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

**28th meeting**
**Lausanne, 13-14 September 2004**

# MEETING REPORT

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## A. INTRODUCTION

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

1. Following the kind invitation of the Swiss authorities, the Committee of Legal Advisers on Public International Law (CAHDI) held its 28th meeting in Lausanne on 13 and 14 September 2004. The meeting was opened by Ambassador Michel (Switzerland), the outgoing Chair of the CAHDI. The list of participants is set out in **Appendix I**.

2. Mr Michel welcomed all the participants in the CAHDI meeting on behalf of the Swiss federal government and particularly thanked the representatives of the city of Lausanne for their hospitality.

3. Ms Cohen Dumani, representative of the municipality of Lausanne, addressed the Committee and informed it about the developments of the city. She further wished the CAHDI's members and guests a fruitful meeting.

4. Mr Michel announced his appointment as the new Under-Secretary-General for Legal Affairs and United Nations Legal Counsel and stated that, in view of this new situation, it would be more appropriate if Ms Dascalopoulou-Livada (Greece), Vice-Chair of the CAHDI, chaired the meeting.

5. Ms Dascalopoulou-Livada expressed her gratitude and conveyed her best wishes to Mr Michel in his new duties. She also warmly thanked the outgoing Chair for his outstanding work on the promotion of international public law and human rights. She then underlined that the meeting took place in the aftermath of the terrible events in Northern Ossetia and assured the Russian delegation of the Committee's heartfelt sympathy and solidarity, asking the delegation to pass on the CAHDI's condolences to the Russian authorities.

6. The agenda, set out in **Appendix II**, was adopted unanimously. The Committee also approved the report of the previous meeting (document CAHDI (2003) 11 prov.) and authorised the Secretariat to publish it on the CAHDI's website (**www.coe.int/cahdi**).

7. The Director of Legal Co-operation of the Council of Europe, Mr Roberto Lamponi, presented an account of recent developments concerning the Council of Europe, including the European Treaty Series. He laid particular emphasis on the recent developments of interest to the CAHDI, such as activities of the Committee of Experts on Terrorism (CODEXTER), the application of the Framework Convention for the Protection of National Minorities and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in Kosovo and the Brief of *Amicus Curie* submitted by the Council of Europe to the United States Court of Appeal. The text of his address is reproduced in **Appendix III**.

8. On behalf of the Committee, the Chair thanked Mr Lamponi for his informative statement and opened the floor for comments and questions on above communication.

9. The delegation of Sweden asked for further details about the authority responsible for the preparation of the Brief of *Amicus Curie*.

10. The observer from Mexico expressed his gratitude to the Council of Europe for all its support and help in bringing the Brief of *Amicus Curie* before the United States Court of Appeal. He particularly underlined the high importance of this case for the entire international legal community.

11. Mr Lamponi explained that the idea of the Brief was an initiative of the delegation of Netherlands to the Committee of Ministers and as that the Netherlands held the presidency of the European Union. that delegation would be in charge of this file.

## B. ONGOING ACTIVITIES OF THE CAHDI

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

12. The Chair referred 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 ("the Recommendation"). She further recalled that at its 26th meeting the CAHDI had adopted a preliminary opinion in response to the request dealing with certain procedural questions and concentrating on the public international law aspects of the matter (see document CAHDI (2004) 14 Appendix III A).

13. The Chair also recalled that Mr Lammers, the delegate of the Netherlands, had agreed to determine whether a supplementary opinion to the one already submitted to the Committee of Ministers was necessary. Mr Lammers had undertaken the task of coordinating the observations made by States and had submitted a document on the basis of these written comments (see documents CAHDI (2004) 14 and CAHDI (2004) 14 Corrigendum). The Chair gave the floor to Mr Lammers for the presentation of his paper (CAHDI (2004) 14 Addendum 1).

14. Mr Lammers informed the CAHDI that the review of observations by delegations – expressed during the last two meetings and in written comments – had been examined on the presumption that, as indicated in the preliminary opinion, the CAHDI would need to concentrate on what were considered public international law issues. In this connection, Mr Lammers analysed the observations made by national delegations on paragraphs 2, 5 and 6 of the Recommendation and explained his rationale behind the language he proposed in the -operative part of the paper.

15. Mr Lammers described two ways of dealing with the question of the broadening of the immunities proposed by the Parliamentary Assembly of Council of Europe (PACE in the text): an amending Protocol or an interpretive statement to the General Agreement on Privileges and Immunities (GA – in the text). He further underlined the necessary conditions for the introduction of an interpretive statement, namely the consensus of the states on how to interpret the GA and the general acceptance of the interpretative statement by the States, in accordance with the provisions of the Vienna Convention of the Law of Treaties, 1969. Several examples of international practice were quoted in this respect. Furthermore, Mr Lammers added that the national legislation could be changed in countries where there are lacunae between national legislation and the aforesaid Convention or where the national courts do not apply it directly.

16. With regard to the operative part of the paper, the delegate of Netherlands suggested that the CAHDI:

a) did not need to express an opinion on paragraph 2 of the Recommendation;

b) with regard to paragraph 6 (iii) of Recommendation, should propose to the Committee of Ministers to ask member states, where national legislation permits, to acknowledge unilaterally as an official document the laissez-passer issued by the competent Council of Europe authorities to the members of the Parliamentary Assembly;
c) referring to paragraph 7 of the preliminary opinion, should recommend that the Committee of Ministers unanimously adopt a position on the interpretation of the General Agreement on Privileges and Immunities of the Council of Europe as recommended by the Parliamentary Assembly in paragraphs 5 (i) and 5 (ii) of its Recommendation;
d) did not need to issue further opinions concerning this Recommendation.

17. The Chair thanked Mr Lammers for his clear statement and opened the floor for discussion.

18. The delegation of the United Kingdom contested Mr Lammers' third proposition with regard to Article 14. First of all, it considered that the interpretation of this provision was a matter for national courts. The United Kingdom had implemented Article 14 of the GA precisely and therefore it would not be possible for the government to adopt this proposition which would be binding on the courts. An amending Protocol to the GA would be more appropriate in this situation. Secondly, the British delegation considered that the suggestion of the PACE would actually amend the GA. The replacement of "in the exercise of their functions" by "within the framework of official functions" appeared to be a widening of the provision and the reference to opinions expressed was certainly a widening of the English wording of the provision "words spoken or words casts". Finally, the proposed interpretation might also be somehow narrower that what was in Article 14 in one respect, because it imposed conditions as regards the official functions by referring to "official functions carried out in the member states on the basis of the decision taken by an Assembly body and with the approval of the competent national authorities".

19. The delegation of the Russian Federation concurred with the main conclusion of the British delegation and believed that the amendment of Article 14 of the GA would be more appropriate than its interpretation.

20. The French delegation agreed with its Russian and British colleagues that the interpretation of Article 14 of the GA was a matter for judicial authorities. Moreover, it considered that the parallel established in the Recommendation between the waiving of parliamentary immunity at national and European level could be a source of confusion. In France, as in the PACE, these immunities existed by virtue of the functional principle and, therefore, the members of the PACE were not exempt from judicial persecution on their national territory, in accordance with Article 15b of the GA. The delegation also noted that the functional principle should be taken into consideration in the discussion of the problematic notion of "during the session of the Assembly". Finally, it stated that the recommendation to states to ask their competent authorities to notify the President of the PACE in case of the detention and judicial prosecution of a member of the PACE, would amend Article 15 of the GA.

21. The delegation of Portugal agreed that states could interpret the provisions of the Treaty under Article 31-33 of the Vienna Convention on the Law of Treaties of 1969. However, it considered that the proposed enlargement of the scope of application could be interpreted as an amendment. The delegation agreed that if strengthening the protection of the PACE posed a political problem, amendment would be more appropriate to the case in point. It also underlined that Portugal was in the process of narrowing the immunities of its national parliament.

22. The delegations of Germany and Finland fully approved Mr Lammers' proposals and stated that there was no collision between the proposals and national legislation or other relevant principles. However, they underlined the need to clarify the overall situation.

23. The Swedish delegation noted that the widening of the scope of the rights of parliamentarians would lead to the amendment of national legislation, which was not problematic from a substantive point of view. However, it doubted its legal significance at domestic level as the question of principle remained: whether or not it was appropriate from a legal point of view to make an interpretation in the Committee of Ministers to this effect. It noted that the practice of the Security Council in this field concerned the working methods of the entity without directly affecting individuals. Lastly, it was convinced that the CAHDI would be more reluctant to interpret a treaty of this kind if it restricted the rights of the individuals concerned.

24. The Norwegian delegation also distinguished the current situation from the examples provided by Mr Lammers with regard to Article 27 paragraph 3 of the UN Charter. It drew a line between the procedural rules in the internal order of international organisations and the issue of immunities, which had a considerable impact at the national level. The delegation supported the idea of carrying out several formal amendments to the treaty.

25. The delegations of Denmark and the Czech Republic joined the majority of the pronounced opinions with respect to Mr Lammers' third proposition and preferred to amend the treaty rather than to produce an interpretive position.

26. The delegation of Belgium agreed that the interpretation of Article 14 of the GA was a matter for national courts and underlined that the text could only be changed through amendments approved by national parliaments.

27. The Chair summed up the discussion by stating that, although there had been no objections to paragraphs a, b, and d of Mr Lammers' proposed text, the majority opinion was that paragraph c could not be accepted as it was. The CAHDI agreed to propose to the Committee of Ministers to ask member states, where national legislation permits, to acknowledge unilaterally as an official document the laissez-passer issued by the competent Council of Europe authorities to the members of the Parliamentary Assembly.

28. The Chair then informed the members of the CAHDI that the Committee of Ministers had decided to forward Recommendation 1650 (2004) – Links between Europeans living abroad and their countries of origin to the CAHDI for information and possible comments (see the document CAHDI (2004) 14 Addendum 2).

29. Mr Lamponi, who participated in the work of the Rapporteur Group of Legal Affairs (GR-J), gave a chronological account of the examination of the aforesaid Recommendation and stated that, after the examination of a draft reply by the GR-J on 7 September 2004, the latter decided to return to the issue in the light of possible input from the CAHDI. Moreover, he highlighted that the CAHDI's comments could be particularly valuable on paragraph 9 of the document, where the Parliamentary Assembly invited member states to review their emigration policies and solutions with regard to relations with their expatriates with a view to improving and strengthening them, and to establish institutional links with expatriate communities in order to enable them to defend their rights, express their opinions and influence any decisions which might concern them.

30. The delegation of Switzerland expressed its astonishment at the request, as in its opinion Recommendation 1650 (2004) did not raise relevant international public law issues at this stage of the discussion.

31. The German delegation fully supported the position of its Swiss colleagues and specified that paragraph 9 of Recommendation 1650 (2004) mainly raised policy questions. The delegation stressed that a legal examination of such policy questions would comprise a very wide mandate for the harmonisation of law and would deal with the relevant policy and law of the European Union. The CAHDI would therefore not be the primarily competent body for such an examination. Finally, the delegation suggested that a policy outline should be fixed and the policy discussion should identify the possible legal impact for the CAHDI.

32. The delegation of France agreed with the Swiss and German approach and pointed out the problematic nature of a proposition to review existing models of relations between expatriates and their countries of origin with a view to making proposals for the introduction of legally-binding measures at the European level. From the point of view of form, such a review would raise the issue of the adoption of a conventional, legally-binding text and from the point of view of content, the nature of expatriate rights should be defined and, eventually, a law specific to expatriates adopted. Therefore, the examination of the aforesaid Recommendation by CAHDI would not be desirable.

33. The delegation of Sweden joined the opinions expressed and hoped that the aforesaid arguments would convince the CAHDI. The delegation proposed to state clearly in the answer to the Committee of Ministers that this draft Recommendation did not raise any legal issues requiring an opinion from the CAHDI.

34. The Portuguese delegation supported the initiative of the Swedish delegation and underlined that it was not aware of Portuguese case quoted in the Recommendation 1650 (2004). Moreover, no legal measures could be taken with regard to sub-paragraph 3 of paragraph 9, since at the present time relations between states and their nationals abroad were still an internal affair for states.

35. The delegation of Norway shared the views expressed by other delegations, but underlined that several formulations in Recommendation 1650 (2004) contained fundamental legal concepts. For example, the invitation “to establish institutional links with expatriate communities […] in order to enable them to defend their rights” could create the misperception that expatriate communities as such had rights. For that reason, the delegation was reluctant to say that the above Recommendation did not raise any legal questions. It proposed rather to state that to a considerable extent the scope of this Recommendation was not unambiguous.

36. The Chair concluded the discussion by summarising that regarding Parliamentary Assembly Recommendation 1650 (2004) – Links between Europeans living abroad and their countries of origin, the CAHDI considered that this Recommendation raised policy questions rather than legal issues and therefore did not require an opinion from the CAHDI at this point. Furthermore, the Chair asked the Secretariat to draft an appropriate reply from the CAHDI to the Secretariat of the Committee of Ministers.

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

### a. List of outstanding reservations and declarations to international Treaties

37. In 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 document CAHDI (2004) 15, drawn up by the Secretariat, and the explanatory note submitted by the delegation of Turkey (see document CAHDI (2004)24).

38. The CAHDI began with the reservations and declarations to treaties concluded outside the Council of Europe (CAHDI (2004)15).

39. The delegation of the United Kingdom requested clarification on the Belgian reservation of 17 May 2004 to the International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999, as this reservation might not be compatible with paragraph 3g of United Nations Security Council Resolution 1373 (2001).

40. The delegation of the Netherlands informed the CAHDI that the aforesaid reservation had also been discussed at the meeting of the EU Council Working Group on Public International Law (COJUR) and that Belgium had agreed to provide further clarification before the discussion of this item at the forthcoming meeting of the COJUR in December 2004.

41. The delegation of Belgium stated that the aim of this reservation was to permit Belgium to exercise in exceptional circumstances the right of control of the political qualification of the infringement which was an objective of the extradition or mutual legal assistance request. Belgium reserved the right to refuse such requests by specifying that its authorities would bring the person whose extradition was requested before the appropriate court for judgment if such competence was foreseen by legislation. Lastly, the delegation of Belgium underlined that the scope of application of this reservation would be reduced, which would be compatible with the principle *aut dedere aut judicare.*

42. The delegation of Austria informed the CAHDI that its authorities had objected to the Jordanian reservation of 17 May 2004 to the International Convention for the Suppression of the Financing of Terrorism, New York, 9 December 1999, as the latter was clearly against the objective and nature of the Convention.

43. The delegation of the Netherlands agreed with the Austrian position and noted that the EU Presidency had spoken to the Legal Adviser of the Jordanian Ministry for Foreign Affairs, who explained that the above declaration had been attached to the temporary law on the aforesaid Convention. The Legal Adviser considered that this temporary law would be sent for parliamentary approval later that year and thus, intervening in the process would complicate the state of affairs and set back the approval. Furthermore, it could be perceived as an external pressure. The Jordanian Legal Adviser also stated that the declaration was of a political, rather than legal, nature and national legislation would not exempt any acts which would constitute terrorist acts under the Convention.

44. The Russian delegation informed the CAHDI that the reaction of its authorities would rather be in the form of a political statement inviting Jordan to reconsider its position and withdraw the declaration.

45. The delegations from Portugal, Spain, Denmark, United Kingdom, Italy, Sweden, Estonia, Canada, Finland, Norway and Germany informed the CAHDI that their authorities had objected to the above reservation. The Belgian delegation stated that its authorities would file an objection in the near future.

46. No reservations were expressed with regard to the declaration of Luxembourg of 6 November 2003 to the International Covenant on Civil and Political Rights, New York, 16 December 1966.

47. With regard to the Turkish declarations of 23 September 2003 to the International Covenant on Civil and Political Rights, New York, 16 December 1966 and to the International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, the delegation of Turkey presented its explanatory note on the declarations' compatibility with the objectives and purposes of the Covenants (CAHDI (2004)24).

48. The Austrian delegation stated its concerns with the protection of national minorities were not entirely dispelled and that the objectives, purposes and the integrity of the provisions of the two Covenants should be preserved.

49. The German delegation considered that the formulation of the second paragraph of the Turkish reservation could cause considerable uncertainty with regard to the States with which Turkey has diplomatic relations and that the third paragraph would considerably limit the obligations under the Covenants.

50. The delegations of Greece, Finland and Italy concurred with the previous speakers' concerns about these reservations.

51. The delegations of Portugal and the United Kingdom stated that their authorities would take final decisions in this regard in the near future.

52. Concerning the Malaysian declarations of 24 September 2004 to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York, 14 December 1973 and to the International Convention for the Suppression of Terrorist Bombings, New York, 15 December 1997, the delegation of the Netherlands informed the CAHDI that its authorities instructed the embassy in Malaysia to seek further clarifications on paragraphs 2 and 3 of the first reservation and paragraph 3 of the second one.

53. The Greek delegation stated that the third paragraph of both reservations raised concerns with regard to human rights protection, namely to the application of principle of due process.

54. The delegation of the United Kingdom expressed reservations concerning the third paragraph of both reservations, as it did not consider that detention without trial under national security and preventive detention rules amounted to bringing offenders to justice, which was part of the objective and purpose of these Conventions.

55. The Representative of Israel considered the declaration of the Syrian Arab Republic of 17 October 2003 to the Optional Protocol to the Convention on the Rights

of the Child on the Involvement of Children in Armed Conflict, New York, 25 May 2000, as being of an explicitly political nature. The objection of Israel would be transmitted to the depositary together with the notification of ratification of the aforesaid Protocol.

56. The French delegation expressed reservations concerning the second part of the Syrian declaration, as it could possibly exclude the application of the above instrument between the Syrian Arab Republic and Israel. It also created uncertainty regarding Syrian obligations *ratione persona* under the terms of the above Protocol.

57. The CAHDI then considered the declarations and reservations in respect of Council of Europe treaties (document CAHDI (2004) 15).

58. With regard to Serbia and Montenegro's reservation of 3 March 2004 to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, the delegation of Austria recalled that a similar reservation had been made by its authorities at the time of the ratification of the above Convention and that it was subsequently changed following the development of the case-law of the European Court of Human Rights.

59. The delegations of Greece and Germany agreed with their Austrian colleague that the principle that courts in Serbia do not, as a rule, hold public hearings when deciding in administrative disputes would require an amendment in future, following the case-law.

60. The delegation of Ukraine requested comments from the delegations of Germany, Luxembourg, Austria and Belgium concerning the temporary suspension in its regard of the application of the European Agreement on Regulations Governing the Movement of Persons between Member States of the Council of Europe, 13 December 1957, which had not yet been ratified by Ukraine.

61. The abovementioned delegations noted that Article 7 of the Agreement provides the possibility of such suspension and that the application of the Agreement with regard to Ukraine would be against the Council Regulation UE 539/2001 of 15 March 2001, concerning visas. However, following the suggestion of the Chair, they agreed to come back to this request at the next meeting in order to provide Ukraine with further clarifications.

62. The delegation of Azerbaijan informed the CAHDI on the reasons for its declarations to the European Convention on the Suppression of Terrorism, 27 January 1977, the Criminal Law Convention on Corruption, 27 January 1999 and the Civil Law Convention on Corruption, 4 November 1999.

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

63. The CAHDI examined the list of reservations and declarations in respect of international treaties applicable to the fight against terrorism, as set out in CAHDI (2004) 22. The additional relevant document was CAHDI (2004)16.

64. The delegation of the United Kingdom proposed to send document CAHDI (2004)22 to the Committee of Ministers, asking it to consider these reservations and to invite the member states concerned to consider withdrawing their respective reservations. Furthermore, it proposed to ask the Committee of Ministers to invite

member states to volunteer to approach the non-member states concerned with regard to their respective reservations.

65. The delegation of Finland was not convinced that Venezuela's reservation to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23 September 1971 was not problematic, since refusal to extradite would concern only minor offences given that in the reservation there was a subsequent specification "unless financial extortion or injury to the crew, passengers, or other persons has occurred". The above reservation might also correspond to the discrimination clause which was a necessary corollary to the prohibition of the political offences exception in more recent anti-terrorist conventions.

66. The delegation of Russian wondered what were the criteria used by the Secretariat to select these reservations as problematic or outstanding.

67. The Secretariat informed the CAHDI that the term "outstanding" was used for the declarations or reservations made within the period in which the objection could be made to the reservation. As for problematic reservations, the Secretariat discerned the list of outstanding reservations divided into two parts: reservations to non Council of Europe treaties and reservations to the Council of Europe treaties. The first part was a list of reservations examined by COJUR at its meetings and submitted to the Council of Europe by the country holding the EU presidency. The second part of the list was prepared by the Secretariat with elements of information concerning the qualification of reservations provided by the Treaty Office in accordance with the decision of the CAHDI. The qualifications in document CAHDI (2004)22 were presented by member States which had submitted comments according to the decision of the CAHDI at its 26th meeting.

68. The CAHDI agreed to transmit document CAHDI (2004) 22 to the Committee of Ministers and to recommend to it the approach proposed by the delegation of the United Kingdom.

## 6. Pilot Project of the Council of Europe on State practice regarding State immunities – Draft analytical report

69. The Chair referred to the Pilot Project in its current version (CAHDI (2004) 5 Part II (A) rev2, (B) rev and table) and thanked Mr Saba Rangel do Carmo of the Graduate Institute of International Studies (Geneva), Ms Breau of the British Institute of International Comparative Law and Mr Hafner of the Vienna University for having prepared their parts of the draft analytical report (CAHDI (2004)5 Part I (A), (B) and (C) respectively).

70. Mr Hafner thanked the CAHDI for the invitation and its members for the six to seven thousands files submitted for the Pilot Project. He continued his presentation with a history of the analysis of the State Immunities issues which led to the elaboration of the United Nations Draft Convention on Jurisdictional Immunities of States and their Property. This development was protracted as the political environment, circumstances and conceptions underlying the State Immunity issue changed during the last decades. However, the Pilot Project seemed precisely to serve to take stock of the present situation and state practice. Furthermore, Mr Hafner was pleased to acknowledge that the practice submitted and reflected in the Pilot Project only confirmed the work of the United Nations in this regard.

71. Mr Hafner outlined that the amount of files and the complexity of the matter were the reasons for the delay in the completion of the Pilot Project. Furthermore,

several files were not detailed enough for in-depth investigation and very often stated the results but not always the reasons and the deliberations of the courts that led to them. He further mentioned that judges were primarily guided by their considerations based on national legislation rather than by international law considerations.

72. Mr Hafner then presented the issue examined by Vienna University, namely state immunity from enforcement measures, state immunity regarding employment contracts with personnel of diplomatic/consular missions and state immunity and the commercial transaction exception.

73. The analysis of practice with regard to enforcement measures confirmed that a restrictive approach, which permitted enforcement measures against property clearly serving non-government purposes, against earmarked property and in cases of waiver was pursued by many national courts. With regard to employment contracts, most national courts took the restrictive immunity concept as a basis and had accepted the non-immunity rule as reflected in international law instruments on State immunity. However, concerning the personnel of diplomatic or consular missions, the courts tried to find a balance between the aforesaid rule on the one hand and the status of a diplomatic/consular mission and its sovereign functions on the other hand. As far as the definition of state immunity and the commercial transaction was concerned, the practice of European States followed well established patterns in the practice of the international law of State immunity according to which there are no clear-cut criteria ready-made in all instances.

74. In concluding, Mr Hafner stated that the development of the rules on State immunity seemed to have come to a settled result. He expressed the hope that the Pilot Project would contribute to this so that the relations governed by the rules of State Immunities could find a firm legal basis in the interests of the economic activities of states, as well as private entities.

75. Ms Breau echoed Mr Hafner on the importance of the work that has been done in the UN and on the difficulties of categorisation of case-law. As for conclusions, the issues examined by her institution, which were property, including ships, waiver of immunity, and arbitration, revealed a clear and unmistakable trend towards restrictive immunity. However, in some cases it was difficult to determine whether it was the nature of the act itself or the purpose of the act and, therefore, it was difficult to identify the analytical framework. In this respect Ms Breau thanked Representatives for recent cases and urged them to continue the reporting. Lastly, she underlined the remarkable unanimity between the conclusions of the three institutions, which would enable the finalisation of the report in the near future.

76. Mr Saba Rangel do Carmo presented the issues which were analysed by his institution, namely the nature of the state and state immunities, torts and state immunities and the distinction or sometimes the amalgam between state immunity and diplomatic immunity. The institute had already compared the relevant state practice with different relevant international instruments, for instance, the Draft United Nations Convention on Jurisdictional Immunities of States and Their Property (2004), the European Convention on State Immunity of 1972 and draft articles on Jurisdictional Immunities of States and their property elaborated by the International Law Commission (1991). However, the analytical report was not yet finalised and would be presented in the near future.

77. The delegation of Austria stressed the usefulness and importance of the Pilot Project and welcomed the progress made in the preparation of the analytical report.

78. The delegation of the United Kingdom proposed to the CAHDI members to submit additional comments and cases, where possible, in order to permit the institutions to finalise the work in light of the forthcoming final outcome of the United Nation's activity on this subject.

79. The Chair thanked Ms Breau, Mr Saba Rangel do Carmo and Mr Hafner for their presentations; welcomed the progress achieved and expressed the wish that the CAHDI could consider the final version of the report at its next meeting. The delegations were asked to submit any additional comments or contributions by 30 October 2004.

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

80. The Chair recalled that following a proposition by the United Kingdom during the 27th meeting, the CAHDI had agreed to gather information on the organisation and functions of the Office of the Ministry for Foreign Affairs Legal Adviser (OLA) on the basis of a questionnaire. The Chair then referred to the compilation prepared by the Secretariat on the basis of 16 contributions from CAHDI members and observers (CAHDI (2004) 19 and addenda) and opened the floor for discussion.

81. The delegation of the United Kingdom expressed its gratitude to the delegations which had replied to the questionnaire and encouraged all member and observer states to contribute to this useful activity. The delegation noted that even if responsibilities did vary to some degree, there was a large degree of similarity between the central issues of OLA activities, such as public international law, responsibility in relation to treaties, the role of the legal adviser within the foreign ministry and government. The delegation thus suggested fixing another deadline for contributions and discussing this issue at the next meeting of the CAHDI.

82. The Portuguese delegation agreed with the British delegation and emphasized that this discussion is particularly important for Portugal, which is in the process of amending the national regulation on the organisation of the Ministry for Foreign Affairs and is trying to reinforce the competences and personnel of the OLA.

83. The representative of Japan reported to the CAHDI members that the Treaties Bureau of the Ministry for Foreign Affairs of Japan has changed its title and as of 1 August 2004 was named the International Legal Affairs Bureau. However, the authority and functions had not been affected and this adjustment was part of an overall structural reform within the Ministry. As for structural changes within the Bureau, the division of work between international and bilateral agreements was replaced by division by fields of international agreements, with economical and social international agreements on the one hand and other international agreements on the other.

84. The delegation of Germany fully approved of the project, informed the CAHDI that the German contribution was in the process of being prepared and, thus, requested another deadline for this useful but very complex activity.

85. The delegation of Norway agreed with the delegation of Germany on the complexity of this activity in the sense that certain OLA, the Norwegian one for instance, had operational and administrative responsibilities which were difficult to explain. However, it fully supported the idea of carrying on the activity in the spirit of cross-fertilization, mutual support and better understanding of the advisory, administrative and/or policy roles that the OLA had in Foreign Ministries.

86. The Chair concluded this item by suggesting the extension of the deadline till 31 January 2005 and invited delegations not having done so to submit their contributions. Ms Dascalopoulou-Livada also noted that a complete compilation should be the objective of this activity and the CAHDI would pursue its consideration of this item further at its next meeting.

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

87. The Chair recalled that at its 27th meeting the CAHDI had analysed documents on this matter (documents CAHDI (2004)7 and 9 respectively) and asked its Chair, Vice-Chair and the Secretariat to prepare a questionnaire regarding national measures to implement United Nations sanctions (see document CAHDI (2004) 20). The Secretariat was also instructed to prepare a document on developments at international level (see document CAHDI (2004) 13). The Chair specially thanked the Italian delegation for the document on national measures to implement United Nations sanctions which it had submitted to the Committee (see CAHDI (2004) 23).

88. The Chair stressed the importance and relevance of this issue and urged Committee members to hold an exchange of views on the subject and consider what action should be taken.

89. The Swedish delegation recalled that the working meeting on this matter had been held by the permanent Swedish and German missions in New York on 24 November 2003, but had had no effective follow-up. However, the correlation between international sanctions mechanisms and respect for human rights remained a primary concern for Sweden, which actively supported the provision in domestic legislations of mechanisms so that the measures could be challenged and compensation sought in case of legal error. As for the questionnaire, in spite of activities at United Nations level, no legal surveys had been conducted on the direct impact of national implementation measures on individuals. For instance, the Stockholm process contributed to the improvement of the efficiency of sanctions, but it could not take into account the problems related to legal security, the respect of law and human rights. Therefore, the Swedish delegation considered it vital to carry on this activity and suggested to add to the questionnaire questions concerning human rights issues, for instance a question about national courts' competence when decisions on sanctions are challenged by the individuals concerned.

90. The delegation of France noted that the questionnaire was particularly useful. However, with regard to the proposition to examine the balance between sanctions' efficiency and human rights issues, it underlined that the United Nations Security Council (SC) was well-aware of this complex problem and had already adopted measures to improve the situation. It outlined in particular the Interlaken Process, Bonn-Berlin and Stockholm Processes. Therefore, this question should be handled carefully by the CAHDI within its competence and possibilities, as well as in view of all the probable implications for its relations with the United Nations and, in particular, with the SC.

91. The Finnish delegation fully shared the position of Swedish delegation on the necessity of the additional questions on the impact of sanctions on human rights. As for the SC, it had already been recognised in the Report of the Monitoring Group to the 1267 SC Committee (Resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities), that this issue should be kept under

review. Therefore, as far as there was an urgent need for innovative ideas, the discussion in the CAHDI should be warmly welcomed. Concerning the questionnaire, it noted that a lot of reporting had already taken place with regard to question 6, for instance in the aforesaid 1267 SC Committee or in the European Union, and thus it would be appropriate to avoid a substantial duplication of the work.

92. The Portuguese delegation strongly stressed the need to maintain questions related to the implementation or incorporation of SC Resolutions in the questionnaire in order to avoid the predominance of the human rights issues. It further suggested introducing a reference to the legal nature of the SC Resolutions in point 2, as it would be significant for the legal systems of Latin countries. It also considered it useful to extend the reference to case-law concerning implementation and constitutional or legal problems provoked by the legal nature of the SC Resolutions. In this respect, Portugal quoted a case concerning the implementation of SC Resolution 1173 (1998) on the situation in Angola. Finally, it considered that the survey would be useful not only for the States, but also for other international entities, such as the SC.

93. The delegation of Switzerland agreed with the position of its French colleagues on the new dimension of the SC's role, both legislative and judicial, and the ambiguous position of states, which should execute the sanctions and comply with their human rights obligations at the same time. However, the Swiss delegation considered it vital to carry out the present survey, because of lacunae at the national and international levels and the lack of studies, for instance on the means of appeal. The survey, consequently, could contribute to the development of the conscience of the problem and its possible solution.

94. The Italian delegation proposed to introduce a separate question for member states of the European Union, in the sense that the answers might be different depending on whether the SC sanction had been implemented through European Union regulations or directly at national level. In this respect, the delegation also specified that one of the main problems before the European Court of Human Rights was the question of whether the European Union did have adequate means of protection. It further proposed to reformulate point 6 in accordance with the proposition of Greece (document CAHDI (2004)7).

95. The Irish delegation endorsed the Italian contribution in the sense that numerous SC Resolutions had been adopted within the legal order of the European Community and, thus, the implementation of national measures was to a large extent dictated by the obligations of Community membership. In this connection, the ruling of the European Court of Human Rights in the case of *Bosphorus Hava Yollari v. Ireland*, on the 29 September 2004, would be of relevance.

96. The delegation of Slovenia presented the national procedure for the implementation of SC Resolutions and supported the exchange of views on experience on this matter.

97. The Austrian delegation agreed that, given the states' preponderant obligation under Article 103 of the UN Charter, the implementation of SC Resolutions could lead to different legal regimes being in contradiction with each other. Consequently, it supported the discussion on this matter and endorsed the propositions of Italy and Portugal.

98. The Slovakian delegation suggested that the CAHDI should co-operate with the Steering Committee for Human Rights (CDDH) with regard to the human rights aspects of the matter.

99. The delegations of Norway and Denmark proposed to focus the survey on the balance between the efficiency of sanctions imposed under Chapter 7 of the United Nations Charter and the individual assessment as to whether the extent of human rights have been fully accounted for and insured.

100. The delegation of the United Kingdom supported the expansion of point 6 and proposed to avoid the duplication of the work by introducing to the answers to the questionnaire references to similar answers to other organisations. It also invited observer States to reply to the survey.

101. The representative of Canada welcomed the activity and reported on its domestic system and the contrast between the rapid mechanism for the implementation of SC Resolution 1267 (1999) concerning Al-Qaida and the Taliban and associated individuals and entities and a separate long-lasting procedure to list terrorists and freeze their assets.

102. The representative of the International Committee of the Red Cross presented the rules of international humanitarian law, which could be very pertinent with regard to sanctions in the situation of armed conflicts. He recalled that, among others, the prohibition of starving of the civilian population and the rule of free passage of goods for the civilian population should be kept in mind when sanctions are imposed.

103. The representative of Mexico and the Turkish delegation approved of the questionnaire and emphasised that the SC could benefit from this discussion.

104. The German delegation mentioned the usefulness of the CAHDI's questionnaire in spite of similar discussions in United Nations, European Union and Proliferation Security Initiative. It also outlined that the reply of the European Union could constitute a valuable contribution.

105. The representative of Japan agreed that there was an urgent need to reconcile the effective measures in countering terrorism with the respect of various principles of Human Rights, including the principle of the assumption of innocence or the principles related to the burden of proof. It considered it evident that the SC would have the final decision on this matter, but other fora, enlarged in comparison with the SC, could also contribute.

106. The representative of the Secretariat informed the members of the CAHDI that the Secretariat would be ready to associate the Steering Committee for Human Rights (CDDH) to the present activity providing that the CAHDI would have responsibility for its format and ultimate aim. The Secretariat proposed to continue to inform the CDDH on developments and to associate the latter Committee to the activity if a more precise form of co-operation was suggested to the Committee of Ministers.

107. The Chair noted that the replies to the questionnaire would refer to the implementation of sanctions in internal law and thus this activity would not duplicate the activities of other international fora. She further proposed to limit the analysis to the existing questionnaire supplemented by the Swedish, Portuguese and Italian

proposals. Lastly, she underlined that the CAHDI could return to the discussion of the use of the questionnaire after the collection and exchange of information.

108. Following the comments and suggestions of the member and observer states, the CAHDI approved the questionnaire as it appears in **Appendix IV**. The Chair asked the delegations from member and observer states of the Council of Europe, as well as from the European Union, to submit their replies by 31 January 2005.

## C. GENERAL ISSUES ON PUBLIC INTERNATIONAL LAW

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

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

109. The Chair welcomed Mr Gaja and thanked him for accepting the CAHDI's invitation. Mr Gaja described recent developments concerning the work of the ILC (see also document CAHDI (2004) Inf.4). The text of his statement is set out in **Appendix V**.

110. The Chair thanked Mr Gaja for his informative statement, welcomed the progress made and opened the floor for discussion.

111. The Austrian delegation referred to the progress made by the Secretariat a few years ago with respect to publishing methods and suggested that these could be taken into consideration in future in order to publish the report of the ILC earlier. It also believed that there was interaction between the ILC and states, but that it was not ideal. The issues, indeed, had never been taken off the agenda, as a result of negative state responses or their absence. Nevertheless, it was important that the ILC identify the areas where guidelines for states would be necessary. Finally, it outlined the negative reaction in the summary records of the 6th Committee to an examination of the issue of unilateral acts by the ILC.

112. The Norwegian delegation welcomed the ILC's conclusive work on diplomatic protection and international liability. It also considered that the national statements should be available to all ILC members. It fully joined its Austrian colleague in the belief that the reaction of the 6th Committee to the ILC on the issue of unilateral acts was so overwhelming that it would be useful for the ILC to examine this case.

113. The delegations of the United Kingdom and Portugal pointed out that the late arrival of the ILC report had certainly reduced the value of its discussion in such international forums as the CAHDI and the COJUR, which were always useful for the activities of the 6th Committee. They considered that the summary records were not able to capture the subtlety of the full statement, in spite of their detailed structure. In this respect, the delegations underlined that verbatim statements are considered by states as state practice and expressed the hope that members of the ILC would regard the verbatim statements circulated by states as official documents.

114. Mr Gaja noted that, since summary records of the Sixth Committee reflected only in part comments contained in verbatim statements, it would be useful if those statements acquired the status of United Nations documents. This would facilitate references to the statements in the Commission's work.

115. With regard to unilateral acts, Mr Gaja underlined that the ILC was bound by the position of the UN General Assembly, which had not asked for the topic to be abandoned in the relevant resolutions. Moreover, there was strong support in the 6th Committee for continuing the work on this delicate issue. Therefore, the ILC would try to deal with and finalise it in a way similar to some extent to the liability issue. The ILC would have to work by consensus as far as possible and possibly produce an expository study, and not necessarily a series of draft articles. Mr Gaja underlined that the case studies prepared by the ILC might not be totally devoid of interest, even in the absence of a decisive conclusion.

116. In conclusion, the Chair thanked Professor Gaja for his analysis of the ILC report and expressed the hope that the latter would be useful for the preparation of the work of the 6th Committee.

**b. Revitalisation of the General Assembly of the United Nations**

117. The Chair presented the letter of the President of the General Assembly of the United Nations, which transmitted an informal text in the form of the draft Resolution of the General Assembly (document CAHDI (2004)10), and opened the floor for discussion.

118. The delegation of France informed the CAHDI that several states had reservations about the proposition to hold the sessions of the 4th and 6th Committees from February to April. The issue remained under discussion and in the absence of a consensus was not taken into consideration in Resolution 58/316 on the Revitalization of the work of the General Assembly which was adopted on 1 July 2004.

119. The delegation of Austria objected to the proposal and considered that the 6th Committee, as an entity of Legal Advisers of the General Assembly, should hold its meetings when relevant questions were discussed by the General Assembly. At the same time, it was in favour of the fragmentation of the debates of the 6th Committee. It further informed the CAHDI that following the Austria–Sweden initiative, the International Law week would be organised in November 2004. In particular, a round table panel discussion on the subject “The Security Council as a world legislator” would take place on 4 November 2004.

120. The German delegation did not consider the rescheduling of the main Committees of the General Assembly as a priority and stated that the introduction of a “troika” system for the continuity of the Presidency Office should be a subject of discussion. It supported a stronger coordination process between the principal UN organs.

121. The Chair closed the discussion on this item and gave the floor to Mr Hafner who informed the CAHDI about the discussion on the Draft United Nations Convention on Jurisdictional Immunities of States and their Property (the Convention in the text). Mr Hafner expressed the hope that the Convention would be finalised by the Secretariat and adopted during the following meeting of the United Nations General Assembly. He outlined the discussions on the application of the Convention to military matters and to immunities *ratione personae*. With regard to the former, Mr Hafner noted that that the Convention did not affect customary rules, that it should be read in conjuncture with the commentary and, therefore, it would be not applicable to military matters. With regard to the latter, since the Convention dealt with the immunities of States and their property, immunities *ratione personae* did not fall within its ambit, as the personal immunities of states organs were left to customary

international law. Mr Hafner considered that it would be appropriate to clarify these points in the explanatory report and not in the text of resolution adopting the text and opening it for signature, as there should be no obstacles to the adoption of the latter.

122. The delegation of Norway drew attention to the need for clarification and agreed with Mr Hafner's approach to such issues as military matters and immunities *ratione personae*. In this respect, it suggested that an official statement by Mr Hafner and the ad hoc Committee on jurisdictional immunities of States and their property would be important for the purposes of clarification. It was also added that Norway was already finalising the translation of the Convention.

123. The Austrian delegation underlined that the adoption of the aforesaid Convention should not be jeopardized. It further informed the CAHDI that the delegations of the Netherlands and Austria prepared the text of the draft Resolution concerning the adoption of the text of the draft Convention by the 6th Committee and asked all its colleagues to comment on this text before the United Nations General Assembly (see document CAHDI (2004)26). It specified that paragraph 2 of the draft Convention was an endorsement of a consensus reached by the abovementioned ad hoc Committee. Lastly, it noted that the German-speaking countries would also produce a German translation of the Convention immediately after its adoption.

124. The French delegation agreed with its Austrian colleague that the results of negotiations on the immunities of persons were reflected in paragraph 2 of the draft Resolution. It also stressed that the problem of military matters required further consideration and that a distinction should be drawn between the meaning of "military" and "armed conflict". As for the draft Resolution concerning the adoption of the text of the draft Convention by the 6th Committee, the French delegation wondered if the provision of paragraph 3 on the opening of the text for signature by the Secretary General should be specified as had been done in United Nations General Assembly Resolution 58/4 on the United Nations Convention against Corruption.

125. The delegation of the United Kingdom thanked the Austrian and Dutch delegations for their well-prepared draft Resolution. Given the importance of the commentaries, the delegation suggested including in the third paragraph of the preamble a reference not only to the final set of draft articles, but also to the commentaries. The delegation also attached particular importance to the consistency of the final terminology and to the presence of all the legal advisers at the time of the adoption of the Convention.

126. The delegation of Germany requested further clarification of certain issues, for instance, the principle of immunity with respect to acts of the armed forces and the principle of non-retroactivity. In this respect, it referred to Articles 31 and 35 of the 1972 European Convention on State Immunities. The delegation recalled that a single legal position could be preserved through a common declaration or even a reservation, but underlined that it would not call on the CAHDI to proceed in this way.

127. The representative of Japan echoed the other delegations on the importance of the Convention and emphasised in this context the need to clarify the understanding of the non-applicability of the Convention to military matters. From the perspective of Japan, the question of the presence of visiting forces in a country with the consent of the host nation would require further commentary or clarification in written form.

128. The Portuguese delegation informed the Committee that it would be extremely useful and important for Portugal to have an international instrument on this matter, since there was a lack of national legislation and non-uniform case-law.

129. The Chair closed the discussion and thanked Mr Hafner on behalf of the CAHDI for his presentation on the Convention, a major achievement in the development of international law. She further expressed the Committee's gratitude to the delegations of Austria and the Netherlands for their Draft Resolution, which had found wide-spread support. Lastly, the Chair expressed the hope that the Convention would be adopted as it was, with the exception of some editorial changes.

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

130. The Chair thanked Mr Kellenberger for accepting the CAHDI's invitation. Mr Kellenberger underlined the relevance of international humanitarian law (IHL) in contemporary armed conflicts. The text of his statement is set out in **Appendix VI**.

131. The Chair thanked Mr Kellenberger on behalf of the CAHDI for his informative statement, welcomed the progress made and opened the floor for discussion.

132. The delegation of Finland informed the Committee that it would transmit a copy of Mr Kellenberger's statement to the relevant Finnish governmental bodies, including the Advisory Body on International Humanitarian Law. As for national activities, Finland had deposited its instrument of ratification of the 2nd Protocol to the 1954 Hague Convention on the Protection of Cultural Property in Armed Conflicts and had prepared the ratification of the 5th Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons. Moreover, the Finnish delegation strongly supported the idea of the participation of victims in the proceedings of the International Criminal Court and of states donating to a victim's trust fund.

133. The delegation of Sweden quoted the following Swedish contributions to the development of the discussions on this subject: an initiative of the Swedish Foreign Minister in the European Union on the rule-based international order, which was a contribution to the European Union's security strategy and included elements of IHL as well; the pledges to the 28th International Conference of the Red Cross and the Red Crescent; and the arrangements for this year's seminar on the role and place of computer network attacks in the framework of IHL. Furthermore, in June 2004, Sweden ratified the 5th Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons.

134. The delegation of Germany informed the CAHDI about the session of the International Commission of Jurists in Berlin from 27 to 29 August 2004 and referred to its final Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism, which aimed at enforcing humanitarian standards in combating terrorism as well. It further underlined that IHL should be implemented without any ambiguity.

135. The Representative of Japan informed the CAHDI about the accession of Japan on 31 August 2004 to two 1977 Additional Protocols to the Geneva Conventions of 1949. It also ratified an Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict of 2000. At national level, a framework law on so-called "emergency situations" concerning the

treatment of prisoners of war is currently under elaboration in order to ensure the thorough and full implementation of IHL in Japan.

136. The delegation of Austria agreed with the German delegation on the need for the strict application of IHL. It wondered further about the ICRC's view of the Advisory Opinion of the International Court of Justice on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory from 9 July 2004 and on the possible improvement of functioning of the International Humanitarian Fact-Finding Commission (the Commission), established under the First Additional Protocol of 1977 to the Geneva Conventions of 1949.

137. The Swiss delegation emphasised the collective responsibility for the respect of IHL. In this regard, it underlined the importance of the aforesaid Advisory Opinion and informed the CAHDI that following this Opinion, Switzerland, as the depository of the four Geneva Conventions of 1949, received a mandate to consult the States Parties to the Conventions on the improved respect of the 4th Geneva Convention relative to the Protection of Civilian Persons in Time of War in the occupied territories. Consequently, it appealed for assistance with regard to this difficult mandate.

138. The delegation of the United Kingdom considered that the aforesaid Advisory Opinion did not satisfactorily address the relationship between human rights law and IHL. The delegation also noted that the applicability of IHL raised difficult questions, for instance the difficulty of the need to stress the basic requirement of "humane treatment", which is a part of customary international law and which has to be applied as a minimum requirement. As for national compliance with IHL, it referred to the publication of the updated Manual of military law for British Armed Forces by Oxford University Press. Lastly, it concurred with Mr Kellenberger and other delegations on the importance of the Commission and urged all the Parties to the Geneva Conventions to accept its competences.

139. The delegation of Slovenia agreed to transmit a copy of Mr Kellenberger's statement to the relevant Slovenian bodies, including the National Commission on IHL.

140. Mr Kellenberger thanked the CAHDI member and observer states for their contributions. Concerning the aforesaid Advisory Opinion, the ICRC had already taken a position on the subject on 17 February 2004, namely on the controversy between Israel's right to security and the construction of a barrier inside Palestinian territory in violation of the 4th Geneva Convention. However, the ICRC had renounced its presentation to the International Court of Justice. With regard to the Commission, its effectiveness would depend on the willingness of the Parties to accept and promote this mechanism which had great potential. Finally, Mr Kellenberger underlined that, surprisingly, the question of the application of IHL to such areas as counter-terrorism arose only with regard to the adequacy of the IHL regime. From the ICRC's point of view, in the "new wars" debate, the qualification of novelty should be done and the applicable legal regime should be determined.

## 11. Developments concerning the International Criminal Court (ICC)

141. The Chair presented an account of the activities of the Assembly of the States Parties to the Rome Statute (ASP), which took place in The Hague from 6 to 10 September 2004. The main subject had been budgetary issues and the Assembly seemed to have been torn between opposing tendencies: one favouring the expansion of ICC activities and another stressing the need to economise the funds.

The election of the members of the Committee on the Budget and Finance had taken place and Ms Fatou Bensouda (Gambia) had been elected to the post of ICC Deputy Prosecutor. Moreover, administrative personnel had been allocated to the Victims' Trust Fund, although some delegations had pointed out that a definition of victim was needed, particularly in view of the poor monetary content of the Trust Fund so far. Some delegations had made pledges to contribute to the Trust Fund. Finally, it had been accepted that the discussion on the crime of aggression could only be improved by intercessional meetings such as the one organised in Princeton University in June 2004. It had been agreed that an entire day would be devoted to the aggression issue at the next ASP while efforts would be made to organise further intercessional meetings. The next ASP would be organised in The Hague.

142. The delegation of Slovenia informed the CAHDI that Slovenia had ratified the Agreement on Privileges and Immunities of the ICC and will present its instrument of notification in the near future.

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

143. The representative of the International Criminal Police Organisation (Interpol) expressed his gratitude for Interpol's observer status and thanked the CAHDI for a warm welcome. He informed the Committee that Interpol co-operated with the International Tribunal for former Yugoslavia and the Tribunal for Rwanda in the context of proceedings against persons suspected of committing serious violations of international humanitarian law on the territories of those countries. With regard to the International Criminal Court, Interpol had regularly expressed its full support for its establishment and had reaffirmed its intention to work alongside with the Court in investigating the crimes referred to in its Statute and bringing offenders to justice. To that end, an agreement was to be signed with the International Criminal Court to improve co-operation and to allow the court access to Interpol's communications network and databases.

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

144. The Secretariat reported about the Council of Europe's activities in the fight against terrorism (document CAHDI (2004) Inf.5). It drew attention to the fact that the Committee of Ministers (CM) was closely following the state of signatures and ratifications of the Amending Protocol to the European Convention on the Suppression of Terrorism adopted on 15 May 2003, which had already been signed by 40 states and ratified by 5. The CM's attention to this issue showed the importance it attached to the early entry into force of this Protocol since it would introduce a number of significant amendments to the 1977 European Convention on the Suppression of Terrorism. The Secretary also informed the CAHDI about the forthcoming CM session, devoted to the assessment of the implementation of the activities in the Council of Europe's priority areas for action against terrorism. Significant progress had been achieved in the areas of special investigation techniques, protection of witnesses and collaborators of justice, international co-operation on law enforcement, action to cut terrorists off from funding sources. Furthermore, the Committee of Experts on Terrorism (CODEXTER) had received Terms of reference from the CM to elaborate one or more international instruments covering the lacunae identified by the CODEXTER in international law and action. Finally, the Secretariat referred to a recent publication of the Council of Europe on "Apologie du Terrorisme" and Incitement to terrorism", which analysed the situation in member and observer states of the Council of Europe.

145. The Representative of Japan gave the CAHDI an overview of work undertaken in this area in Asia. He mentioned the Japanese Counter-Terrorism Capacity Building Initiatives in such areas as immigration control and adoption of measures for the suppression of terrorist financing through the organisation of seminars. The Japanese authorities had hosted a seminar on these subjects in October 2003 and would host another seminar on the suppression of terrorist financing in November 2004. Furthermore, the Japanese Representative drew the CAHDI's attention to the Ministerial Conference on counter-terrorism co-hosted by Australia and Indonesia in August 2004, in which Japan had actively participated and played the role of co-ordinator for the purposes of strengthening the legal framework.

146. The delegation of Slovenia informed the CAHDI that it had ratified the International Convention for the Suppression of the Financing of Terrorism of 1999.

## D. OTHER

### 14. Election of the Chair and Vice-Chair

147. The CAHDI examined document CAHDI (2004) 17 and proceeded with the election of the Chair and Vice-Chair. The Swiss delegation nominated Ms Dascalopoulou-Livada (Greece) for the post of Chair and was supported unanimously. In accordance with the statutory procedure in force, Ms Dascalopoulou-Livada (Greece) was elected to serve as Chair for a one-year term.

148. In accordance with statutory regulations and following the proposition of Portuguese delegation, Sir Michael Wood (United Kingdom) was unanimously elected Vice-Chair of the CAHDI for one year.

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

149. The CAHDI approved the draft specific terms of reference of the CAHDI for 2005-2006 (document CAHDI (2004) 18) and decided to submit them to the Committee of Ministers for adoption. The draft specific terms of reference appear in **Appendix VII** to the present report.

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

150. The CAHDI decided to hold its 29th meeting in Strasbourg, France, on 17 and 18 March 2005 and adopted the preliminary draft agenda as it appear in **Appendix VIII** to the present report.

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

151. The Chair referred to the note on a new notification procedure (document CAHDI (2004) 21) and gave the floor to Secretariat -Legal Advice Department and Treaty Office- of the Council of Europe.

152. The Secretariat explained the main objective of the new procedure, which was to introduce the notification of member states using new technologies, in place of the current notification procedure which consisted in the transmission of notification by post. The proposition was summarised as follows: all notifications would be made available in an online database which would offer a variety of search and protection functions and Permanent and Observer Representations, as well as

other interested entities would be informed by e-mail about the legal acts that had been registered and put on the notification website. He also added that the proposed procedure would be in conformity with the final clauses of Council of Europe treaties and would follow the current practice of other international depositaries. Finally, the Secretariat gave an overview of the advantages offered by the proposed notification procedure, which would be more efficient, secure and less costly that the existing one.

153. The Chair thanked Secretariat for the detailed account of the proposition. She noted that the definitive decision on this item would be taken by Permanent and Observer Representations in Strasbourg and that the deadline for observations and objections would be fixed subsequently. She then opened the floor for discussion.

154. The delegation of the United Kingdom raised a technical point of coherence between the use of web-site notification and the 1969 Vienna Convention on the Law of Treaties, namely the possibility to object to a reservation by the end of a period of 12 months after the State had been notified of the reservation. The delegation proposed that the Special Rapporteur for Reservations should do a special report on this matter.

155. The Austrian delegation considered that the introduction of such a notification procedure would be revolutionary, as the Parties to the Treaties would be expected to address the depositary and not *vice versa*. The delegation requested further details on similar practice of other depositaries and wondered in what way the Council of Europe took into consideration their experience.

156. With regard to the request of the Austrian delegation, the Secretariat noted that member states would not be expected to visit the online database regularly, as they would continue to receive notification by e-mail on signatures and ratifications. Moreover, this almost instantaneous notification would reduce the delays that are inherent in the current system of transmission between different interested entities. As regards other depositories, both the European Union and the United Nations had been consulted. The United Nations had started to use e-mail notification in parallel to the practice of individually signed notifications. The Council of Europe, however, preferred a secure website offering better protection against data interference than transmission by e-mail, which could be modified or faked much more easily. The Secretariat further stated that an objective of the reform was to avoid simultaneous notification by paper and by electronic means. Nevertheless, the Treaty Office could also provide an additional notification by e-mail if states expressed a preference for this medium.

157. The Chair concluded the discussion of this item by welcoming this initiative and by adding that the CAHDI would keep this item on its agenda in order to monitor developments on this matter.

158. The CAHDI adopted the abridged meeting report as set out in **Appendix IX.**

APPENDIX I

## LIST OF PARTICIPANTS

**ALBANIA/ALBANIE:**
Apologised/Excusé

**ANDORRA/ANDORRE**:
Ms Iolanda SOLA, Legal Adviser, Ministry of Foreign Affairs

**ARMENIA/ARMENIE**:
Mrs Narine MATOSYAN, Third Secretary, Legal Department, Ministry of Foreign Affairs

**AUSTRIA/AUTRICHE**:
Mr Hans WINKLER, Ambassador, Legal Adviser, Federal Ministry of Foreign Affairs

**AZERBAIJAN/AZERBAIDJAN**:
Mr Asif GARAYEV, 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

M. Patrick DURAY, Conseiller, Direction Générale des Affaires Juridiques, Service public fédéral des Affaires Etrangères

**BOSNIA AND HERZEGOVINA/BOSNIE-HERZEGOVINE**

**BULGARIA/BULGARIE**

**CROATIA/CROATIE**:
Apologised/Excusé

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

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

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

**ESTONIA/ESTONIE**:
Mrs Triin PARTS, Director General, Legal Department, Ministry of Foreign Affairs
**FINLAND/FINLANDE**:
Mrs Irma ERTMAN, Ambassador, Director general for Legal Affairs, Ministry of Foreign Affairs

Mrs Marja LEHTO, Director, Ministry of Foreign Affairs

**FRANCE**:
M. Jean-Luc Florent, Directeur adjoint des Affaires juridiques, Ministère des Affaires étrangères

M. Pierre BODEAU-LIVINEC, Chargé de mission, Sous-direction du droit international public général, Ministère des Affaires Etrangères

**GEORGIA/GEORGIE**:
Mr Teimuraz BAKRADZE, Director, Ministry of Foreign Affairs, International Law Department

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

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

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

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

**HUNGARY/HONGRIE**:
Dr Sándor BEER, Senior Adviser, International Law Department, Ministry of Foreign Affairs

**ICELAND/ISLANDE**:
Apologised/Excusé

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

**ITALY/ITALIE**:
Mr Ivo Maria BRAGUGLIA, Head of the Legal Department, Ministry for Foreign Affairs

Dr Annalise CIAMPI, Adviser, University of Florence

**LATVIA/LETTONIE**:
Ms Juta DURITE, Head of the Administrative Legal Division, Ministry of Foreign Affairs

**LIECHTENSTEIN**:
Apologised/Excusé

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

**MALTA/MALTE:**
Mrs Marvic SCIBERRAS ABDILLA, Counsel, Office of the Attorney General

**MOLDOVA**:
M. Iurie CERBARI, Chef du Service général du droit international et des traités, Ministère des Affaires Etrangères

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

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

Mr Åsmund ERIKSEN, Department for Legal Affairs, Ministry of Foreign Affairs

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

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

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

**ROMANIA/ROUMANIE**:
Ms Alina OROSAN, Attaché within the Directorate General of Legal Affairs, Ministry of Foreign Affairs

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

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

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

**SLOVENIA/SLOVENIE**:
Mrs Meta BOLE, Head of the International Law Department, Ministry of Foreign Affairs

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

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

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Mr Carl-Henrik EHRENKRONA, Ambassador, Director-General for Legal Affairs, Ministry for Foreign Affairs

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

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M. Paul SEGER, Directeur, Direction du droit international public, Département fédéral des Affaires étrangères

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

**"THE FORMER REPUBLIC YUGOSLAV OF MACEDONIA"/"L'EX-REPUBLIQUE YOUGOSLAVE DE MACEDOINE":**
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**EUROPEAN COMMUNITY/COMMUNAUTE EUROPEENNE**

**EUROPEAN COMMISSION/COMMISSION EUROPEENNE**:
Mrs Sybilla FRIES, Member of the Legal Service

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Mr Keiichi HAYASHI, Director General, International Legal Affairs Bureau, Ministry of Foreign Affairs

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**UNITED STATES OF AMERICA/ETATS-UNIS D'AMERIQUE**:

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Mrs Esther EFRAT-SMILG, Director, Treaties Department, Ministry of Foreign Affairs

**UNITED NATIONS/NATIONS UNIES:** M. Nicolas MICHEL, Sous-secrétaire général de l'ONU pour les affaires juridiques et jurisconsulte, Nations Unies **(Outgoing Chairman/Président sortant)**

**EUROPEAN ORGANISATION FOR NUCLEAR RESEARCH (CERN)/ORGANISATION EUROPEENNE POUR LA RECHERCHE NUCLEAIRE (CERN)**
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**INTERPOL:**
Mrs Sandrine CAPSALAS, OIPC-INTERPOL

**INTERNATIONAL COMMITTEE OF THE RED CROSS/COMITE INTERNATIONAL DE LA CROIX ROUGE:**
Mr Jean-Philippe LAVOYER, Head of the Legal Division, GENEVA

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Professor Gerhard HAFNER, Department of International Law, University of Vienna

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M. Sérgio SABA RANGEL DO CARMO, Institut Universitaire de Hautes Etudes internationales, The Graduate Institute of International Studies, GENEVE

**SPECIAL GUESTS/INVITES SPECIAUX**

Dr Jakob KELLENBERGER, President of the International Committee of the Red Cross, GENEVA

Mr Giorgio GAJA, International Law Commission, Dipartimento di Diritto Pubblico, FLORENCE

**SECRETARIAT GENERAL**

**DIRECTORATE GENERAL OF LEGAL AFFAIRS/DIRECTION GENERALE DES AFFAIRES JURIDIQUES**

M. Roberto LAMPONI, Directeur de la Coopération Juridique/Director of Legal Co-operation

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

Mr Jorg POLAKIEWICZ, Treaty Office/Bureau des Traités

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

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

APPENDIX II

## AGENDA OF THE 28TH MEETING OF THE CAHDI

### A. INTRODUCTION

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

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

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

### B. ONGOING ACTIVITIES OF THE CAHDI

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

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

   a. List of outstanding reservations and declarations to international Treaties

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

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

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

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

### C. GENERAL ISSUES ON PUBLIC INTERNATIONAL LAW

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

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

   b. Revitalisation of the General Assembly of the United Nations

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

11. Developments concerning the International Criminal Court (ICC)

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

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

## D. OTHER

14. Election of the Chair and Vice Chair

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

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

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

APPENDIX III

**COMMUNICATION OF MR ROBERTO LAMPONI, THE DIRECTOR FOR LEGAL CO-OPERATION OF THE COUNCIL OF EUROPE**

On behalf of the Secretary General of the Council of Europe I would like to express my gratitude to Swiss authorities and municipality of Lausanne for their kind invitation to host the meeting in the beautiful city of Lausanne and for their very warm hospitality.

I would also like to congratulate the outgoing Chairman, Mr; Michel, on his appointment as Under-Secretary-General for Legal Affairs and United Nations Legal Counsel. The relations between the Council of Europe and the United Nations are already excellent but I trust that with the friend of the Council of Europe in such a high place these relations will be even stronger in the future.

As it is customary, I would like to give you some information on the institutional life and work of the Council of Europe and I will finish by informing you about a couple of developments that may interest you particularly in your capacity of Legal Advisors.

The new Secretary General, Mr Terry Davis, was elected in June 2004 and has taken up his office on the 1st of September 2004. It is a five year mandate.

Second institutional development that we expect in a few days is an accession by Monaco to the Council of Europe on the 5th of October 2004, thus bringing to 46 the membership of our Organisation.

Another decision of importance for the Council of Europe and for each one of its bodies is the decision to hold the third Summit of Heads of States and Governments. It will take place in Warsaw in May 2005. It will be devoted to defining and clarifying the European architecture in the situation post enlargement of the European Union and will also be an opportunity for the Heads of States and Governments to give impute to priority areas in the work of the Council of Europe.

When I speak of priority areas, I should immediately go on to speak about the fight against terrorism. The recent events in Russian Federation have moved the Committee of Ministers and the Parliamentary Assembly of the Council of Europe to take very firm public stand of condemnation and of resolve to act with means available to the Organisation and within its competence. You will have in your agenda an item devoted to this issue (CAHDI (2004) Inf 5) and let me just stress that the Committee of Ministers decided to accelerate the already fast path of work of the Committee of Experts on Terrorism (CODEXTER), who should be able to conclude rapidly the elaboration of a Convention having for its specific scope the prevention of terrorism. Along this binding instrument other non-binding instruments are in the course of preparation, concerning the protection of witnesses and collaborators of justice, special investigation techniques and the protection of victims. The rapid adoption of these above-mentioned instruments will allow the Council of Europe to make a valuable contribution to the efforts of the international community against terrorism and they are expected to be ready in time before the third Summit of Heads of States and Governments.

Concerning other drafting activities of the CODEXTER, a significant progress has been made in the elaboration of a Protocol which will complement the existing Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from

Crime. It should be mentioned that this text is also expected to be ready in time for adoption at the third Summit of Heads of States and Governments. In this context the importance of CAHDI's consideration of reservations to anti-terrorist Conventions requires an even higher importance.

It is undeniably that many other areas of work have been developed over the last months since your previous meeting and I would like to draw you attention to a booklet which has been distributed and which presents the ongoing activities and achievements of the Directorate General I – Legal Affairs. Therefore, I will not take up much of your time since the CAHDI's agenda for this meeting is quite heavy.

Another item of your agenda concerns developments in the European Treaty Series and you will find ample details on this matter in document CAHDI (2004) Inf 3. I would also like to mention the opening for signature of the Protocol # 14 to the Convention on the Protection of Human Rights and Fundamental Freedoms, amending its procedures on May 12, 2004. Moreover, you will find in your file a document CAHDI (2004) 21 prepared by the Treaty Office of the Council of Europe highlighting its proposals on upgrading the depository capacity of the Secretary General through the use of information technologies in a speedy and safe way.

As I mentioned previously, I would like to present two recent developments that might interest you as legal advisers and as experts of international law.

The first one concerns the application of two Conventions of the Council of Europe in Kosovo. The first Convention is the Framework Convention for the protection of national minorities. The substantive part of this Convention was already applicable in Kosovo by virtue of the constitutional framework governing the Kosovo region, but no so the procedural part of the Convention which foresees the submission of reports on the way the Convention is applied and the examination of these reports by the Committee of Ministers of the Council of Europe with the help of the Advisory Committee.

To remedy this shortcoming, the Secretary General of the Council of Europe and the Special Representative in Pristina sighed a Technical Arrangement (TA – below in the text) by which UNMIK will present reports to the Council of Europe on the way in which UNMIK itself and the provisional institutions of self-government for the matters of their competences complied which the substantive provisions of the Convention.

From there on the procedure before the Committee of Ministers would go on as it does with the States parties to the Convention. The TA clearly states that this is simply the TA, it doesn't make Kosovo a party to the Convention and it is without prejudice to the future status of the Kosovo.

The other treaty on which the solution had to be found was the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The Convention set up the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) which has a power to visit all places in which persons are deprived of their liberty in the States parties to it. It is certain that Kosovo could not become a State party and, therefore, another TA was concluded, by which UNMIK and the provisional institutions allow the CPT to make inspections in the places of detention under the responsibility of UNMIK. The same logic follows, namely that Kosovo doesn't become party to the Convention by the simple signature of this act and this is without prejudice to the future status of Kosovo.

The TA also contains an Appendix according privileges and immunities to the members of the CPT, to their staff and to their advisors, while performing their visits in Kosovo. This covers the places of detention under responsibility of UNMIK. The similar TA is under discussion with NATO in order to allow the CPT to carry out inspections in the places of detention under the responsibility of KFOR or under military responsibility in general.

Lastly, I would like to mention to you that the Council of Europe is about to file a Brief of *Amicus Curie* before the United States Court of Appeal. You may remember the recent decision of the International Court of Justice in a case brought by a number of Mexican nationals sentenced to death penalty in the United States of America without the benefit of consular support. The International Court of Justice considered that the substantive matter of those judgements should be reviewed and one of the applicants submitted the writ of certiorari to a United States Court of Appeal.

The European Union had already filed an *Amicus Curie* Brief and the Council of Europe is now intervening in support of the European Union brief. The gist of this Brief is that in the views of the Council of Europe, the right of detained foreign nationals to be informed of the right to access to a consular is an individual right. Moreover, if the foreign national is convicted without being informed of this right, this individual must be allowed to apply to the Court to challenge the conviction, even when the ordinary law of the country would not foresee a means of appeal. Finally, the Council of Europe supports the European Union in stressing the need for respect for judgements of the International Court of Justice being a basic requirement of the Rule of Law at the international level.

By the above-stated I would like to conclude my presentation on recent developments, as they were, in my opinion, the most important and pertinent.

Thank you very much for your attention.

APPENDIX IV

**QUESTIONNAIRE ON NATIONAL* MEASURES TO IMPLEMENT UN SANCTIONS**

**Deadline for reply: 31 January 2005**

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

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

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

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

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

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

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

(*) Or European Union.

APPENDIX V

**THE FIFTY-SIXTH SESSION OF THE INTERNATIONAL LAW COMMISSION (2004)**

Giorgio Gaja

*Introduction.*

I am very honoured and pleased to have been given this opportunity to provide CAHDI with some information on the work of the International Law Commission [ILC] in 2004.

Regrettably, the current ILC report to the General Assembly is not yet available either in print or on the web. It will appear only at the end of September. This delay is due to the time required for translating the report into some of the official languages of the UN. The lack of flexibility on the part of the UN, which could have posted on the web the texts that are already available, is possibly connected with some discussions that took place among UN officials during the last session about when ILC documents should be put on the website.

*Diplomatic Protection*

The Commission's major achievement during the session was to finalize the adoption at first reading of the draft articles on diplomatic protection. This was made possible by the Commission's decision, advocated by the special rapporteur John Dugard, to limit the scope of the topic to issues of admissibility. Moreover, the discussion of one outstanding item - the question of clean hands - was deferred to the second reading.

The draft articles on diplomatic protection that were provisionally adopted in the previous sessions were rearranged and polished.

Among the matters of substance that were discussed during the last session, the main issue related to the diplomatic protection of shareholders in a corporation by the shareholders' State of nationality, when the injury directly affects the corporation. As a rule, only the State of nationality of the corporation is entitled to exercise diplomatic protection. However, the Commission endorsed the two exceptions that were envisaged by the International Court of Justice in the *Barcelona Traction* judgment. The first one, which the Court was inclined to accept, concerns the case in which the corporation has ceased to exist. The second one, about which the Court was more doubtful, is the case when the corporation has the nationality of the allegedly responsible State. In the latter case, according to the Commission, the exception only applies when incorporation in the host State was required as a precondition for doing business in that State. The purpose of the second exception is to provide some remedy when the requirement of local incorporation appears to have been set by the host State in order to avoid pressure from the home State.

The special rapporteur's fifth report was largely devoted to the question of the protection of ship crews. The Commission concluded that the State of nationality of the ship has the right to seek redress on behalf of crew members, whatever their nationality. However, this right has not been characterized as a right to exercise diplomatic protection. It does not in any event affect the right of the State of nationality of any crew member to exercise diplomatic protection on his behalf.

Another issue of importance concerned the relations between diplomatic protection by the State of nationality and the rights that other subjects of international law may have with regard to the same internationally wrongful act. As a paradigm, one could take the case of infringements of human rights. The draft articles include a "without prejudice" clause in order to make it clear that in certain cases States other than the State of nationality as well as other subjects of international law - such as the individuals themselves - may also be entitled to invoke responsibility under international law.

*Transboundary Harm*

A second draft was completed at first reading during the 2004 session. It was given the title "Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities". This text contains a preamble and 8 principles. It is designed to prompt States to set up comprehensive measures for ensuring compensation of transboundary damage caused by activities that are not prohibited by international law. A key measure is the imposition of liability on the operator or, where appropriate, other persons or entities.

While some members of the Commission, and no doubt a certain number of Governments, would prefer a text in the form of a draft convention, the Commission, so guided by the special rapporteur P.S. Rao, considered that non-binding principles would probably be more meaningful. A draft convention would have to be a framework convention and, if adopted, would attract few ratifications on the part of States with greater financial resources. It may be appropriate to recall that, for instance, the 1999 Protocol to the Basel Convention has obtained only one ratification so far. I expect that the issue of the final form of the draft will nevertheless be one of the main objects of the forthcoming discussion in the Sixth Committee.

The ILC principles concern damage caused in the territory or in other places under the jurisdiction or control of a State other than the State in whose territory, or under whose jurisdiction or control, the activities are carried out. Damage caused in areas outside the jurisdiction of States - for instance, pollution of the high seas - has not been included within the scope of the Commission's principles, mainly because of the difficulty in establishing who could bring a claim in such an event and what sort of claim would be admissible.

*Responsibility of International Organizations*

Coming to the topic for which I am special rapporteur - responsibility of international organizations - the Commission considered the question of attribution of conduct to international organizations and adopted four draft articles.

The Commission did not find any justification for altering the rules on attribution of conduct to States that were adopted in 2001 in the articles on responsibility of States for internationally wrongful acts. Thus, conduct of a State organ has to be attributed to the respective State, whether or not that organ is complying with a binding decision of an international organization or acting within an organization's competence. The Commission also shared the special rapporteur's view that, while responsibility generally depends on attribution of conduct - as was stated in draft article 3 adopted last year - there may be cases in which responsibility does not depend on attribution. As was done with State responsibility, these cases have not been considered in the context of the rules on attribution of conduct, but will be examined at a later stage.

In the current draft articles, the general rule provides for attribution to an international organization of conduct taken by its organs or agents. The Commission adopted a wide definition of agents, in line with the ICJ's definition in the *Reparation for Injuries* opinion. Thus, the term "agent" is said to include "officials and other persons or entities through whom the organization acts".

Determining what are organs' or agents' functions depends on the "rules of the organization". The definition of these rules includes a reference to "established practice of the organization". Hence, the existence of a factual relation will often be important also in this regard.

The same type of relation has been taken as decisive by the Commission for the question of attribution of conduct of an organ of a State or an international organization when that organ has been placed at the disposal of another international organization. In this context, which concerns persons or entities acting for two different subjects of international law, the criterion for attribution of conduct to one or the other subject is that of effective control over the relevant conduct. Thus, for example, the conduct of members of a peacekeeping force will normally be attributed to the United Nations, but there may be cases in which the effective control pertains to the contributing State. This may occur because of the jurisdiction and disciplinary power that are retained by the contributing State. Attribution would have to be made to the contributing State also when the national contingent is not under the effective control of the UN, as occurred with some forces taking part in UNOSOM II. I note that, while the criterion of effective control does not expressly appear in the corresponding article on State responsibility, the relevant article possesses a similar meaning, as is shown by the relevant commentary.

In the Commission's draft on responsibility of international organizations, provisions on *ultra vires* conduct and on acknowledgement and adoption of conduct are modelled on the corresponding articles on State responsibility.

*Reservations to Treaties*

The ILC's long drawn out study on reservations to treaties has not yet reached the stage of discussing inadmissible reservations. In the 2004 session the Commission adopted five draft guidelines which had been referred to the drafting committee the previous year. They relate to the question of widening the scope of reservations and to modification and withdrawal of interpretative declarations.

The special rapporteur's ninth report was - in Alain Pellet's own words - a "corrigendum" to the second part of the previous report, which dealt with the definition of objections to reservations. The definition of objections which was proposed in the ninth report was wider than the one previously made. Taking into account some views that were expressed in the debate in the plenary, the special rapporteur suggested at the end of that debate that an objection should be defined as a unilateral statement "whereby the objecting State or organization purports to exclude or modify the effects of the reservation in the relations between the author of the reservation and the author of the objection". The corresponding guideline has been referred to the drafting committee and will be discussed by the committee at the next session.

*Unilateral Acts*

A little progress was also made on unilateral acts. The special rapporteur's seventh report made extensive references to practice in order to show instances of unilateral

acts such as promises, waivers or acts of recognition, and instances of conduct which produces effects that are equivalent to those of unilateral acts. Since this practice had hardly been analyzed in the report, several members of a working group chaired by Alain Pellet have taken as homework the task of producing about twenty case studies according to an analytical framework set out by the group. These studies will be made available to the special rapporteur, Victor Rodriguez Cedeno, by November and later to the Commission.

*Transboundary Groundwaters*

On the topic that is still currently called "shared natural resources" (although the term "shared" is objected to by some members of the Commission and also by certain Governments), the special rapporteur, Chusei Yamada, produced a second report on "transboundary groundwaters". Scientific experts have stressed the need for increased protection of aquifers against pollution and overexploitation. One difficulty in drafting articles on the subject is that probably all aquifers are - even if not at all times - linked with surface waters and therefore fall within the scope of the 1997 Convention on the Law of Non-Navigational Uses of International Watercourses, although the Convention does not specifically address problems of groundwaters. In so far as a special regime, and not only rules providing for added protection, would be devised for aquifers, there could be conflicts with the 1997 Convention.

The special rapporteur intends to present to the Commission in 2005 a complete set of revised draft articles on transboundary groundwaters.

*Fragmentation of International Law*

The study group on fragmentation of international law produced a report which summarizes the six papers hereto presented and the following discussions. This report is part of the Commission's report to the General Assembly. The papers have not been released as ILC documents, but are available from the Codification Division.

The current aim of the study group is to produce by 2006 a substantial study of about 100 pages alongside a shorter version which may contain some recommendations. Two remarkable papers, both written by Martti Koskenniemi, who is also the chairman of the study group, have already reached their final form. They concern *lex specialis* and the question of "self-contained" regimes. The main conclusion reached in these papers is that general international law plays a significant role as background of special rules and regimes and that it fills gaps in the special rules. No set of rules may be regarded as isolated from general international law.

*New Topics*

Finally, two new subjects which had been included in the year 2000 in the Commission's long-term programme have been taken up in the current programme. The titles of these two subjects are: "Effects of armed conflict on treaties" and "Expulsion of aliens". Ian Brownlie was appointed special rapporteur for the first subject and Maurice Kamto for the second one. The first reports of the two new special rapporteurs are expected in 2005.

APPENDIX IV

**SPEECH BY DR JAKOB KELLENBERGER**
**PRESIDENT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS**

**The relevance of international humanitarian law in contemporary armed conflicts**

Madam Chair, Excellencies, Ladies and Gentlemen,

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

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

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

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

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

What I propose to do in this brief presentation is to first outline some current challenges to the relevance of IHL in contemporary armed conflicts, to then speak

about the issue of weapons and war, and to finally address the question of national implementation of IHL.

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

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

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

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

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

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

Extra-judicial killings and detention without application of the most basic judicial guarantees have proven to be another consequence of the fight against terrorism. Other examples could be cited as well, such as the recent queries on whether the rules on the questioning of detainees depend on their legal status. We should be

perfectly clear on this point: there is only one set of rules for the interrogation of persons detained, whether in international or non-international armed conflict, or, indeed, outside of armed conflict.

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

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

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

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

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

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

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

While these developments are remarkable, they also reflect the necessity of ensuring that IHL keeps up with both the rapid development of technology and humanitarian

problems on the ground. However, preserving fundamental norms governing weapons requires not only adopting new norms, when necessary, but also defending old norms from new challenges.

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

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

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

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

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

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

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

both at the national level and, for Member States of the European Union, in the current review of the EU Code of Conduct on arms transfers.

One of the most ancient norms in war has been the prohibition on poisoning and the deliberate spread of disease. The prohibition of the use of chemical and biological weapons is enshrined in the 1925 Geneva Protocol and reinforced by the Biological and Chemical Weapons Conventions. However, in the face of stunning advancements in the life sciences and increasing interest in certain types of so-called "non-lethal" weapons, vigilance is needed to ensure that current norms are respected and reinforced. Two years ago, the ICRC launched a public appeal on "Biotechnology, Weapons and Humanity" calling on governments, the scientific community and industry to reaffirm existing norms and take a wide range of preventive actions. The ICRC has followed this up with an extensive program of outreach to these constituencies. All of these actors together bear responsibility to ensure that the "biotechnology revolution" is not harnessed for hostile purposes.

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

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

At the *international* level States must not only respect but also "ensure respect" for humanitarian law: They must act, whether through bilateral or multilateral channels, to ensure that parties to an armed conflict comply with the law. They are also encouraged to accept the competence of the International Fact-Finding Commission established under the first Additional Protocol of 1977 to enquire into violations of humanitarian law. More recently, with the establishment of the International Criminal Court, an important step has been taken to punish war crimes at the international level.

However, humanitarian law focuses above all on effective implementation at the *national* level. All States have the obligation to disseminate its rules as widely as possible — both within the armed forces and to the public. Many would argue that this is the most important, and effective, means of promoting compliance.

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

States are obliged to take action to prevent the misuse of the Red Cross, Red Crescent and other protective emblems and signals prescribed by humanitarian law. This is likely to require not only a strict system of control, but also the imposition of penalties on those who misuse the emblems and thereby undermine their protective value. Humanitarian law also sets out a range of fundamental guarantees —

including rules on humane treatment, legal procedures and conditions of detention — and States must ensure that these guarantees are reflected in their national law.

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

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

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

The ICRC's Advisory Service – with experts in Geneva and in several delegations - is committed to help the national authorities adopt and implement the legislative, regulatory and administrative measures required to ensure respect for the law at the national level. One of the activities of the Advisory Service is to promote the ratification of IHL treaties, in particular the four Geneva Conventions and their Additional Protocols. If all States members of the Council of Europe are party to the 4 Geneva Conventions, a few States are still not bound by the 2 Additional Protocols of 1977. 34 States have accepted the competence of the International Fact-Finding Commission.

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

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

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

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

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

On the one hand, the environment has become more hostile in terms of respect for international humanitarian law because the number of armed groups that simply do not care, about others or about their own members seems to be on the increase;

- it is more hostile, because of a growing tendency to dehumanise or demonise the adversary. The link with the rise of fundamentalism – not only Islamic fundamentalism – is obvious. Nor am I thinking only of religious fundamentalism. Fundamentalists, as you know, think they are always right. They reduce the richness and complexity of human beings to some very few features – or even to a single one – and they are very good at explaining the world in very simple terms, which is what makes them so successful. Their horror vision is a complex human being who takes on many different identities;

- it is more hostile because some people continue to have serious difficulties in achieving a decent balance between legitimate security concerns and the obligation to respect human dignity;

- it is more hostile, because expectations of reciprocity in terms of respect for international humanitarian law no longer play an important disciplining role. Which measures could compensate for this loss is one of the interesting questions we have to ask ourselves. Among such measures, I would include training and educational programmes, and the determined fight against impunity;

- it is more hostile, because the High Contracting Parties not parties to an armed conflict may be less inclined to take the potentially awkward steps of approaching Parties to an ongoing armed conflict with a view to securing their respect for the Geneva Conventions, when doing so might result in losing their support in connection with other, mainly security-related issues.

On the other hand, the environment has become more favourable to progress in terms of respect for international humanitarian law

- because international humanitarian law has a visibility and attracts a level of attention one would not have dreamed of ten or fifteen years ago. Debates related to Iraq, Sudan and other places have contributed to underline the intrinsic value of this body of law. The interest in the ICRC's educational programme for young people aged between 13 and 18 to help them embrace humanitarian principles, to give but one example, is amazing – all the more so when one considers that the States that have introduced the programme belong to different civilizations;

- it is more favourable, because the normative development in the field of international humanitarian law over the last ten years has been quite remarkable, the

adoption of the Rome Statute of the International Criminal Court standing out as particularly important;

- it is more favourable, because the space for impunity, even if a lot of tenacity and some patience are needed, will gradually narrow, thanks to the ICC, thanks to the ad hoc tribunals, thanks to progress being done in the different national legal orders in order to have the basis for prosecuting crimes under the Rome Statute and other legal instruments;

- it is more favourable, because persons whose lives and dignity are under threat can make their voices heard better than in the past;

- it will be more favourable if the commitment contained in the Declaration to the 28th International Conference of the Red Cross and Red Crescent "to protect human dignity in all circumstances by enhancing respect for the relevant law and reducing the vulnerability of populations to the effects of armed conflicts" will be taken seriously.

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

APPENDIX VII

## DRAFT SPECIFIC TERMS OF REFERENCE FOR 2005-2006

1. Name of Committee: Committee of Legal Advisers on Public International Law (CAHDI)

2. Type of Committee: *Ad hoc* Committee of Experts

3. Source of terms of reference: Committee of Ministers

4. Terms of reference:

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

5. Membership of the Committee:

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

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

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

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

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

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 2006.

APPENDIX VIII

## PRELIMINARY DRAFT AGENDA OF THE 29TH MEETING OF THE CAHDI

### A. INTRODUCTION

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

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

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

### B. ONGOING ACTIVITIES OF THE CAHDI

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

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

   a. Consideration of outstanding reservations and declarations to international Treaties

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

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

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

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

### C. GENERAL ISSUES ON PUBLIC INTERNATIONAL LAW

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

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

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

12. Developments concerning the International Criminal Court (ICC)

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

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

**D. OTHER**

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

16. Other business

APPENDIX IX

## LIST OF ITEMS DISCUSSED AND DECISIONS TAKEN

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

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

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

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

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

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

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

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

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

Saba Rangel do Carmo of the Graduate Institute of International Studies and examined the contributions submitted by their respective institutions. The CAHDI welcomed the progress achieved and expressed the wish that it could consider the finalized version of the report at its next meeting; and asked delegations to submit any additional comments or contributions by 30 October 2004.

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

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

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

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

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

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

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

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

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