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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

**Presentation by Mr Petr VÁLEK,
Chair of the Committee of Legal Advisers on
Public International Law (CAHDI)**

**at the 71st Session of the International Law Commission (ILC)
on 31 May 2019**

**58th meeting
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Mr Chair,
Members of the International Law Commission,
Ladies and Gentlemen,

I had a pleasure to meet some of you already two weeks ago at an event on the universal jurisdiction organized by the Geneva Academy. Now it is an honour for me to address, for the first time, the International Law Commission in my capacity as the new 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 have started my first term of office on the CAHDI Chairmanship in January this year, following the elections which took place in September 2018. I have taken over in this role after the Chairmanship of the CAHDI was in the able hands of **Ms Päivi KAUKORANTA** from Finland.

INTRODUCTION

First of all, please allow me to recall that the CAHDI, established 28 years ago, is composed of the Legal Advisers of the Ministries of Foreign Affairs of the 47 member States of the Council of Europe, together with 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, including the Asian-African Legal Consultative Organization (AALCO), an international intergovernmental organisation composed of 47 member States from Asia and Africa with advisory functions in the field of international law, and a forum for Asian-African co-operation in legal matters of common concern. Hence, all in all the CAHDI counts 66 States and organisations which are allowed to take part in its meetings and which is reflected in a high number of participants (e.g. 92 participants at our last meeting in March 2019). In this respect, CAHDI is building bridges among legal advisers on public international law beyond Europe and across continents.

In the framework of the truly pan-European setting which is the Council of Europe, 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 about topical issues and to exchange national experiences and practices. The CAHDI plays an important role in fostering **co-operation and collaboration between the Council of Europe and the United Nations**. For instance, and with a view to strengthen this co-operation, we held an exchange of views with **Mr Stephen MATHIAS**, Assistant Secretary-General for Legal Affairs of United Nations, at our meeting in Helsinki in September 2018.

Furthermore, we have close ties with the Commission which are reflected on two levels: the first one is that the work of the ILC is regularly on the agenda of our meetings and is the subject of

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

enlightening discussions among all participants. The second one is related to our institutional relationship, strengthened by the privilege of welcoming an ILC member (usually the President) every year for an exchange of views on your ongoing activities. At our 57th meeting held last September in Helsinki, we welcomed **Mr Pavel ŠTURMA**, at that moment the first Vice-Chair of ILC's 70th Session. On behalf of the CAHDI experts and in my own name, I would like to congratulate Pavel for being elected the Chair of the Commission and express our sincere thanks for taking the time to share the Commission's work with us. We are looking forward to receiving him again in the CAHDI on 26 September 2019, in Strasbourg, during our forthcoming 58th meeting.

The CAHDI also carries out a dialogue with international courts, and in March this year we held an exchange of views with **Judge Ivana HRDLIČKOVÁ**, President of the Special Tribunal for Lebanon (STL), who gave us an overview of the work and activities of this Special Tribunal, including its unique features in the international criminal justice system, such as *in absentia* trials or the hybrid character of this STL (applying law and procedural rules inspired by both the Lebanese and international legal systems), as well as the participation of victims.

I would like, at present, to introduce some of the activities of the CAHDI of interest to you. I will do so in two parts:

- First of all, I will speak about some of our activities that contribute to the development and evolution of international law in general, and therefore to the work of the ILC; and
- Secondly, I will present more specifically some of CAHDI's activities related to the immunities.

I. THE CONTRIBUTION OF THE CAHDI TO THE DEVELOPMENT OF INTERNATIONAL LAW AND THE WORK OF THE ILC

One of the major contributions of the CAHDI to the development of Public International Law is represented by one of its flagship activities in its capacity as the "**European Observatory of Reservations to International Treaties**", namely the examination of reservations and declarations to treaties subject to objections. In this capacity, the CAHDI monitors the States' compliance with the rules of public international law in the field of treaty law. 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 19 years, has proved its effectiveness. Indeed, in carrying out this examination, the CAHDI makes use of the "*dialogue réservataire*", a concept whose birth can be traced back to the CAHDI and for which our 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 it also gives an opportunity to other delegations to understand the rationale behind reservations before formally objecting to them. In this respect, the participation of observers from other regions than Europe is of great importance.

As my predecessor mentioned to you in previous years, we have observed and continue to observe the revival of a trend whereby certain States subordinate the application of the provisions of a Convention to their domestic law. As we all know, such reservations are inadmissible under international law² due to reasons of legal uncertainty, but also because they often go against the object and purpose of the treaties concerned.

In CAHDI's work, **The Guide to Practice on Reservations to Treaties**, an outstanding "product" of the International Law Commission and namely Professor Alain Pellet, is of great assistance to the members of the CAHDI when they examine reservations.

² Article 27 of the Vienna Convention on the Law of Treaties (1969): "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46".

Concerning the contribution of the CAHDI to the development – or rather the evolution – of international law, allow me to mention some of the latest CAHDI activities which are particularly innovative. As a part of its advisory role on legal matters to the executive body of the Organization, the Committee of Ministers, the CAHDI adopted in September 2018 a legal opinion concerning the **legal challenges related to “hybrid war”**³. In this Opinion the CAHDI underlined that, in the absence of a universally agreed definition of “hybrid war”, relevant national and international legal regimes apply to the military and non-military means of “hybrid war”, and therefore each action should be assessed individually according to the relevant legal regime. If the actions amount to an armed conflict, be it international or no, International Humanitarian Law applies. The CAHDI also recalled that international human rights law is relevant to both the military and non-military actions carried out as part of a “hybrid war”, including in particular the case-law of the European Court of Human Rights as regards restrictions on certain human rights (such as the rights to respect for private and family life, freedom of expression, and freedom of assembly and association). Indeed, many political and legal issues are raised by the activities referred to as a “hybrid war”, but some of them are already addressed by existing legally-binding international instruments as well as by several international entities and committees within the Council of Europe and beyond (such as the *Council of Europe Convention on Cybercrime* (ETS No. 185); the *Council of Europe Convention on the Prevention of Terrorism* (CETS No. 196) and its Protocol; and the Council of Europe Counter-Terrorism Strategy for 2018-2022). 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.

In relation to CAHDI's main role, which is to provide legal advice to the Committee of Ministers of the Council of Europe, two other **legal opinions** were adopted by the CAHDI in September 2018: on “*State of emergency: proportionality issues concerning derogations under Article 15 of the European Convention on Human Rights*”⁴ and on “*Humanitarian needs and rights of internally displaced persons in Europe*”⁵.

As regards the **derogations to the *European Convention on Human Rights*** (the European Convention) allowed by Article 15, a particular reference was made to the most recent cases where these derogations were used by France and Turkey which have already been withdrawn as well as to the derogation by Ukraine made in 2015 and which is still in force. The CAHDI recalled in its Opinion that Article 15 of the European Convention allows States Parties to derogate, in exceptional circumstances, and in a limited and supervised manner, from their obligations to secure certain rights and freedoms under the European Convention, but only for such time as is strictly required by the exigencies of the situation provided that such measures are not inconsistent with its other obligations under international law. As you know some rights, however, do not allow any derogation under Article 15⁶. The CAHDI underlined the importance to highlight that the European Convention continues to apply at the national level in the country concerned, with the restrictions due to derogations in time of emergency, and the individuals under the jurisdiction of such country continue to have the right to file applications to the European Court of Human Rights. Finally the CAHDI also recalled that only the European Court of Human Rights is competent to determine whether the measures taken by a State Party under Article 15 are strictly required by the exigencies of the situation and consistent with other obligations under international law.

³ [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.”](#)

⁴ [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.”](#)

⁵ [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.”](#)

⁶ The right to life, except in the context of lawful acts of war (Article 2 ECHR), the prohibition of torture and inhuman or degrading treatment or punishment (Article 3 ECHR), the prohibition of slavery and servitude (Article 4 paragraph 1 ECHR), and the rule of “no punishment without law” (Article 7 ECHR). Similarly, there can be no derogation from Article 1 of Protocol No. 6 (abolishing the death penalty in peacetime) to the ECHR, Article 1 of Protocol No. 13 (abolishing the death penalty in all circumstances) to the ECHR and Article 4 (the right not to be tried or punished twice) of Protocol No. 7 to the ECHR.

In its legal opinion on the **humanitarian needs and rights of internally displaced persons (IDPs)**, the CAHDI recalled that the primary responsibility for protecting the rights of IDPs, as well as for providing them with humanitarian assistance, lies with the state concerned, and that they are entitled to the enjoyment of their property and possessions or to receive adequate compensation in accordance with human rights law. In this respect the CAHDI recalled the standards contained in the [Committee of Ministers Recommendation Rec\(2006\)6 on internally displaced persons](#) adopted on 5 April 2006. The CAHDI further underlined the need to apply to IDPs in member States all relevant obligations under international humanitarian law in situations of armed conflict, as well as international human rights law, including the *European Convention on Human Rights*, and to take account of relevant case-law.

All legal opinions adopted by the CAHDI are published in our website and fully accessible if you are interested in getting the full text.

In relation to this first part of my presentation, I would also like to mention that the CAHDI traditional discussions on the topic of “**Peaceful Settlement of Disputes**” have mainly focused on the clauses of acceptance of the compulsory jurisdiction of the International Court of Justice (ICJ). Nevertheless, last year the CAHDI decided to expand this topic to cover other clauses establishing the jurisdiction of the ICJ, the case law of the International Tribunal for the Law of the Sea, the inter-States arbitration cases, and any other relevant cases of peaceful settlement of disputes between States. Therefore, at present in every CAHDI meeting, members provide information about the latest developments in the field of peaceful settlement of disputes, including cases concerning them. This practice contributes to increased knowledge of current developments in this field.

II. CAHDI'S ACTIVITIES ON THE TOPIC OF IMMUNITIES

The second part of my presentation will be devoted to our most recent activities in relation to immunities from different angles.

The **first activity** related to the **settlement of disputes of a private character to which an international organisation is a party**, which the CAHDI started to examine in 2014 at the request of the delegation of the Netherlands. The Dutch delegation prepared a document to facilitate discussions on the topical questions related to the settlement of third-party claims for bodily injury or death and for loss of property or damage allegedly caused by an international organisation, as well as on the effective remedies available to claimants in these situations. Indeed, the immunity of international organisations in many cases prevents individuals who have suffered harm from the conduct of an international organisation from bringing a successful claim before a domestic court. This immunity has been increasingly challenged on the alleged incompatibility of upholding immunity with the right of access to court. The document contained five questions addressed to members of the CAHDI and 20 delegations submitted their replies⁷. These contributions remain confidential, as the discussions are not finalised yet and the replies are only used as a basis for the examination of this issue by the CAHDI. In September 2017, the representative of the Netherlands presented a document summarising the main trends derived from the replies of States and further examining this issue in the context of peacekeeping and police operations.

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 Nations⁸. This is a good example of the “pioneer” role of the CAHDI, which acts as a testing ground for subjects which are more difficult to discuss at a more “global” level.

⁷ Albania, Andorra, Armenia, Austria, Belarus, Belgium, Canada, the Czech Republic, Denmark, Estonia, Germany, Greece, Hungary, Israel, Mexico, Serbia, Slovenia, Spain, Switzerland and the United Kingdom.

⁸ United States Court of Appeals for the Second Circuit, [Georges v. United Nations](#), judgment of 18 August 2016, 834 F.3d 88 (2016). There was no final appeal to the Supreme Court.

United States District Court, Eastern District of New York, [LaVenture et al. v. United Nations](#), No. 14-CV-1611 (SLT) (RLM), 23 August 2017. The case was appealed and the United States Court of Appeals for the Second Circuit upheld the judgment of the District Court in a [Summary Order](#) of 28 December 2018.

These discussions are facilitated by the fact that the CAHDI experts, the Legal Advisers of the Council of Europe member and observer States, take also part in these global *fora* - all of them at the United Nations – which further allows to maintain legal coherence on certain issues and also to promote legal exchanges within these different organisations.

The **second activity** that I would like to mention is the "**Declaration on Jurisdictional Immunities of State Owned Cultural Property**"⁹, which was a joint initiative of my country, the Czech Republic, and Austria. This Declaration 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, States recognise the customary nature of the relevant provisions of the **2004 United Nations Convention on Jurisdictional Immunities of States and Their Property** – a Convention to which preparation this Commission highly contributed – 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 Affairs¹⁰ of **member and non-member States of the Council of Europe** (and circulated among the United Nations Missions in New York last year). This Declaration has proved to be, over the years, a practical tool to facilitate the loans of State-owned cultural property, and does not prejudice States in their position vis-à-vis the 2004 UN Convention.

The third activity that 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 discussions on several topics by, *inter alia*, collecting evidence from delegations on State practice concerning a certain topic currently under consideration. On several occasions, the data so collected has served as the basis for a publication¹¹, which allows us to make our research publicly available, including to researchers and practitioners. In relation to this issue, 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 specific national practices in the field of special missions. We received 38 replies from States member and non-members of the Council of Europe.

In relation to this initiative, I would like to warmly thank **Sir Michael WOOD**, member of the Commission and also a former Chair of the CAHDI, for preparing an excellent analytical report on the basis of the information submitted by the above mentioned 38 States, but also taking into account the provisions of the **1969 United Nations Convention on Special Missions**, the key judicial decisions and national legislation on special mission immunity, as well as government statements, and other state practice and evidence of *opinio juris*. I have the pleasure to inform you that we have received the CAHDI Book published by Brill-Nijhoff Publishers last month.

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

⁹ "[Declaration on Jurisdictional Immunities of State Owned Cultural Property](#)".

¹⁰ 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.

¹¹ *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).

III. CONCLUSION

Let me close my presentation by highlighting the fundamental importance that the CAHDI attaches to its 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 on issues of treaty law, immunities, case law related to public international law, peaceful settlement of disputes, and international criminal justice. In doing so, we always welcome your input and the interaction with the ILC.

On behalf of the CAHDI, I would like to express my sincere gratitude for the opportunity to present and discuss our work with you.

I thank you for your attention.