

**Presentation by Ms Alina OROSAN,
Chair of the Committee of Legal Advisers on
Public International Law (CAHDI)**

**at the 1449th meeting of the Ministers' Deputies
Strasbourg (France), 23 November 2022**

Madame Chair,
Ambassadors,
Ladies and Gentlemen,

It is an honour and a great pleasure for me to have the opportunity to address, for the second time, the Committee of Ministers in my capacity as the Chair of the Committee of Legal Advisers on Public International Law (CAHDI). I have started my second term of office on the CAHDI Chairmanship on 1 January this year following the elections which took place last year and I have by now chaired four CAHDI meetings. My CAHDI Chairmanship will end at the end of this year following the 63rd meeting which took place in my own country, in Bucharest, on 22-23 September 2022. As my predecessors, I have done my utmost to be worthy of the trust placed in me and I have tried to serve the CAHDI – and also the Committee of Ministers – in the best possible way. I would also like to underline that I value my Chairmanship of the CAHDI very highly – it has been one of the most interesting positions that I have been holding so far.

I would like to thank the Committee of Ministers for offering the CAHDI this opportunity to present its work also this year. The interest that the Committee of Ministers shows towards our work encourages us to pursue the provision of legal guidance and support to the Council of Europe member States and beyond to the best of our abilities.

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 46 member States of the Council of Europe, the 5 observer States to the Council of Europe, 4 further observer States to the CAHDI – namely Australia, Israel and New Zealand and South Korea - and 10 participating international organisations. Hence, all in all the CAHDI counts 65 States and organisations as its members.

Concerning the international organisations present in the CAHDI, allow me to highlight that at our last meeting, **the CAHDI examined and agreed to the request by the International Development Law Organization (IDLO) to be granted observer status with the CAHDI** according to paragraph C. 8 a. of Resolution CM/Res(2021)3 on intergovernmental committees and subordinate bodies, their terms of reference and working methods. IDLO is a global intergovernmental organisation, established in 1988, devoted to promoting the rule of law to advance peace and sustainable development. In view of the relevance of its activities to those of the CAHDI, IDLO's future participation in the work of the Committee will enable important synergies to be developed, particularly in the promotion of the rule of law in developing States, with economies in transition or affected by war.

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 **118 participants (81 physically in the room and 37 connected online)** at our last hybrid meeting in September in Bucharest. It is also worth stressing that most of the Heads 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.

I am happy to notice that your Committee decided this morning to take note of the abridged report of the last CAHDI meeting held in September, as proposed by the Rapporteur Group on Legal Co-operation (GR-J) on 17 November 2022. The abridged report shows in a condensed form the variety of topics currently dealt with by the CAHDI. It further vividly shows the important role played by the Committee on two levels: firstly, within the Council

of Europe, and, secondly, beyond the Council of Europe in its liaison role between the Council of Europe and other international organisations. Let me now illustrate to you with some examples on how the CAHDI has operated at both of these levels since November last year when I last presented the CAHDI work to your Committee.

II. THE CONTRIBUTION OF THE CAHDI TO THE WORK UNDERTAKEN WITHIN THE COUNCIL OF EUROPE

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 subjects among 193 States is more complex than among “46 plus” (i.e., when counting the observers). The CAHDI takes full advantage of this undeniable asset of the Council of Europe.

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

This year was sadly marked by **the Russian Federation's aggression in Ukraine and its legal consequences for the Organisation**. In this context, on 6 April 2022, the CAHDI was invited by your Committee to provide an analysis of any relevant international law issues arising out of the continued participation of the Russian Federation in open conventions elaborated in the framework of the Council of Europe (i.e., conventions open to non-member States). The **Guidance Note**¹ prepared by the CAHDI was circulated to all Council of Europe Permanent Representations in Strasbourg on 3 May 2022. In your decisions of 30 June 2022 concerning the “Modalities for the participation of the Russian Federation in open

¹ CAHDI Guidance Note to the Committee of Ministers, ‘Continued participation of the Russian Federation in “open” conventions elaborated in the framework of the Council of Europe’, [CM/Inf\(2022\)17](#), 3 May 2022.

conventions”,² you welcomed this Guidance Note. Furthermore, I was invited to explain the Note to the Steering Committee for Human Rights (CDDH) plenary on 16 June 2022, which I did with great pleasure.

Also in this context, the CAHDI adopted, on 5 September 2022, an opinion concerning the PACE Recommendation on “***The Russian Federation’s aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes***”.³ In this opinion, the CAHDI recalled its unwavering support for attaining accountability for the alleged atrocity crimes committed since the beginning of the Russian Federation’s invasion of Ukraine. In addition, it noted, *inter alia*, that there is, currently, no international mechanism that has jurisdiction *rationae personae* in relation to a crime of aggression committed against Ukraine by Russian political and military leadership. Consequently, in order to pursue individual criminal accountability at international level for the crime of aggression committed against Ukraine, an adequate legal basis would have to be established for the international or internationalised investigation, prosecution and adjudication of this crime. To this end, the CAHDI indicated several potential international options, including: a hybrid tribunal incorporated into Ukraine’s legal system set up through an agreement between Ukraine and an international organisation; a potential proposal for an ad hoc tribunal by the United Nations General Assembly (while noting that the option of a resolution by the UN Security Council would not appear promising due to the likely exercise of its veto right by the Russian Federation and although a resolution adopted by the UNGA would not create international obligations binding on any State); or an international tribunal based on a multilateral international treaty concluded by States, including Ukraine, following the examples of the International Military Tribunal (IMT) and the International Criminal Court (ICC). The opinion then sets out the various practical, legal and political problems associated with these different options, including those relating to the immunity of the Troika (i.e., Head of State, Prime Minister and Minister for Foreign Affairs of any State), the length of time needed to implement these options and the need for coordination with relevant existing mechanisms.

² [CM/Del/Dec\(2022\)1438/2.3](#), Consequences of the aggression of the Russian Federation against Ukraine, Modalities for the participation of the Russian Federation in open conventions, decision adopted by the Ministers’ Deputies at their 1438th meeting on 30 June 2022.

³ Recommendation 2231 (2022) “[The Russian Federation’s aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes](#)”.

I would like also to inform you on the continued **involvement of the CAHDI in the accession process of the European Union to the European Convention on Human Rights**. As you might recall, further to your decision, the CAHDI appointed me in 2020 to participate as observer in the meetings of the Ad hoc negotiation Group 46+1. Also during my second year in this role, which combines the CAHDI with the wider work of the Council (one of the aims for the future of the CAHDI as identified during the evaluation of our activities in 2021) I have been able to regularly participate in the meetings of the Group – 4 in total since I last addressed your Committee – and hence had, on occasion, the opportunity to assist the Group with issues related to public international law. In fact, the Group is meeting for its 16th meeting as we speak, and I will be able to join the colleagues again this afternoon.

To conclude this section 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”***. 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 of the United Nations. This function, which the CAHDI has now been operating for more than 21 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. During its two last meetings the CAHDI examined **28 reservations and declarations** which had been identified as potentially problematic.

In relation to this last activity I have just mentioned (reservations and declarations to treaties), I would like to highlight the close links established between the CAHDI and the

Treaty Office of the Council of Europe as treaty law has always been a very important part of Public International Law. In this respect, allow me to make a remark in relation to the essence of our Committee: we are not a traditional standard-setting committee but a legal forum which assists and cooperates with member and non-member States in order to develop the rule of law in the field of international law as a key factor in the organisation of inter-state relations. While the CAHDI does not normally engage in actual preparatory work of the Council of Europe Conventions, it is always available for providing assistance in treaty law and other questions of public international law.

III. LA CONTRIBUTION DU CAHDI AU-DELÀ DU CONSEIL DE L'EUROPE ET SON RÔLE DE LIAISON AVEC D'AUTRES ORGANISATIONS INTERNATIONALES

Permettez-moi maintenant de passer à la présentation de la contribution du CAHDI au-delà du Conseil de l'Europe et à son rôle de liaison avec d'autres organisations internationales.

Tout d'abord, le CAHDI joue un rôle important dans **la promotion de la coopération entre le Conseil de l'Europe et les Nations Unies**, en particulier avec la Commission du droit international (CDI) et la Sixième Commission de l'Assemblée générale des Nations Unies. A cet égard, lors de sa 63^e réunion en septembre dernier à Bucarest, le CAHDI a eu la chance d'organiser un échange de vues avec le **Professeur Dire Tladi, Président de la CDI**, qui a présenté le rapport de la 73^e session (2022) de la CDI traitant de plusieurs sujets dont le *jus cogens*, la protection de l'environnement en lien avec les conflits armés, l'immunité de juridiction pénale étrangère des représentants de l'Etat, la succession d'Etats en matière de responsabilité de l'Etat et les principes généraux du droit. Dans ce contexte, au cours de la « Semaine du droit international » de la Sixième Commission de l'AGNU à New York, qui réunit les conseillers juridiques des ministres des affaires étrangères, j'ai été invité à participer à un dialogue interactif sur **le rôle des organes de codification régionaux et internationaux dans le cadre du développement du droit international**, organisé par le Center for International Law and Policy in Africa (Centre pour le droit international et la politique en Afrique) (CILPA) le 26 octobre 2022. À cette occasion, ma présentation s'est concentrée sur la contribution du CAHDI au développement du droit international, en mettant notamment l'accent sur le rôle du CAHDI en tant qu'organe

international de codification et dans le cadre de la coopération en matière de droit international.

Le CAHDI contribue également, par les discussions tenues lors de ses réunions, aux débats sur des questions d'actualité relatives au droit international public qui revêtent une grande importance pratique. Ainsi, toujours dans le contexte de l'agression de la Fédération de Russie contre l'Ukraine, le CAHDI a eu l'honneur et le plaisir d'organiser, lors de sa 62^e réunion hybride qui s'est tenue à Strasbourg les 24-25 mars 2022, **un échange de vues portant sur le « Recours à la force en droit international public - le cas de l'Ukraine »** avec des remarques introductives du **Professeur Dapo Akande** de l'Université d'Oxford, qui est également membre élu de la CDI. Par ailleurs, lors de sa 63^e réunion, le CAHDI a procédé à **un échange de vues sur les aspects de droit international public de la situation actuelle d'agression contre l'Ukraine**. Dans ce cadre, les membres du CAHDI ont condamné l'agression russe contre l'Ukraine et ont fermement soutenu les voies et mécanismes juridiques que l'Ukraine a emprunté pour assurer la responsabilité globale. L'échange de vues a abordé, en outre, le mécanisme permettant d'assurer la responsabilité du crime d'agression, un sujet qui sera examiné davantage, notamment sur la base de contributions supplémentaires de la délégation ukrainienne.

La contribution du CAHDI aux discussions sur les questions d'actualité relatives au droit international public ne se limite pas, loin s'en faut, aux discussions lors de ses réunions semestrielles. A cet égard, les membres du CAHDI se sont félicités de la pratique établie consistant à organiser des séminaires d'experts en marge des réunions du CAHDI. Ces séminaires conduisent souvent à des activités de suivi par le CAHDI et rationalisent davantage les discussions qui s'y déroulent. En tout état de cause, ils se sont avérés jusqu'à présent des occasions utiles pour les conseillers juridiques, leur permettant de discuter de manière informelle de questions pratiques de droit international public. Cette année, un séminaire sur **« Les obligations des Etats, en vertu du droit international public, relatives à l'immunité des représentants de l'Etat »** a été organisé par le Ministère des Affaires étrangères de Roumanie, à Bucarest, le 21 septembre 2022, en marge de la 63^e réunion du CAHDI. L'événement avait pour but d'offrir une perspective académique et experte sur ce sujet complexe au regard des pratiques actuelles et émergentes, afin

d'informer et de soutenir l'évaluation, par les Etats, de l'articulation entre la jurisprudence pertinente des tribunaux internationaux et les immunités coutumières des représentants de l'Etat, ainsi que de faciliter un échange de vues général sur la question.

IV. NEW ACTIVITIES OF THE CAHDI

The CAHDI endeavours to be at the forefront of the debates on future issues. In this regard, it has identified new topics on which exchanges of views between Legal Advisers might be deemed useful as also reflecting general discussions at international level such as "The application of international law in cyberspace". During its last meeting in Bucharest, the CAHDI had held an exchange of views on this new topic with introductory presentations by special guests - Professor Dapo Akande, Doctor Cordula Droege (Chief Legal Officer/Head of Legal Division, ICRC) and H. E. Mr Guilherme de Aguiar Patriota (Former Chair of the Group of Governmental Experts [GGE] on Advancing responsible State behaviour in cyberspace in the context of international security). These presentations focused on several important issues such as the applicability of international law, notably international humanitarian law or the law of armed conflict, to cyber operations and the question of responsible State behaviour in cyberspace.

Furthermore, as a follow up to the seminar on "**Non-Legally Binding Agreements in International Law**" organised in the framework of the German Chairmanship of the Committee of Ministers of the Council of Europe on the occasion of the 60th CAHDI meeting in March 2021, the CAHDI decided to follow-up on the topic as one of its new activities. A detailed questionnaire was approved by the CAHDI and submitted to delegations for their replies. We are now turning to a first analysis of the replies received. Depending on the outcome of this analysis, the CAHDI will subsequently need to decide which form the final deliverable of the exercise will take, a glossary of terms, a model MoU or any other guidance tool.

V. FUTURE CHALLENGES AND PERSONAL REMARKS

In its thirty-one years of existence, the CAHDI has become a forum in which debates are dynamic between member States, non-member States and international organisations on contemporary issues of public international law.

I am of the opinion that the terrible aggression of the Russian Federation against Ukraine, which we all hope will soon come to an end, has further underlined the usefulness of the CAHDI in the present era. Indeed, on the one hand, the CAHDI makes it possible, in a preventive manner if I may say so, to find consensual solutions, within the framework of diplomatic and peaceful discussions, to problems between countries represented in its midst, despite the fact that the latter share extremely antagonistic positions in certain situations. On the other hand, when such dialogue is unfortunately not sufficient to resolve these differences peacefully in accordance with international law, the CAHDI provides a platform for its member States to adopt common positions and coordinate their actions in response to gross violations of international law such as those committed by the Russian Federation in Ukraine. Our Committee is therefore not limited to a mere discussion forum, but in practice enables real solutions to be found to today's challenges and in this sense constitutes a real "mechanism" for preserving the values that the Council of Europe intends to defend, namely human rights, the rule of law and democracy, both within the Council of Europe and beyond, in view of the wider geographical area in which the CAHDI operates.

However, the fulfilment of this mission, and in the broader sense of the CAHDI's mandate, requires significant work, including preparatory work. In this respect, I would also like to draw your attention to the fact that adequate resources, both financial and human, are needed for the proper implementation of its mandate.

On a more personal note, my term as Chair has been marked by two major crises: one health-related, namely the Covid-19 pandemic, and the other political and military, namely the Russian Federation's aggression against Ukraine. Both situations required me, the CAHDI members and the Secretariat to find innovative solutions and new working methods. On these occasions, I was able to observe the dedication of each of them to the success and outreach of the work of the CAHDI, which made me very proud.

On behalf of the Committee that I have the honour to chair, I wish to thank you for the confidence you have placed in the CAHDI over thirty-one years, and I am most grateful for the opportunity to speak to you today.