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

**27th meeting
Strasbourg, 18-19 March 2004**

MEETING REPORT

Secretariat document
prepared by the Directorate General of Legal Affairs

A. INTRODUCTION

1.-3. Opening of the meeting, adoption of the agenda and communication from the Secretariat

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 27th meeting in Strasbourg on 18 and 19 March 2004 under the chairmanship of Ambassador Michel (Switzerland), Chairman of the CAHDI. The list of participants is set out in **Appendix I**.

2. The agenda, set out in **Appendix II**, was adopted unanimously. The Committee also approved the report of the previous meeting (document CAHDI (2003) 14 prov.) and authorised the Secretariat to publish it on the CAHDI website (www.coe.int/cahdi).

3. The Chairman thanked the special guests for accepting the invitation and welcomed the representative of the ICRC, a new observer on the Committee. He added that the CAHDI's previous meetings had taken place in contexts of extreme violence when the outrages of 11 September 2001, the war in Iraq and the murder of the Swedish Foreign Affairs Minister occurred. He laid particular emphasis on the atrocity of the attacks perpetrated in Madrid as lately as 11 March, assured the Spanish delegation of the Committee's heartfelt sympathy and solidarity, and asked the delegation to pass on the condolences of the Committee to the Spanish authorities.

4. The Spanish delegation expressed its gratitude and warmly thanked the Chairman. It recalled the fact that Spain had been stricken by acts of terrorism for over a quarter-century. The recent attack, however, had been exceptional in its scale and effect, given the different nationalities of the victims and also of the criminal perpetrators who had been aided by cross-border support and complicity. As a result, terrorism threatened all democracies, and the Spanish government was determined to be still more resolute in fighting terrorism and to emphasise the importance of international co-operation. In this context, the delegation recalled the role of the Council of Europe which must intensify its inter-state collaboration.

5. The Director General of Legal Affairs, Mr Guy de Vel, addressed the Committee and conveyed the deep sympathy of the Council of Europe Secretariat to Spain. The extent of the anti-terrorism activities being conducted within the Council of Europe was proof of solidarity but also of the need for vigilance. He offered also his condolences to the delegation of "the former Yugoslav Republic of Macedonia" following the death of its President. The Director General concluded with an account of developments of interest to the CAHDI concerning the Council of Europe and including the European Treaty Series. The text of his address is reproduced in **Appendix III**.

B. ONGOING ACTIVITIES OF THE CAHDI

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

6. The Chairman adverted to the request of the Ministers' Deputies to the CAHDI for an opinion on Recommendation 1602 (2003) on immunities of members of the Parliamentary Assembly. In response to the request, the CAHDI at its 26th meeting had adopted a preliminary opinion dealing with certain procedural questions, and had concentrated on the public international law aspects (see document CAHDI (2003)14, Appendix III).

7. In this connection, the Secretariat informed the CAHDI that the Committee of Ministers had taken note of its opinion and transmitted it to the Parliamentary Assembly. In

order to meet the CAHDI's request and continue with work in the matter, the Secretariat had also prepared a digest of the Assembly's practice and of other relevant texts (doc. CAHDI (2004) Inf.2 and addendum). The Chairman invited the delegations to exchange their views, and suggested that if a consensus was not reached at the current meeting, the question should be resumed at the next.

8. The delegation of Portugal said it would prefer to postpone the discussion to the next CAHDI meeting. Moreover, it shared the views expressed by the United Kingdom at the previous meeting regarding the interpretation of Article 14 of the General Agreement on Privileges and Immunities of the Council of Europe ("the Agreement") (cf. paragraph 5.i of Recommendation 1602 (2003)). It observed that what was ostensibly an interpretation in fact constituted a change in the scope of this provision such as to necessitate the amendment of the Agreement. As to the question of the links between the various immunities, the delegation, citing the case of Portugal as an example, considered it contestable that members of the Parliamentary Assembly not elected by universal suffrage should continue to enjoy European immunity when the country had decided to lift their immunity. Regarding the "laissez-passer", Portugal had enacted a law on the subject in 2003, and caution should be exercised over the method adopted and applied. If need be, Portugal could give to the CAHDI examples drawn from the relevant national legislation.

9. The delegation of the Russian Federation once again queried the notion "during the sessions of the Assembly" as stated in paragraph 2 of the Recommendation, and took the view that it did not cover the whole year. Furthermore, as it had pointed out at the previous meeting, the Parliamentary Assembly was not the competent authority for interpreting the Agreement and the notion of the session's duration according to international law; only the States Parties to the treaty could do so. Concerning paragraph 6.iii of the Recommendation, the question of the "laissez-passer" was a domestic policy matter and the legislation of the Russian Federation did not permit the issuance of such documents to the members of the Council of Europe. Thus, the request made to the member states to acknowledge the "laissez-passer" was permissible only if consistent with domestic legislation, and that was not so in the case of the Russian Federation.

10. The German delegation differed with some other delegations in considering the scope of Article 14 of the Agreement wide enough to accommodate an extensive interpretation, as evidenced by the fact that the provision was formulated to cover parliamentarians' protection in the discharge of their office. It furthermore accepted the interpretation of the notion "during the sessions of the Assembly" within the meaning of paragraph 5.i of the Recommendation. However, as the United Kingdom delegation had pointed out earlier, this power of interpretation belonged to the national courts. In addition, it considered that the waiving of immunity contemplated in paragraph 5.ii of the Recommendation, reflecting Article 15 of the Agreement, was in accordance with Article 31 paragraph 3 of the Vienna Convention on the Law of Treaties. Lastly, the delegation asked the Chairman to grant extra time to study the document prepared by the Secretariat, and to resume discussion of this item at the next meeting.

11. The Netherlands delegation concurred with the remarks of the Russian Federation concerning the authority of the States Parties to the treaty to interpret the notion "during the sessions of the Assembly", but pointed out that if the Parties agreed on an interpretation, it was valid and must prevail. The Netherlands delegation therefore called upon the Committee members to arrive at a consensual interpretation of the notion. It also considered the interpretation of paragraph 5.i of the Recommendation compatible with Article 14 of the General Agreement and regarded it as an appropriate interpretation of the provisions on immunities. Finally, waiving of immunity ought not to be automatic, and the national authorities should be contacted for the purpose of waiving the immunity in question.

12. The delegation of Azerbaijan stressed that it was for the Parties to interpret the notion "during the sessions of the Assembly". As to the question of waiving immunity, the

delegation noted that the end of the last sentence in paragraph 3 clashed with paragraph 5.ii of the Recommendation, reflecting the dilemma facing the Parliamentary Assembly. In fact the two texts must necessarily be interpreted in the event of immunity being waived. Their correlation should therefore be the subject of further clarifications.

13. The delegation of Sweden shared the views expressed by the United Kingdom at the previous meeting about placing an extensive construction on Article 14 of the Agreement, whose scope could only be widened by an amendment to the treaty. Accordingly, it wondered what legal implications an interpretation of this article by the Committee of Ministers would have for the national courts applying the treaty. Lastly, the grant of the "laissez-passer" did not raise major difficulties, but was not possible for the time being in Swedish law.

14. The delegation of Austria drew a distinction between the procedural questions and the substantive issues. The former related to the methods of interpretation in accordance with public international law, and the latter concerned the grant of immunity. This delegation concurred with the delegations of Germany and the Netherlands in the belief that the interpretation of paragraphs 2 and 5.i of the Recommendation was reasonable. The question raised was whether the Parties agreed on the interpretation. It was in everyone's interest that all members of the Assembly should be protected, because their functions had evolved considerably with time and now included election monitoring and field missions. From the procedural standpoint it was possible for the Committee of Ministers in its configuration of States Parties to the Agreement to agree on the due interpretation of specific provisions of the Agreement. Any divergence of interpretation in the application of these provisions at national level was up to the national courts to determine. The delegation therefore stressed the importance of a consensus.

15. The United Kingdom delegation said that its position was unchanged. It thought that there had been too much expense of time and documents on this question. It was not the place of the CAHDI, or of the Committee of Ministers, to adopt a stance on paragraph 2 of the Recommendation, as no request to that effect had been made by the Parliamentary Assembly in the Recommendation. Moreover, the Committee of Ministers decision in the matter would not be binding. The United Kingdom's domestic legislation incorporated the Agreement, and the interpretation of the provisions in question lay to the domestic courts. As to paragraph 5 of the Recommendation, it considered that the scope of Article 14 of the Agreement was very broad as it stood, and that paragraph 5.i of the Recommendation brought a new notion into being. The national courts responsible for applying the instruments in force, Articles 14 and 15 of the Agreement included, would not apply an interpretation of that kind. Regarding paragraph 5.iv of the Recommendation, the competent authorities were not under an obligation to notify the Assembly of the measures taken in respect of an Assembly member. For example, if a member was caught in the act of committing an offence, the British authorities would not inform the President of the Assembly and at best could only do so with the consent of the person concerned.

16. The Chairman concluded that there was no consensus, and therefore proposed a resumed discussion of this item at the next meeting. He also invited the delegations to forward any comments to the Secretariat by 20 May 2004, and asked Mr Lammers (Netherlands), who had chaired the drafting group for the preliminary opinion, to report at the next meeting.

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

a. Consideration of outstanding reservations and declarations to international Treaties

17. In the context of its function as European Observatory of Reservations to International Treaties, the CAHDI considered a list of declarations and reservations to international treaties on the basis of the document drawn up by the Secretariat in consultation with the Chair (see document CAHDI (2004) 4).

18. The CAHDI commenced with the reservations and declarations to treaties concluded outside the Council of Europe (CAHDI (2004) 4).

19. The delegation of Austria informed the Committee members that its authorities had objected to the Syrian Arab Republic's reservation of 7 April 2003 to the Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979¹, on the ground of incompatibility with the object and purpose of the Convention. The delegation recalled the final date for submitting an objection, 6 April of the current year, and invited the States to do so as speedily as possible.

20. The delegations of the Netherlands, Greece, Spain, Finland, Sweden and Germany indicated that their authorities had objected to the above reservation, pointing out that since Article 2 was a fundamental provision of the Convention the reservation defeated the object and purpose of the treaty, that the reference to the Shariah was too vague, and that consequently the extent of this State's commitment in public international law lacked clarity and could be questioned.

21. The delegation of Austria expressed reservations concerning the interpretative declaration of the United Kingdom of Great Britain and Northern Ireland of 24 June 2003 to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, New York, 25 May 2000², although it had no objection. It

¹ Reservation by the Syrian Arab Republic:

.... subject to reservations to Article 2 ; Article 9, paragraph 2 concerning the grant of a woman's nationality to her children; Article 15, paragraph 4 concerning freedom of movement and of residence and domicile ; Article 16, paragraph 1 c), d), f) and g), concerning equal rights and responsibilities during marriage and at its dissolution with regard to guardianship, the right to choose a family name, maintenance and adoption ; Article 16, paragraph 2 concerning the legal effect of the betrothal and the marriage of a child, inasmuch as this provision is incompatible with the provisions of the Islamic Shariah ; and, Article 29, paragraph 1, concerning arbitration between States in the event of a dispute.

The accession of the Syrian Arab Republic to the Convention shall in no way signify recognition of Israel or entail entry into any dealings with Israel in the context of the provisions of the Convention.

² Declaration made upon signature and confirmed upon ratification :

The United Kingdom of Great Britain and Northern Ireland will take all feasible measures to ensure that members of its armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

The United Kingdom understands that Article 1 of the Optional Protocol would not exclude the deployment of members of its armed forces under the age of 18 to take a direct part in hostilities where:

- a) There is a genuine military need to deploy their unit or ship to an area where hostilities are taking place;
- b) by reason of the nature and urgency of the situation :
 - i) it is not practicable to withdraw such persons before deploy; or
 - ii) to do so would undermine the operational effectiveness of their ship or unit, and thereby put at risk the successful completion of the military mission and/or the safety of other personnel.

Declaration upon ratification :

.....in accordance with Article 3, paragraph 2 of the Optional Protocol:

understood the reasons, stated in explicit detail at the previous meeting, which had prompted the United Kingdom to make the declaration, but had not been convinced and thus considered the declaration problematic. On this point, the delegation of Switzerland notified that it had been convinced by the arguments which the United Kingdom had adduced at the previous meeting.

22. With regard to Turkey's declarations and reservations in respect of the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights, New York, 16 December 1966³, the Austrian delegation informed the Committee that its authorities were currently considering the declarations and would probably submit objections on the grounds that Turkey did not protect its minorities.

23. The German delegation had doubts about the second and fourth paragraphs of the Turkish reservations and requested not only that the Turkish authorities clarify these reservations but also that the other delegations give their opinion on the fourth paragraphs of the reservations in respect of the two Covenants.

The minimum age at which individuals may join the UK Armed Forces is 16 years. This minimum broadly reflects the minimum statutory school leaving age in the United Kingdom, that is the age at which young persons may first be permitted to cease full-time education and enter the full-time employment market. Parental consent is required in all cases of recruitment under the age of 18 years.

The United Kingdom maintains the following safeguards in respect of voluntary recruitment into the armed forces:

1. The United Kingdom Armed Forces are manned solely by volunteers; there is no compulsory recruitment.
2. A declaration of age, backed by an authoritative, objective proof (typically the production of an authentic birth certificate) is an integral and early requirement in the recruitment process. Should an individual volunteering to enter the United Kingdom Armed Forces be found either by their own declaration or by inspection of supporting evidence of age to be under 18 years of age, special procedures are adopted. These procedures include :
 - the involvement of the parent(s) or legal guardian(s) of the potential recruits:
 - clear and precise explanation of the nature of the duties involved in military service both to the individual and to their parent(s)/guardian(s); and
 - as well as explaining the demands of military life to the individual volunteer, the requirement that the parent(s) or guardian(s), having been similarly informed, freely consent to the individual's entry into the Armed Forces and duly countersign the appropriate application or other appropriate recruitment process forms.

³ Turkey's declarations and reservations in respect of the International Covenant on Civil and Political Rights:

The Republic of Turkey declares that it will implement its obligations under the Covenant in accordance with the obligations under the Charter of the United Nations (especially Article 1 and 2 thereof).

The Republic of Turkey declares that it will implement the provisions of this Covenant only to the States with which it has diplomatic relations.

The Republic of Turkey declares that this Convention is ratified exclusively with regard to the national territory where the Constitution and the legal and administrative order of the Republic of Turkey are applied.

The Republic of Turkey reserves the right to interpret and apply the provisions of Article 27 of the International Covenant on Civil and Political Rights in accordance with the related provisions and rules of the Constitution of the Republic of Turkey and the Treaty of Lausanne of 24 July 1923 and its Appendixes.

Turkey's declarations and reservations with regard to the International Covenant on Economic, Social and Cultural Rights:

The Republic of Turkey declares that it will implement its obligations under the Covenant in accordance to the obligations under the Charter of the United Nations (especially Article 1 and 2 thereof).

The Republic of Turkey declares that it will implement the provisions of this Covenant only to the States with which it has diplomatic relations.

The Republic of Turkey declares that this Convention is ratified exclusively with regard to the national territory where the Constitution and the legal and administrative order of the Republic of Turkey are applied.

The Republic of Turkey reserves the right to interpret and apply the provisions of the paragraph (3) and (4) of the Article 13 of the Covenant on Economic, Social and Cultural Rights in accordance to the provisions under the Article 3, 14 and 42 of the Constitution of the Republic of Turkey

24. The Netherlands delegation also had doubts about the fourth paragraphs of the reservations. The general reference to the Constitution of the Republic of Turkey was too vague and it was impossible to check that the provisions in question were compatible with the country's commitments.

25. The Swedish delegation thought that the concept of "diplomatic relations" in the second paragraph of the reservations in respect of the Covenants was unclear in terms of the scope of and compliance with the state's commitments. In its opinion, the restriction of the application of the Covenant to national territory stipulated in the third paragraph was incompatible with the aim of the treaty. Lastly, the fourth paragraph amounted to discrimination which violated the obligation to respect the rights of the different minorities. This delegation had not yet submitted an objection but was seriously considering the possibility.

26. The Finnish and Norwegian delegations concurred with the previous speakers' concern about these reservations.

27. The Turkish delegation informed the Committee that its authorities would discuss all the points raised and present a written reply at the next meeting.

28. The CAHDI then considered the declarations and reservations in respect of Council of Europe treaties (CAHDI (2004) 4).

29. The Spanish delegation provided further information on its declaration in respect of the Protocol amending the European Convention on the Suppression of Terrorism (ETS No 190), 15 May 2003⁴ concerning the relationship between the provisions of the Protocol

⁴ Declaration by Spain at the time of signature of the instrument on 9 October 2003:

In conformity with the Conclusions of the Council of the European Union of 2 October 2003 on the application of the European arrest warrant and its relationship with Council of Europe legal instruments, and as recognised explicitly by the member States of the European Union, Spain declares that Council of Europe legal instruments allow member States of the European Union to apply between themselves pre-existing agreements or conclude new agreements in order to facilitate or simplify even further their procedures for the surrender of individuals.

In conformity with the aforementioned Conclusions, Spain declares that the instruments adopted within the European Union in matters which affect the European Convention on the Suppression of Terrorism and its amending Protocol, constitute a series of agreements or a uniform law which will take precedence as between the member States of the European Union.

In conformity with the aforementioned Conclusions, Spain declares that the series of European Union instruments will continue to take precedence when the present Protocol enters into force.

In conformity with the aforementioned Conclusions, Spain understands that the said instruments adopted within the European Union, which take precedence as between the member States of the European Union, *inter alia*:

The Agreement of 26 May 1989 between the Member States of the European Communities on the simplification and modernization of methods of transmitting extradition requests,

The Convention of 10 March 1995 drawn up on the basis of article K.3 of the Treaty on European Union, on simplified extradition procedure between the Member States of the European Union (O.J. C 78-30/03/95 et O.J. C 375-12/12/96),

The Convention of 27 September 1996 drawn up on the basis of article K3 of the Treaty on European Union, relating to extradition between the Members States of the European Union (O.J. C313-23/10/96 et O.J. C191-23/07/97),

The Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism (O.J. L 344-28/12/2001) and its modifications,

The Council Common Position of 27 December 2001 on combating terrorism (O.J. L 344-28/12/2001),

The Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (O.J. L 344-28/12/2001), and its modifications,

amending the Convention and European Union (EU) law on the same subject. The declaration did not concern a specific article of the Protocol but was aimed at ensuring the preferential application of the EU law. It particularly drew attention to Article 9 of the Protocol concerning possible bilateral or multilateral agreements.

30. The Swedish delegation noted that the effect of this declaration would be to give EU law precedence over any other treaty. This implied that any other State Party, which was also a member of another legal system, could take advantage of and gives precedence to commitments entered into elsewhere.

31. In this connection, the Spanish delegation explained that Article 9 of the Protocol merely enshrined the practice already followed by the Council of Europe and the European Union for years, as, for example, in the case of the Council of Europe Convention on Mutual Assistance in Criminal Matters. This was in accordance with the Vienna Convention on the Law of Treaties.

32. The Netherlands delegation concurred with the remarks made by the Spanish delegation: the problem was not the declaration itself but the extent to which the Parties were committed to one legal system when they wished to enter into commitments under another system. This question also had a fundamental impact on relations between the different Parties.

b. Reservations and declarations concerning international treaties applicable to the fight against terrorism

33. The Chair recalled the decision taken by the Ministers' Deputies with regard to Council of Europe anti-terrorist activities (CM/Del/Dec (2001)765bis, item 2.1, Strasbourg, 21 September 2001). In the context of their consideration of the steps to be taken in response to the Committee of Ministers' Declaration of 12 September 2001 on the fight against international terrorism, the Ministers' Deputies had instructed the CAHDI's European Observatory of Reservations to International Treaties to examine the question of reservations in respect of regional and universal conventions relating to terrorism and to hold exchanges of views on the conventions under preparation within the UN with a view to co-ordinating member states' positions.

34. In accordance with this decision, the Committee examined the list of reservations and declarations in respect of international treaties applicable to the fight against terrorism, as set out in CAHDI (2004)3.

35. The United Kingdom delegation recalled that its written observations, which appeared in the first part of the document, were designed to draw the Committee members' attention to reservations that might be open to question. It had no objections to the Israeli reservation to the 1997 International Convention for the Suppression of Terrorist Bombings.

The Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering (O.J. L 344-28/12/2001),

The Council Decision 2001/927/EC of 27 December 2001 establishing the list provided for in Article 2(3) of Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism (O.J. L 344-28/12/2001), the Council Decision 2002/344/EC (O.J. L116-03/05/2002) and its modifications,

The Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (O.J. L190-18/07/2002),

The Council Framework Decision of 13 June 2002 on combating terrorism (O.J. L190-18/07/2002), as well as those which will be adopted in the future, in the matters affecting the European Convention on the Suppression of Terrorism, will not be affected by the entry into force of the present Protocol.

36. The Italian delegation specified that the COJUR had discussed the reservation at its meeting on 19 February 2004 and had prepared a document containing explanations on this point, which could be distributed to the Committee members.

37. The Finnish delegation informed the CAHDI that the COJUR had also discussed Jordan's declaration in respect of the International Convention for the Suppression of the Financing of Terrorism. Like the Austrian delegation, the Finnish authorities had objected to the declaration on the ground that this reservation was unacceptable. The Portuguese and Netherlands delegations took the same stance and said their authorities also intended to make an objection.

38. The Portuguese delegation explained why its authorities had decided to submit a reservation in respect of the 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents and, in particular, the extradition problems that arose when there was a prospect of the death penalty or life imprisonment. The issue had been resolved during the latest constitutional revision.

39. The Netherlands delegation informed the Committee that its authorities intended to withdraw the reservation in respect of the 1973 Convention because it was in fact incompatible with the object and purpose of the treaty.

40. The Swiss delegation informed Committee members of the interpretative declarations relating to the exchange of information to prevent terrorist attacks, following the 1973 Convention and the 1979 Convention against the Taking of Hostages. It pointed out that all requests for information must comply with the general principles of law and the rules applicable to judicial and police co-operation.

41. With regard to the 1980 Convention on the Physical Protection of Nuclear Material, the United Kingdom delegation pointed out that, although it was too late to submit an objection to Pakistan's reservation, it was possible and indeed necessary to ask it to withdraw it. The United Kingdom delegation agreed with the Austrian delegation that this was precisely the object and purpose of the European Observatory of Reservations. It appeared that the CAHDI had, in practice, lost sight of this objective and drew attention only to declarations to which objections could still be entered.

42. Moving on to a more general matter, the Chair asked the CAHDI members what they considered the most appropriate way to increase the effectiveness of the Committee's work as a European observatory. He drew the attention of a number of states to the importance of going through the whole document prepared by the Secretariat and of not restricting their discussion to reservations or declarations against which an objection might be raised. The delegations might change their approach and their policy with regard to treaties as a result of the CAHDI's discussions. Failure to respond should therefore not be interpreted as a lack of interest.

43. The Austrian delegation endorsed this proposal and drew a distinction between the examination of reservations for the purpose of encouraging delegations to withdraw or review them and the examination of reservations for purely informative purposes.

44. The Norwegian delegation thought it was obvious that failure to respond did not mean that the reservation, for example the aforementioned reservation by Pakistan, had been accepted.

45. The Greek delegation thought that this exercise was useful. In the case of reservations against which objections could no longer be entered because the time-limit had expired, this work was important for the purposes of the preparation of future reservations of the same type. Therefore, the CAHDI ought to continue this work and it would perhaps be a

good idea to reconsider the methods used and the unwieldiness of CAHDI (2004)³ and prepare a more clearly targeted, specific and functional document.

46. The Portuguese delegation endorsed these statements and underlined the importance of this exercise for countries which did not have sufficient resources to examine the reservations and raise objections. It suggested that two separate documents should be drafted: one setting out all the reservations and the other only those reservations against which objections could be entered.

47. Given the importance of efforts to combat terrorism, the Chair thought that the CAHDI should continue to examine the full list of reservations in respect of treaties. It was necessary to decide whether it was useful to take action on these reservations, in particular whether certain delegations should be contacted and asked to reconsider their reservations. It was a good idea to use the document which the United Kingdom had provided, for information purposes, and which was intended solely for the use of Committee members. This approach would reinforce the CAHDI's work and could be used by other delegations.

48. The United Kingdom delegation suggested that a list of the reservations posing problems be submitted to Committee of Ministers, irrespective of whether they were old or new reservations. The Committee of Ministers could then decide what action should be taken.

49. The Chair concluded discussion of this item by specifying that the reservations that posed a problem would be discussed at the next meeting and that a list of these reservations could then be forwarded to the Committee of Ministers, which would either take note of them or give the CAHDI specific terms of reference. Delegations were invited to send their contributions to the Secretariat by 30 June 2004 at the latest.

6. Pilot project of the Council of Europe on State practice regarding State immunities

50. The Chairman reminded participants that at its 21st meeting (Strasbourg, 6-7 March 2001), the CAHDI had decided to undertake an activity on State practice regarding immunities, focusing in particular, but not exclusively, on practice in Council of Europe member states, in order to gather together the most relevant court decisions relating to foreign states and their property. He then referred to the Pilot Project in its current version (CAHDI (2004)⁵ Parts I and II) and to the agreement concluded by the Secretariat with the British Institute of International Comparative Law, the Institute of International Law of the University of Vienna and the Graduate Institute of International Studies, Geneva, with a view to preparing a report on the Pilot Project.

51. He thanked Ms Breau from the British Institute of International Comparative Law, and Mr Kohen and Mr Saba Rangel do Carmo from the Graduate Institute of International Studies for accepting the Committee's invitation and participating in the discussion on progress in preparing the report.

52. Mr Kohen congratulated the CAHDI on its choice of subject-matter for the pilot project. He specified that state immunity was a consequence of the sovereign nature of the state and observed that the perception of what constituted sovereign acts and state practice on immunity were undergoing a major shift at present. Therefore, the old customary rules governing this section of international law were also changing. However, the diverse yet contradictory practices observed in states made it difficult to ascertain and assess the content of these practices.

53. He likewise pointed out that Europe was the only part of the world where a convention had been drawn up to regulate relations between the States Parties in this particular area. Like any codification exercise, however, its impact and ramifications exceeded not only the number of States Parties but also the number of cases in which the

convention was applied. The advantage of having a treaty that provided clear rules to be enforced by domestic courts also brought with it certain problems, and it was important not to underestimate the fact that many states had opted to remain outside the convention-based system.

54. He went on to mention the preparation of the analytical report on the Council of Europe's Pilot Project on state practice on immunities, to be based on the national contributions provided by the CAHDI, and specified that 27 contributions had been submitted to date.

55. Mr Kohen outlined the structure of the analytical report which was designed to provide a comprehensive source of information on how states tackled the various aspects of immunity from legal proceedings and immunity from execution, to categorise state practice in order to show comparable and conflicting solutions adopted by domestic courts, to determine the scope of the European Convention on state immunity in domestic judicial practice, not only in cases where it was applicable but also in cases where it was not, to determine the status of customary law in the various areas examined and, finally, to make suggestions for harmonising state practice, bearing in mind that such matters were governed mainly by international law and not national law.

56. In order to achieve these objectives, the researchers would begin by summarising the relevant international instruments such as the European Convention on State Immunity of 1972, the recently adopted Draft United Nations Convention on jurisdictional immunities of States and their property, the draft articles of the International Law Commission adopted in 1991, the 1991 Resolution of the Institute of International Law and the draft articles of the International Law Association of 1994. These texts would then be examined in the light of state practice. Following this analysis, conclusions would be drawn as to the current state of customary rules in the various areas of state immunity.

57. In carrying out their task, the researchers faced a number of problems, namely the time factor, the lack of information in certain areas, and thirdly the language problems concerning certain information (only a summary of the information was available, in English or French). Another problem was to determine whether or not the European Convention had been applied in a particular case: even if the States Parties were known, the defendant State was not always identified in the documentation provided.

58. The institutes had agreed to share the workload as follows : the British Institute of International Comparative Law would examine matters relating to property (including ships), matters of social law (labour law), the lifting of immunity and, finally, the issue of state immunity and arbitration ; the Institute of International Law of the University of Vienna would look at the issue of commercial property and issues arising from the enforcement of decisions against the state while the Graduate Institute of International Studies, Geneva, would carry out research into the scope of the notion of "state" in immunity cases, state immunity and offences and the distinction between state immunity and diplomatic immunity.

59. With regard to the work of the Graduate Institute of International Studies, and in particular the different approaches to the notion of "state" and other entities or equivalent bodies, at international as well as national level, Mr Kohen described the specific, highly complex issues involved in studying offences committed by states, even though there was a recognised tendency not to grant immunity in cases of human rights violations and war crimes. In the course of this study, researchers would draw not only on state practice but also on the case-law of the European Court of Human Rights. Lastly, although in theory the distinction between state immunity and diplomatic immunity was clearly established, case-law tended to blur this distinction in practice. Determining which of the two should apply in particular cases presented some problems which the report would endeavour to clarify.

60. With regard to the preliminary work carried out by the British Institute of International Comparative Law, Ms Breau said that very few cases had been identified in the field of labour law and that there was not much material available. The doctrine of restricted immunity was firmly established except in the case of diplomatic staff. It was also worth looking at the practice of the new member states of the Council of Europe, the countries of Central and Eastern Europe, for whom the doctrine of absolute immunity had changed considerably.

61. The United Kingdom delegation believed that the draft UN Convention on jurisdictional immunities of States and their property was a very important development and should be the basic reference for the study. Even though it was a valuable instrument, few countries had ratified the European Convention on State Immunity of 1972 and Article 26 of the UN Convention was sufficiently comprehensive to be accepted by the States Parties to the European Convention. The draft articles of the International Law Commission, on the other hand, were less relevant owing to the lack of consensus. The United Kingdom delegation recognised, however, that in matters relating to employment, the provisions of the draft UN Convention were of limited use. Lastly, the relationship between state immunities and the European Convention on Human Rights was a very important one and should be investigated further, with special attention being given to the case-law of the European Court of Human Rights.

62. The Portuguese delegation informed the Committee that Portugal had not ratified the European Convention and that this study was therefore extremely useful and important. The domestic courts adhered strictly to the classic principle of absolute immunity, even in the case of employment, although there were signs of a shift to a more flexible approach.

63. The Japanese observer welcomed the progress made in the Pilot Project and also the preparation of the analytical report. He likewise emphasised the importance of the UN Convention which would provide a sound framework for this study.

64. The Norwegian, Greek and Irish delegations stressed the usefulness and importance of the Pilot Project and of the analytical report currently in preparation and agreed about the need to use the UN Convention as a principal reference point whilst bearing in mind the underlying principles of the European Convention of 1972.

65. Ms Breau and Mr Kohen thanked the delegations for their comments and urged any states which had not yet done so to report on their national practice as soon as possible. They concurred with all the delegations on the limited scope of the European Convention and the importance of the UN Convention as a frame of reference. The draft articles of the International Law Commission had been mentioned because, at the outset of the work, this was the only UN document to reflect a view which, although a minority view, nevertheless merited consideration. As to the question of violations of obligations arising from international human rights law and war crimes, this was a sensitive issue that was causing a fair amount of contention between the different states, as was the question of *jus cogens* and immunity.

66. The CAHDI decided to return to this item at its next meeting and asked any delegations which had not yet done so to submit their national reports at the earliest opportunity.

C. GENERAL ISSUES ON PUBLIC INTERNATIONAL LAW

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

67. The Chairman thanked the Greek and Swedish delegations for the documents submitted to the Committee on this subject (documents CAHDI (2004)7 and 9 respectively).

68. The Greek delegation mentioned the problems connected with the incorporation into the state legal system of unilateral acts emanating from international organisations. Citing as an example the resolutions of the United Nations Security Council (SC), it pointed to the fairly disparate nature of state practices, the impact of particular provisions of SC decisions and the increased variety of subjects covered and sanctions imposed. The delegation further proposed that a series of issues relating to the following subjects be addressed: methods of incorporating SC decisions into domestic law, the existence in domestic law of penalties for failing to comply with SC resolutions and the procedure for revoking these penalties, the procedure for appointing a national authority to authorise exports in case of exemption from an embargo and if there was no surveillance committee (see, for example, paragraph 10 of SC Resolution 1483 (2003) on the situation between Iraq and Kuwait and the incorporation of sanction committee decisions into domestic law). The delegation likewise emphasised the need to discuss a potential conflict between human rights and SC sanctions as well as the challenging in court of enforceable enactments introducing sanctions and the state's responsibility in such cases.

69. The Swedish delegation mentioned a number of human rights issues and possible solutions that could be considered in the effort to improve instruments for international sanctions imposed by the SC. It began by noting the need to develop detailed criteria for identifying the persons and organisations covered by the sanctions. Once that had been done, the introduction of a series of interim measures adopted by the appropriate sanctions committee could meet the need to freeze terrorist financing and protect human rights. At the same time, the individuals and organisations concerned could benefit from an independent, statutory review of the facts and evidence and have the right to appeal the decision. To this end, the delegation called for the setting up of two committees comprising experienced lawyers appointed by the SC and who would act as legal advisers to the Security Council. There was also, it seemed, a need to introduce a system and procedures for obtaining damages, and possibly financial compensation, from the international community. The delegation told CAHDI members that these matters had been discussed in detail at the working meeting held by the permanent Swedish and German missions in New York on 24 November 2003.

70. The Chairman stressed the importance and relevance of this matter and urged Committee members to hold an initial exchange of views on the subject, identify possible solutions and consider what action should be taken.

71. The observer from Mexico spoke of his experience as a non-permanent member of the SC, in particular at the time of the adoption of SC Resolution 1267 (1999) on the situation in Afghanistan. The issue of the rule of law had not been given sufficient attention and as a result, there had been some difficult discussions. The Mexican delegation had wanted to bring the matter to the fore but had not had much success. It had called, for example, for the adoption of guidelines, and for the introduction of safeguards to ensure that victims of sanctions had access to a court of law. In Mexico, there was no implementing law for sanctions imposed by the Security Council and the publication in the Official Journal was all that was required. The question of sanctions against states was less tricky. In the case of individuals, it was understood that any sanctions imposed on them in a resolution were binding but it was also advisable to include the alternative judicial remedies. It was very important therefore that the CAHDI continue exploring this issue, including the question of the legal effects and implications of sanctions. Sanctions similar to those adopted as part of the action against terrorism and to ensure respect for human rights could be considered as well as specific solutions of the kind proposed by Sweden.

72. The Russian Federation delegation identified firstly the issue of national implementing measures raised by Greece, and secondly the issue of the content and substance of sanctions. The delegation preferred to focus first on national implementing

measures and urged the delegations to provide information on national implementation. It stressed that the compiling a digest of these practices could be useful.

73. The Swiss delegation agreed that there were two separate, although related, issues here: national implementation, which was a technical matter, and the more tricky issue of the balance between sanctions and protecting human rights. As far as human rights were concerned, the discussion should continue beyond this meeting, focusing in particular on the relation between the application of international sanctions and the national remedies available in Council of Europe states party to the European Convention on Human Rights. The question was thus deciding whether a right-of-appeal system for UN sanctions or an international review system should be introduced to deal with problematic situations.

74. The Canadian observer noted that some individuals whose property and assets had been frozen had contested the constitutional nature of these measures in their domestic courts. In Canada, there was a body responsible for implementing UN resolutions and the law called for compliance with the Canadian Charter of Human Rights in cases where persons were to be punished for a criminal offence. Canada found itself in something of a dilemma over UN sanctions committee decisions because the freezing of assets was effected automatically. The implementation of SC Resolutions 1483 (2003) on the situation between Iraq and Kuwait and SC Resolution 1267 (1999) on the situation in Afghanistan had highlighted this dilemma and Canada did not have the option of invoking the European Convention on Human Rights. Gaps in the Canadian criminal code had been exposed when it came to implementing these resolutions. There were various ways in which this dilemma might be resolved: for example, where an order was issued requiring the immediate freezing of assets, it was important to also provide mechanisms in domestic law so that the measures could be challenged and compensation sought at national level. Instruments in the form of guidelines and principles, for example, should be developed at international level. It should be noted, however, that even though it was the SC that imposed sanctions and froze assets, in the event of legal action, it would be individual states and not the UN that would be sued.

75. The Austrian delegation noted that it had a similar arrangement to that of Mexico where applying sanctions was concerned. No implementing law was required; merely publication in the Official Journal, and the decision was not directly applicable. As a member of the EU, the sanctions were implemented by an act that was directly applicable in domestic law. As to the question of whether such an act adopted at EU level was capable of being contested in a human rights institution such as the European Court of Human Rights, this remained unanswered as the Court had not ruled on the merits in the case of Senator Lines GmbH⁵. With regard to the freezing of assets and transfers, as in the case of SC Resolution 1483 (2003) and Article 23 mentioned by Greece, this was a national measure rather than a matter of Community law. In the event that there should be a case involving the freezing or transfer of funds, a law would have to be passed and domestic remedies provided. The delegation agreed with the Russian Federation on the need to separate out the technical issue of applying sanctions, as in the case of Community regulations implementing sanctions. With regard to the relation between sanctions and respect for human rights, the question was deciding firstly what could be done at international level by the SC or by the body imposing sanctions, and this was not something that could usefully be discussed within the CAHDI, and secondly, how sanctions, such as the freezing of assets, could be implemented without infringing human rights. It would helpful here to have an exchange of views within the CAHDI, or even a Committee of Ministers recommendation.

76. The Portuguese delegation told the Committee that Portugal had experienced similar problems to those described by the other delegations in relation to SC Resolution 1173 (1998) on the situation in Angola. The main issue concerned the incorporation of the Resolution into domestic law; Portugal did not have to adopt a specific law in order to implement the Resolution as there was a general provision to this effect in the Portuguese

⁵ Case 56672/00 Senator Lines GmbH v the 15 Member States of the European Union.

Constitution. As to the type of resolutions, Portuguese practice had changed considerably and now presented problems mainly with regard to resolutions on action against individuals. As to the question of human rights, various categories of rights were being violated and not just human rights. In this respect, particular attention should be given to the issue of access to the courts. The delegation therefore proposed that the question raised by the Greek delegation be addressed first by drawing on the questionnaire and then by presenting state practice.

77. The United Kingdom delegation identified two main issues: implementation in domestic law and, from an international perspective, the practice of the SC. On the first issue, it had no objections to the idea of exchanging information on domestic practice (legislative, administrative and judicial). It was not convinced, however, that a comparative study would be of much use, and preferred to compile information on what went on at the UN and the Court of Justice of the European Communities. On the subject of the balance to be struck between individual rights and coercive measures (cf. Article 24 of the UN Charter), solutions had been found such as targeted sanctions, in place of the general approach adopted in former Yugoslavia, for example. Some thought needed to be given to the legitimacy of appealing SC decisions. Discussions were under way in other fora. The CAHDI could look into the question of the application of sanctions.

78. The Norwegian delegation felt that the two issues were not really separate. In fact, if States were bound by SC resolutions (cf. Articles 24, 25, 41 and 103 of the UN Charter), individuals were not, and had remedies available to them in domestic law. Where conflicts arose between the law implementing the sanction and national rules, the obligations arising from the European Convention on Human Rights and the International Covenant on Civil and Political Rights prevailed. The two issues were closely connected therefore. As to whether there was any point in discussing implementation at national level, states were already required to forward information concerning, *inter alia*, the freedom of movement of persons and the freezing of assets to the Security Council's Counter-Terrorism Committee. It was important to find a balance between the preservation of peace and international security, on the one hand, and respect for human rights on the other. It was possible to ensure and preserve both and the SC was increasingly opting for the prevention route, although it still had some way to go. The question of compensation was a national matter. The UN's role in this respect was limited, therefore. The Norwegian delegation also considered it vital to carry out codification work on national practice and residual matters concerning the impact of the Conventions. The state reports submitted to the SC were in the public domain and available on the internet. As for the questionnaire prepared for the SC, some aspects had been omitted and it was here that the Council of Europe could provide added value.

79. The Finnish delegation made a distinction between the imposition and the implementation of sanctions. The EU's practice here was extensive and relevant, concerning, for instance, the implementation of SC Resolution 1373 (2001) on the threats to international peace and security caused by terrorist acts. Like the United Kingdom delegation, it believed that progress had been made, even at SC level. With regard to the specific issues raised by Sweden, it was important to continue the discussions and make sure that debate within the CAHDI was not confined to national implementation measures and was more general. Lastly, it agreed with Norway that these were two sides of the same coin and could not be dealt with separately.

80. The Turkish delegation urged the CAHDI to continue looking into all aspects of this question and supported the drafting of a comprehensive study of State practice in order to identify common features in States' positions.

81. The Slovak Republic delegation said that the technical issues raised by the implementation of the sanctions were those which posed practical problems and that its authorities had not yet considered the possible repercussions in human rights terms. The

Slovak authorities had passed a special law on the execution of international sanctions in 2002, and SC and EU Council sanctions were promulgated by government decree. The country's forthcoming accession to the EU would bring about some changes of a constitutional nature and the regulations would be directly applicable. It proposed that there should be co-operation with the Steering Committee for Human Rights (CDDH) with regard to the human rights aspects of the matter. Lastly, it also proposed that the CAHDI continue its discussions of the technical issues in terms of international law.

82. The European Union delegation announced that the EU Council had issued various recommendations during summer 2003 and that the Court of First Instance was currently considering the lawfulness of the EU Council's measures. It would issue a ruling shortly.

83. The Greek and Swedish delegations thanked the delegations for their comments and agreed that it would be worthwhile gathering information on national implementation measures as quickly as possible. They asked other delegations to add other questions, as the list was not exhaustive. A more detailed questionnaire could then be distributed. It seemed that the approach to adopt was to identify the most appropriate solutions by considering national implementation measures.

84. The Chair noted that the Committee had reached a consensus on continuing the discussion, gathering information on national implementation measures and drawing up a questionnaire. It was important to focus on a limited number of key issues, as much had already been done in this area in other international organisations. In conclusion, he said that the Chair and the Vice-Chair would join with the Secretariat in drawing up the questionnaire on national implementation machinery for UN sanctions, which could serve as the basis for the collection of information on member and observer States and would be discussed at the next meeting. The CAHDI also asked the Secretariat to prepare for its next meeting a document on developments at international level.

8. Implementation of international instruments protecting the victims of armed conflicts

85. The Swiss delegation reported on the 28th International Conference of the Red Cross and the Red Crescent on "Protecting Human Dignity", which had been held in Geneva from 2 to 6 December 2003⁶. At this conference, a workshop had been organised jointly by the Swiss Government and the International Committee of the Red Cross (ICRC) with a view to look into the main challenges facing international humanitarian law in contemporary armed conflicts.

86. Various experts had given addresses on the term "war against terrorism", the protection of individuals in armed conflicts by other branches of international law, in particular by international human rights law, the problems involved in implementing international humanitarian law in non-international armed conflicts and responses to these problems, and the existing mechanisms for improving the respect for international humanitarian law during armed conflicts and the inadequate use made of them. The participants had also considered the results of the five regional meetings of experts organised by the ICRC in 2003 to find means of improving the respect for international humanitarian law.

87. The participants had underlined the important role the ICRC played in ensuring respect for international humanitarian law and the importance of the obligation to respect and ensure respect for international humanitarian law set out in common Article 1 of the Geneva Conventions. The participants had also urged the ICRC and its partners to continue

⁶ Further information is available on the Red Cross/Red Crescent website at <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/conf28?OpenDocument>.

their efforts to identify new methods for improving respect for international humanitarian law and to revive the large number of key mechanisms that already existed.

88. The Italian delegation reported on the conclusions adopted at the close of the meeting of the EU's General Affairs and Foreign Relations Council on 21 July 2003. The committee responsible for the civilian aspects of crisis management had drawn up draft guidelines, which were currently being considered by the EU's Human Rights and Military Committees.

89. The ICRC observer welcomed the CAHDI's interest in international humanitarian law and the work done by the ICRC. He then described the latest standard-setting developments, in particular the establishment of the International Criminal Court, the adoption of the 5th Protocol on Explosive Remnants of War supplementing the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons and the 1997 Ottawa International Convention on the Prohibition and Destruction of Anti-Personnel Landmines. He also welcomed the entry into force of the 2nd Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts. Lastly, he mentioned the studies being conducted by the ICRC on the customary rules of international humanitarian law, the challenges of contemporary conflicts and territories under international administration. In conclusion, he said that the challenge today was not so much drawing up legal standards as implementing them.

90. The United Kingdom delegation underlined the importance of the study on the customary rules of international humanitarian law, which had to be conducted with great care, it being particularly important not to exaggerate the sources of international humanitarian law but to go by State practice. In this connection, the United Kingdom would shortly be publishing a handbook on the law of armed conflicts, which would be used by the armed forces for training purposes. For its part, the International Humanitarian Fact-Finding Commission set up under Article 90 of Protocol I (1977) was one of the means of ensuring compliance with international humanitarian law. To date, few states had recognised the competence of the commission, but the United Kingdom had done so in 1999 and the delegation urged all States to follow suit. It was a simple act that offered practical confirmation of States' commitment to comply with international humanitarian law. Lastly, the delegation welcomed the adoption of the 5th Protocol, which was a significant advance and was very interesting from a legal point of view.

91. The Norwegian and Swedish delegations agreed about the importance of the International Fact-Finding Commission, the competence of which had already been accepted by 65 States, underlined the importance of the adoption of the 5th Protocol and hoped that it would enter into force soon. The Norwegian and Swedish authorities were currently preparing their respective ratification instruments and hoped other States would do likewise. The two delegations were keen to see the findings of the study on customary rules of international humanitarian law and agreed with the United Kingdom's position in this respect. With regard to contemporary conflicts, both humanitarian organisations and the UN had been directly targeted in armed conflicts, which was a flagrant violation of humanitarian law. This raised the question of the protection of UN and humanitarian personnel. They called for more in-depth consideration to be given to peace-keeping operations and access by humanitarian personnel to vulnerable groups.

92. The Austrian delegation welcomed the success of the conference in Geneva in December 2003. As far as the Fact-Finding Commission was concerned, the question was not really the participation of the States Parties but rather the use made of the Commission, as no State had referred cases to it to date. There was therefore a need to continue awareness raising and training in international humanitarian law. In his country, for instance, a publication on the law of war produced by the national committee on international humanitarian law had been distributed in the armed forces and civil society.

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

93. The Italian delegation announced that its authorities had signed an agreement with the UN on 17 March 2004 on the execution of the judgments of the International Criminal Tribunal for Rwanda.

10. Developments concerning the International Criminal Court (ICC): Exchange of views with the Chief Prosecutor of the ICC, Mr Luis Moreno Ocampo

94. The Chair welcomed Mr Luis Moreno Ocampo, Chief Prosecutor of the ICC, and Ms Silvia Fernandez de Gurmendi, Head of the Chief Prosecutor's Private Office, and thanked them for accepting the committee's invitation. On the committee's behalf, the Chair took the opportunity to congratulate Mr Moreno Ocampo on his recent election.

95. Mr Moreno Ocampo thanked the CAHDI for inviting him to attend its meeting and underlined the Council of Europe's consistent support for the ICC. He thanked the Council for the efforts it had made to facilitate the ICC's work and then described recent developments concerning the ICC and his Office (OTP). The text of his statement is set out in **Appendix IV**.

96. The Chief Prosecutor first underlined the priorities of his Office and the strategy being developed to deal with the first cases with which it is faced. He then described the structure of the Office of the Prosecutor, which was made up of three operational divisions, and the way it interacted with the other organs. Lastly, he referred to the pending cases concerning Uganda and the Congo and the approach adopted for selecting cases.

97. On behalf of the Committee, the Chair thanked Mr Moreno Campo for his informative and clear statement and opened the discussion.

98. The Norwegian delegation supported the idea of strengthening potential dialogue through participation by States in the Assembly of States Parties and other regional bodies. In this connection, it underlined the discreet but nevertheless effective role played by the Council of Europe, which had greatly helped member States with the process of ratifying the Rome Statute and had boosted co-operation between member States through multilateral consultations. It underlined the importance of safeguarding the integrity of the Court, the fact that States could not issue instructions to the OTP and the importance of the Agreement on the Privileges and Immunities of the ICC, of which the low level of ratification was worrying. The deadline had been set for June and ten signatures were still needed for it to enter into force.

99. The German delegation supported the negotiation of agreements for the protection and relocation of witnesses. However, this would have to be discussed at national level. It also supported the idea of an inexpensive and effective structure for the OTP.

100. The Greek delegation agreed with the Prosecutor on the importance of the complementarity principle of the ICC, which compelled this State to appraise its national procedures according to this principle. In this regard, a possible review of the Criminal Code, the Code of Criminal Procedure and the Military Code would be necessary, primarily to include the new crimes stipulated by the Rome Statute. This long and tedious work has already been undertaken by the competent authorities. Furthermore, the delegation wondered if the Prosecutor would be ready to proceed proprio motu, in the event of certain States not being co-operative.

101. The Finnish delegation called on the other delegations to ratify the Agreement on the Privileges and Immunities of the ICC as soon as possible so as to strengthen the Court's action. A draft ratification law was due to be tabled in the Finnish parliament before the summer. The delegation also underlined the importance of the document setting out the

elements of crimes, which supplemented the Rome Statute. The Finnish authorities had therefore published the list in Finnish and armed forces personnel received training in international humanitarian law. It asked the Prosecutor about the assessment to date of the fact-finding visits conducted by the judges and wondered whether members of the OTP had taken part in these activities.

102. The United Kingdom delegation underlined that both the challenges posed and the expectations raised by the ICC were unprecedented. It recalled that much remained to be done in the long term with regard to co-operation with States and also to co-operation between the various organs of the ICC and other courts, in particular the ICTY and the ICTR. The delegation indicated that legal advisers were present at all levels in the British armed forces and referred to the important role of defence lawyers, to which the Court should pay particular attention on the basis of the international criminal tribunals' extensive experience in this area. Lastly, there was an urgent need to ratify the Agreement on the Privileges and Immunities of the ICC, which the United Kingdom would do during summer 2004, and the agreement on relations with the UN was equally important. Elsewhere, the situation in northern Uganda needed to be dealt carefully and the members of the "Lord's Resistance Army" should be rehabilitated rather than punished, with only its leaders being prosecuted.

103. The Spanish delegation welcomed the transparency of the OTP's co-operation with the States Parties and referred, in this connection, to a meeting held in Spain in October 2003. It then reported on legislative developments at national level. For instance, not only genocide but all crimes falling within the ICC's jurisdiction were now crimes under the Spanish Criminal Code. The new provisions would enter into force in October 2004. In addition, a law on co-operation with the UN would enter into force in December and preparations were being made in connection with the Agreement on the Privileges and Immunities of the ICC. With regard to the receipt of communications by the OTP, in particular files from NGOs, it wondered about the practical findings of analysis of the information and their dissemination among the Parties. The OTP should also be careful when preparing files on sensitive issues so as to avoid being accused of partiality with regard to admissibility criteria.

104. The Netherlands delegation reported that legislation on co-operation with the UN was already in force in the Netherlands. Like the Greek delegation, it wondered about the possible reaction of the OTP if submitted cases were withdrawn or redefined. With regard to the relations between the OTP of the ICC and prosecutors from other international courts, it wondered about the possibility of establishing a more institutional framework for meetings between the prosecutors from the ICC, the ICTY and the ICTR such as, for instance, the CAHDI.

105. The Japanese observer urged the ICC to pay particular attention to awareness raising and the dissemination of information. He wondered about the possibility of the ICC to try senior figures guilty of crimes, as it had been mentioned at the Assembly of States Parties.

106. The Norwegian delegation wondered about the role of the legal advisers in the OTP and the arrangements for building the team working for the OTP, given the need for effective advice and strategies in view of the many tricky legal issues. It also agreed with the previous comments about the importance of strengthening co-operation and about complementarity and competence as the operating criterion for the ICC.

107. The International Committee of the Red Cross (ICRC) observer underlined the excellent co-operation that existed in terms of promoting and implementing the standards of international humanitarian law and mentioned the definition of war crimes in this connection. The ICRC had helped States to bring their legislation into line with the ICC Statute and had provided legal assistance on the ground. For instance, it had developed a database on

national measures for implementing international humanitarian law and would continue to support the ICC to the best of its ability.

108. The Azerbaijani delegation shared the concerns already expressed about the possibility of launching investigations if there was no domestic legislation or facilities for conducting them.

109. Mr Moreno Ocampo thanked the delegations for their comments and questions. He underlined the importance of improving and boosting communication with States and urged members of the CAHDI to help improve communication. The ICC had held an initial information meeting in The Hague in February 2004, and the OTP would do its best to send out information, including to States that were not parties to the ICC Statute. In reply to the Spanish delegation, he said that the confirmation of the receipt of a communication was a formality and that the decision to publish it was taken when analysis of the communication was completed.

110. With regard to the Finnish delegation's question, the information would be obtained from sources other than the judges. As far as the crimes committed and the links between the groups involved were concerned, information was obtained not only from States, NGOs and open sources but also from other sources. For instance, in the case of illegal arms trafficking networks, it was necessary to obtain information on the organisations that committed crimes, and this involved co-operation with police forces and INTERPOL. In this connection, the protection of victims and information was important at all stages in the process. As to relocation of witnesses and the entire witness protection programme, it is a very costly exercise, but it would be implemented without misuse, if it were deemed necessary. In addition, his Office maintained very close relations with various organs of the ICC that dealt with very complex matters. The weekly co-ordination meetings with the Registry and monthly co-ordination meetings with the Presidency had improved the situation and it was important to continue in that direction. In this connection, he welcomed the proposal made by the United Kingdom delegation and would pass on the information to the ICC President. He also wished to improve interaction with other bodies or courts and underlined that networking with other organisations such as the Council of Europe and the ICRC was most useful, adding that he would be glad to hold regular meetings with the CAHDI.

111. With regard to work on the ground, he shared the concerns of the United Kingdom delegation and emphasised the underlying idea of international justice, which was that of reconciliation and confidence. For instance, in the Congo and Uganda cases, several local NGOs were in favour of an amnesty but not immunity because of the horrendous acts perpetrated to separate people and communities. In this connection, the ICC was looking into the question of increasing the use of African model of justice as opposed to the western model, but more detailed comments on positive outcomes might be made in a report to be published later.

112. With regard to the question of competence and facilities for conducting investigations, he assured members of CAHDI that he used all his powers to do his work as effectively as possible and launch investigations, which remained the crucial point for the OTP. Co-operation agreements with the authorities in the States concerned were particularly important in this connection.

113. Lastly, he agreed with the Norwegian delegation on the important role of legal advisers and said that the OTP's aim was to have a preventive impact on crime at State level, which went beyond the conventional role of a prosecutor's office.

114. In conclusion, the Chair thanked Mr Moreno Ocampo for attending and said that the CAHDI would continue to follow developments concerning the ICC.

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

115. The Secretariat reported on recent developments concerning Council of Europe activities in this area. It drew attention to the state of the signatures and ratifications of the Protocol amending the European Convention on the Suppression of Terrorism (ETS 190) and the Committee of Ministers' call to ensure that the protocol entered into force as soon as possible. It then gave an overview of the Council of Europe's priorities in the fight against terrorism concerning, in particular, research on the concepts of "*apologie du terrorisme*" and "incitement to terrorism", special investigation techniques, protection of witnesses and "pentiti", international co-operation and repression, action to cut terrorists off from funding sources, questions of identity documents which arose in connection with terrorism and the work of the specialised governmental committees responsible for implementing these activities.

116. In addition, it informed that the 25th Conference of European Ministers of Justice held in Sofia in October 2003 had adopted Resolution No 1 reaffirming the intention to continue their efforts to combat terrorism, including in particular, the protection of victims of terrorist acts, helping States to build their legislative and institutional capacity for combating terrorism and looking into the added value of a comprehensive European Convention against terrorism, which could make a significant contribution to the UN's efforts in this area. In this connection, the Committee of Experts on Terrorism (CODEXTER) would discuss the study prepared by Professor Tomuschat at its next meeting.

117. The Spanish delegation thanked the Council of Europe for the efforts it was making in the fight against terrorism and underlined that there was an urgent need to step up international co-operation so as to make the relevant efforts more effective. It hoped that CODEXTER would be able to move forward in a determined fashion with the tasks assigned to it and, in particular, the drafting of a comprehensive convention.

D. OTHER

12 Request for observer status by the European Organisation for Nuclear Research (CERN) and by the International Criminal Police Organisation (INTERPOL)

118. The Chair announced that the Committee was required to decide on the applications for observer status submitted by INTERPOL and CERN (doc. CAHDI (2004) 2).

119. The CAHDI decided to grant observer status to INTERPOL for the duration of the Committee and to CERN for specific items on the agenda at CERN's request and with the agreement of the Chair. The draft revised terms of reference appear in **Appendix V**.

13. Date, place and agenda of the 28th meeting of the CAHDI

120. Further to the kind invitation from the Swiss delegation, the CAHDI decided to hold its 28th meeting in Switzerland on 13 and 14 September 2004.

121. The United Kingdom delegation proposed that an item on the role of legal advisers be added to the next meeting's agenda. Although a similar exercise had already been conducted at the United Nations, it would be advisable to take the matter up at the CAHDI so as to exchange information and discuss possible questions. A draft questionnaire concerning all the legal activities performed by Ministry of Foreign Affairs legal advisers, ie not only those involving public international law, was circulated (document CAHDI (2004) Misc 1) and approved by the Committee. The CAHDI agreed to gather information on the organisation and functions of the Office of the Ministry of Foreign Affairs Legal Adviser on the basis of the questionnaire set out in **Appendix VI**. Delegations were asked to submit their replies to the questionnaire to the Secretariat by 30 June 2004.

122. The CAHDI adopted a preliminary draft agenda for its next meeting as set out in **Appendix VII**.

14. Other business

123. The United Kingdom delegation drew CAHDI members' attention to the reform of the European Court of Human Rights that was currently being analysed by the Steering Committee for Human Rights (CDDH). It noted that some problematic issues remained, in particular regarding admissibility, and hoped that agreement would be reached within the CDDH, failing which the matter would be brought before the Committee of Ministers.

124. The Swiss delegation mentioned the revitalisation of the United Nations General Assembly and referred to the document it had distributed at the meeting (CAHDI (2004) 10).

125. The Norwegian delegation underlined the importance of the initiative and highlighted the parallelism of the discussions within the Sixth Committee and the General Assembly, for instance concerning the report of the International Law Commission.

126. The United Kingdom and Portuguese delegations underlined the importance of the issue, which called for consideration of the document distributed and in-depth discussion at the CAHDI's next meeting.

127. The CAHDI adopted the abridged meeting report as set out in **Appendix VIII**.

Appendix I

List of Participants**ALBANIA/ALBANIE:**

Mrs Ledia HYSI, Director of the Legal and Consular Department, Ministry of Foreign Affairs

ANDORRA/ANDORRE:

Apologised/Excusé

ARMENIA/ARMENIE: -**AUSTRIA/AUTRICHE:**

Mr Hans WINKLER, Ambassador, Legal Adviser, Federal Ministry of Foreign Affairs

AZERBAIJAN/AZERBAIDJAN:

Mr Azad JAFAROV, International Law and Treaties Department, Ministry of Foreign Affairs

BELGIUM/BELGIQUE:

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

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Mrs Marina KALJURAND, Deputy Under-Secretary of the Legal Department, Ministry of Foreign Affairs

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Mrs Irma ERTMAN, Ambassador, Director general for Legal Affairs, Ministry of Foreign Affairs

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Mr, Carlos SALAZAR-DIEZ DE SOLLANO, Deputy Permanent Observer of Mexico to the Council of Europe, STRASBOURG

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Mr Ehud KEINAN, Principal Deputy Legal Advisor, Ministry of Foreign Affairs

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Mr Baldwin DE VIDTS, Service juridique, BRUXELLES

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

Apologised/Excusé

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M. Marcelo KOHEN, Institut Universitaire des Hautes Etudes Internationales, GENEVA

M. Sérgio SABA RANGEL DO CARMO, Institut Universitaire de Hautes Etudes internationales, GENEVE

SPECIAL GUESTS/INVITES SPECIAUX

Mr Luis MORENO-OCAMPO, Chief Prosecutor, International Criminal Court, THE HAGUE

Mme Silvia FERNANDEZ DE GURMENDI, Chef de Cabinet du Procureur, Cour pénale internationale, THE HAGUE

SECRETARIAT GENERAL

DIRECTORATE GENERAL OF LEGAL AFFAIRS / DIRECTION GENERALE DES AFFAIRES JURIDIQUES

M. Guy de VEL, Directeur Général des Affaires Juridiques/Director General of Legal Affairs

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

Mr Rafael A. BENITEZ, Secretary of the CAHDI/Secrétaire du CAHDI

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Ms Saskia DANIELL, Assistant/Assistante, Department of Public Law/Service du Droit public

INTERPRETERS/INTERPRETES:

Mr Jean SLAVIK

Mme Martine CARALAY

Appendix II

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1. Opening of the meeting by the Chairman, Ambassador Nicolas Michel **CAHDI (2004) 1**
2. Adoption of the agenda and approval of the report of the 26th meeting (Strasbourg, 18-19 September 2003) **CAHDI (2004) 0J 1 rev & CAHDI (2003) 14 prov**
3. Communication by the Director General of Legal Affairs, Mr Guy de Vel **CAHDI (2004) Inf 1**

B. ONGOING ACTIVITIES OF THE CAHDI

4. Decisions by the Committee of Ministers concerning the CAHDI and requests for CAHDI's opinion (Opinion on Recommendation 1602 (2003) on Immunities of members of the Parliamentary Assembly **CAHDI (2004) 6**
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5. The law and practice relating to reservations and interpretative declarations concerning international treaties : European Observatory of Reservations to international Treaties
 - a. Consideration of outstanding reservations and declarations to international Treaties **CAHDI (2004) 4 & CAHDI (2003) 14 prov**
 - b. Consideration of reservations and declarations to international Treaties applicable to the fight against terrorism **CAHDI (2004) 3**
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CAHDI (2004) 5 Part II (A) and (B)

C. GENERAL ISSUES ON PUBLIC INTERNATIONAL LAW

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12. Date, place and agenda of the 28th meeting of the CAHDI
13. Request of observer status by the European Organization for Nuclear Research (CERN) and by INTERPOL **CAHDI (2004) 2**
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Statement by Mr de Vel, Director General of Legal Affairs

I am pleased to be able to attend the 27th meeting of the CAHDI and should like to assure you of the great importance I attach to your Committee and its activities.

This meeting is taking place against a very worrying international background, following the terrorist attacks that occurred in Madrid on 11 March. I should like to extend my deepest sympathy to the Spanish delegation and would underline the need in this connection to continue the Council of Europe's efforts to combat terrorism.

I should also like to extend my sympathy to the delegation of "the former Yugoslav Republic of Macedonia" following the death of President Trajkovski.

I will now turn to the developments concerning the Council of Europe since the CAHDI's last meeting and the activities of the committee itself. First of all, however, I would point out that the Council of Europe's political agenda is currently headed by a third Summit of Heads of State and Government scheduled for the first part of 2005, which will focus on the Council's objectives for the 21st century.

With regard to developments at the Council of Europe since the CAHDI's last meeting, special attention should be paid to the **fight against terrorism**. In particular, a resolution on combating terrorism was adopted at the Conference of European Ministers of Justice held in Sofia on 9 and 10 October 2003 on the subject of "International co-operation in the fight against international terrorism and implementation of the relevant instruments of the Council of Europe" and "The response of the justice system - civil and criminal - to terrorism".

The Committee of Experts on Terrorism (CODEXTER) then discussed follow-up to the conference and the launch of various activities at its meeting from 27 to 30 October 2003.

For instance, as far as the comprehensive convention on terrorism is concerned, an independent scientific study has been conducted on the added value of a possible comprehensive Council of Europe convention on terrorism, or some elements of such a convention, and its significance as a contribution to the United Nations' efforts in this area. The study, which was carried out by Professor Tomuschat, comes to a positive conclusion on these points. It should also be noted that the Parliamentary Assembly of the Council of Europe has adopted Recommendation 1644 (2004) on "Terrorism: a threat to democracies", calling on the Committee of Ministers "to begin work without delay on the elaboration of a comprehensive Council of Europe convention on terrorism, based on the normative acquis of the United Nations', Council of Europe's and European Union's legal instruments and other texts, and develop them as much as necessary."

A further point that should be mentioned is the continuation of the activities concerning the protection of witnesses and "pentiti", special investigation techniques, the protection and compensation of victims, action to cut terrorists off from funding, the strengthening of international co-operation, "*apologie du terrorisme*" and incitement to terrorism and the preparation of country reports on counter-terrorism capacity.

CODEXTER will discuss these various issues at its next meeting from 29 March to 1 April 2004, focusing in particular on a comprehensive regional convention.

In addition, the Conference of Ministers of Justice in Sofia instructed the European Commission for the Efficiency of Justice (CEPEJ) to draft an assessment report on the effectiveness of national judicial systems' responses to terrorism.

As regards **the fight against corruption and organised crime**, the Council of Europe took part in the 11th International Anti-Corruption Conference and Global Forum III on fighting corruption (Seoul), as well as the MERIDA Forum (Mexico), at which GRECO's leading role as an international body for monitoring anti-corruption measures was underlined.

In this connection, I would draw attention to the launch of GRECO's second evaluation round concerning the laundering of the proceeds of corruption, public administration and corruption and the liability of legal entities for corruption. Seven evaluation visits are planned, to Finland, Iceland, Latvia, Luxembourg, Poland, Slovakia and Slovenia.

I would also draw attention to an exchange of views that took place on "Focus on Specialist Anti-Corruption Services" during the first Octopus Interface conference in Strasbourg and the implementation of the PACO programme against corruption and organised crime in south-eastern Europe, including regional and country projects.

With regard to **measures to combat money laundering**, I would mention the second MONEYVAL evaluation round on anti-laundering measures implemented in 26 members and non-members of the Council of Europe (such as Monaco) that are not members of the FATF. All the countries except Armenia, Azerbaijan, Bosnia and Herzegovina and Serbia and Montenegro have been evaluated.

With regard to **combating cybercrime**, a number of activities have been carried out to promote the signature and ratification of the Convention on Cybercrime and the additional protocol thereto (in Bulgaria, Norway, Argentina and Hong Kong). The protocol has been signed by 22 states to date.

As regards the **independence and efficiency of justice**, the 1st European Day of Civil Justice, co-organised by the European Commission and the Council of Europe, was held in Budapest on 18 October 2003. Other events took place at the same time in Hungary, Austria, France, Germany, Italy, Latvia and Malta.

For its part, the Consultative Council of European Judges (CCJE) has adopted an opinion on the law and practice of judicial appointments to the European Court of Human Rights.

In another development, the 1st European Conference of Judges was held on 24 and 25 November 2003 on the theme of "The Early Settlement of Disputes and the Role of Judges". The participants recommended that the Council of Europe undertake activities to promote the early settlement of disputes in litigation and by mediation.

With regard to **nationality**, principles and rules on avoidance of statelessness in relation to state succession have been adopted with a view to the preparation of an international instrument in this area.

With regard to the **information society**, 10 states have indicated their interest in signing and ratifying the Convention on Information and Legal Co-operation concerning Information Society Services (ETS 180).

In the **bioethics** field, a resolution was adopted by the representatives of the national ethics committees (or similar bodies) of Council of Europe member states at the 7th European Conference of National Ethics Committees (COMETH), which was held in December 2003 on the theme of bioethics education and biobanks.

In the **data protection** field, the Draft Guiding Principles for the Protection of Personal Data with Regard to the Use of Smart Cards has been finalised at expert level.

As far as activities in the human rights sector are concerned, particular attention is being paid to **combating trafficking in human beings**. In this connection, it is worth noting the

conclusion of the LARA project on the effective criminalisation of human trafficking and the protection of victims' human rights in south-eastern Europe and the launch of the drafting of the European Convention on trafficking in human beings, which could be finalised at the beginning of 2005.

With regard to the **protection of children**, the experts have prepared a final report concerning the protection of children against sexual exploitation, which sets out positive initiatives identified in member states as best practices.

As far as the **International Criminal Court** is concerned, I welcome the participation by the Chief Prosecutor, Mr MORENO-OCAMPO, at the CAHDI's meeting and wish to thank him for accepting the invitation to take part in an exchange of views on recent developments concerning the International Criminal Court. The Council of Europe actively supports the ICC, with 38 of its 45 members having become Parties to the Rome Statute.

I should also like to mention **the developments concerning the European Treaty Series** since the CAHDI's last meeting.

In particular, the Protocol amending the European Convention on the Suppression of Terrorism (ETS 190), which was opened for signature on 15 May 2003, has been signed by 36 states and ratified by two (Norway and Bulgaria).

The Additional Protocol to the Criminal Law Convention on Corruption (ETS 191), which was opened for signature on 15 May 2003, has been signed by 23 states and ratified by three (Bulgaria, Norway and the United Kingdom).

The Convention on contact concerning children (ETS 192), which was opened for signature on 15 May 2003, has been signed by 16 states.

Lastly, the latest convention, the European Convention for the Protection of Animals during International Transport (Revised) (ETS 193), which was opened for signature on 6 November 2003, has been signed by 11 states and ratified by two.

In addition, the Civil Law Convention on Corruption (ETS 174) entered into force on 1 November 2003.

Under the **co-operation programme**, progress has been made thanks to the close co-operation by the Council of Europe with, inter alia, Serbia and Montenegro, Bosnia and Herzegovina, Kosovo (UNMIK), the Caucasus republics, "the former Yugoslav Republic of Macedonia", Moldova and the Russian Federation concerning anti-terrorist legislation, judicial training, legal aid, family law and the reform of judicial systems.

The excellent **co-operation with the European Union** must also be underlined. It has been reflected in two exchanges of views between the Troika of the Article 36 Committee of the Council of the European Union and a Council of Europe delegation in Brussels on 24 March and 22 October on the fight against terrorism, the fight against corruption (GRECO), the European Arrest Warrant, cybercrime, money laundering, trafficking in human beings, the efficiency of justice (CEPEJ) and, lastly, co-operation in the justice and home affairs field in the Balkans and with other states bordering on the European Union.

The Council of Europe has also contributed to the EU's *acquis* through the 25 conventions drawn up in the justice and home affairs field (in particular concerning human rights, crime problems and data protection), which are fully integrated in the *acquis*.

With more specific regard to the **CAHDI's activities**, I should now like to welcome the representatives of the delegations who are taking part in the committee's work for the first time.

I am most satisfied with the dynamism and quality of the major activities under way. This dynamism is reflected, in particular, in the request by the Committee of Ministers that you continue the consideration of the issues raised by Parliamentary Assembly Recommendation 1602 (2003) on the Immunities of Members of the Parliamentary Assembly with a view to issuing a fresh opinion if you deem that to be necessary. A request has also been made for you to consider the possible adoption of a position on the interpretation of the General Agreement on Privileges and Immunities of the Council of Europe. This demonstrates, if there was any need, the importance that the Committee of Ministers attaches to the CAHDI and, in particular, its experience and know-how.

With regard to the completion of the second phase of the Pilot Project on State practice regarding State immunities, I welcome the participation of our friends from the British Institute of International and Comparative Law and the Graduate Institute of International Studies in Geneva. You will therefore have an opportunity to discuss the points made in connection with the preparation of the analytical report.

A further CAHDI activity I should like to draw attention to is the European Observatory of Reservations to International Treaties. This meeting will discuss outstanding reservations and also reservations to the international treaties applicable to the fight against terrorism. I should like to thank the United Kingdom delegation which has submitted a list of reservations that raise difficulties and in respect of which there may be objections. The consideration of these reservations will clearly be part of your contribution to the Council of Europe's activities to combat international terrorism.

Lastly, a new item has been added to the agenda at the Greek delegation's request on national measures to implement UN sanctions and respect for human rights. I should like to thank the delegation for the memorandum prepared for the Committee, which rightly demonstrates the complexity of the issues raised from a legal point of view and the diversity of states' responses. The CAHDI is the ideal forum for discussing these issues and thereby contributing to the development of international law.

In conclusion, I should like to underline the unique role your Committee plays within the Council of Europe as a forum where the legal advisers from member states' foreign ministries and many observer states and organisations can discuss and, indeed, co-ordinate their views in the field of international public law and so contribute to its implementation and development.

Thank you.

**Speech by the Prosecutor of the International Criminal Court,
M. Moreno Ocampo**

INTRODUCTION

We have been taking strategic decisions, working very hard to design the organizational structure and to recruit our staff, we are selecting our first cases. We are planning our investigation and prosecution strategy which will identify the persons most responsible, assemble the best evidence in the shortest timetable, and to bring few charges, in order to keep proceedings on a fast track.

STRATEGIC DECISIONS

Our strategy includes the decision to focus our resources on the investigation and prosecution of persons bearing the greatest responsibility for the crimes within our jurisdiction. This means that the Office of the Prosecutor (OTP) will prosecute those without whose participation these crimes would not have taken place, instead of focusing on mid- or low-level perpetrators.

We have also committed ourselves to the complementarity principle enshrined in the Rome Statute, and have decisively sought to have a positive approach to it. This means that we have tried to make states understand that the International Criminal Court (ICC) is a tool that even territorial states can use. We have already had positive results with this approach, as can be seen in the Ugandan referral of the situation in the country.

Our Office is being organized with a lean and flexible structure, so that it can adapt quickly to the changing needs of our caseload, and so that external and local expertise can be properly harnessed.

I will focus on our priorities:

- To build the OTP team and relations with other organs
- To start the investigation in Northern Uganda
- To prepare the investigation in Ituri
- To improve understanding with the states, NGOs, and the international community at large

BUILDING THE OTP TEAM***Recruitment***

Since my arrival eight months ago, we have been working quickly but carefully at building an efficient Office, learning from our accumulated experience and expert consultations.

We have placed the greatest emphasis on the statutory requirements of efficiency, competence and integrity. My goal has been to recruit the highest quality people, emphasizing team-building, energy and commitment to the mandate of the Office. This focus on quality is the way to ensure success and to preserve our independence. Let me tell you about the some of the additions to our operational team.

Serge Brammertz has been elected by the Assembly of States Parties as the Deputy Prosecutor for investigations. He was a Federal Prosecutor in Belgium and was selected out of applications from over 45 countries. Since his arrival, recruitment has begun for the investigation teams and the development of investigation strategies.

Our recent additions also include Michel de Smedt, who was a senior police officer in Belgium for 18 years and a successful private consultant for 3 years, giving public management advice in European and African countries. Christine Chung joins our Prosecution Division after 12 years of experience in the Southern District of Manhattan. During the last two years she was chief of the appeals section. Ekkehard Withopf, formerly a German prosecutor and currently acting Senior Trial Attorney in the ICTY, will join us in July. Andrew Cayley, formerly a military lawyer in the UK, and currently a Senior Trial Attorney in the ICTY, will join us in 10 months. Fabricio Guariglia will be our first Appeals lawyer. He was one of the drafters of the Rome Statute, was working for ICTY for 5 years and now teaches at the London School of Economics. The Office benefits from this diverse wealth of experiences.

In addition, we have called for nominations for the Deputy Prosecutor responsible for Prosecutions. We are particularly bearing in mind the need for geographic and gender representation.

We are working to avoid mistakes of previous institutions, in creating large bureaucracies. We are building a small flexible Office, which will call upon networks of support as needed. Local people in affected areas will not be excluded but rather will be recruited as the need arises, so that we benefit from their particular knowledge and better explain our activities.

Structure

Our Office faces unprecedented challenges, given our potentially wide-reaching but complementary jurisdiction. Our experiences in the last months have guided us in shaping the best structure to carry out this mission. The new structure includes three functional divisions:

- o *The Prosecution Division*, with trial and appeals lawyers who will present cases before the judges. This division is concerned with classic prosecutorial work, although some of the procedures being applied are new.
- o *The Investigation Division*, a group of lawyers, investigators, and experts working together in special teams tailored to each specific situation. Some will be based in headquarters and others will be deployed in the field. They will have to conduct investigations of massive cases under extreme conditions in vastly different parts of the world.
- o *The Jurisdiction, Complementarity and Cooperation Division (JCCD)* deals with the fundamental issues of jurisdiction, admissibility and cooperation, which are the essential foundations for any effective investigation and prosecution. The Division brings together the analytical and legal expertise for the analysis of jurisdictional and admissibility questions and also provides dedicated specialist work in building networks of international cooperation.

These operational divisions are complemented by sections and units providing assistance and expertise on particular issues.

We have also established an Executive Committee that will advise the Prosecutor, particularly on decisions to move a situation from one stage to another (for example, from analysis to investigation to prosecution). The Executive Committee includes the Deputy Prosecutors for Investigations and Prosecutions and the head of the JCCD, and is chaired by the Prosecutor. This is another improvement on other institutions, and will ensure that the heads of each division are aware of and involved in major decisions, thereby improving coordination.

The structure is designed to respond to the particular challenges faced by the ICC. In particular, the creation of the JCCD flowed from the lessons learned in our first few months, which highlighted differences in the main functions required of our Office.

First, unlike any previous international tribunals, the Office has an open-ended jurisdiction, requiring analysis of multiple situations of potential jurisdiction. Second, unlike other national and international tribunals, the ICC has a complementary jurisdiction, requiring assessment of national proceedings. Each of these tasks requires specialist legal and analytical expertise.

Unlike UN tribunals, it does not have the pre-established backing of Chapter VII enforcement powers under the UN Charter. Thus, we have to work to obtain access to the operational field.

In addition, unlike a national prosecution service, the Office does not have its own police and national system to rely upon, it is essential that we have dedicated efforts to build a network of support and cooperation with States and organisations.

INTERACTION WITH OTHER ORGANS

Weekly meetings with the Registry are helping us to identify and resolve possible problems as early as possible. We are pleased with the work of Bruno Cathala and the Registry in first building an institution and adapting as needed to accommodate the needs of the Presidency, chambers and the Office of the Prosecutor. I welcome the appointment of Ida Goede, a planning engineer, as the temporary Director of Common Services. Right now, we are involved in the preparation of the budget. It requires agreements about the times, the distinction between core and conditional activities, budgetary stages, clear definitions of the mission of each unit. Shared tasks such as working on the budget have been a productive exercise: We may have separate missions but we have one budget, and we have to learn how to integrate our activities.

We are also very pleased with our interactions with the Presidency. President Kirsch is well respected from his leading role in adopting the Rome Statute, he has a great background in international relations and international law, and he is totally committed to his role as judge.

We welcome the arrival of Medard Rwelamira as the Director of the Secretariat of the Assembly of States Parties. With him on board, the interaction with the Assembly will be smooth and productive.

PRIORITY SITUATIONS

I expect to initiate investigations in two situations in 2004, although of course the final decisions remain to be taken formally.

At the same time, I hope we all also agree that it is also important to take the correct steps, with good practices and good foundations of cooperation.

We must all recall the early experiences of the ICTY, where the Office of the Prosecutor was under undue pressure to produce hurried investigations and indictments. The result was a set of practices and decisions that were subsequently criticized and that took considerable time to correct. Our approach is to take considered decisions at each step and to move from success to success.

In these early stages, we are continually facing new issues, we have to adopt sound decisions, we are learning from the experience.

Analysis

Because of the scope of the territorial and personal jurisdiction of the Court, there may at any time be several situations that could potentially warrant investigation by the ICC. Thus, a constant baseline activity is to engage in analysis of situations of interest. Such analysis is required under Article 15 of the Rome Statute and Rule 104 (Rules of Procedure and Evidence).

In order to promote public understanding of our approach, my Office will be publishing revised regulations and a paper explaining how we carry out analysis of information.

To give a brief description, analysis is carried out in three phases. The first phase of analysis is an initial screening to identify those communications that manifestly do not provide any basis for further action. Once the initial backlog of communications is cleared, the Office will endeavor to ensure that this first phase is completed and acknowledgements are sent within one month of receipt of a communication.

The second phase of analysis is a more detailed legal and factual analysis of significant communications. This is carried out by JCCD under supervision of the Executive Committee and myself, with the Investigation Division feeding in any accumulated information about the alleged crimes.

The most serious situations will proceed to the third phase, where a joint team is formed between the Investigation Division and JCCD, under supervision of the Executive Committee and the Prosecutor. This third phase, advanced analysis, will include advanced gathering of information and preparatory work such as development of an investigation plan. In this way, any decision to initiate an investigation will be well-informed, taking into account not only jurisdiction and admissibility but also any special difficulties, the prospects for success and with concrete plans for how to proceed.

We called this phase analysis of information to avoid the misperception that the expression "preliminary examination" could produce. In this phase we are collecting information from open sources, and eventually seeking information from states or NGOs. We have not yet taken any testimony, but if we do so, of course it will be at the seat of the Court.

In our approach to selecting situations, we are carefully staying within the centre of our mandate, in order to demonstrate that the Court is a credible, responsible institution warranting support of the international community as a whole.

Two situations – Uganda and Ituri – are now in an advanced stage of analysis and preparation, in order to gather all information necessary to prepare an investigation plan and to make sure we have the foundations for a successful investigation. I will take the decision to initiate an investigation once we have enough information to see that we have strong prospects for a successful investigation.

Uganda

As you know, Uganda has made the first referral of a situation by a State Party. We welcome this referral, which is a historic first for the Court. We are also pleased that a state referring a situation within its own territory is a great sign of confidence and trust in the Court.

Where a State refers a situation within its own territory, this comes with a strong expectation that the State will give its support and cooperation, including in providing security for ICC investigation teams. This is very important for my Office, given the potential difficulties for any investigation in unstable situations so often faced by the ICC.

The referral was initially made in confidence. In February, I was invited by the President of Uganda to a meeting to discuss the manner in which the government will cooperate with our investigations. We decided that the meeting should not be secret and that it would be appropriate to inform the public.

I should note that the Prosecutor of the ICC is in a very different position from a national prosecutor. A national prosecutor may be seen to prejudice his or her independence if contacts are made with the political authorities of the state. In contrast, as the ICC Prosecutor, I will often need to enter into dialogue with heads of state and government and with other agencies of a state in order to carry out my mandate. This may include meetings to receive referrals, to discuss modalities of cooperation, and to discuss prospects for a state's own authorities taking proceedings themselves. Consistent with our published policy paper, I intend to pursue constructive relations with states. We never include in these conversations our selection of the cases in the situation referred. The distinction between the JCCD and the Investigation Division helps us to protect our independence and impartiality.

Accordingly, we are analyzing alleged crimes carried out in northern Uganda in an independent and impartial way. I will continue to receive information from any source on crimes within the jurisdiction of the Court.

The situation referred is that of northern Uganda. In their letter the Ugandan government referred the "situation concerning the Lord's Resistance Army". We explained to them that the scope of the referral will be interpreted in accordance with the principles underlying the Rome Statute. I have advised the Ugandan authorities of this approach. According to the BBC, President Museveni pledged to cooperate with the ICC if it investigates his army's alleged involvement in war crimes.

"I am ready to be investigated for war crimes...(ellipsis as published) and if any of our people were involved in any crimes, we will give him up to be tried by the ICC,"..."And in any case, if such cases are brought to our attention, we will try them ourselves," Museveni said.

We are in an advanced stage of analysis and planning, gathering relevant information on crimes, admissibility, interests of justice, and prospects for cooperation, and laying in place an investigation plan and the foundations for cooperation. The formal decision whether to initiate an investigation will be taken as soon as possible.

The situation presents a number of difficult considerations. For example, we are talking with local groups to discuss their concerns about the role of international justice.

We will face extreme challenges in attempting to investigate in a war zone. Ensuring the safety and security of my investigation teams is a fundamental priority. We are working to obtain immunity agreements.

The issue of how to carry out arrests is another major consideration. The government of Uganda has faced great difficulties carrying out arrests, so we are exploring other possibilities.

Ituri

The situation in Ituri remains a priority for my Office. The Ugandan referral has received considerable media attention, but it has not altered the importance we place on the massive crimes in Ituri.

We have proposed a consensual division of labour with the DRC. We would contribute by prosecuting the leaders who bear the greatest responsibility. National authorities, with the assistance of the international community, could implement appropriate mechanisms to address other responsible individuals. The DRC has responded with a letter affirming that such a division of labour would be welcomed.

The situation on the ground in Ituri remains extremely complex. There are several groups operating in the territory that may be responsible for serious international crimes.

There are also initiatives underway to promote a negotiated settlement to the conflict, demobilization and disarmament. I want to be sure that the timing of any announcement does not derail the current fragile stability in the region and therefore lead to further killings. Article 53 of the Statute requires that I consider the interests of victims. To avoid new killings is my basic duty. We can wait to choose the moment to start some of the cases. As a permanent court, the ICC can work on a situation for as long as needed.

We are exploring cooperation with MONUC. The Court's Presidency is negotiating the Relationship Agreement with the UN, which is now a key concern. We will continue to foster the necessary support from the main partners, and we will be making key decisions on whether to initiate and how to initiate in the near future.

CO-OPERATION WITH STATES

The situations under analysis, by definition, pose extreme challenges for investigation. In order to succeed, my Office will need the support of the international community, including states, multinational organizations and civil society.

From governments, what we most need is support as we embark on this difficult but important process.

We will also need various forms of practical and logistical support and assistance. This might relate to gathering information, protecting witnesses, or ensuring a secure environment for investigation. The active cooperation of states and organizations may be required in order to locate suspects and carry out arrests.

The challenge before us is daunting, but the States Parties in creating the ICC did not create it in order to fail. We must succeed. There will inevitably be controversies or divergences as to the best approach along the way, but we must continue to work together to our shared goals.

Draft Revised Specific Terms of Reference of the CAHDI

1. Name of committee:

Committee of legal advisers on public international law (CAHDI)

2. Type of committee:

Ad Hoc Committee of experts

3. Source of terms of reference:

Committee of Ministers

4. Terms of reference:

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

5. Membership of the Committee:

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

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

c. The following observers with the Council of Europe may send a representative to meetings without the right to vote or to a refund of expenses:

- Canada
- Holy See
- Japan
- Mexico
- United States of America.

d. The following observers with the Committee may send representatives to meetings of the Committee, without the right to vote or to a refund of expenses:

- Australia
- Israel⁷
- New Zealand
- The Hague Conference on Private International Law
- NATO⁸
- The Organisation for Economic Co-operation and Development
- The United Nations and its specialised agencies⁹
- International Committee of Red Cross (ICRC)

⁷ Admitted as observer "for the whole duration of the Committee" by the CAHDI, March 1998. The same is valid for subordinated committees. Decision confirmed by the Committee of Ministers (CM/Del/Dec(99)670, item 10.2 and CM(99)57, para. D15).

⁸ See CM/Del/Dec/Act(93)488/29 and CM/Del/Concl(92)480/3.

⁹ For specific items at the request of the Committee.

European Organization for Nuclear Research (CERN)¹⁰
International Criminal Police Organization (INTERPOL).

6. Structures and working methods:

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

7. Duration:

The present terms of reference expire on 31 December 2004.

¹⁰ For specific items at the CERN's request and subject to the Chair's approval.

Appendix VI

Questionnaire on the Organisation and Functions of the Office of the Legal Adviser (OLA) of the Ministry of Foreign Affairs

1. What are the title, rank and position of the Legal Adviser?
2. What are the principal functions of the OLA?
3. Please give a brief description of staff employed by the OLA, including overseas staff.
4. Briefly describe the organisation and structure of the OLA.
5. What is the OLA's place within the Ministry of Foreign Affairs?
6. What are the main contacts of the OLA within Government?
7. Please describe the relations of the OLA with lawyers in private practice, academics and legal institutions.
8. Please provide a brief bibliography on the OLA, if available

Preliminary draft agenda of the 28th meeting of the CAHDI**A. INTRODUCTION**

1. Opening of the meeting by the Chairman, Ambassador Michel
2. Adoption of the agenda and approval of the report of the 27th meeting (Strasbourg, 18-19 March 2004)
3. Communication by the Director General of Legal Affairs, Mr de Vel

B. ONGOING ACTIVITIES OF THE CAHDI

4. Decisions by the Committee of Ministers concerning the CAHDI and requests for CAHDI's opinion
5. The law and practice relating to reservations and interpretative declarations concerning international treaties: European Observatory of Reservations to international Treaties
 - a. Consideration of outstanding reservations and declarations to international Treaties
 - b. Consideration of reservations and declarations to international Treaties applicable to the fight against terrorism
6. Pilot Project of the Council of Europe on State practice regarding immunities of States – Preliminary Analytical report

C. GENERAL ISSUES ON PUBLIC INTERNATIONAL LAW

7. The work of the Sixth Committee of the General Assembly of United Nations and of the International Law Commission (ILC)
 - a. 56th Session of the International Law Commission
 - b. Revitalisation of the General Assembly
8. National implementation measures of UN sanctions, and respect for Human Rights
9. Implementation of international instruments protecting the victims of armed conflicts
10. Developments concerning the International Criminal Court (ICC)
11. Implementation and functioning of the Tribunals established by United Nations Security Council Resolutions 827 (1993) and 955 (1994)
12. Fight against Terrorism – Information about work undertaken in the Council of Europe and other international Fora

D. OTHER

13. Election of the Chair and the Vice-Chair
14. Adoption of the draft specific terms of reference for 2005-2006
15. Date, place and agenda of the 29th meeting of the CAHDI
16. Other business

List of Items Discussed and Decisions Taken

1. The Committee of Legal Advisers on Public International Law (CAHDI) held its 27th meeting in Strasbourg, on 18 and 19 March 2004. The meeting was chaired by Ambassador Michel (Switzerland), Chairman of the CAHDI. The list of participants can be consulted in the meeting report (document CAHDI (2004) 11 prov.) and the agenda appears in Appendix I to the present report (the references of the documents submitted in the meeting appear in Appendix II to document CAHDI (2004) 11 prov.).
2. The Director General of Legal Affairs, Mr de Vel informed the CAHDI about developments concerning the Council of Europe since the last meeting of the Committee.
3. Further to its preliminary opinion on Recommendation 1602 (2003) on immunities of the Members of the Parliamentary Assembly adopted at its 26th meeting, the CAHDI pursued its consideration of this Recommendation and asked the Dutch delegate, Mr Lammers, to coordinate the preparation of a possible supplementary draft opinion which will be examined at the 28th meeting of the CAHDI. To this end, delegations were invited to submit any comment to the secretariat before 20 May 2004.
4. In the context of its activity as *European Observatory of Reservations to International Treaties*, the CAHDI considered a list of outstanding declarations and reservations to international treaties and several delegations informed the Committee about the follow-up they envisaged to give to some of them. Further to that, the CAHDI considered reservations to international treaties applicable to the fight against terrorism in accordance with the decision of the Committee of Ministers of 21 September 2001 (CM/Del/Dec (2001) 765 bis, Item 21) and agreed to submit a list of reservations that posed significant problems to the Committee of Ministers at its next meeting. To this end, delegations were invited to make submissions to the secretariat before 30 June 2004.
5. The CAHDI considered the progress made in the preparation of an analytical report on the *Pilot-Project of the Council of Europe on State practice regarding Immunities of States*. In this connection, it held an exchange of views with Mrs Breau of the British Institute of International and Comparative Law and with Mr Kohen of the Graduate Institute of International Studies. The CAHDI agreed to pursue consideration of this item at its next meeting and invited delegations not having done so to submit their national report at their earliest possible convenience.
6. The CAHDI considered the implementation at national level of UN sanctions and respect for human rights on the basis of contributions submitted by the delegations of Greece and Sweden. In this connection, the CAHDI asked its Chair, Mr Michel and its Vice-Chair, Mrs Dascalopoulou-Livada to prepare a questionnaire regarding means of implementation of such sanctions at domestic level which would serve as a basis to collect information about member and observer States for consideration at its next meeting. Moreover, it asked the Secretariat to prepare a document on developments at international level for its next meeting.
7. The CAHDI was informed about recent developments concerning the implementation of international instruments protecting the victims of armed conflicts and had an exchange of views on this issue.
8. Further to that, the CAHDI considered developments concerning the functioning of the Tribunals established by UN Security Council Resolutions 927 (1993) and 955 (1994).
9. The CAHDI considered the developments of the International Criminal Court (ICC), and had an exchange of views with Mr Moreno Ocampo, Chief Prosecutor of the ICC. His statement appears in Appendix III to the meeting report (document CAHDI (2004) 11 prov.).

10. The Secretariat informed the members of the CAHDI about developments concerning the Council of Europe activities against terrorism.
11. The CAHDI granted observer status to the International Criminal Police Organization (INTERPOL) for the whole duration of the Committee and to the European Organization for Nuclear Research (CERN) for specific items on the agenda at the CERN's request and subject to the Chair's approval. The revised draft specific terms of reference appear in Appendix II to the present report.
12. The CAHDI was informed about ongoing discussions concerning the reform of the European Court of Human Rights and the revitalisation of the UN General Assembly.
13. The CAHDI agreed to collect information on the structure and functioning of the Legal Adviser of the Ministry of Foreign Affairs in the member and observer States and, to this end, agreed on a questionnaire which appears in Appendix III to the present report. Delegations were asked to submit their replies to the questionnaire to the Secretariat by 30 June 2004.
14. Following the kind invitation of the Swiss authorities, the CAHDI decided to hold its next meeting in Switzerland, on 13 and 14 September 2004 and adopted the preliminary draft agenda in Appendix IV to the present report.