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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

**Presentation by Ms Päivi Kaukoranta,
Chair of the Committee of Legal Advisers on
Public International Law (CAHDI)**

at the 70th Session of the International Law Commission (ILC)

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

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Mr Chair,
Members of the International Law Commission,
Ladies and Gentlemen,

It is an honour and a great pleasure for me to have the opportunity to address, for the second time, the International Law Commission in my capacity as the Chair of the Committee of Legal Advisers on Public International Law of the Council of Europe (CAHDI). I would like to thank the International Law Commission for offering the CAHDI this unique opportunity to present its work also this year. This tradition allows these two expert bodies to continue our dialogue which is very much appreciated by the members of the CAHDI. I would also like to use this opportunity to congratulate this Commission for the successful event on the occasion of the seventieth anniversary which I had a pleasure of participating in my personal capacity on 5 and 6 of July.

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. I will conclude my CAHDI Chairmanship 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.

I. INTRODUCTION

First of all, please allow me to recall that the CAHDI, established 27 years ago, 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 (Canada, Holy See, Japan, Mexico and the United States of America), 4 further observer States to the CAHDI – namely Australia, Belarus, Israel and New Zealand - and 10 participating international organisations¹. Hence, all in all the CAHDI counts 66 States and organisations which are allowed to participate in its meetings and which is reflected in an increased number of actual participants (eg. 86 at our last March meeting).

Concerning the international organisations participating in the CAHDI, I would like 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. As you know, AALCO is an international intergovernmental organisation based in New Delhi (India), and established in 1956, which is currently composed of 47 member States from Asia and Africa. I believe this new development in the participation of the CAHDI is highly important and furthermore it responds to a request from some members of this Commission and also from other entities: for the first time we are counting with an Organisation representing states from Asia and Africa within the CAHDI.

¹ EU, UN, OECD, CERN, The Hague Conference on Private International Law, Interpol, NATO, ICRC, OSCE and AALCO.

In the framework of a truly pan-European setting, the CAHDI is a legal forum for coordination, but also for discussion, reflection and advice - a **laboratory of ideas** essential for the development of public international law. Its biannual meetings enable all participants to inform each other on topical issues and to exchange national experiences and practices. The CAHDI further has an important role to play in fostering **co-operation and collaboration between the Council of Europe and the United Nations**, including with the Sixth Committee of the General Assembly.

The CAHDI also carries out a dialogue with international courts. I recall that last year the CAHDI held exchange of views with **Mr Ronny ABRAHAM**, then the President of the International Court of Justice (ICJ), and in March this year with **Mr Allan ROSAS**, Judge of the European Court of Justice (CJEU), who gave an overview on "*The European Court of Justice and Public International Law*".

I would now like to introduce to you some of the activities of the CAHDI in some detail. I will do so at two levels:

- First, I will talk about some of our activities that contribute to the development and evolution of international law in general;
- And secondly, I will present some activities that I believe to be capable of contributing to the work of the International Law Commission and the Sixth Committee more specifically.

II. THE CONTRIBUTION OF THE CAHDI TO THE DEVELOPMENT OF INTERNATIONAL LAW

One of the major contributions of the CAHDI to the development of Public International Law is represented by one of the CAHDI's flagship activities, namely the examination of reservations and declarations subject to objection in its capacity as the "**European Observatory of Reservations to International Treaties**". In this capacity, the CAHDI examines those reservations and declarations subject to objection, thereby promoting and monitoring the States' adherence to the rules of public international law in the treaty law field. The CAHDI examines both the reservations and declarations made to the Council of Europe conventions as well as to the conventions deposited with the Secretary-General of the United Nations. This function, which the CAHDI has now been operating for more than 18 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 gives an opportunity to the other delegations to understand the rationale behind reservations before formally objecting to them. In this respect the participation of observers from other regions is of great importance. As I mentioned last year, we have observed the revival of a trend whereby States are subordinating the application of the provisions of a Convention to their domestic law. As we all know, such reservations are inadmissible or objectionable under international law due to reasons of legal uncertainty and also because they are often against the object and purpose of the treaties concerned. Furthermore, we have also witnessed an increased use of reservations and declarations to international treaties to signal the non-recognition of a State by another or to reaffirm a territorial dispute.

We believe that both “practices”, which are often against the object and purpose of the conventions concerned, are undermining the basic rules of treaty law and preventing a full implementation of the standards and rules contained in such conventions. Therefore, we believe that the CAHDI, together with the relevant entities of the United Nations should discourage such practice. **The Guide to Practice on Reservations to Treaties**, adopted by the International Law Commission at its 63rd session is of great assistance to the members of the CAHDI while they examine reservations. During its last meeting, the CAHDI examined **19 reservations and declarations** which had been identified as potentially problematic, some of them containing the above-mentioned type of reservations and declarations.

Another important initiative in which the CAHDI has recently been directly involved and which could also contribute to the development of international law 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)**. The work of this Drafting Group can be placed at the 1252nd meeting of the Committee of Ministers of the Council of Europe, on 30 March 2016, where they welcomed the report of the Steering Committee for Human Rights (CDDH) on the longer-term future of the system of the *European Convention on Human Rights*. The Committee of Ministers of the Council of Europe “*instructed the CDDH to carry out a detailed analysis of all questions relating to the place of the Convention in the European and international legal order and on the medium-term and longer-term prospects, in the light of the relevant paragraphs of the report (conclusion § 203 iii)*”. Therefore, the DH-SYSC (Committee of Experts on the System of the European Convention on Human Rights) was 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 Drafting Group (DH-SYSC-II) was invited to examine:

- (i) the challenge of the interaction between the Convention and other branches of international law, including international customary law;
- (ii) the challenge of the interaction between the Convention and other international human rights instruments to which the Council of Europe member States are parties;
- (iii) the challenge of the interaction between the Convention and the legal order of the EU and other regional organisations.

The aim of the work is the preservation of the efficiency of the Convention system against risks of fragmentation within the European and international legal spaces in the field of human rights protection by diverging interpretations. The CAHDI has 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 CAHDI held an exchange of views with the Chair of this Drafting Group, **Ms Florence Merloz (France)**, 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, once the draft Report is finalised.

The CAHDI has traditionally held also discussions on a topic “**Peaceful Settlement of Disputes**”, which was focused on the clauses of acceptance of the compulsory jurisdiction of the International Court of Justice. In its last meeting the CAHDI extended this topic to cover also other clauses of attribution of jurisdiction to the ICJ, the case law of the International Tribunal of the Law of the Sea

(ITLOS), inter-States arbitration cases and any other relevant cases of peaceful settlement of disputes between States.

Following these illustrative examples of the CAHDI's contribution to the development of international law in general, allow me now to turn to the next part of my presentation, namely on CAHDI activities capable of contributing to the work of this Commission and the Sixth Committee of the General Assembly more specifically.

III. THE CONTRIBUTION OF THE CAHDI TO THE WORK OF THE INTERNATIONAL LAW COMMISSION

As you probably know, the work of the ILC is regularly on the agenda of our meetings and is the subject of enlightening discussions for all participants. Besides, we have always had the privilege of welcoming an ILC member for an exchange of views on your ongoing activities. Most recently, at our 55th meeting held last September in Strasbourg, we welcomed **Mr Georg NOLTE**, your Chairperson for your 69th Session, in the framework of the annual interaction between the CAHDI and the ILC. On behalf of the CAHDI experts and on my own behalf, I would like to express our sincere thanks to Mr Georg Nolte for taking his time to share your work with us. I would also like to thank your current Chairperson, **Mr Eduardo Valencia-Ospina**, for having accepted our invitation to address the CAHDI at our 56th meeting on 21 September 2018 in Helsinki.

I could enumerate many items on our agenda that relate to the topics you are or have been considering but taken the time available for our dialogue I would like to provide you with some information about four of the current CAHDI's initiatives and projects related to different aspects of immunities with practical value and importance for States as well as international organisations.

The **first initiative** that I would like to recall is the interesting discussions that we are currently having on the question of the **settlement of disputes of a private character to which an international organisation is a party**. The immunity of international organisations in many cases prevents individuals who have suffered harm due to the 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 and could affect in particular the peacekeeping operations of the United Nations². The Netherlands has prepared for the CAHDI a preliminary document summarising the main trends of the replies already received from States and further examining this issue in the context of peacekeeping and police operations. The CAHDI wishes to receive even further written contributions from its member and non-member states. At this stage contributions remain confidential as the discussions are still at an embryonic stage.

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. Indeed, international law is by definition universal and cannot be constrained to the European continent, but as you can imagine, tackling subjects among 193 States is more complex than among "47 plus" (i.e. when

² United States Court of Appeals for the Second Circuit, [Georges v. United Nations](#), judgment of 18 August 2016, 834 F.3d 88 (2016).

United States District Court, Eastern District of New York, [LaVenture et al. v. United Nations](#), No. 14-CV-1611 (SLT) (RLM), 23 August 2017.

counting the observers). The CAHDI takes full advantage of this undeniable asset of the Council of Europe to be able to focus pragmatically on issues that cannot be addressed in the same way within other international organisations. Moreover, 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 among these different organisations.

The **second activity** that I would like to mention relates to the CAHDI's main role which is to provide legal advice to the Committee of Ministers of the Council of Europe. 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 its 55th meeting 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"**. The CAHDI legal opinion prepared on this Recommendation has many legal issues connected with the above mentioned CAHDI initiative. 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. In relation to this issue, I would like to highlight that in its **legal opinion**, the CAHDI offered two main 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 ECHR³. This CAHDI Legal Opinion will be published on its website as soon as the Committee of Ministers examines it, probably in September of this year.

In order to fulfil its task of providing legal advice to the Committee of Ministers of the Council of Europe, the CAHDI will prepare during its forthcoming meeting in September three legal opinions: (i) on derogations under Article 15 of the European Convention on Human Rights⁴, (ii) on the rights of internally displaced persons in Europe⁵, and (iii) on the legal challenges related to hybrid war⁶.

³ 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.

⁴ [Recommendation 2125 \(2018\) – "State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights"](#)

⁵ [Recommendation 2126 \(2018\) – "Humanitarian needs and rights of internally displaced persons in Europe"](#)

⁶ [Recommendation 2130 \(2018\) – "Legal challenges related to hybrid war and human rights obligations"](#)

The **third project** I would like to recall is the "**Declaration on Jurisdictional Immunities of State Owned Cultural Property**"⁷ which is a non-legally binding document developed within the framework of the CAHDI. It expresses a common understanding of *opinio juris* concerning the fundamental rule that certain kind of State property - cultural property on exhibition - enjoys immunity from any measure of constraint, such as attachment, arrest or execution, in another State. By signing this Declaration, a State recognises the customary nature of the relevant provisions of the **2004 United Nations Convention on Jurisdictional Immunities of States and Their Property** – a convention prepared by this Commission – but which, as you know, has not yet entered into force. As regards the Declaration, the CAHDI is therefore at the center of the development of international law, and in this particular case it is even the main actor of the formulation and reaffirmation of customary law on this question. To date, the Declaration has been signed by 20 Ministers of Foreign Affairs⁸ of member and non-member States of the Council of Europe. The CAHDI also discusses regularly domestic case law on state immunities which allows the CAHDI members to follow the evolving practice.

The **fourth initiative** I would like to mention shows that the input of the CAHDI to discussions on 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 on State practice concerning a certain topic currently under consideration. On several occasions already, the data so collected has served as a basis for a publication⁹. This allows us to make our research available to the general public, including researchers and practitioners. In relation to this issue, I would like to bring to your attention that there is a publication currently under finalisation on "**Immunities of special missions**"¹⁰. The CAHDI discussed this topic in September 2013 and agreed to prepare a questionnaire aimed at establishing an overview of the legislation and specific national practices in the field of special missions. We have received 38 replies from States member and non-members of the Council of Europe. In this respect, I would like to thank a member of your Commission, **Mr Evgeny ZAGAYNOV**, who is also a CAHDI member and who has been crucial for obtaining the reply of the Russian Federation to this CAHDI questionnaire.

As you know special missions sent by one State to another play an important role in international diplomacy, while the international law governing them remains to some extent uncertain. Determining whether a special mission has been established has direct implications on the immunities that the members of the special mission enjoy, including immunity from arrest and from criminal jurisdiction.

In relation to this initiative, I would like to thank very much **Sir Michael WOOD**, who is also a former Chair of the CAHDI, as well as a **Mr Andrew Sanger**, from the Faculty of Law of the

⁷ "[Declaration on Jurisdictional Immunities of State Owned Cultural Property](#)", presented at the 46th meeting of the CAHDI (Strasbourg, 16-17 September 2013).

⁸ Albania, Armenia, Austria, Belarus, Belgium, Czech Republic, Estonia, Finland, France, Georgia, Holy See, Hungary, Ireland, Latvia, Luxembourg, the Netherlands, Portugal, Romania, Russian Federation and Slovak Republic.

⁹ *State Practice regarding State Succession and Issues of Recognition*, edited by Jan Klabbers, Martti Koskenniemi, Olivier Ribbelink, Andreas Zimmermann and the Council of Europe (Brill Nijhoff, 1999); *Treaty Making - Expression of Consent by States to be Bound by a Treaty*, edited by the Council of Europe (Kluwer Law International, 2001); *State practice regarding State Immunities*, edited Gerhard Hafner, Marcelo G. Kohen, Susan Breau and the Council of Europe (Martinus Nijhoff Publishers, 2006); *The Judge and International Custom*, edited by Liesbeth Lijnzaad and the Council of Europe (Brill Nijhoff, 2016); *The CAHDI Contribution to the Development of Public International Law: Achievements and Future Challenges*, edited by the Council of Europe (Brill Nijhoff, 2016).

¹⁰ 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.

University of Cambridge, for preparing the analytical report for this CAHDI Book on the basis of the information submitted by the above mentioned 38 States, considered against the background of the **1969 United Nations Convention on Special Missions**, key judicial decisions and national legislation on special mission immunity, as well as government statements, and other state practice and evidence of *opinio juris*.

A contract between the Council of Europe and Brill-Nijhoff Publishers for the publication of this new CAHDI book has been concluded and the publication will be ready in the second half of this year.

The latter two initiatives illustrate yet again the proactive contribution of the CAHDI to disseminate the standards of United Nations conventions and to foster an ever closer co-operation and collaboration between the Council of Europe and the United Nations.

IV. CONCLUSION

Let me close my presentation by highlighting the fundamental importance that the CAHDI attaches to our collaboration with the International Law Commission. The Commission and the CAHDI share the common goal of promoting the role of public international law in international relations. We will continue our work, for instance, on issues relating to treaty law, immunities, case law related to public international law, peaceful settlement of disputes and international criminal justice. While doing so, we will always welcome any input from or interaction with the ILC. On behalf of the CAHDI, I would like to express my sincere gratitude for the opportunity to present and discuss with you our recent work.

I thank you for your attention.