

**OBSERVATIONS OF THE COMMITTEE OF LEGAL ADVISERS ON PUBLIC  
INTERNATIONAL LAW (CAHDI) ON THE PRELIMINARY DRAFT REPORT BY THE  
SECRETARY GENERAL ON THE REVIEW OF COUNCIL OF EUROPE  
CONVENTIONS**

1. In the framework of the general reform of the Organisation, the Council of Europe is currently analysing the relevance of its conventions with a view to introducing follow-up measures *inter alia* to "increase the visibility and the number of parties". To that end, the Secretary General has prepared, a Preliminary draft report on the review of Council of Europe conventions (SG/Inf(2011)21rev2).

2. As envisaged in the Secretary General's Outline of convention review (SG/Inf(2011)2 FINAL), an exchange of views was held on the preliminary draft report at the 42<sup>nd</sup> meeting of the CAHDI. The CAHDI subsequently notified the Secretary General of the results of its discussions (CAHDI(2011)MISC 4 rev), emphasising the importance and appropriateness of the stocktaking exercise on Council of Europe conventions but pointing out that it required more time for a thorough analysis of the preliminary draft. As a result, the Secretary General suggested to the Committee of Ministers that the CAHDI be given the necessary time to prepare a detailed legal analysis of the document (Secretary General's communication of 28 September 2011).

3. At its 43<sup>rd</sup> meeting, the CAHDI held an exchange of views on the preliminary draft report on the review of Council of Europe conventions and adopted the present observations.

4. As an opening remark, the CAHDI reiterates the importance and expediency of the review of Council of Europe conventions and welcomes the work of the Secretariat General in formulating the preliminary draft report. The main goal of this process is to improve the efficiency and strengthen the impact of the conventions of the Council of Europe. This exercise, which requires a sustained effort, is particularly delicate as it touches on spheres of competence within the remit of the States, notably in connection with the ratification, amendment or denunciation of conventions or the formulation of reservations. Indeed, the preliminary draft points out, several times, the leading role played by States.

General observations

5. The Committee recalls that the Council of Europe is an international organisation with a regional role whose aim is to "achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress" (Article 1 of the Statute). The principles laid down in Council of Europe conventions are intended to define the standards to be met by its member States in the spheres that are central to the Organisation's values. The participation of non-member States to Council of Europe conventions is possible. However, the applicable texts do confer upon them a status differing from that of the member States.

6. Accordingly, the CAHDI believes that, even though the issue is important, the review of the participation by member States should prevail, in the preliminary draft, over the question of the participation by non-member States. Reference in this respect is made *inter alia* to the use of the criterion of "ratification by non-member States" to determine which conventions belong to Group 1 "Key conventions", as well as to the further section dedicated to them in chapter 3 on "Related issues".

7. Moreover, the CAHDI is of the view that the preliminary draft has a tendency to place in the same position, as regards the conventions of the Council of Europe, non-member States of the Council of Europe on one hand and the European Union on the other hand. However, all the member States of the European Union share the values of the Council of Europe of which they are all member States. The non-member States of the Council of Europe may also share those values. Additionally, the question of the potential risk of creating "legal dividing lines" between European Union member States and the other States parties to the Council of Europe conventions which are not member States of the European Union has been raised.

8. Furthermore, several of the proposals mentioned in the preliminary draft report require fine-tuning as they might have the effect of jeopardising the existing balance between the States which are parties to conventions on the one hand and the Council of Europe on the other hand. The CAHDI believes it necessary for the preliminary draft to clearly establish that the Organisation cannot be given a role other than the one assigned to it by its Statute and on a case-by-case basis in the conventions.

#### Classification of Council of Europe conventions

9. The CAHDI underlines the importance of fixing objective criteria for assessing the relevance of Council of Europe conventions. Accordingly, some criteria which are difficult to evaluate should be dropped, such as "role as a model for legislative reforms", "effective implementation" or "added value on the international scene".

10. The Committee notes certain inconsistencies in the classification compiled in the preliminary draft. When considering additional protocols, it might be useful to examine whether they should be classified in the same group as the convention they are intended to supplement or amend. Accordingly, the link between a convention and its additional protocols should also be taken into consideration when including a convention or a protocol in a certain group.

11. Furthermore, at this stage of the exercise, the preliminary draft should not draw up an exhaustive list of the conventions belonging to the respective groups and instead go no further than providing a few examples on which there is consensus. It will be the task of the different steering committees to decide on the classification of the conventions into the different groups on a case-by-case basis and to establish lists as complete as possible. The result of the classification by the steering committees should be evaluated at a later stage. At that point, the CAHDI would be ready to provide the Committee of Ministers with additional observations.

12. The categorisation of conventions used in the preliminary draft report may appear artificial and the boundaries between groups are sometimes tenuous.

13. In particular there are doubts as to whether the distinction between "key conventions" and "active conventions" is a pertinent one. These two categories could be merged under the title "conventions with numerous ratifications and considered as key". This group would include the conventions termed as "flagship" instruments meeting both the criterion of "ratification by 40 member States or more" and, in addition, the criterion of "identification as a convention in a subject area relating to the Organisation's core values" or "conventions considered important by the steering committees".

14. Similarly, the distinction between group 2 "active conventions" and group 3 "conventions with few ratifications or limited application" is unclear. As it stands, ratification of a convention by a small number of States may result in it being classified in either one of these groups. In this respect, the second group could cover "conventions with few ratifications so far but considered as key". This change of name could obviate any risk of confusion.

15. Accordingly, the CAHDI suggests, as an indication, the following classification of the Council of Europe's conventions:

- Group 1: "conventions with numerous ratifications and considered as key";
- Group 2: "conventions with few ratifications so far but considered as key";
- Group 3: "other active conventions";
- Group 4: "inactive conventions".

16. The CAHDI sees the category of "conventions for which updating or revision could be considered" as a transversal category which may apply to conventions belonging to groups 1 to 4. Moreover, once again, it would be preferable not to go so far as drawing up a list of the kind appended under group 5, even if it is only indicative. As this category is likely to evolve, mentioning a few universally agreed examples would be a better course of action.

### Related issues

17. The CAHDI believes that Chapter 3 "Related issues" raises important questions. It would benefit from being synthesised and incorporated in chapter 4 "Proposed action plan for the Council of Europe conventions". The "Proposed action plan" must be the focal point of the preliminary draft report.

18. As regards the question of participation by non-member States in the life of a convention, this should be examined on a case-by-case basis at the time of the negotiation.

19. Regarding the risk of a potential conflict between the 1969 Vienna Convention on the law of treaties and the Statute of the Council of Europe, the CAHDI considers this not to be an issue. The Vienna Convention, which reflects the rules of customary law applicable in the sphere of treaty law in numerous respects, makes it clear that the law specific to an international organisation may provide grounds for applying derogating rules (article 5).

20. Where reservations to conventions are concerned, the CAHDI points out that the necessity to make specific provisions regarding reservations should be decided for each convention when negotiating it, depending on its purpose and aim. Accordingly, the Committee does not consider it desirable to state a position of principle regarding the advisability or otherwise of clauses restricting or denying the right to formulate reservations. In addition, it notes that the preliminary draft makes no mention of the case of Council of Europe conventions which do not allow any reservations to be formulated.

#### Proposed action plan for the Council of Europe conventions

21. The first sub-section of chapter 4 on "Measures relating to the promotion of the conventions among member States" places the member States at the heart of the Council of Europe conventions review process. The measures proposed must indeed be aimed first and foremost at the Organisation's member States.

22. The CAHDI questions the relevance of some of the measures proposed. Besides the issue of the impact on the Council of Europe's budget and member States' contributions, certain measures may prove to be of little benefit for achieving the goal of the current exercise:

- Where the budgetary consequences are concerned, the CAHDI believes that it would be advisable to consider the costs generated by some of the measures proposed in the preliminary draft. Promoting conventions at events which are already planned appears to be more appropriate for the goal pursued by the review than organising specific high-level seminars or colloquies intended exclusively to promote one or several conventions.
- Regarding the relevance of some of the measures proposed, the CAHDI suggests that care be taken when considering running a campaign to "raise awareness among judges" of European or domestic courts, which might infringe the principles of the independence of judges and the separation of powers. Furthermore, the "measures to improve the management of conventions" appear to assign a role to the Organisation that would exceed its prerogatives. It is for the States to determine, when negotiating a convention, how that convention is to be managed and, where they deem necessary, to decide to set up a monitoring mechanism.

23. Concerning the "measures relating to inactive conventions", such as for example the adoption of a recommendation of the Committee of Ministers inviting the parties to denounce a convention or the abrogation of a convention by the Committee of Ministers, the CAHDI reiterates that it is for the parties to decide, on the basis of their own considerations, whether they wish to denounce a convention. Given the legal complexity of denouncing a convention, the CAHDI encourages an analysis of different approaches. In this connection, resorting to a conference of Parties is a costly measure which might prove to be of limited effect as the denunciation procedure is not uniform in the 47 member States.