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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

**Presentation by Mr Petr VÁLEK,
Chair of the CAHDI**

**at the 1349th meeting of the Ministers' Deputies
on 12 June 2019**

58th meeting
Strasbourg (France), 26-27 September 2019

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Mister Chair, Ambassadors, dear former CAHDI members, Ladies and Gentlemen,

It is an honour and a great pleasure for me to have the opportunity to address, for the first time, the Committee of Ministers in my capacity as the Chair of the Committee of Legal Advisers on Public International Law (CAHDI). I started my term of office on January 1 this year and already chaired my first meeting of the CAHDI on 21-22 March here in Strasbourg. As my predecessors, I will do my utmost to be worthy of the trust placed in me and hope to be able to serve the CAHDI – and thus indirectly also the Committee of Ministers – in the best possible way.

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 - Australia, Belarus, Israel and New Zealand - and 10 participating international organisations. The latest addition is the participation of a regional intergovernmental organisation representing states from outside Europe: the Asian African Legal Consultative Organisation (AALCO).

Impressive is not only the number of States and organisations allowed to attend the CAHDI meetings or their global distribution but also the actual number of participants at each meeting. Indeed, we welcomed a total of 92 participants at the last meeting in March in Strasbourg. We also witnessed the continuation of the custom of an almost full attendance from the member States of the Council of Europe. It is also worth stressing that most of the Head of Delegations participating in the CAHDI meetings are the Legal Advisers of the respective Ministries of Foreign Affairs themselves, on the level of directors general or directors of international law departments, ensuring thus representation of States at the highest possible rank.

On 2 May 2019, you took note of the abridged report of the last CAHDI meeting held in March this year, which included an exchange of views with **Ambassador Emil RUFFER**, Chair of the Rapporteur Group on Legal Co-operation (GR-J), to discuss the interaction between the CAHDI and the GR-J, in particular as the latter examines the legal opinions prepared by the CAHDI in reply to Recommendations adopted by the Parliamentary Assembly of the Council of Europe (PACE).

The CAHDI addresses a great range of topics in the field of public international law, demonstrating an important role played by the Committee on two levels: both within the Council of Europe and beyond, as regards its liaison role between the Council of Europe and other international organisations. Let me now illustrate this with some examples of how the CAHDI has operated at these two levels since June 2018 - when my predecessor, **Ms Päivi KAUKORANTA** from Finland, presented the CAHDI's work to your Committee.

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 issues among 193 States is far more complex than among "47+", i.e., when counting the observers.

With this in mind, 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, the CAHDI is instructed to provide legal opinions at your request - or at the request of other Steering or *Ad Hoc* Committees, transmitted via the Committee of Ministers.

Last year, the CAHDI adopted **four legal opinions** on Recommendations of the Parliamentary Assembly. My predecessor already covered the fourth one regarding “**Jurisdictional Immunity of International Organisations and Rights of their Staff**” in her exchange of views with you last year.

At its meeting last September, the CAHDI adopted three legal opinions on important topics for the protection of human rights in Europe and beyond. One concerned the **legal challenges related to “hybrid war”**¹, where the CAHDI underlined the lack of an internationally agreed definition, and the fact that relevant national and international legal regimes apply to the military and non-military means of “hybrid war”. The CAHDI further recalled that international human rights law is relevant to the actions carried out as part of a “hybrid war”, including the case-law of the European Court of Human Rights as regards restrictions on certain human rights. The CAHDI concluded that, in the absence of a common understanding as to what “hybrid war” entails, the development of new legal standards to prevent and combat the threats of “hybrid war” would be premature at this stage.

The two other **legal opinions** adopted by the CAHDI in September 2018 addressed the “**State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights**”² and “**Humanitarian needs and rights of internally displaced persons in Europe**”³. Both of them can be found on CAHDI’s website.

To conclude this part 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**”. This function, which the CAHDI has carried out for more than 19 years, has proved its usefulness. Indeed, the CAHDI makes use of the “*dialogue réservataire*”, a concept whose emergence can be traced back to the CAHDI and for which this Committee has been praised as it fosters dialogue and conciliation. This working method not only allows States which have formulated a problematic reservation to have the opportunity to clarify its scope and effect and, if necessary tone it down or withdraw it, but also facilitates the understanding by other delegations of the rationale behind reservations before formally objecting to them.

I would like to add that we have observed in previous years, and continue to observe, a trend whereby certain States subordinate the application of the provisions of a Convention to their domestic law, sometimes even the law of sharia. Such reservations are inadmissible under international law, in particular based on Article 27 of the Vienna Convention on the Law of Treaties, and also because they are often incompatible with the object and purpose of the treaties concerned. At its last meeting, in March this year, the CAHDI examined 11 reservations and declarations which had been identified as potentially problematic, some of them containing the above-mentioned type of reservations and declarations.

I will now move on to the contribution of the CAHDI in the field of immunities of States and international organizations. In this regard, I would like to mention the “**Declaration on Jurisdictional Immunities of State Owned Cultural Property**”⁴, which was a joint initiative of my

¹ [Opinion of the CAHDI on Recommendation 2130 \(2018\) of the Parliamentary Assembly of the Council of Europe – “Legal Challenges Related to Hybrid War and Human Rights Obligations.”](#)

² [Opinion of the CAHDI on Recommendation 2125 \(2018\) of the Parliamentary Assembly of the Council of Europe – “State of Emergency: Proportionality Issues concerning Derogations under Article 15 of the European Convention on Human Rights.”](#)

³ [Opinion of the CAHDI on Recommendation 2126 \(2018\) of the Parliamentary Assembly of the Council of Europe – “Humanitarian needs and rights of internally displaced persons in Europe.”](#)

⁴ [“Declaration on Jurisdictional Immunities of State Owned Cultural Property.”](#)

country, the Czech Republic, and Austria. This non-legally binding instrument, developed within the framework of the CAHDI, 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, States recognise the customary nature of the relevant provisions of the **2004 United Nations Convention on Jurisdictional Immunities of States and Their Property**, but which, as you know, has not yet entered into force. The Declaration has so far been signed by 20 Ministers of Foreign Affairs⁵ of member and non-member States of the Council of Europe and we hope to get some more signatures in the future. Furthermore, last year the delegations of Austria and the Czech Republic took this initiative further and circulated the Declaration among the UN Missions in New York under the agenda item “The rule of law at the national and international levels” of the United Nations General Assembly. The Declaration has proved to be a practical tool to facilitate the loans of State-owned cultural property, and it does not prejudice States in their position vis-à-vis the 2004 UN Convention. In this context, I would like to call on the member and non-member States that have not yet done so, to sign this Declaration at their earliest opportunity.

The input of the CAHDI to discussions of topical issues of public international law is by far not limited to discussions at its biannual meetings. **Between CAHDI meetings, we feed information for the discussions, *inter alia*, by collecting evidence from delegations on State practice concerning a certain topic currently under consideration.** On several occasions already, the data so collected has served as the basis for a publication⁶, which allows us to make our research and analysis available to a wider audience, including to researchers and practitioners. I would like to bring to your attention our latest publication, on “**Immunities of Special Missions**”. The CAHDI discussed this topic back in September 2013 and agreed to prepare a questionnaire to get an overview of the legislation and State practice in the field of special missions. We received 38 replies from member and non-member States of the Council of Europe. Based on these submissions, **Sir Michael WOOD**, member of the International Law Commission and also a former Chair of the CAHDI, prepared an excellent analytical report on the basis of the information submitted. This “CAHDI Book” was published by Brill-Nijhoff Publishers in April 2019.

The CAHDI also plays an important role in fostering the **co-operation and collaboration of the Council of Europe with the United Nations**, in particular with the International Law Commission and the Sixth Committee of the UN General Assembly, linking these two Organisations in the legal field.

At the 56th CAHDI meeting in September 2018 in Helsinki, the CAHDI held an exchange of views with **Mr Stephen MATHIAS**, Assistant Secretary-General for Legal Affairs of the United Nations.

Equally at the 56nd meeting, the CAHDI welcomed **Mr Pavel ŠTURMA**, then **First Vice Chair and now Chair** of the UN International Law Commission (ILC), in the framework of the annual interaction between the CAHDI and the ILC. In addition, the Secretary of the CAHDI, Ms Marta Requena, and myself recently attended the ILC meeting in Geneva. Prof. Šturma will be one of CAHDI’s special guests in September 2019 to continue the established practice between the CAHDI and the ILC.

At our meeting in March this year, the CAHDI was again privileged to welcome another outstanding personality from the international law community as a special guest: **Judge Ivana HRDLIČKOVÁ**,

⁵ 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.

⁶ *State Practice regarding State Succession and Issues of Recognition*, edited by Jan Klabbbers, 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).

President of the Special Tribunal for Lebanon (STL). Ms HRDLIČKOVÁ presented the history of the STL and focused on several key features of this special tribunal, such as the *in absentia* trials.

Mister Chair, Ambassadors,
coming to the final part of my statement, I would like to ask you for support and help:

I recently found out that, according to the draft CoE Programme and Budget for 2020-21, i.e., the Contingency Plan, dated May 2, 2019: "The number of CAHDI meetings will be reduced to 1 per year and secretariat support reduced." In fact, according to this proposal, 50 percent of the CAHDI meeting time and two posts at the CAHDI Secretariat are supposed to be abolished which means *de facto* shutting it down. I have to admit that I was taken by surprise by this proposal, both for procedural and substantive reasons.

Regarding the **procedure**, I certainly do understand the need to find savings across the CoE activities and can imagine cost-cutting measures that would be imposed equally on all inter-governmental committees, such as the reduction of per diem for the delegates. According to the Contingency Plan, however, no other committee is supposed to take cuts both in meetings and Secretariat support, while some committees are not mentioned at all – without providing any reasons or arguments whatsoever. Finally, this proposal was included into this document without any attempt to discuss it with the CAHDI members, including myself.

Turning to the **substance**, let me please first explain what CAHDI really is, how it operates and why I believe it deserves to continue in its current form:

- First, as I already mentioned, CAHDI is a unique body bringing to one meeting room not just the European legal advisers on public international law, but – among others – the legal adviser of the U.S. Department of State. Such inclusive forum allows to have a frank and open discussion not just on “technical” legal issues, such as the immunities of States and international organizations, but also on the key rule of law questions, such as the legal dilemmas arising from the fight against terrorism (the so-called “war on terror”), from prosecuting the perpetrators of crimes under international law or the role of international courts and tribunals. Perhaps also because of this feature, the attractiveness of CAHDI outside Europe is growing. Australia has just returned to this committee at the last meeting and, in Geneva, after my statement in the International Law Commission, I was approached by Chile who wants to become an observer too.
- Second, while the primary role of CAHDI is to provide public international law advice to the Committee of Ministers, equally important is the information exchange on State practice and national and international judgments in the field of public international law, since all of us – legal advisers at the ministries of foreign affairs – are usually faced with the same legal questions. As someone who has served as the director of international law department and CAHDI member for the past seven years, I can confirm how incredibly useful this sharing of experience is for our daily work. Instead of “re-inventing the wheel”, I could rely on expertise of my colleagues who tackled the same problem, e.g., an execution against a bank account of a diplomatic mission, before myself.
- Third, between the meetings, we can rely on CAHDI website that compiles a huge amount of information on public international law issues ranging from immunities of States and international organizations to the implementation of UN sanctions and peaceful settlement of disputes. This database is regularly updated by the CAHDI Secretariat.

If the budget cuts proposed in the Contingency Plan are adopted, the 28-years long success story of CAHDI will be most likely in danger. One CAHDI meeting per year is hardly enough for, at the same time, drafting opinions for the Committee of Ministers, keeping a meaningful dialogue on public international law questions and performing the function of observatory of reservations, given the time limit for raising objections under the Vienna Convention on the Law of Treaties. Finally,

the CAHDI Secretariat would not be here for us to update our legal databases or prepare the CAHDI publications and meetings etc. Its institutional knowledge and experience would be lost forever. The CAHDI would become just "an empty shell" without necessary time and personal resources for its further work.

Mister Chair, Ambassadors,

I strongly believe that the respect for public international law is a key element of the rule of law enshrined in the Statute of the Council of Europe. In this context, I would like to ask you for support and help so that the only inter-governmental committee tasked with public international law may meaningfully continue its mandate. Thank you for your attention and understanding.