



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

at the 69th Session of the International Law Commission

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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 first 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 is very much appreciated by the members of the CAHDI and demonstrates your interest in the activities of our Committee which has now been in existence for more than 26 years.

I started my term of office on 1 January this year and already chaired my first meeting of the CAHDI in March at the Council of Europe in Strasbourg with the Vice-President of the CAHDI, Mr Petr VALEK, the Legal Adviser of the Czech Republic. It has been a great pleasure for us to continue the work carried out with outstanding know-how and skill by my predecessor, Mr Paul RIETJENS from Belgium, with whom you met the last years.

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 (Canada, Holy See, Japan, Mexico and the United States of America), 4 further observer States to the CAHDI (Australia, Belarus, Israel and New Zealand) and 9 participating international organisations¹. Most of the Head of Delegations participating in the CAHDI meetings are the Legal Advisers of the respective Ministries of Foreign Affairs themselves, thus ensuring representation of the States at the highest possible rank. Moreover, the delegations participating in our meetings are often composed of two or three participants, and, hence, we welcomed a total of 92 participants at the last meeting in March in Strasbourg while 99 attended the previous meeting in Brussels in September last year.

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 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 of the Council of Europe with the United Nations. For instance, with the view of strengthening this co-operation, we held an exchange of views with the Under-Secretary-General for Legal Affairs and United Nations Legal Counsel, Mr Miguel SERPA SOARES, at our meeting in September 2016 and, this March, with the President of the International Court of Justice (ICJ), Mr Ronny ABRAHAM. Furthermore, in addition to the close ties with your Commission, our collaboration with the Sixth Committee of the United Nations General Assembly allows us to act as a link between the two Organisations in the legal field.

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

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

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

An important initiative in which the CAHDI has recently been directly involved relates to the draft "*Model Final Clauses for Conventions, Additional Protocols and Amending Protocols concluded within the Council of Europe*". These clauses have been prepared by the Treaty Office of the Council of Europe in order to update the 1980 Model Final Clauses² to include the new developments occurred, during the last four decades, within the treaty making process at the Council of Europe. Indeed, since then the treaties concluded under the auspices of the Council of Europe have not only become more varied with regard to the subject matters they address but also in relation to their ever widened reach beyond Europe. This global reach and transnational character of the recent Council of Europe conventions and protocols has led to an increased participation of non-member States, the European Union and international organisations. Today, of the 221 treaties concluded within the Council of Europe 152 are open to non-member States upon invitation by the Committee of Ministers. For instance, since 2012 the Treaty Office has received 96 requests from non-member States to become party to the Council of Europe conventions. By the same token, an important evolution has taken place with regard to the type of legally binding instruments concluded within the Council of Europe: We have witnessed a significant increase in the use of additional and amending protocols to complement or modernise existing conventions. Hence it became necessary to elaborate specific clauses for these types of instrument as well. At the same time, it was felt that specific model final clauses for instruments titled "agreements" were no longer needed as no such instruments had been drafted under the auspices of the Council of Europe since 1996.³ In sum, the need for a revision of the model clauses was evident for a variety of reasons. As it was the case with the 1980 Model Final Clauses, also this time the draft prepared by the Council of Europe Treaty Office was submitted to the CAHDI who greatly contributed to the revision process through the experience of its experts in different means of expressing the consent to be bound by a treaty within the Council of Europe as well as within other international organisations. Drawing on the invaluable experience of the Legal Advisers of the "47 plus" serves as a guarantee that the revised

² "[Model Final Clauses for Conventions and Agreements concluded within the Council of Europe](#)" adopted by the Committee of Ministers at its 315th meeting in February 1980.

³ The last one being the [European Agreement relating to persons participating in proceedings of the European Court of Human Rights](#) (1996), ETS No. 161, which entered into force on 1 January 1999.

version now submitted to the Committee of Ministers of the Council of Europe for adoption takes into account the latest developments of treaty law.

Continuing with another example from the field of treaty law and one of the CAHDI's flagship activities, in its capacity as the "*European Observatory of Reservations to International Treaties*" the CAHDI examines reservations and declarations subject to objection at its meetings thereby promoting and monitoring the States' adherence to the rules of public international law in this field. 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 deposited with the Secretary-General 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. As my predecessor Mr RIETJENS mentioned last year, we are observing the revival of a trend of States 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. At our last meetings we have further discussed another recent practice: The use of reservations and declarations to international treaties for highlighting the non-recognition of a State by another or to reaffirm a territorial dispute. As a reaction to objections States increasingly withdraw their reservations - which is a welcome development but in the case of partial withdrawal it brings about potentially inadmissible modification of reservations or late reservations.

Concerning the contribution of the CAHDI to the development – or rather the evolution – of international law, I am further thinking of the Committee's various initiatives and projects with practical value and importance for States as well as international

organisations as subjects of international law. We are, for instance, currently having very interesting discussions on the question of the settlement of disputes of a private character to which an international organisation is a party. Indeed, the immunity of international organisations in many cases prevents individuals who have suffered harm from 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. 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 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 within these different organisations.

After 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 on the contribution of the CAHDI to the work of the International Law Commission in particular.

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

As you probably know, the work of the ILC is 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 one of you for an exchange of views on your ongoing activities. Most recently, at our 52nd meeting held last September in Brussels, we welcomed Mr

Pedro COMISSÁRIO AFONSO, your Chairperson for your 68th Session, in the framework of annual interaction between the CAHDI and the ILC. Please transmit our sincere thanks, on behalf of the CAHDI experts and on my own behalf, to Mr COMISSÁRIO AFONSO for taking his time to share your work with us. I would also like to thank your current Chairperson, Mr Georg NOLTE, for having accepted our invitation to address the CAHDI at our 54th meeting on 21 September 2017.

I could enumerate many items on our agenda that relate to the topics you are currently considering but I would like to raise here the "*Declaration on Jurisdictional Immunities of State Owned Cultural Property*"⁴, which I believe to have a direct impact on your work. The Declaration, developed within the framework of the CAHDI, is a non-legally binding document which 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 *United Nations Convention on Jurisdictional Immunities of States and Their Property* (2004) which, as you know, has still not 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, 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 Affairs, since July last year by the Minister of Foreign Affairs and Trade of Hungary (18 August 2016), the Minister for Foreign Affairs of Finland (14 September 2016), the Minister of Foreign Affairs of Portugal (21 February 2017) and the Secretary for the Holy See's Relations with States (22 May 2017). Furthermore, with regard to the Declaration, I would like to inform you that in January, the Permanent Representatives of Austria and the Czech Republic to the United Nations transmitted to the Secretary-General of the world Organisation a letter requesting the Declaration to be circulated among the member States of the United Nations for information purposes under the agenda item "The rule of law at the national and international levels" of the United Nations General Assembly. This marks a further

⁴ "[Declaration on Jurisdictional Immunities of State Owned Cultural Property](#)", presented at the 46th meeting of the CAHDI (Strasbourg, 16-17 September 2013).

initiative by the original initiators of the project, Austria and the Czech Republic, to raise awareness for the Declaration beyond the boundaries of the Council of Europe.

IV. CONCLUSION

Let me close my presentation by highlighting the fundamental importance that we at the CAHDI attach to our collaboration with the International Law Commission. The Commission and the CAHDI share a 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, sanctions, case law relating 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 you our recent work and to discuss it with you.

I thank you for your attention.