jean-Claude Juncker of Luxembourg in his 2006 report to the Heads of State and Government of the member States of the Council of Europe.⁹ Mr Juncker noted that *the essential question here is how Community law, which transfers extensive powers, including many external powers, from member states to the EU, can be linked more effectively with international law, which is also evolving.*¹⁰

17. Against the background of rapid changes in Community law and substantial changes in international, convention-based law, such as that drawn up by the Council of Europe, Mr Juncker made a case for averting legal insecurity and major incompatibilities between Community and international law – particularly European law, whose *standard setting potential must remain a judiciously shared asset, and not become a cause of dissension and linking changes in Community law with changes in international law through consultation with the Council of Europe.*¹¹

⁸ See, among others, explanatory report of the Council of Europe Convention on the Prevention of Terrorism, CETS n° 196, para. 272, <http://conventions.coe.int/>

⁹ Council of Europe – European Union "A sole ambition for the European continent" - Report by Jean-Claude Juncker, 11 April 2006, pp. 15-16.

¹⁰ Idem, p.15.

¹¹ Idem, p.16.

18. This question has also been considered recently by the United Nations International Law Commission (ILC).¹² The 2005 ILC report described a divergence of views on the effects of "disconnection clauses":

*464. Some members felt that the proliferation of such clauses was a significant negative phenomenon. The opinion was even expressed that such clauses might be illegal inasmuch as they were contradictory to the fundamental principles of treaty law. Others, however, observed that whatever their political motives or effects, such clauses were still duly inserted in the relevant conventions and their validity thus followed from party consent. It was difficult to see on what basis parties might be prohibited from consenting to them. The Study Group [on the "Function and scope of the *lex specialis* rule and the question of 'self-contained regimes'"] agreed, however, that such clauses might sometimes erode the coherence of the treaty. It was important to ensure that they would not be used to defeat the object and purpose of the treaty. Nonetheless, it was felt impossible to determine their effect in abstracto.*

465. It was also pointed out that in some situations the result may not be as problematic, particularly if the obligations assumed by the parties under the disconnection clause were intended to deal with the technical implementation of the provisions of the multilateral convention or are more favourable than those of the regime from which it departs.

19. The 2006 report of the ILC Study Group on the Fragmentation of International Law,¹³ dealing with "conflict clauses" included in treaties that are designed to clarify the relationship between the treaty and subsequent or prior conflicting treaties, states:

292. Article 30 (2) of the VCLT provides that "when a treaty specifies that it is subject to, or that it is not be considered as incompatible with, an earlier or later treaty, the provision of that other treaty will prevail". This formulation covers also disconnection clauses. They are thus best analyzed as conflict clauses added to treaties with the view to regulating potential conflicts between Community law and the treaty. What may seem disturbing about such clauses is that they are open to only some parties to the original treaty and the content of the Community law to which they refer may be both uncertain and subject to change. Nevertheless, this is scarcely different from regular inter se amendments that also apply between some parties only and that may be subject to future modification.

293. Under what conditions is this type of clause (...) permissible? The starting-point is, of course, that the clause is agreed to by all the parties, so that no question of validity will rise. Nevertheless, it cannot be excluded that the other parties might not know of the real import of the disconnection clause because the rules referred to therein (the relevant EC rules) have been obscure, or modified or interpreted in a new way. In this case, the EC rules begin to resemble a new, successive treaty, covered by article 30 (4) VCLT. According to article 30 (5) VCLT "paragraph 4 [of article 30] is without prejudice to article 41". Through this means, an open-ended disconnection clause would become also conditioned by the requirements of article 41. During the preparatory work for the VCLT, the Chairman of the ILC confirmed that a right to an inter se modification should not be unlimited but that any modification would need to respect the object and purpose of the treaty. A similar position was taken by Pellet in context of reservations as he explained that an expressly authorized unspecified

¹² Report of the International Law Commission 2005, UN Doc A/60/10, para. 463-465 and Report of the International Law Commission 2006, UN Doc A/61/10, para. 251, *Conclusion 30*.

¹³ See the Report of the Study Group of the International Law Commission, finalised by Martti Koskenniemi, UN Doc. A/CN.4/L.682 of 13 April 2006 and Add.1 of 2 May 2006.

reservation must also fulfil the object and purpose test. Thus, while the scope and content of the disconnection clause is normally covered by the original consent, in case the regulation referred to in that clause will be modified, such modification may only be allowed to the extent that it does not "affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations [or] relate to a provision derogation of which is incompatible with the effective execution of the object and purpose of the treaty as a whole" as stipulated by article 41 (1) of the VCLT.

294. Like inter se modification, a disconnection clause makes it possible for a limited group of parties to enhance the objectives of the treaty by taking measures that correspond to their special circumstances. But just like inter se agreements, this practice creates the possibility of undermining the original treaty regime. The actual effect of a disconnection clause depends on its specific wording. Their common point, however, is that they seek to replace a treaty in whole or in part with a different regime that should be applicable between certain parties only. The real substance of clause is not apparent on its surface, but lies in the regime referred to in the clause. It is the conformity of the substance of that regime with the treaty itself where the real point of concern lies. From the perspective of other treaty parties, the use of disconnection clause might create double standards, be politically incorrect or just confusing. To alleviate such concerns, some disconnection clauses are worded so as to be "without prejudice to the object and purpose of the present Convention". Nevertheless, even if they did not contain such a reference, the condition of conformity with object and purpose may, as pointed out above, derive from those laid down for the inter se modification. In assessing such conformity, two concerns seem relevant. First, a disconnection clause is agreed to by all the parties of the treaty. From this perspective, the practice seems unproblematic. The validity of a disconnection clause flows from party consent. On the other hand, it is not obvious that parties are always well-informed of the content of the regime to which the clause refers and that regime may change independently of the will or even knowledge of the other parties. In such cases, the criterion concerning conformity with object and purpose will provide the relevant standard for assessing the practice of the treaty parties. Like elsewhere, the consideration of whether the provisions to which the treaty refers are what Fitzmaurice called "integral" or "interdependent" provisions that cannot be separated from the treaty, seems relevant."

20. The ILC took note of the Conclusions of the Study Group and commended them to the attention of the General Assembly.¹⁴ Conclusion (30) reads as follows:

(30) Conflict clauses. When States enter into a treaty that might conflict with other treaties, they should aim to settle the relationship between such treaties by adopting appropriate conflict clauses. When adopting such clauses, it should be borne in mind that:

- (a) They may not affect the rights of third parties;*
- (b) They should be as clear and specific as possible. In particular, they should be directed to specific provisions of the treaty and they should not undermine the object and purpose of the treaty;*
- (c) They should, as appropriate, be linked with means of dispute settlement.*

The UN General Assembly took note of the Conclusions of the Study Group and commended their dissemination (A/Res/61/34 of 4 December 2006, para. 4).

¹⁴ See Report of the International Law Commission 2006, UN Doc A/61/10, para. 251, Conclusion 30.

21. In addition, a number of authors have recently written about "disconnection clauses".¹⁵

Legal analysis of "disconnection clauses"

Validity of the clauses

22. If those negotiating a treaty agree to include a "disconnection clause" the latter will in principle be legally effective. There is nothing in international law that precludes states or organisations negotiating a treaty from including in the text of the treaty a "disconnection clause" and there is considerable practice of negotiating such clauses and other similar provisions stipulating that different parties to a multilateral treaty have different rights and obligations there under.¹⁶

23. The CAHDI therefore considers that the clauses included in the four conventions referred to in the ad hoc terms of reference do not pose a problem from the point of view of their validity.

Effects of the clauses

24. The effects of "disconnection clauses" cannot be assessed *in abstracto* but only on a case-by-case basis taking into account the terms of the convention in which they are included. Consequently, in pursuance of the ad hoc terms of reference, the present report concentrates on the effects of the particular "disconnection clause" contained in Article 26.3 of the *Council of Europe Convention on the Prevention of Terrorism* (CETS No. 196), Article 40.3 of the *Council of Europe Convention on Action against Trafficking in Human Beings* (CETS No. 197), Article 52.3 of the *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism* (CETS No. 198) and Article 43.3 of the *Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* (CETS No. 201). This reads:

¹⁵ See for instance: BAUME, T., *Competence of the Community to conclude the new Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters: Opinion 1/03 of 7, German Law Journal* n° 8, August 2006; BORRAS, A, *Les clauses de déconnexion et le droit international privé communautaire*, in Festschrift für Eric Jayme (herausgegeben von H.P. Mansel-T. Pfeiffer-H. Kronke-Ch. Kohler-R. Hausmann), Munich (Sellier), I, pp. 57-72; BRIERE, C., *Les conflits de conventions internationales en droit privé*, Bibliothèque de Droit Privé, L.G.D.J., 2001, p. 49; CREMONA, M. and ECKHOUT, P., *Community report, External relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility and Effects of International Law*, Ed. Xenios Xenopoulos, FIDE 2006, pp. 319-360; DE SCHUTTER, O., *The division of tasks between the Council of Europe and the European Union in the promotion and protection of Human Rights in Europe: Conflict, Competition and Complementarity*, 15 January 2007; ECONOMIDES, C. & KOLLIPOULOS, A., *La clause de déconnexion en faveur du droit communautaire: une pratique critiquable*, in RGDIP 273 (2006); HOFFMEISTER, F., *The contribution of EU practice to international law*, in: M. Cremona (ed.), *Developments in EU external relations*, Oxford, OUP, 2008, pp. 37-127; LAVRANOS, N., *Topic 3 External relations of the EU and the Member States*, FIDE Conference 2006, Dutch European Law Society, Report for the Netherlands, p.2; LEIN, E., *La compétence externe de la Communauté*, *Etudes Suisses de Droit Comparé*, 2006-2; MANGILI, F., *Avis 1/03 de la Cour de Justice*, Centre d'Etudes Juridiques Européennes, Avril 2006; POLAKIEWICZ, J. "Treaty Making in the Council of Europe", Council of Europe Publishing, Strasbourg, 1999, pp.68-70; SCHULTZ, A. *Reflection Paper to Assist in the preparation of a Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*; TELL, O., *Disconnection clause*, proceedings of the Seminar UIA Edinburgh; VOLODIN, I. *The European Union's participation in the activities of the Council of Europe: Legal problems*, Master thesis, European Institute of Public Administration – Antenna Luxembourg, not yet published.

N.B.: This list has been compiled by the Secretariat bearing in mind also the contribution from the EU (cf. CAHDI (2008) 3 Part 3).

¹⁶ Article 53 of the Vienna Convention on the Law of Treaties, which provides that "[a] treaty is void, if at the time of its conclusion, it conflicts with a peremptory norm of international law", has no role in this context since no question of *jus cogens* arises.

Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case, without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties.

Nevertheless, this analysis may contain elements applicable *mutatis mutandis* to other forms of the "disconnection clause" and to other conventions.

25. At the outset, it should be stressed that the "disconnection clause" is intended to cover "members of the European Union [...], *in their mutual relations*" and not in their relations with other states or individuals.

26. This being said, the impact of the clauses mentioned above depends first and foremost on their wording. In this case, they refer to a legal order which is distinct from both the domestic legislation of the Member States and from the Council of Europe conventions, i.e. the legal order of the EC/EU, which is specific and complex.¹⁷ It may however also be noted that in a number of important fields of law there is a close relationship between this legal order and the European Economic Area Agreement, which the EFTA Court has characterized as having created a distinct legal order of its own.¹⁸ Moreover, in other regional contexts than the European one, there are on-going integration processes that might in the future lead to similar needs being invoked.

27. As underlined in the report of the Study Group of the International Law Commission¹⁹, the hypothesis that certain states might not have any knowledge of the actual impact of the "disconnection clause" at the moment of its adoption, due to the complexity of EC/EU rules which are the origin of the "disconnection clause", cannot be excluded. This is all the more true in view of the fact that these rules can develop rapidly and are subject to changing interpretation or that they can include technically complex wordings.

28. Therefore, while the impact on the field of application *ratione personae* of the conventions is rather obvious, this is not the case with regard to the field of application *ratione materiae* where the application of the clauses could constitute an obstacle for states not members of the EU in respect of their accessibility to and the possibility to foresee the scope of the EU Member States' domestic law in the areas concerned.

29. This also constitutes an obstacle to the assessment of the conformity of the "disconnection" process with the object and purpose of the Council of Europe conventions concerned and may be prejudicial to legal certainty, which is crucial to the relations between the Parties.

30. However, the wording of the "disconnection clause" in the four conventions mentioned above provides some assurance with regard to the scope of application *ratione materiae* of those texts. These clauses include the following formula: "*without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties*". This wording should help to ensure that EC/EU rules on matters subject to the disconnection respect the minimum standards and procedures set out by the conventions concerned. The application of any EC/EU rule below these conventional standards instead of the application of the convention standards could well be regarded as being in breach of the

¹⁷ The EC/EU legislation relevant to the Council of Europe Conventions in question is included in Appendix 3, submitted by the EU.

¹⁸ Case E-7/97, 1998 Rep. EFTA Ct., 127, Sveinbjörnsdóttir, para. 59.

¹⁹ Para.19 above.

object and purpose of the treaty. Likewise, the "disconnection clause" should not detract from the monitoring mechanism provided by the convention since this could well be regarded as contrary to the object and purpose of the convention and its overall efficacy.

31. Thus, the "disconnection clause" as formulated in the four conventions mentioned above uses more precise language compared with earlier versions, in that it mentions that the clause is without prejudice to the object and purpose of the convention or to its full application with the other parties. Moreover, the EU declaration made at the time of adoption by the Committee of Ministers of the three 2005 Warsaw Conventions²⁰ further clarifies that the "disconnection clause" is only applicable to the provisions that fall within EU competence and that as a result, EU Member States could not invoke the respective conventions directly among themselves but would be bound by them in their relations with third parties (i.e. non-EC States), which obviously remain free to invoke the provisions of the conventions in their relations with EU Member States. In this connection, the respective explanatory reports also mention the possibility for third parties (non-EU States) to be informed of the division of competence between the EU/EC and its member states.

32. It should be borne in mind that, in order to be effective, the analysis of pertinent EC/EU rules can only be done in collaboration with the Member States. However, the "disconnection clauses" in question do not contain any obligation to notify the depositary of this procedure nor of the applicable EC/EU rules. Nor is anything said in this respect in the explanatory reports of the conventions concerned.

33. The CAHDI draws attention to the importance of ensuring, when it is necessary to include "disconnection clauses" in future conventions, that all the parties to the convention are able to identify the applicable EC/EU rules so as to allow each party to ascertain the extent of each of the respective parties' commitment.

34. During the CAHDI's discussions concerning the preparation of the present report, the EU reiterated the underlying reasons for the inclusion of a "disconnection clause", i.e., to take account of the institutional structure of the EU, including the unique relationship between the EU legal order and the domestic legal systems of the member states, without prejudice to EC and its member states' full respect of the conventions in question.²¹

35. The CAHDI welcomed with satisfaction the EU's willingness to provide full transparency for non-EU member states on the scope *ratione materiae* of the clause, including during negotiations of future instruments. The CAHDI further welcomed with satisfaction the relevant EU *acquis* submitted in pursuance of the mandate given to CAHDI to prepare the present report²² and of its readiness to provide updates, in an appropriate form, to States Parties of any substantive developments of the EU *acquis* after their entry into force.²³

36. The CAHDI underlines the importance of pursuing consideration of these matters, in particular the possibilities for ensuring legal certainty among the Parties about the applicable law.²⁴ This would facilitate above all the determination of the scope, material as well as temporal,²⁵ of the clauses. It would also facilitate the assessment of its conformity with the

²⁰ Para. 14 above.

²¹ Introductory remarks by the Presidency of the Council of the European Union on CAHDI Agenda Item 5 (Disconnection Clause), 6 March 2008.

²² See Appendix 3.

²³ *Ibid.*

²⁴ See also Explanatory Report of the Cybercrime Convention, para. 308 reproduced in Appendix 2.

²⁵ ECONOMIDES, C. and KOLLIPOULOS, A., note 16 above, p. 275, have criticised the 'automaticity' of the clauses, pointing out that there are examples of international conventions involving "disconnection clauses" which

object and purpose of the treaty concerned and would contribute to legal certainty and clarity for non-EU member states parties as to the accessibility and foreseeability of the regime applicable in place of the convention, whether EC, EU or domestic law.

37. The CAHDI notes that a number of multilateral treaties concluded within various international fora, including the United Nations, foresee the possibility of participation by "regional economic integration organisations" and prescribe that such organisations shall, when expressing their consent to be bound by the treaty, make a declaration specifying the scope of their competence over the issues covered by the treaty. In such cases, a "disconnection clause" is usually not included.²⁶ The European Community is a party to more than a dozen such conventions. A similar approach could, in appropriate cases, be adopted within the Council of Europe.

38. While the effects of the application of a "disconnection clause" in respect of the treaty concerned could thus be limited to guaranteeing a certain legal stability, such a clause could nevertheless have other indirect implications such as the possible emergence of a wider practice in international law, for example if these clauses begin to be included in multilateral treaties referring, in vague terms, to a range of other legal systems. The CAHDI therefore recommends that careful consideration be given in each particular case to whether a "disconnection clause" is actually appropriate, and if so to the precise scope of the clause. As the ILC Study Group recommended,²⁷ such clauses should be as clear and specific as possible. This will be useful in order to limit their use to circumstances where they are actually needed and avoid creating precedents as to lack of clarity and scope. In some cases it is assumed that the object and purpose of the treaty concerned does not exclude the conclusion of particular *inter se* legal arrangements between particular States Parties, for example where their legal effects would not apply to third parties and the treaty concerned does not purport to establish a particular standard.

39. Concerns have also been expressed about possible cases where the EC cannot or does not become party to a convention to which some or all of its Member States are parties. In such cases, questions of the liability of the EC Member States that are parties may arise under Community law, when they are acting in an area of Community law. As a matter of international law, with respect to non-EU states, the situation remains unchanged. Non-EU states can demand the full application of the convention in question from those EC Member States parties, but of course not from the Community, which is not a party.

40. The situation is special as regards *erga omnes* or standard-setting obligations. It was noted that such obligations are normally implemented not in mutual relations between parties but rather by each party individually in its domestic legal order. In this context, the clauses should be understood as leaving it to the EU and its Member States to decide whether the relevant treaty provision is to be implemented through national or EU/EC legislation. However, in order for EU Member States to comply with the convention in question, such EU/EC legislation should be in conformity with the convention. Otherwise, EU Member States could find themselves in a situation of non-compliance with the convention. Such situations could be avoided if the Community itself participates in the convention, a matter to be considered on a case-by-case basis.

Term used to refer to the clauses

are not necessarily applied automatically, for instance Article 13.3 of the *Unidroit Convention on stolen or illegally exported cultural property* (see Appendix 2).

²⁶An. example of such a treaty is United Nations Convention on the Law of the Sea: see its Annex IX concerning intergovernmental organizations constituted by States to which member States have transferred competence over matters governed by the Convention.

²⁷ See above, para. 20.

41. The CAHDI was invited to consider the term "disconnection clause" which has often been used to refer to the provisions in question. The CAHDI notes that any term used will not be a term of art, but merely a convenient way of referring to a number of provisions that occur in a variety of forms and in various contexts. Therefore, from a legal point of view the term used is not important. Any significance attached to the term will be political.

42. At its meeting of 18-19 September 1989, the CJ-DI (the CAHDI's predecessor) already questioned the appropriateness of the term "disconnection clause", finding it "misleading"²⁸ and that it reflected "*neither the real nature nor the purpose of the clause*".²⁹ The Committee recommended using a more appropriate expression and made suggestions such as "*special relations*", "*special agreements*" and "*inter se agreements*".

43. This issue was picked up again in the *Juncker Report* of 11 April 2006. Mr Juncker asked whether it would not be more appropriate to rename this type of clause and proposed, as an example, "*EU clauses*".³⁰ However, this term is already in use for various other types of clause, and does not reflect the fact that the "disconnection clause" may be in general terms and not specific to the EU.

44. One possibility that has sometimes been mentioned and that would reflect the effect of the clause without the unnecessarily negative implications of the term "disconnection clause" is "transparency clause".

Conclusions

45. On the basis of the foregoing considerations, the CAHDI draws the following conclusions:

i. The existing "disconnection clauses" are legally valid.

ii. They do not cover the relations between EU Member States and other parties to conventions. Therefore, they may not be interpreted or applied in a way that would change the contents of rights and obligations of EU Member States vis-à-vis other parties.

iii. Recent versions of the clauses stipulate that any EU regime that is different from the one established by the convention in question shall be without prejudice to the object and purpose of the convention. In order to assess whether it is the case, it is advisable to ensure that all parties to a convention are able to identify the applicable EU/EC rules. Given the practice within the Council of Europe of producing detailed explanatory reports to accompany its conventions, the nature, scope and function of any "disconnection clause" should be set out in the explanatory report.

iv The need for, and precise scope of, any "disconnection clause" should be assessed on a case-by-case basis, taking into account the nature and content of the convention in question.

v. The experience of EC participation in UN conventions may be helpful. Where the Community participates in a convention alongside its Member States, the need for a disconnection clause may fall away. Community participation may help to ensure the coherence of the relevant treaty regime; the fact that both the Community and its Member

²⁸ CDCJ (89) 58, note 6 above, p. 10, para. 33.

²⁹ Ibid, p.11, para. 36, vi.

³⁰ Note 9 above, p. 16.

States are parties would ensure that the convention would be fully implemented. Community participation should therefore be encouraged in appropriate case.

APPENDIX V

OPINION OF THE COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI) ON RECOMMENDATION 1842 (2008) OF THE PARLIAMENTARY ASSEMBLY

1. On 9 July 2008, the Ministers' Deputies communicated Assembly Recommendation 1842 (2008) "Activities of the International Committee of the Red Cross (ICRC)" to the Committee of Legal Advisers on Public International Law (CAHDI) for information and possible comments by 31 October 2008.

2. The Ministers' Deputies also communicated this Recommendation to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT), the European Committee on Migration (CDMG), the Steering Committee on Human Rights (CDDH), the European Committee on Legal Co-operation (CDCJ) and the Steering Committee for Education (CDED). The Ministers' Deputies invited their Rapporteur Group on Social and Health Questions (GR-SOC) to prepare, on the basis of possible comments, a draft reply for adoption at one of their forthcoming meetings.

3. The CAHDI examined the above-mentioned Recommendation at its 36th meeting (London, 7-8 October 2008) and adopted the following comments which concern aspects of the recommendation which are of particular relevance to the mandate of the CAHDI.

4. In Recommendation 1842 (2008), the Assembly recommended that the Committee of Ministers:

a support the ICRC in its work on monitoring conditions of detention;

b co-operate with ICRC on promoting humanitarian assistance for persons affected by armed conflict and other situations of violence (including refugees and internally displaced people);

c contribute to solving the issue of missing persons as a result of armed conflict and other situations of violence in Europe;

d promote the dissemination and national implementation of international humanitarian law.

5. From the outset, the CAHDI would like to underline the fact that it attaches considerable importance to international humanitarian law, which is a regular item on its agenda. In particular, the CAHDI has paid special attention to the relationship between international law, human rights law and international humanitarian law.

6. The CAHDI member states and observers regularly report on national events aimed at the promotion and dissemination of international humanitarian law and hold exchanges of views on the promotion of the relevant international instruments, such as the Third Additional Protocol to the Geneva Conventions and the Second Protocol to the Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict.

7. The ICRC contributes actively as an observer to the work of the CAHDI, attending its meetings regularly to inform the Committee about the ICRC's on-going projects and initiatives. In particular, the CAHDI closely followed the elaboration and the dissemination of the ICRC Study on Customary International Humanitarian Law and took note of the ICRC document "Principles for Legislating the Situation of Persons Missing as a Result of Armed Conflict or Internal Violence", which was offered as a tool to assist states and their national

authoritative bodies with the adoption of legislation that will address, prevent and resolve cases of missing persons.

8. Moreover, at its 28th meeting (Lausanne, 13-14 September 2004) the CAHDI held an exchange of views with Mr Jakob Kellenberger, President of the ICRC, on the relevance of the international humanitarian law in contemporary armed conflicts, the issue of weapons and war, and national implementation of the international humanitarian law. Other issues, such as extra-judicial killings and detention in the context of the fight against terrorism were also addressed during this exchange of views.

9. Finally, the CAHDI pursues its consideration of current issues of international humanitarian law and supports the activities of the ICRC.

APPENDIX VI

OBJECTIONS TO OUTSTANDING RESERVATIONS AND DECLARATIONS TO INTERNATIONAL TREATIES OBJECTIONS AUX RÉSERVES ET DÉCLARATIONS AUX TRAITÉS INTERNATIONAUX SUSCEPTIBLES D'OBJECTION

(08/10/08)

Legend / Légende:

- State has objected / L'Etat a fait objection
- State intends to object / L'Etat envisage de faire objection
- State does not intend to object / L'Etat n'envisage pas de faire objection

TREATIES / TRAITÉS

- A. Convention on the Rights of Persons with Disabilities and Optional Protocol thereto / *Convention relative aux droits des personnes handicapées et son protocole facultatif*, New York, 13 December / décembre 2006
- B. International Covenant on Economic, Social and Cultural Rights / *Pacte international relative aux droits économiques, sociaux et culturels*, New York, 16 December / décembre 1966
- C. United Nations Convention against Corruption / *Convention des Nations Unies contre la Corruption*, New York, 31 October / octobre 2003
- D. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III) / *Protocole additionnel aux Conventions de Genève du 12 août 1949 relatif à l'adoption d'un signe distinctif additionnel (Protocole III)*, Geneva/ Genève, 8 December / décembre 2005
- E. International Convention for the Suppression of Acts of Nuclear Terrorism / *Convention internationale pour la répression des actes de terrorisme nucléaire*, New York, 13 April/avril 2005
- F. Convention on the prevention and punishment of crimes against internationally protected persons, including diplomatic agents / *Convention sur la prévention et le répression des infractions contre les personnes jouissant d'une protection internationale, y compris les agents diplomatiques*, New-York, 14 December/décembre 1973
- G. Comprehensive nuclear test-ban treaty / *Traité d'interdiction complète des essais nucléaires*, New-York, 10 September/septembre 1996

States / Etats	Conventions	A			B		C	D	E			F	G
	Reservation/ Réserve	1	2	3	4	5	6	7	8	9	10	11	12
		El Salvador	Mauritius Maurice	Thailand Thaïlande	Bahrain Bahreïn	Pakistan	Bahamas	Israel Israël	Egypt Égypte	Uzbekistan Ouzbékistan	Turkey Turquie	Singapore Singapour	Colombia Colombie
	Deadline Délai	30/03/07	25/09/07	28/07/09	03/10/08	17/04/09	30/01/09	21/11/08	20/09/05	07/05/09	14/09/05	13/05/09	11/02/09
Albania / Albanie													
Andorra / Andorre													
Armenia / Arménie													
Austria / Autriche	○						□						
Azerbaijan / Azerbaïdjan													
Belgium / Belgique													
Bosnia and Herzegovina / Bosnie-Herzégovine													
Bulgaria / Bulgarie													
Croatia / Croatie													
Cyprus / Chypre													
Czech Republic / République tchèque													
Denmark / Danemark													
Estonia / Estonie													
Finland / Finlande	○												
France													
Georgia / Géorgie													

Germany / <i>Allemagne</i>	○**												
Greece / <i>Grèce</i>													
Hungary / <i>Hongrie</i>													
Iceland / <i>Islande</i>													
Ireland / <i>Irlande</i>						□							
Italy / <i>Italie</i>								●					
Latvia / <i>Lettonie</i>								●		●			
Liechtenstein													
Lithuania / <i>Lituanie</i>													
Luxembourg													
Malta / <i>Malte</i>													
Moldova	□	□		□		□	□	□			□		
Monaco													
Montenegro													
Netherlands / <i>Pays-Bas</i>	○												
Norway / <i>Norvège</i>													
Poland / <i>Pologne</i>	○**												
Portugal													
Romania / <i>Roumanie</i>													
Russian Federation / <i>Fédération de Russie</i>								○*					
San Marino / <i>Saint-Marin</i>													
Serbia / <i>Serbie</i>													
Slovakia / <i>Slovaquie</i>	○**												
Slovenia / <i>Slovénie</i>													
Spain / <i>Espagne</i>													
Sweden / <i>Suède</i>	○	○		□	□								
Switzerland / <i>Suisse</i>													
"the former Yugoslav Republic of Macedonia" / "l'ex-République yougoslave de Macédoine"													
Turkey / <i>Turquie</i>													
Ukraine													
United Kingdom / <i>Royaume-Uni</i>							□						
Canada													
Holy See / <i>Saint-Siège</i>													
Israel													
Japan / <i>Japon</i>				□								□	
Mexico / <i>Mexique</i>													
United States of America / <i>Etats-Unis d'Amérique</i>													

(*) Consideration of political statement / *Considération d'une déclaration de nature politique*

(**) If confirmed upon ratification / *Si confirmé lors de la ratification*

(***) Considers it a late reservation and therefore not in force / *Considère ceci comme une réserve tardive et donc pas en vigueur*

APPENDIX VII

Opening statement by Ms. Patricia O'Brien
Under-Secretary-General for Legal Affairs, The Legal Counsel
in the framework of the 36th Meeting of the Committee of Legal Advisers on Public
International Law (CAHDI)
Agenda item 5 "Exchange of views with Ms. Patricia O'Brien"

Dear Michael,
Dear colleagues and friends,

I am very pleased for the opportunity to have an exchange of views with you in my new capacity as Legal Counsel of the United Nations. This, indeed, is a great honour.

Whereas last time around when we met in Strasbourg I could hide safely behind the "Ireland" nameplate and listen to my predecessor Nicolas Michel, not knowing whether to pity or envy him for being UN Legal Counsel. Now that I am in his place I am not sure which sentiment prevails. As I intend to stay in touch with you and with CAHDI in the future, I hope I will get an opportunity to keep you informed.

On that note, allow me to begin with some introductory remarks. I wish to address three topics:

- (i) further to Nicolas' briefing in March in Strasbourg, I wish to provide you with an update on development of the concept of the "responsibility to protect";
- (ii) secondly, I propose to share with you some thoughts on the ongoing concerns regarding the proliferation of international courts and tribunals; and
- (iii) lastly, I thought you might be interested to have a further brief overview of our thinking on the ongoing conundrum of the peace and justice debate

As Legal Advisers in your respective Ministries of Foreign Affairs I know that you wield great influence on your respective countries' positions with regard to all of these issues.

Responsibility to protect

I was struck by Foreign Secretary David Miliband's focus last night on the concept of sovereignty as responsibility which of course lies at the heart of the principle of R2P.

We now widely speak of sovereignty as responsibility – the positive duty of States to protect their populations. Yet, R2P is not exclusively about how we understand relations between States. It is also, perhaps even primarily, about individuals and their place in the international legal order.

For many years, the international community was thought of in state – centric terms. Yet, the UN Charter as a whole has a human face. Its consistent message of maintaining peace and securing freedom is one that can only be understood by thinking of peoples as well as States.

The terrible events of the 1990's which brought issues of sovereignty and intervention into sharp focus were coupled with a deepening recognition that individuals are in a direct relationship with the international legal order. This is not a wholly new development. Individuals have for many years possessed responsibility in international humanitarian law and human rights law.

However, the consequences of that direct relationship have evolved in our globalised and increasingly independent world – where state borders are more and more permeable.

As the international community still struggles to absorb the implications of this new reality, R2P offers a conceptual framework, which could make tangible the role of the individual and human rights at the heart of the UN.

I would emphasize at the outset that legal input and guidance is of course crucial to the clarification and implementation of emerging international principles, including R2P. And we all have a responsibility in this regard. But we, as lawyers, must recognise that key challenges of the R2P concept, such as promoting a conceptual shift in our shared understanding of the obligations of membership of the UN, are clearly not solely or fundamentally legal tasks. My concern as Legal Counsel will be to play a supportive role to ensure that, if and when we invoke the R2P concept, we do so coherently, with confidence and in accordance with international law, and, in particular, in accordance with the UN Charter.

For your part, I would endorse the statement made by my predecessor that you are each well-placed within your governments to keep the political spotlight on the responsibility to protect and to give thought to how it can be made effective. This will involve raising awareness of the concept whenever and however opportune. It will also involve a responsibility on your part to increase understanding of the concept and to address and dispel the misunderstanding which may abound. We know that ensuring that the relevant criminal legislation is in place and that any offenders are prosecuted and punished is essential of course, but so is an effective strategy for prevention. We can learn much in this regard from the humanitarian law tradition of widespread and effective dissemination of the law. Promoting a rule of law culture among the institutions of government and the population at large is key to prevention.

In the years immediately preceding the report of the International Commission on Intervention and State Sovereignty, the UN and its highest officials had repeatedly spoken of the need for this new age of prevention. R2P, a model with prevention as its keystone, may assist in breaking the cycle of human rights violations and conflict and in ensuring the involvement of the international community where populations are at risk.

The responsibility to protect is now slowly beginning to crystallise. Its foundations are firmly placed in existing international law - international humanitarian law, human rights law, international criminal law and the UN Charter itself. I would also suggest the rule of law itself as a core element of the concept. At the domestic level, the rule of law guarantees basic rights to prevent coercive or abusive action by the State. At the international level, R2P can be considered an essential aspect of international rule of law applying to whole populations. Simply put, sovereign States have a first fundamental duty to protect their populations from the most egregious crimes. Those crimes of course are: genocide; war crimes; ethnic cleansing; and crimes against humanity.

As we are all aware, and as we were reminded by Secretary-General Ban Ki Moon in his July speech in Berlin, the responsibility to protect can, in summary, be broken down into three elements or pillars, which are:

1. that States are under an obligation to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.
I think it is important to mention in the context of the first of these elements: To be conceptually coherent and operationally sound, the scope of R2P should remain narrow and tied to these four listed crimes and violations. A key element of this first pillar is that the primary responsibility rests with States to protect their populations.

2. that the international community has a responsibility to assist States in that regard and to use all appropriate peaceful means (political, diplomatic, humanitarian and other means) in pursuit of that protective role; and
3. that MS have a responsibility to respond in a timely and decisive manner when a State is failing to provide protection. The international community is under a responsibility to act where the State is unable or unwilling to protect their populations. Response could include the wide range of tools available to the UN under: Chapter VI; Chapter VIII; and coercive measures under Chapter VII, where necessary.

There are of course already a number of legal frameworks and mechanisms upon which we can draw. The Genocide Convention places a legal obligation on all States to prevent genocide. With the Rome Statute, a system of international criminal justice based on the rule of law provides a common framework for the core crimes of genocide, war crimes, and crimes against humanity. And it is also already the case that where States consider intervention, they are required to do so in accordance with the rules of the UN Charter.

We can also look to international human rights treaty monitoring bodies. These mechanisms can act as an early warning system, not merely flagging where breaches of R2P have occurred, but also to proactively identifying where a State's capacity to fulfil the responsibility requires international assistance. This should allow earlier and more effective responses by the international community.

It will be important that measures taken by the international community in pursuit of R2P are recognised as such to ensure that the concept moves at the appropriate time from theory to a real part of the landscape of international law. To quote the Secretary General: "How we are proceeding in the effort to turn promise into practice, words into deeds."

Shared language and visibility of R2P in action could build consensus among the international community on the meaning and scope of the concept, thereby guarding against a fragmented and discordant understanding of the principle. The 2005 Outcome Document is a clear

statement of R2P, but the principle must be gradually constructed on the basis of concrete practical actions. There are already several valuable precedents where the international community has acted in furtherance of the responsibility to protect, through mediation and other peaceful supports. Consideration could be given to highlighting such actions as success stories, to assist in further embedding the model in the international order.

However, in expressly using the language of R2P, we must be ever-cautious not to exacerbate tensions or threats to peace and security in particular cases. Equally, the language of R2P should not be employed where actions fall outside its remit, at risk of discrediting the model.

In the 2005 Outcome Document, Member States firmly emphasised collective fulfilment of the responsibility to protect, through the mechanisms of the UN and in accordance with the Charter. Collective action and the ultimate threat of force cannot stand without UN engagement. It would undermine both the logic of R2P and the shared consensus of the international community if the UN lags behind or fails to support implementation of R2P at all levels (national, regional and international). Bearing in mind its relative fragility, we should regard R2P as an indispensable and cross-cutting element of our efforts to promulgate the international rule of law.

The international community is strongly anticipating the Secretary General's report to the General Assembly this year, setting out a proposed approach to R2P by the UN. As I take up my duties as UN Legal Counsel, I am very conscious of the great challenge we face in seeking to advance the R2P

model, in accordance with international law and in partnership with regional organizations. And, as with my predecessor, I invite you as Foreign Ministry Legal Advisers to keep a focus on this issue within your own countries. In a sense, R2P is a new prism through which to view and crucially to connect the existing blocks of international law. For my part, it is my view that an R2P perspective can be coherently and systematically mainstreamed into most if not all of the activities of the UN and I would encourage you, my colleagues, to also consider the place which this concept can play in the emergence and development of thinking within your national jurisdictions and within the UN.

The proliferation of international courts and tribunals

Let me now turn to the proliferation of international courts and tribunals.

This issue is, of course, part of the broader discourse on the nature of international law. We live in a time when lawyers speak of a proliferation of international courts and tribunals, a natural offshoot of the increase in transnational forms of governance and co-operation between States. As relations between States are placed on a formal footing in various spheres, such as trade and the environment, they are accompanied by specialised international methods of dispute settlement. This plays an important role in legitimising transnational structures and maintaining the rule of law in international relations. Moreover, individuals have greater interaction with the international legal order, both as rights-bearers under international humanitarian law and international human rights law, and as bearing responsibility under international criminal law. This also contributes to the rule of law, ensuring that State sovereignty cannot place individuals entirely beyond the reach of international law in appropriate circumstances.

We must bear in mind that this expansion of the international judicial architecture is of course accompanied by an ever increasing scope and density of international norms. This raises important questions for the international lawyer, for example whether the risks of fragmentation and the spectre of “self-contained regimes” in international law are real or imaginary.

These questions are also of concern to domestic judges and lawyers. To quote Justice Sandra Day O'Connor, “understanding international law is no longer just a legal specialty, but a duty we all share.” Domestic legal systems may feel under stress, as the influence of international law upon a State's internal rules and policies continues to grow. There may be a fear that judicial competence is creeping upward, fuelled by a traditional conception of domestic and international courts standing in a hierarchical relationship. Equally, the reliance of international law on municipal courts for its implementation may suffer greatly if the international legal system *appears* fragmented to those who enter it as unfamiliar terrain, even if that is not the reality. In considering relations between international and domestic courts, we should remain conscious of the overriding obligation to justice and the rule of law at all levels of adjudication.

Peace and Justice

Let me finally turn to the issue of the relationship between peace and justice, an issue that more and more arises in our efforts to help ending violent conflicts.

With the growing involvement of the United Nations in post-conflict societies - both in facilitating the negotiation of peace agreements and in establishing judicial and non-judicial accountability mechanisms - the Organization has frequently been called upon to express its position on the relationship between peace and justice and connected issues such as on the validity and lawful contours of amnesty and on the interaction between UN

representatives and persons indicted by international and UN-based tribunals, who continue to hold positions of authority in their respective countries.

With regard to the relationship between peace and justice, a good starting point is the position taken by the Secretary-General in a landmark address to the Security Council on 24 September 2003:

“We should know that there cannot be real peace without justice, yet the relentless pursuit of justice may sometimes be an obstacle to peace. If we insist, at all times and in all places, on punishing those who are guilty of extreme violations of human rights, it may be difficult or even impossible to stop the bloodshed and save innocent civilians. If we always and everywhere insist on uncompromising standards of justice, a delicate peace may not survive. But equally, if we ignore the demands of justice simply to secure agreement, the foundations of that agreement will be fragile, and we will set bad precedents.” (24 September 2003, the Secretary-General in the Security Council, S/PV.4833).

“There are no easy answers to such moral, legal and philosophical dilemmas. At times, we may need to accept something less than full or perfect justice or to devise intermediate solutions such as truth and reconciliation commissions. We may need to put off the day when the guilty are brought to trial. At other times, we may need to accept, in the short-term, a degree of risk to the peace in the hope that in the long-term peace will be more securely guaranteed.” (24 September 2003, the Secretary-General in the Security Council, S/PV.4833).

While we will uphold those principles, the challenge will be to find the right balance for each specific instance where this issue arises. Justice and peace must be regarded as complimentary requirements. There can be no lasting peace without justice. The problem is not one of choosing between peace and justice, but of the best way to interlink one with the other, in the light of specific circumstances, without ever sacrificing the duty to pursue justice.

On the issue of amnesties for international crimes, the UN position is equally clear:

The UN does not recognize any amnesty for genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law. This principle, which reflects a long-standing position and practice, applies to peace agreements negotiated or facilitated by the United Nations, or otherwise conducted under its auspices. Guidelines have been established for UN personnel in situations such as where the UN is involved in the witnessing of agreements or in interacting with indictees. These guidelines follow from the UN's commitment to the pursuit and maintenance of respect for international criminal justice.

Conclusion

These are just a few issues which the Office of Legal Affairs of the United Nations is dealing with and which I hope may be of interest to you.

Thank you.

APPENDIX VIII

PRELIMINARY DRAFT AGENDA FOR THE 37th MEETING

A. INTRODUCTION

1. Opening of the meeting by the Chair, Mr Rolf Fife
2. Adoption of the agenda
3. Approval of the report of the 36th meeting
4. Statement by the Director of Legal Advice and Public International Law, Mr Manuel Lezertua

B. ONGOING ACTIVITIES OF THE CAHDI

5. Decisions by the Committee of Ministers concerning the CAHDI and requests for the CAHDI's opinion
6. Immunities of States and international organisations:
 - a. State practice and case-law
 - b. UN Convention on Jurisdictional Immunities of States and Their Property
7. Organisation and functions of the Office of the Legal Adviser of the Ministry for Foreign Affairs
 - a. Situation in member and observer States
 - b. The role of the OLA in national implementation of international law
8. National implementation measures of UN sanctions and respect for Human Rights
9. Cases before the ECtHR involving issues of public international law
10. Peaceful settlement of disputes:
11. 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

C. GENERAL ISSUES ON PUBLIC INTERNATIONAL LAW

12. Consideration of current issues of international humanitarian law
13. Developments concerning the International Criminal Court (ICC)
14. Implementation and functioning of other international criminal tribunals (ICTY, ICTR, Sierra Leone, Lebanon, Cambodia)
15. Follow-up of the International Conference "International Courts and Tribunals - The Challenges Ahead" (London, 6-7 October 2008)

16. Follow-up to the outcome document of the 2005 UN World Summit – Advancing the international rule of law
17. Fight against terrorism - Information about work undertaken in the Council of Europe and other international bodies
18. Topical issues of international law

D. OTHER

19. Date, place and agenda of the 38th meeting of the CAHDI
20. Other business:
 - a. Status of ratification of Protocol 14 to the ECHR

APPENDIX IX

List of items discussed and decisions taken Abridged report

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 36th meeting in London on 7 and 8 October 2008 with Sir Michael Wood in the Chair. The list of participants is set out in Appendix I to the meeting report.³¹

2. The CAHDI adopted the agenda as set out in **Appendix I** to the present report. It also adopted the report of its 35th meeting (Strasbourg, 6-7 March 2008) and authorised the Secretariat to publish it on the CAHDI's website.

3. The Director of Legal Advice and Public International Law (Jurisconsult), Mr Manuel Lezertua, informed the CAHDI about developments concerning the Council of Europe since the last meeting of the Committee, in particular those concerning the Council of Europe Treaty Series. His intervention is set out in Appendix III to the meeting report.

4. The CAHDI considered the decisions of the Committee of Ministers relevant to its work and requests for the CAHDI's opinion.

In accordance with the *Ad hoc* terms of reference given to it by the Committee of Ministers on 10 October 2007, the CAHDI adopted a *Report on the consequences of the so-called "disconnection clause" in international law in general and for the Council of Europe's conventions containing such a clause in particular*,³² agreed to submit the report to the Committee of Ministers, and recommended that the Committee of Ministers consider making the report public.

Furthermore, following the Committee of Ministers' decision of 15 July 2008,³³ the CAHDI adopted an opinion on Recommendation 1842 (2008) of the Parliamentary Assembly as set out in **Appendix II** to the present report.

5. The CAHDI considered state practice and case-law regarding state immunities. It invited delegations to submit or update their contributions to the relevant CAHDI database at their earliest convenience. It further received updates on the process of accession of its member and observer states to the Convention on Jurisdictional Immunities of States and Their Property.

6. The CAHDI considered the situation in member and observer states concerning the Organisation and Function of the Office of the Legal Adviser of the Ministry for Foreign Affairs. In this context, it welcomed the new contributions to the relevant CAHDI database and invited delegations to submit or update their contributions at their earliest convenience. The Committee further discussed the role of the OLA in the implementation of international law at the national level and agreed to keep this item on the agenda.

7. The CAHDI further discussed the issue of the national implementation of UN sanctions and respect for human rights and in particular it took note with appreciation of the presentation of the representative of the United Nations Analytical Support and Sanctions Monitoring Team for Al Qaida and the Taliban. It further took note of the judgment of the Court of Justice of the European Communities in Joined Cases Kadi and Al Barakaat

³¹ Document CAHDI (2008) 25 prov.

³² Document CAHDI (2008) 1 rev 2.

³³ Document CM/Del/Dec (2008) 1032.

International Foundation v. Council and Commission. The CAHDI also referred to its restricted database on the national implementation of UN sanctions and respect for human rights and agreed, in principle, to make this database public. With this in mind, the CAHDI's member and observer States were invited to consider their contributions to this database before 1 December 2008.

8. The CAHDI took note of cases brought before the European Court of Human Rights (ECHR) involving issues of public international law on the basis of information provided by delegations. It further invited delegations to keep the Committee informed about relevant pending cases.

9. In the context of its consideration of issues relating to the peaceful settlement of disputes, the CAHDI welcomed the adoption by the Committee of Ministers of its Recommendation Rec(2008)8 to member states on the acceptance of the jurisdiction of the International Court of Justice and its Recommendation Rec(2008)9 to member states on the nomination of international arbitrators and conciliators. Regarding the latter, the CAHDI invited its member and observer States to keep under review the list of treaties and other instruments, set out in the appendix to this Recommendation, which provide for the nomination of arbitrators or conciliators.

10. In the framework of its activity as the European Observatory of Reservations to International Treaties, the CAHDI considered a list of outstanding reservations and declarations to international treaties and the follow-up given to them by delegations. A table summarising delegations' positions is set out in **Appendix III** to the present report.

The CAHDI also continued its consideration of possibly problematic reservations to international treaties applicable to the fight against terrorism in the light of the list it had drawn up in pursuance of the Committee of Ministers' decision of 21 September 2001³⁴ and comments provided by delegations.

11. The CAHDI had an exchange of views with Ms Patricia O'Brien, United Nations Under-Secretary-General for Legal Affairs and Legal Counsel.

12. The CAHDI discussed the work of the 60th session of the International Law Commission (ILC) on the basis of its report, presented by a member of the ILC.

13. The CAHDI considered current issues of international humanitarian law on the basis of contributions from delegations.

14. The CAHDI also considered recent developments concerning the International Criminal Court (ICC) as well as developments concerning the implementation and functioning of the international criminal tribunals.

15. The CAHDI further discussed the outcome of the International Conference "International Courts and Tribunals – The Challenges Ahead", organised by the Council of Europe under the Swedish Chairmanship of the Committee of Ministers and at the invitation of British authorities (London, 6-7 October 2008). The Conference provided a forum for fruitful discussions between the CAHDI's members and observers and a significant number of presidents, prosecutors and registrars from international courts and tribunals. The CAHDI agreed to follow the Conference up by keeping it as an item on its agenda. The Secretariat of the CAHDI was requested to circulate the Conference conclusions it had prepared.

³⁴ Document CM/Del/Dec (2001)765bis/2.1.

16. The CAHDI considered the follow-up to the Outcome Document of the 2005 UN World Summit and took note of the work undertaken in the Council of Europe and other international bodies on the fight against terrorism. It agreed to pursue consideration of both matters at its next meeting.

17. The CAHDI also held an exchange of views on the UN Human Rights Committee's Draft General Comment No. 33 under the item "Topical issues of international law".

18. Following the expiry of the second term of office of Sir Michael Wood (United Kingdom), the Chair of the CAHDI, and in accordance with the statutory regulations, the CAHDI elected Mr Rolf Einar Fife (Norway) as Chair for one year as of 1 January 2009. The CAHDI expressed its gratitude to the outgoing Chair for the excellent work he had accomplished.

Moreover, in accordance with the statutory regulations, the CAHDI elected Mr Luis Serradas Tavares (Portugal) as Vice-Chair of the Committee for one year as of 1 January 2009.

19. The CAHDI approved its draft specific terms of reference for 2009-2011 as set out in **Appendix IV** to the present report and decided to submit them to the Committee of Ministers for adoption.

20. Under other business, the CAHDI took note with concern of the worsening of the European Court of Human Rights' situation, where the number of individual appeals pending continues to increase. It noted that the state of ratification of Protocol 14 to the European Convention on Human Rights has remained unchanged for a number of years. In this context, a number of delegations raised the possibility of launching new initiatives aimed at enabling the Court to deal efficiently with the ever-increasing number of pending cases.

21. The CAHDI decided to hold its next meeting in Strasbourg on [19 and 20 March 2009] and adopted the preliminary draft agenda as it appears in **Appendix V** to the present report.

22. The CAHDI thanked the British and Swedish authorities for their warm hospitality and valuable contribution to the preparation of the Conference "International Courts and Tribunals – The Challenges Ahead" and the 36th meeting of the Committee.