

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

at the 74th Session of the International Law Commission

Geneva (Switzerland), 13 July 2023

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

It is an honour for me to address the International Law Commission (ILC) for the first time in my capacity as Chair of the Committee of Legal Advisers on Public International Law of the Council of Europe (CAHDI). I would like to thank the ILC for offering CAHDI this opportunity to present its work. I am delighted that we are returning, after several postponements due to Covid-19, to this tradition that allows our two expert bodies to continue our dialogue, which is very much appreciated by the members of CAHDI and even more needed to face the current challenges to the international legal order, in particular those arising from the Russian Federation's war of aggression against Ukraine.

I have started my first term of office as CAHDI Chair in January this year, having taken over in this role from **Ms Alina Orosan** from Romania, and being assisted by my Vice-Chair, **Kerli Veski** from Estonia. I would like to take this opportunity to thank her for her work, notably for maintaining the cooperation between CAHDI and your Commission.

The CAHDI, established **32 years ago**, is composed of the Legal Advisers of the Ministries of Foreign Affairs of the now **46 member States** of the Council of Europe (CoE), together with the Legal Advisers of the **5 observer States to the Council of Europe** Canada, Holy

See, Japan, Mexico and United States of America, of **4 further observers States to the CAHDI** Australia, Israel, Republic of Korea and New Zealand, and of **11 participating international organisations**¹ The latter group now includes also the International Development Law Organization (IDLO) that joined CAHDI as an observer in September 2022. IDLO is a global intergovernmental organisation composed of 38 members, established in 1988, and devoted to promoting the rule of law to advance peace and sustainable development. Hence, all in all CAHDI counts representatives of **66 States and international organisations** admitted to its meetings, which is reflected in the high number of participants (e.g. 111 participants – 90 physically present and 21 online - at our last meeting in March 2023). In this respect, CAHDI is building bridges and establishing personal contacts among legal advisers on public international law beyond Europe and across continents.

In the framework of the pan-European setting which is the Council of Europe, 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, during the official two-day meetings and at their margins, sometimes also in the context of an additional seminar. CAHDI plays also an important role in fostering **co-operation between the Council of Europe and the United Nations**. So we held an (online) exchange of views with **Mr. Guilherme de Aguiar Patriota** (Deputy Permanent Representative of Brazil to the UN/Former Chair of the Group of Governmental Experts (GGE) on Advancing responsible State behaviour in cyberspace in the context of international security) on the application of international law in cyberspace, at our meeting in September 2022. **Professor Dapo Akande**, now a member of the ILC, also took part in this exchange of views.

Furthermore, CAHDI has strong ties with the Commission that are reflected by the fact that the work of the ILC is permanently on the agenda of our meetings. It is the subject of instructive discussions among all participants, in particular at our September meetings when we get ready for the discussion of the report of the ILC to the 6th Committee of the General

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

Assembly. Then we regularly have the privilege of welcoming an ILC member (usually the Chair) for an exchange of views on your ongoing activities. In September 2022, we welcomed **Professor Dire Tladi**, then Chair of the ILC, at our meeting, and I would like to express our thanks to him for taking the time to share the Commission's work with us. We are now looking forward to an exchange with **Ms Patricia Galvao Teles** during our forthcoming 65th meeting in Strasbourg on 29 September 2023.

The CAHDI also carries out a dialogue with international courts, and during our meeting in September we will also hold an exchange of views on the adoption of a Convention on International Cooperation in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes with **Ms Silvia Fernández de Gurmendi** (from Argentina), Chair of the Diplomatic Conference for the Adoption of this Convention which took place in Ljubljana/Slovenia from 15 to 26 May 2023) and President of the Assembly of State Parties to the Rome Statute of the International Criminal Court (ICC).

An issue of high priority discussed at CAHDI remains the Russian Federation's aggression against Ukraine. Following the exclusion of the Russian Federation from the Council of Europe, CAHDI issued an opinion on the legal consequences of the cessation of the membership regarding the participation of the Russian Federation to treaties bodies. Another CAHDI opinion referred to Recommendation 2231 (2022) of the Parliamentary Assembly of the Council of Europe – "The Russian Federation's aggression against Ukraine ensuring accountability for serious violations of international humanitarian law and other international crimes". During the CAHDI meeting in March 2023, CAHDI members continued to focus on the public international law aspects of the aggression, including all aspects of international criminal accountability, before the International Criminal Court (ICC) and other international instances as well as the possibility of establishing a register of damages.

I would like now to address some of the activities of CAHDI that might contribute to the work of the ILC.

One of the major specific activities of CAHDI relevant for the development of public international law is the "**European Observatory of Reservations to International**

Treaties", i.e. the examination of reservations and declarations to treaties that might become subject to objections and oppositions. In this capacity, CAHDI monitors the States' compliance with the rules of public international law in the field of treaty law. CAHDI examines both the reservations and declarations made to Council of Europe and United Nations conventions. In addition, CAHDI decided, at its last meeting in March 2023, to examine also reservations and declarations to treaties deposited with the Hague Conference on Private International Law (HCCC).

Another innovation of the work of CAHDI is reflected by the recent introduction, in September 2022, of an item on its agenda entitled "**The use of new technologies and international law**". In the framework of this item, CAHDI envisages to initiate a dialogue on the application of international law to cyberspace, including in the field of international humanitarian law, by way of organising panel discussions and taking stock of the formal discussions conducted at UN level as well as of various academic initiatives ongoing in the area.

I would also like to recall that we hold, at each of our meetings, an exchange of views on "**Immunities of states and of international organisations, diplomatic and consular immunity**" concerning topical issues, State practices and relevant case-law. I believe this discussion to be particularly relevant for the ILC, bearing in mind that your Commission is working on the topic of "Immunity of State officials from foreign criminal jurisdiction". The Ministry of Foreign Affairs of Romania organised, on 21 September 2022, a half-day expert seminar on "States' obligations under public international law in relation to immunity of State officials"², for the members of the CAHDI on the margins of its meeting in Bucharest. This seminar, opened by my predecessor Ms Alina Orosan and which included several interventions by high-level special guests, aimed to offer an academic and expert perspective over the complex topic of States' obligations in relation to immunity of State officials in view of current and emerging practices. Subjects discussed were:

- the determination of officials entitled to immunity *ratione personae* (beyond the Troika);
- limitations and exceptions to the immunity of State officials from foreign criminal jurisdiction;

² [Seminar on States' obligations under public international law in relation to immunity of State officials.](#)

- the relationship between immunity *ratione materiae* and individual criminal responsibility;
- the exercise of universal/extra-territorial jurisdiction in relation to international crimes;
- the consequence of the jurisprudence of the ICC for States if the ICC issues an arrest warrant for officials of third States who benefit from immunity under customary international law, if this official finds him/herself on the territory of a State Party;
- and the removal of immunity before the ICC as a consequence of the participation of a State Party to the Rome Statute and of the third State (whose officials are under arrest warrants issued by the ICC) in an international treaty related to crimes under the jurisdiction of the ICC.

Another activity of CAHDI that is particularly relevant to the work of the ILC is related to **non-legally binding agreements in international law** - a subject your Commission decided to include in its long-term programme of work at its 73rd Session. As you also noted in your report of the 73rd Session,³ this topic is, since 2021, on the agenda of the CAHDI, where the "rising importance of non-legally binding agreements in international law" has been stressed. In practical terms, an Expert Workshop on Non-Legally Binding Agreements in International Law, organised by the German Federal Foreign Office and the University of Potsdam in the framework of the German Chairmanship of the Committee of Ministers of the Council of Europe, was held in March 2021, on the occasion of the 60th CAHDI meeting. As a follow-up to the Expert Workshop, the German delegation prepared an option paper on how CAHDI could explore the topic of non-legally binding agreements in the future. At its meeting on 23-24 September 2021, CAHDI decided to prepare a questionnaire on "The practice of States and international organisations regarding non-legally binding agreements". It aimed at establishing an overview of State practice, including substantive and procedural aspects characterising non-legally binding agreements and rules applicable, in this field. At its meeting in September 2022, CAHDI agreed to entrust the Secretariat with the task of contracting a consultant to initiate an analysis of the replies.

³ Report of the International Law Commission, Seventy-third session (18 April–3 June and 4 July–5 August 2022), p353, §2.

The selected consultant, **Prof. Andreas Zimmermann** (University of Potsdam/Germany), prepared an analytical report on the basis of the 22 responses received until the end of 2022. The report, dated 31 December 2022, addressed the practice of member States of the Council of Europe and other States participating in the CAHDI (as well as that of two responding international organisations) and included the main trends arising from the replies to the questionnaire, while bearing in mind the possible follow-up. As we speak, the Secretariat is about to prepare a revised version of the report with 9 additional responses received since the beginning of the year.

At its meeting in March 2023, CAHDI further decided to keep the item under its new denomination **“Non-legally binding instruments in international law”** on the agenda, as it was thought that “instruments” better reflects the non-legally binding nature of the objects under discussion. CAHDI decided to task the Secretariat with the preparation of a working document on this subject in view of elaborating best practices and, where relevant, guidelines. CAHDI would stand ready to transmit the revised version of the analytical report to your Commission at a later stage should this be of interest for you.

I should further mention that in addition to its work on non-legally binding instruments, CAHDI is also holding exchanges of views on two related subjects. The first one concerns **treaties not requiring parliamentary approval**. Following a suggestion made by the delegation of Slovenia to explore the issue of legally binding agreements not requiring parliamentary approval, a draft questionnaire on the topic was prepared by this delegation in collaboration with the Chair, Vice-Chair and the Secretariat and was subsequently adopted by the CAHDI. It explores national rules on treaties that do not require parliamentary approval. To date, 19 States⁴ have replied to the questionnaire. For the time being, we are encouraging more States to submit answers to this questionnaire so that we could consider next steps with regard to the subject matter during our meeting in September 2023.

Lastly, under the aegis of the Italian Presidency of the Council of Europe’s Committee of Ministers and in collaboration with the CAHDI Secretariat, the Italian Ministry of Foreign Affairs organised, on the margins of the CAHDI meeting in March 2022, a panel discussion

⁴ Austria, Canada, Estonia, Finland, Germany, Greece, Hungary, Italy, Japan, Lithuania, Monaco, the Netherlands, Norway, Poland, Romania, Slovenia, Sweden, Switzerland and the United Kingdom.

focused on the increasing role of the soft multilateral law-making and its implications for international governance. Subsequently, at its meeting in September 2022, CAHDI examined and agreed to the proposal by the delegation of Italy to include the issue of soft law instruments on the agenda of future CAHDI meetings. During its meeting in March 2023, CAHDI took note of the presentation by the delegation of Italy of a non-paper on this matter and agreed with the Italian proposal to prepare and circulate a draft questionnaire on soft law instruments for possible written comments by delegations. The draft questionnaire has now been circulated to delegations and could possibly be adopted during our forthcoming 65th meeting in September. The questionnaire aims to analyse the impact of soft law on the activities of the Ministry of Foreign Affairs/Legal Departments (MFA/LD) of the member States. As this subject has its own specific autonomy, both conceptually and operationally, the proposed questionnaire is intended to be fully complementary and in no way to overlap with other initiatives undertaken by CAHDI in the field of non-legally binding instruments.

Let me close my presentation by highlighting the fundamental importance that CAHDI attaches to its exchange with the ILC. Your Commission and CAHDI share the common goal of promoting the rule of law and the role of public international law in international relations. We will continue our work on issues related to treaty law, immunities, non-legally binding instruments, international criminal justice and other relevant subjects. In doing so, we always welcome your input and the interaction with the ILC.

On behalf of 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.