

**Ms Liesbeth LIJNZAAD, Chair of the
Committee of Legal Advisers on Public International Law (CAHDI)**

**1202nd meeting of the Ministers' Deputies
(11 June 2014)**

INTRODUCTION

It is a pleasure for me to address this meeting of the Ministers' Deputies for the second time and to inform you of the work the CAHDI has been undertaking since we met last time in May 2013.

I am now in my second year as a Chair of the CAHDI and my term of office will therefore end in December 2014. As it is the custom, we will organise the last meeting of my chairmanship in my country. The 48th meeting of the CAHDI will take place in The Hague on 18-19 September 2014 and will be followed by a seminar on "Legal aspects of the role of the host State".

Before going into details on the latest activities of the CAHDI, I would like to underline that it has been a honour and pleasure to chair this prestigious committee which undoubtedly – by providing legal guidance and support to the Council of Europe member States but also to States and organisations outside the sphere of the Council of Europe – contributes to the development of international law.

THE CAHDI

Allow me to recall that the CAHDI is composed of the Legal Advisers on international law of the Ministries of Foreign Affairs of the 47 member States of the Council of Europe and of a significant number of observer States and organisations.

With the adoption by the Committee of Ministers in November 2013 of its new terms of reference for 2014-2015, the CAHDI now counts Belarus among its observer States, in addition to the 5 States (Canada, Holy See, Japan, Mexico and the United States) having observer status with the Council of Europe and the 3 other observer States to the CAHDI (i.e. Australia, Israel and New Zealand).

Furthermore, since the entry into force of these terms of reference on 1 January 2014, the CAHDI has also welcomed the OSCE as new observing organisation, in addition to notably the European Union, the UN and its specialized agencies, ICRC, NATO and OECD.

This high-level of representation and indeed participation makes the CAHDI a unique forum where topical issues of international law can be discussed and cooperation can be strengthened between the different actors of international law.

The end of 2013 and the beginning of 2014 has been a very intensive period for the CAHDI and I will now address some of the recent activities.

INSTRUCTIONS BY THE COMMITTEE OF MINISTERS

As an *ad hoc* committee directly answerable to the Committee of Ministers, the CAHDI follows your instructions and seeks to assist you in your work.

In the past year, we have provided opinions at your request on two recommendations of the Parliamentary Assembly of the Council of Europe.

- *Opinion on Recommendation 2027 (2013) on “European Union and Council of Europe human rights agendas: synergies not duplication”*

The CAHDI examined Recommendation 2027 (2013) of the Parliamentary Assembly on “European Union and Council of Europe human rights agendas: synergies not duplication” by means of an electronic consultation and adopted its opinion in November 2013.

In this recommendation, the Assembly expresses its concern with regard to possible duplication between the work of the Council of Europe and of the European Union with regard to human rights and recalls the primary role of the Organisation in this area.

The opinion adopted by the CAHDI underlined that the protection and promotion of human rights is a common objective of both organisations. However, it recalled that according to the Memorandum of Understanding of 2007 concluded between these two organisations, the European Union has recognised the role of the Council of Europe, as the Europe-wide reference source for human rights, both with respect to the norms developed by the Council of Europe as to the decisions and conclusions of its monitoring structures which the EU has undertaken to take into account where relevant.

The CAHDI therefore recommended that any initiative pertaining to areas of cooperation between the two organisations should take into account the principles for cooperation under the agreements concluded, in order to avoid duplication and promote complementarity in view of ensuring their added value.

With regard to the specific question of the participation of the EU in the Council of Europe conventions, the CAHDI took note of the relevant decisions of the Committee of Ministers related to the review of Council of Europe conventions and indicated that it stood ready to assist the Deputies in their examination of the modalities aimed in general at allowing or facilitating the participation of the EU to the Council of Europe conventions.

- *Opinion on Recommendation 2037 (2014) on “Accountability of international organisations for human rights violations”*

The CAHDI also adopted an opinion at its last meeting in March 2014 on Recommendation 2037 (2014) of the Parliamentary Assembly on the issue of the “Accountability of international organisations for human rights violations”.

With regard to this very topical issue, the CAHDI first stressed that the promotion and protection of human rights formed part of the foundations of the Council of Europe, the European Union (EU), the United Nations (UN) and its specialised agencies and that the most relevant international legal instruments and human rights standards had been developed in the framework of these international organisations.

It also underlined that privileges and immunities of international organisations were essential elements for the fulfilment of their mission and that they were governed by international law. The CAHDI invited international organisations to consider waiving of immunity in individual cases where appropriate, stressing however that the decision to waive immunity is the exclusive competence of the international organisation itself. It underlined that the question of the immunity of international organisations was frequently discussed within the Committee and referred in this regard to recent

case-law related to the scope of this immunity and to the question of the availability of “reasonable alternative means”.

The CAHDI finally encouraged continuing reflection on the issues raised by the Parliamentary Assembly regarding notably the accountability issues and the responsibility of international organisations.

I understand that this recommendation, together with the opinions of the CAHDI and the CDDH, will soon be examined by the Committee of Ministers at its GR-H meeting on 20 June 2014.

Let me at this point reiterate that the CAHDI stands ready to continue to provide its expertise on the topics dealt with in the above-mentioned recommendations and, more generally, on any given subject related to questions of public international law.

- *Review of Council of Europe conventions*

An important exercise that the CAHDI has undertaken this year is the review of the conventions for which it had been given responsibility.

Following your decision of 10 April 2013 instructing steering and *ad hoc* committees to carry out an examination of these conventions, the CAHDI initiated this exercise at its meeting in March, with the examination of the *European Convention for the Peaceful Settlement of Disputes* [CETS No. 023].

Following an exchange of views on this Convention, the CAHDI noted that although it was not very well-known, the Convention had been used in the past, in particular to bring a number of cases before the International Court of Justice (ICJ). It was underlined that there was no need for revision as it was considered as a good convention very useful in encouraging resort to the ICJ but that it would benefit from more promotion in order to improve its visibility and increase the number of ratifications.

The review exercise will continue in 2014 and 2015 when we will examine the *European Convention on Consular Functions* [CETS No. 61] as well as the *European Convention on the Abolition of Legalisation of Documents executed by Diplomatic Agents or Consular Officers* [CETS No. 63].

We will of course report back to you on the outcome of our discussions in due time.

- *Council of Europe Gender Equality Strategy for 2014-2017*

The CAHDI has also addressed the inclusion of a gender equality perspective in its work.

In conformity with the Council of Europe Gender Equality Strategy for 2014-2017 which you adopted on 6 November 2013, the CAHDI has appointed two gender equality rapporteurs (myself and the Vice-chair of the CAHDI, Mr Paul RIETJENS) and it was decided to include into one of its questionnaires additional questions on gender issues.

And so, the questionnaire on the organisation and functions of the Office of the Legal Adviser (OLA) of the Ministry of Foreign Affairs has now additional questions related to:

- the distribution of posts between men and women within the OLA;
- the category they belong to;
- recruitment and promotion policies, provisions and/or quotas to ensure non-discrimination and equal opportunities.

The CAHDI will continue explore ways to promote this Strategy and include these aspects in its work.

TOPICAL ISSUES OF INTERNATIONAL LAW

Allow me now to highlight several issues of international law which have been extensively discussed by the Legal Advisers since our last meeting in May 2013.

Obviously, the CAHDI cannot turn its back on these questions which are of paramount importance not only for the members of the Council of Europe but also beyond the boundaries of the Organisation.

The discussions have notably focused on the questions of immunities of States and international organisations and more particularly on the practical aspects of this issue.

- *Immunity of State owned cultural property on loan*

First of all, the CAHDI initiated at our September meeting last year a discussion on the “Immunity of State owned cultural property on loan”.

This exchange of information arose from a specific case which highlighted several practical questions to which concrete answers were not clear.

Indeed, recent years have borne testimony to a number of legal disputes involving issues of immunity from seizure of cultural objects belonging to foreign States while on loan abroad. Sometimes, cultural objects are seized in connection with a dispute over owners’ rights. In other cases, seizure is sought as a means to secure rights that bear no relation to the seized object itself, such as, for instance, in an action brought by a creditor for payment of a debt owed either by the lender or the borrower.

The immunity of cultural State property is addressed by the 2004 *United Nations Convention on Jurisdictional Immunities of States and Their Property* but this convention is not yet in force.

The CAHDI has therefore considered how it could contribute to the ongoing reflection aimed at increasing the level of protection for cultural objects on loan. To this end, it has discussed a declaration recognising the customary nature of the pertinent provisions of the UN Convention related to the immunity of these objects.

Furthermore, in order to have an overview of national practices in this area and to facilitate the loan of art objects, the CAHDI has elaborated a practical questionnaire on this issue and will, at its next meeting in September 2014, examine the different replies given by member and observer States.

- *Immunities of special missions*

An issue of great practical relevance is the question of the “Immunities of special missions”.

This question concerns the situations where a temporary mission representing a State is sent to another State with the consent of the latter for the purpose of dealing with it on specific questions, or of performing a specific task in relation to it.

Whilst this is a matter of great practical importance to all members of the CAHDI and beyond, it is less well-known and understood by the public at large than, for example, the immunities of permanent diplomatic missions. Furthermore, many States have noted a steady increase in volume of their own practice in recent years and have indicated their wish to obtain information on other State practices.

The CAHDI has therefore initiated a debate on specific questions related to this issue and is currently gathering information on the practice and the law on special missions throughout the

member States of the Council of Europe and those observing and participating in the work of the CAHDI with the idea of assisting a broader understanding of the law in this field.

As for the previous topic, the replies will also be examined at our next meeting in September.

- *Settlement of disputes of a private character to which an international organisation is a party*

Another issue discussed at our meeting in March is the question related to the settlement of disputes of a private character to which an international organisation is a party.

You may have heard about the class action lawsuit which was filed in October 2013 by lawyers for Haiti Cholera victims against the United Nations on allegations that UN peacekeepers had brought the disease into Haiti. The UN in this case claimed its immunity.

This case is an example of the topical questions related to the immunity of international organisations which in many cases prevents individuals who have suffered harm from conduct of an international organisation from bringing a successful claim before a domestic court.

The UN, with its peacekeeping operations, is increasingly confronted with such issues and other international organisations are also more often faced with this matter. The CAHDI has found it important to start discussing this important issue and has agreed to submit replies to specific questions.

Here again, the role and the place of the CAHDI in the sphere of international law has been crucial and has showed that the Committee remains at the forefront of contemporary international law. The CAHDI has indeed offered a forum for discussion on this topical question of international law as the idea may be to pursue follow-up discussions at UN level.

This is typically a case where the CAHDI can be the driving force by providing valuable elements for possible discussions at other levels, such as the UN.

- *International law aspects of the recent events in Ukraine*

Finally, regarding topical issues of international law that the CAHDI has examined this year, I would like to mention the exchange of views that was held in March of this year on the international law aspects of the recent events in Ukraine.

This exchange of views took place at the request of the Ukrainian delegation which, together with the delegation of the Russian Federation and the EU presidency (Greece) made statements.

Following these statements, many delegations took the floor and expressed their support to the statement made by the European Union.

The CAHDI further discussed international law aspects and expressed concerns regarding the infringement of basic principles of international law, in particular the principles of territorial integrity, the inviolability of borders and the prohibition of the threat or use of force.

THE CAHDI AS A FORUM FOR EXCHANGE

As illustrated with the discussions on topical and practical questions of international law, the CAHDI is undoubtedly a key forum for exchanging and liaising between the Council of Europe and different international organisations.

We have again this year had the opportunity to exchange with some international bodies.

As has become the practice, the CAHDI Chair was invited to visit the International Law Commission of the United Nations (ILC) during its July session in Geneva last year. At this meeting with the UN's expert body for the codification and development of international law, I have presented CAHDI's work. The meeting is an excellent opportunity not only to showcase the work of the CAHDI, but most of all to present the issues that the Council of Europe legal advisers consider of contemporary importance in international law. An interesting and in depth discussion followed my presentation and this exchange proves to be very useful for the CAHDI. This visit demonstrates the relevance of the CAHDI in international debate. I am happy to note that we have also received an invitation for this year's ILC session in a few weeks' time.

Following my visit to the ILC, and in accordance with the terms of reference of the CAHDI instructing the Committee "*to deepen exchanges of views on the work of the International Law Commission and of the Sixth Committee*", we have had the pleasure of having an exchange of views with Professor Pavel ŠTURMA, a member of the ILC, on the recent activities of the Commission at the meeting in September 2013.

Then in the margins of the March meeting, we organised a seminar on "The immunity *ratione materiae* of State officials from foreign criminal jurisdiction", which counted with the participation of:

- Ms Concepción ESCOBAR HERNÁNDEZ, Special Rapporteur of the ILC on "Immunity of State officials from foreign criminal jurisdiction" and a former CAHDI member;
- Mr Roger O'KEEFE, Professor at the University of Cambridge;
- Ms Paola GAETA, Professor at the Geneva Academy of International Humanitarian Law and Human Rights;
- Sir Michael WOOD, member of the ILC, also a former CAHDI member.

The proceedings of this seminar are currently being prepared and will be issued as a public document before the next meeting of the CAHDI.

Also at the meeting, another topical exchange of views took place at the 47th meeting of the CAHDI in March of this year. The CAHDI welcomed Ms Fatou BENSOUA, Prosecutor of the International Criminal Court (ICC), who presented the recent activities of the Office of the Prosecutor as well as the challenges it faced.

The in depth discussions were important, and concerned notably the amendments to the Rules of Procedure and Evidence adopted by the Assembly of State Parties to the Rome Statute in November 2013 and in particular on the new Rule 134^{quater} on "Excusal from presence at trial due to extraordinary public duties" which raised some concerns among States. Furthermore, Ms Bensouda spoke about the crucial importance of cooperation with States Parties which is essential for the proper functioning of the Court and she underlined that for the Office of the Prosecutor to effectively carry out its mandate, full, timely and tangible support from the States Parties, inter-governmental organisations and civil society is needed.

Ms Bensouda welcomed the exchange of views with the CAHDI and expressed the hope that her visit marked the beginning of an era of cooperation and collaboration between the Council of Europe and the Office of the Prosecutor of the ICC.

We therefore believe that there is now an open door for cooperation between the Council of Europe and the ICC, notably on questions such as gender based violence in armed conflict or the principle of complementarity.

ONGOING WORK

The CAHDI regularly carries out work which may not seem as interesting as the questions I have just developed but which is of practical relevance for the member States, observer States and observer organisations of the Committee.

- *Reservations*

In its capacity as European Observatory of Reservations to International Treaties, the CAHDI regularly considers outstanding reservations and declarations to international treaties. This activity covers both the conventions concluded outside the Council of Europe and those concluded within the Council of Europe.

This exercise promotes the reservations dialogue and helps States inside and outside the Organisation to consider their positions towards a problematic reservation and act on these rights.

- *CAHDI databases*

The CAHDI has also developed and maintains a number of databases in public international law that are of crucial importance to the everyday work of the Legal Advisers. To date, the CAHDI has three operational databases on:

- Immunities of States and international organisations;
- Organisations and functions of the Office of the Legal Adviser of the Ministry of Foreign Affairs;
- Implementation of UN sanctions and respect for human rights.

At the end of last year, the new website of the CAHDI was launched (<http://www.coe.int/cahdi>) and we are currently in the process of developing the databases.

This project aims at:

- facilitating and simplifying the contribution by CAHDI experts to the three abovementioned databases;
- facilitating the access to the information through a more intuitive and user-friendly research system;
- ensuring the sustainability of the information collected.

We have high hopes for this website which will be a useful tool on international legal practice. In particular, I would personally consider that this will in particular be a great asset to smaller administrations.

I am aware of the restrictions in the budget, but allow me to take advantage of my presence today to encourage you to consider contributing to this important project which undoubtedly will contribute to the development and the wider promotion of the activities of the CAHDI and the knowledge and information collected by it over the years.

I invite you to contact the Secretariat of the CAHDI for more information on this project.

FUTURE WORK

As you can see, the CAHDI is working hard and provides an important forum for a fruitful and thorough debate between member States and non-member States and international organisations.

The agenda for the coming months remains busy and we will continue assisting and supporting the Committee of Ministers, States and international organisations on issues related to public international law.

In the near future, we will notably continue our work on the issues of:

- responsibility of international organisations, which is of a very practical importance, also outside the Organisation.
- division of responsibility between States and international organisation (The Hague, 18-19 September 2014));
- the so-called “Mutual Legal Assistance (MLA) Initiative” aimed at improving the international framework for mutual legal assistance and extradition on investigating and prosecuting the most serious crimes: genocide, crimes against humanity and war crimes. This initiative is also closely linked with the ICC as it intends to strengthen the principle of complementarity that governs the exercise of the ICC’s jurisdiction;
- the issue of the accession of the European Union to the European Convention on Human Rights (ECHR): we will continue to provide support and guidance on this important matter.

I hope this has given you a useful overview of the work undertaken by the CAHDI. As my term as its chairperson will soon come to an end, I would say that it is a pleasure to contribute to a forum that is able to strengthen and contribute to the development of the rule of international law, not in the least because of the generous participation of my colleagues, the Legal Advisers of Council of Europe Member States.

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