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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

**Presentation by Ms Päivi KAUKORANTA,
Chair of the CAHDI**

**at the 1319th meeting of the Ministers' Deputies
on 13 June 2018**

56th meeting
Helsinki (Finland), 20-21 September 2018

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Mister Chair,
Ambassadors,
Ladies and Gentlemen,

It is an honour and a great pleasure for me to have the opportunity to address, for the second time, the Committee of Ministers in my capacity as the Chair of the Committee of Legal Advisers on Public International Law (CAHDI). I would like to thank the Committee of Ministers for offering the CAHDI this unique opportunity to present its work also this year. The interest that the Committee of Ministers pays to our work encourages us to pursue the provision of legal guidance and support to the Council of Europe member States and beyond to the best of our abilities.

I have started my second term of office on the CAHDI Chairmanship on 1 January this year following the elections which took place last year and I have by now chaired three CAHDI meetings. My CAHDI Chairmanship will end at the end of this year following the 56th meeting which will take place in my own country, in Helsinki, on 20-21 September 2018. As my predecessors, I have done my utmost to be worthy of the trust placed on me and I have tried to serve the CAHDI – and also the Committee of Ministers – in the best possible way. I would also like to underline that I value my Chairmanship of the CAHDI very highly – it has been one of the most interesting positions that I have been holding so far.

I. INTRODUCTION

First of all, allow me to recall that the CAHDI is composed of the Legal Advisers of the Ministries of Foreign Affairs of the 47 member States of the Council of Europe, the 5 observer States to the Council of Europe, 4 further observer States to the CAHDI – namely Australia, Belarus, Israel and New Zealand - and 10 participating international organisations. Hence, all in all the CAHDI counts 66 States and organisations which are allowed to participate in its meetings and which is reflecting in an increased number of actual participants (eg. 86 at our last March meeting).

Concerning the international organisations participating in the CAHDI, allow me to highlight that at our last meeting we counted with an illustrious participant: the Secretary General of the **Asian African Legal Consultative Organisation (AALCO)** which has been granted recently the “Participant Status” to the CAHDI. AALCO is an international intergovernmental organisation based in New Delhi (India) established in 1956 and which is currently composed of 47 member States from Asia and Africa. I believe this new development in the participation in the CAHDI is highly important as for the first time we are counting with an Organisation representing states from Asia and Africa within the CAHDI.

It is worth highlighting in addition that most of the Heads of Delegations participating in the CAHDI meetings are the Legal Advisers of the respective Ministries of Foreign Affairs themselves, ensuring thus representation of the States at the highest possible rank.

I am happy to notice that the abridged report of the last CAHDI meeting in March was presented to you this morning. It shows in a condensed form the variety of topics currently dealt with by the CAHDI. It further vividly shows the important role played by the Committee on two levels: Firstly, within the Council of Europe, and, secondly, beyond the Council of Europe in its liaison role between the Council of Europe and other international organisations. Let me now illustrate to you with some examples of how the CAHDI has operated at both of these levels since June last year when I presented the CAHDI work to your Committee.

II. THE CONTRIBUTION OF THE CAHDI TO THE COUNCIL OF EUROPE ACTIVITIES

Firstly, with regard to the contribution of the CAHDI to the work undertaken within the Council of Europe, it is important to recall one of the major strengths of this Committee: to be able to focus pragmatically on issues that cannot be addressed in the same way within other international organisations. Indeed, international law is by definition universal and cannot be constrained to the European continent, but as you also know, tackling subjects among 193 States is more complex than among “47 plus” (i.e. when counting the observers). The CAHDI takes full advantage of this undeniable asset of the Council of Europe.

With this in mind, the CAHDI performs one of its main roles which is to provide legal advice to the Committee of Ministers. In accordance with its terms of reference, it is instructed to provide legal opinions at the request of the Committee of Ministers - or at the request of other Steering Committees or Ad hoc Committees-, transmitted via the Committee of Ministers. The most recent opportunity for the CAHDI to pursue this role occurred in March 2018 when the Committee of Ministers communicated to the CAHDI **Recommendation 2122 (2018) of the Parliamentary Assembly of the Council of Europe on “Jurisdictional immunity of International Organisations and Rights of their Staff”**. This CAHDI legal opinion will be shortly submitted to you for your reply to the Parliamentary Assembly and therefore I will not enter into its details now. Nevertheless I would like to highlight that in its **legal opinion** on this Recommendation, adopted during its 55th meeting in March 2018, the CAHDI thanked the Parliamentary Assembly for acknowledging its work in relation to the jurisdictional immunity of international organisations during almost two decades and offered two lines of reasoning. On the one hand, the CAHDI pointed out that the privileges and immunities of international organisations serve the legitimate purpose of protecting the independence of international organisations, which is crucial for the effective performance of their functions. On the other hand, the CAHDI agreed with the Parliamentary Assembly that against the background of the Council of Europe’s responsibility for setting international human rights standards and promoting the rule of law at all levels, the Organisation has a special duty to offer its staff timely, effective and fair justice. In this respect, the CAHDI underlined that in conformity with the case law of the European Court of Human rights (ECtHR) the key factor in determining whether granting international organisations immunity from jurisdiction of the national courts is permissible under the *European Convention on Human Rights* (ECHR) is whether the applicants concerned

had available to them “reasonable alternative means” to effectively protect their rights under the ECHR¹.

In order to fulfil this task of providing legal advice to the Committee of Ministers and following your request, the CAHDI will prepare during its forthcoming meeting in September, in Finland, three legal opinions on derogations under Article 15 of the European Convention on Human Rights², on the rights of internally displaced persons in Europe³ and on the legal challenges related to hybrid war⁴.

Another important initiative in which the CAHDI is contributing to the work of the Council of Europe relates to the activities of the *Drafting Group on the Place of the European Convention on Human Rights in the European and International Legal Order* (DH-SYSC-II). As you know the DH-SYSC (Committee of Experts on the System of the European Convention on Human Rights) is entrusted by the CDDH to “prepare a draft report for the Committee of Ministers containing conclusions and possible proposals for action (deadline: 31 December 2019)”. The preparatory work was entrusted to the DH-SYSC-II. The CAHDI has already appointed its Vice-Chair, Mr Petr Válek (Czech Republic), to represent the CAHDI in this Drafting Group DH-SYSC-II. Furthermore, during our last meeting in March this year, the Chair of this Drafting Group, Ms Florence Merloz (France) held an exchange of views with the CAHDI and it was agreed that, if necessary, the Steering Committee for Human Rights (CDDH) will submit a request for a CAHDI opinion, via the Ministers’ Deputies, when the draft Report will be finalised.

To conclude this section on the contribution of the CAHDI to the work of the Council of Europe, let me now come to one of the flagship activities of the CAHDI, namely the examination of reservations and declarations subject to objection in its capacity as the “**European Observatory of Reservations to International Treaties**”. As you know, this model is recognised both inside and outside the Council of Europe insofar as the CAHDI examines both the reservations and declarations made to the Council of Europe conventions as well as to the conventions of the United Nations. This function, which the CAHDI has now been operating for more than 17 years, has proved its effectiveness. In carrying out this examination, the CAHDI makes use of the “*dialogue réservataire*”, a concept whose emergence can be traced back to the CAHDI and for which the CAHDI has been praised for being predicated on good faith and fostering dialogue and conciliation. This working method not only allows the States which have formulated a problematic reservation to have an opportunity to clarify its scope and effect and, if necessary tone it down or withdraw it, but also the other delegations to understand the rationale behind reservations before formally objecting to them. During its last meeting the CAHDI examined **19 reservations and declarations** which had been identified as potentially problematic.

In relation to this last activity I have just mentioned (reservations and declarations to treaties), I would like to highlight the close links established between the CAHDI and the Treaty Office of the Council of Europe as treaty law has always been a very important part of Public International Law. In this respect, allow me to make a remark in relation to the essence of our Committee: we are not a traditional standard-setting committee but a legal forum which assist and cooperate with member

¹ ECtHR, *Beer and Regan v. Germany*, no. 28934/95, Grand Chamber judgment of 18 February 1999; ECHR, *Waite and Kennedy v. Germany*, no. 26083/94, Grand Chamber judgment of 18 February 1999; ECHR, *Chapman v. Belgium*, no. 39619/06, decision of 5 March 2013; ECHR, *Stichting Mothers of Srebrenica and others v. the Netherlands*, no. 65542/12, decision of 11 June 2013.

² [Recommendation 2125 \(2018\) – “State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights”](#)

³ [Recommendation 2126 \(2018\) – “Humanitarian needs and rights of internally displaced persons in Europe”](#)

⁴ [Recommendation 2130 \(2018\) – “Legal challenges related to hybrid war and human rights obligations”](#)

and non-member States in order to develop the Rule of Law in the field of international law as a key factor in the organisation of inter-state relations. While the CAHDI does not normally engage in actual preparatory work of the Council of Europe Conventions, it is always available for providing assistance in treaty law and other questions of public international law.

III. THE CONTRIBUTION OF THE CAHDI BEYOND THE COUNCIL OF EUROPE AND ITS LIAISON ROLE WITH OTHER INTERNATIONAL ORGANISATIONS

Let me now move on to the CAHDI contribution beyond the Council of Europe and its liaison role with other international organisations.

The external dimension of the CAHDI is illustrated first of all by the fact that the CAHDI experts, the Legal Advisers of the Council of Europe member and observer States, equally take part in several other fora - some of them in the European Union and all of them at the United Nations. This allows us to have legal coherence on certain issues but also to promote legal exchanges within these different organisations. The CAHDI has a very important role to play in this process of exchanges insofar as it constitutes a laboratory of ideas essential for the development of international law.

In this regard, I am thinking in particular on the "**Declaration on Jurisdictional Immunities of State Owned Cultural Property**", developed within the framework of the CAHDI. By signing this Declaration, a State recognises the customary nature of the relevant provisions of the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (2004) which, as you know, has still not entered into force. The CAHDI is therefore at the center of the development of international law, and in this particular case it is even the main actor, the pioneer, of the formulation and reaffirmation of customary law on this question. To date, the Declaration has been signed by 20 Ministers of Foreign Affairs⁵ of member and non-member States of the Council of Europe.

Concerning the impact of the CAHDI beyond the scope of the Council of Europe, I am further thinking of the Committee's various initiatives and projects with practical value and importance for member States and non-member States. This can be illustrated for instance with the very interesting discussions we are having on the question of the **settlement of disputes of a private character to which an international organisation is a party**. This subject has many legal issues connected with the above mentioned opinion prepared by the CAHDI for the Committee of Ministers. However, the main difference is that the staff of an international organisation usually has access to an internal dispute settlement procedure while these third parties usually do not have such legal protection unless the immunity of the international organisation concerned is waived. Indeed, the immunity of international organisations in many cases prevents individuals who have suffered harm from a conduct of an international organisation from bringing a successful claim before a domestic court. This immunity has been increasingly challenged on an alleged incompatibility of upholding immunity with the right of access to court. While this theme is of practical importance for the Council of Europe itself, it obviously goes beyond the European regional framework. It is a good example of the "pioneer" role of the CAHDI which acts as a testing ground for subjects which, at this stage, are more difficult to discuss at a more "universal" level.

The input of the CAHDI to discussions of important and topical issues of public international law is by far not limited to discussions at its biannual meetings. Between the meetings we feed the discussions, inter alia, by collecting evidence from the delegations of State practice concerning a

⁵ Albania, Armenia, Austria, Belarus, Belgium, the Czech Republic, Estonia, Finland, France, Georgia, Holy See, Hungary, Ireland, Latvia, Luxembourg, the Netherlands, Portugal, Romania, the Russian Federation and the Slovak Republic.

certain topic currently under consideration. On several occasions already, the data so collected has served as a basis for a publication. This allows us to make our research available to the outside public. For instance, we are currently finalising a publication on the topic of “**Immunities of special missions**”⁶. In this respect, I would like to inform you that **Sir Michael WOOD**, member of the United Nations International Law Commission (ILC) and former Chair of the CAHDI, agreed to prepare an analytical report on legislation and practice of member States of the Council of Europe and other States and international organisations participating in the CAHDI concerning “*Immunities of Special Missions*”, including the main trends arising from the replies to the questionnaire prepared by the CAHDI on this matter which have been collected since 2013. A contract between the Council of Europe and Brill-Nijhoff Publishers for the publication of this new CAHDI book has already been concluded and the publication will be ready in the second half of this year.

The CAHDI further has an important role to play in fostering **co-operation and collaboration of the Council of Europe with the United Nations**, in particular with the International Law Commission (ILC) and the Sixth Committee of the United Nations General Assembly linking the two Organisations in the legal field.

On the occasion of its 54th meeting in September 2017, the CAHDI welcomed **Mr Georg NOLTE**, then Chair of the United Nations International Law Commission (ILC), in the framework of annual interaction between the CAHDI and the ILC which is further marked by the exchange of views between the CAHDI Chair and Secretary with the ILC in its session in Geneva every July. Indeed myself and the Secretary of the CAHDI, Ms Marta Requena, will attend the forthcoming ILC meeting in Geneva on 19 July. In his address to the CAHDI, Mr NOLTE gave an overview of the recent activities of the ILC and the topics discussed during the ILC’s 69th Session. His presentation touched on topical issues related to the crimes against humanity, the protection of the atmosphere, the immunity of State officials from foreign criminal jurisdiction, the provisional application of treaties, the *jus cogens*, the succession of States in respect State responsibility and the protection of the environment in relation to armed conflicts. He further provided information on the main events which are marking the 70th Anniversary of the ILC, some of them have already taken place in New York and others forthcoming events will take place in Geneva on the 5 and 6 July 2018.

On the occasion of its 55th meeting in March of this year in Strasbourg, the CAHDI members held a very interesting exchange of views with **Mr Allan ROSAS**, Judge in respect of Finland at the Court of Justice of the European Union (CJEU) on the subject of “*The European Court of Justice and Public International Law*”. In particular Mr Rosas analysed the issues of the European Union as an external actor and subject of international law, the conclusion of international agreements, the status of international law in European Union law, and the dispute settlement mechanisms. His [speech](#) is public at the CAHDI website

IV. CONCLUSION

As you can see - and I have listed only about a quarter of our activities -, the CAHDI is a forum in which debates are dynamic between member States, non-member States and international organisations on contemporary issues of public international law.

⁶ According to the *United Nations Convention on Special Missions* of 1969 a “special mission” is a temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task.

On behalf of the Committee that I have the honor to chair, I wish to thank you for the confidence you have placed in the CAHDI in all those over 27 years. I am most grateful for the opportunity to speak to you today. I believe that, especially in the light of the increasing challenges faced by different actors in the context of international law today, a forum like the CAHDI with its tradition and reputation of thriving for a steady development of public international law represents a great asset for the member States and the Council of Europe as a whole.