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COMMITTEE OF LEGAL ADVISERS ON PUBLIC INTERNATIONAL LAW (CAHDI)

Presentation by Ms Päivi KAUKORANTA,
Chair of the CAHDI

at the 1289th meeting of the Ministers' Deputies
on 14 June 2017

54th meeting
Strasbourg (France), 21-22 September 2017

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Mr Chair,
Ambassadors,
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 would like to thank the Committee of Ministers for offering the CAHDI this unique opportunity to present its work also this year. The interest that the Committee of Ministers pays to 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 started my term of office on 1 January this year and already chaired my first meeting of the CAHDI on 23 and 24 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.

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 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 9 participating international organisations. Hence, all in all the CAHDI counts 65 participants.

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 while 99 attended the previous meeting in Brussels in September last year. Delegations of Council of Europe member and non-member States are often composed of two or three participants. We also witnessed the continuation of the custom of an almost full attendance from the member States of the Council of Europe: 46 out of 47 attended the meeting in March. It is worth highlighting in addition that most of the Head of Delegations participating in the CAHDI meetings are the Legal Advisers of the respective Ministries of Foreign Affairs themselves, ensuring thus representation of the States at the highest possible rank.

I am happy to notice that the abridged report of the last CAHDI meeting in March was presented to you this morning. It shows in 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 some examples of how the CAHDI has operated at both of these levels since June 2016 when my

predecessor, **Mr Paul RIETJENS** from Belgium - to whom I would like to pay tribute here for his excellent chairmanship – presented the CAHDI work to your Committee.

II. THE CONTRIBUTION OF THE CAHDI TO THE COUNCIL OF EUROPE ACTIVITIES

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 “47 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 that of “legal adviser” to the Committee of Ministers. In accordance with its terms of reference it is instructed to provide 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. The most recent opportunity for the CAHDI to pursue this role occurred in July 2016 when the Committee of Ministers communicated to the CAHDI *Recommendation 2095 (2016) of the Parliamentary Assembly on “Parliamentary immunity: challenges to the scope of the privileges and immunities enjoyed by members of the Parliamentary Assembly”*. In its legal **opinion** on this Recommendation, adopted during its 52nd meeting in September 2016 in Brussels, the CAHDI underlined that the scope of privileges and immunities enjoyed by the members of the Parliamentary Assembly, including their legal situation when seeking to attend an official meeting in a member State, was governed by the applicable Council of Europe treaties, in particular the *General Agreement on Privileges and Immunities of the Council of Europe* (GAPI) and its Protocol. An efficient implementation of these rules currently in force would, according to the CAHDI, solve most of the issues highlighted by the Parliamentary Assembly in its Recommendation. The CAHDI also importantly reaffirms that international law grants States full sovereignty over their territory, therefore implying that States can also freely decide, in conformity with their obligations under international law, on the entry of foreign nationals into their territory. The Committee of Ministers drew upon all these CAHDI legal arguments when adopting its Reply¹ to the Parliamentary Assembly.

Another important initiative in which the CAHDI has recently acted as “legal adviser” to the Committee of Ministers relates to the draft “**Model Final Clauses for Conventions, Additional Protocols and Amending Protocols concluded within the Council of Europe**”. These draft model final clauses have been prepared by the Treaty Office of the Council of Europe in order to update the 1980 Model Final Clauses² to include the new developments occurred, during the last four decades, within the treaty making process at the Council of Europe. Indeed, since then the treaties concluded under the auspices of the Council of Europe have not only become more varied with regard to the subject matters they address but also with regard to their ever widened reach beyond Europe. This global reach and transnational character of the recent Council of Europe conventions and protocols has led to an increased participation of non-member States, the European Union and international organisations. Today, of the 221 treaties concluded within the Council of Europe 152 are open to non-member States upon invitation by the Committee of Ministers. For instance, since 2012 the Treaty Office has received 96 requests from non-member

¹ Document [CM/AS\(2017\)Rec2095-final](#).

² “[Model Final Clauses for Conventions and Agreements concluded within the Council of Europe](#)” adopted by the Committee of Ministers at its 315th meeting in February 1980.

States to become party to the Council of Europe conventions. The need for a revision of the model clauses was thus evident.

As it was the case with the 1980 Model Final Clauses, this draft was submitted to the CAHDI who greatly contributes to the revision process through the experience of its experts in different means of expressing the consent to be bound by a treaty within the Council of Europe as well as within other international organisations. Therefore, the CAHDI examined these draft model final clauses at its 51st, 52nd and 53rd meetings in the light of the comments and alternative proposals made by CAHDI delegations and agreed on the revised version of the draft model final clauses on 24 March 2017 during its 53rd meeting. Drawing on the invaluable experience of the Legal Advisers of the “47 plus” is a guarantee that the revised version now submitted to you takes into account the latest developments of treaty law which should facilitate the examination of these clauses by your Rapporteur Group on Legal Co-operation (GR-J) on the 22 June [and/or 4 July] and afterwards their adoption. It is to be expected that these model clauses, once adopted by the Committee of Ministers, will be of great assistance in the treaty making process carried out within the Council of Europe.

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 17 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 last meeting that I was chairing the CAHDI examined 22 reservations and declarations which had been identified as potentially problematic.

In relation to these two last activities I have just mentioned (final clauses and reservations 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 assist and cooperate 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 thus 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 as was the case when Protocol No. 14 bis to the European Convention on Human Rights was being negotiated.

III. THE CONTRIBUTION OF THE CAHDI BEYOND THE COUNCIL OF EUROPE AND ITS LIAISON ROLE WITH OTHER INTERNATIONAL ORGANISATIONS

Let me now move on to the contribution of the CAHDI beyond the Council of Europe and its liaison role with other international organisations.

The external dimension of the CAHDI is illustrated first of all by the fact that the CAHDI experts, the Legal Advisers of the Council of Europe member and observer States, equally take part in several other fora - some of them in the European Union and all of them at the United Nations. This allows us to have legal coherence on certain issues but also to promote legal exchanges within these different organisations. The CAHDI has a very important role to play in this process of exchanges insofar as it constitutes a laboratory of ideas essential for the development of international law.

In this regard, I am thinking in particular on the "**Declaration on Jurisdictional Immunities of State Owned Cultural Property**", developed within the framework of the CAHDI. By signing this Declaration, a State recognises the customary nature of the relevant provisions of the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (2004) which, as you know, has still not entered into force. The CAHDI is therefore at the center of the development of international law, and in this particular case it is even the main actor, the pioneer, of the formulation and reaffirmation of customary law on this question. To date, the Declaration has been signed by 20 Ministers of Foreign Affairs, the last two in 2017 by **Mr Augusto Santos Silva**, Minister of Foreign Affairs of Portugal, on 21 February 2017 and **Archbishop Paul Richard Gallagher**, Secretary for the Holy See's Relations with States, on 22 May 2017. Furthermore, with regard to this Declaration, I would like to inform you that in January, the Permanent Representatives of Austria and the Czech Republic to the United Nations transmitted to the Secretary-General of the world Organisation a letter requesting the Declaration to be circulated among the member States of the United Nations for information purposes under the agenda item "The rule of law at the national and international levels" of the United Nations General Assembly. I would like to express my appreciation to the delegations of Austria and the Czech Republic, the original initiators of the whole project, for taking this further initiative to raise awareness on our Declaration beyond the boundaries of the Council of Europe.

Concerning the impact of the CAHDI beyond the scope of the Council of Europe, I am further thinking of the Committee's various initiatives and projects with practical value and importance for member States and non-member States. This can be illustrated for instance with the very interesting discussions we are having on the question of the **settlement of disputes of a private character to which an international organisation is a party**. Indeed, the immunity of international organisations in many cases prevents individuals who have suffered harm from conduct of an international organisation from bringing a successful claim before a domestic court. This immunity has been increasingly challenged on an alleged incompatibility of upholding immunity with the right of access to court. While this theme is of practical importance for the Council of Europe itself, it obviously goes beyond the European regional framework. It is a good example of the "pioneer" role of the CAHDI which acts as a testing ground for subjects which, at this stage, are more difficult to discuss at a more "universal" level.

The input of the CAHDI to discussions of important and topical issues of public international law is by far not limited to discussions at its biannual meetings. Between the meetings we feed the discussions, inter alia, by collecting evidence from the delegations of State practice concerning a certain topic currently under consideration. On several occasions already, the data so collected

has served as a basis for a publication. This allows us to make our research available to the outside public. For instance, during its last meeting, the CAHDI agreed on the preparation of a publication on the topic of “**Immunities of special missions**”³. This future CAHDI publication, which will be prepared by a specialist on the subject, will contain an analysis outlining the main trends arising from the delegations’ replies to a questionnaire on the topic collected by the CAHDI since 2013.

The CAHDI further has an important role to play in fostering **co-operation and collaboration of the Council of Europe with the United Nations**, in particular with the International Law Commission (ILC) and the Sixth Committee of the United Nations General Assembly linking the two Organisations in the legal field.

On the occasion of its 52nd meeting in September 2016 in Brussels under the chairmanship of my predecessor, **Mr Paul RIETJENS** from Belgium, the CAHDI held an exchange of views with **Mr Miguel SERPA SOARES**, Under-Secretary-General for Legal Affairs and United Nations Legal Counsel. I would like to highlight the fact that he himself is a former member of the CAHDI. In his presentation, Mr SERPA SOARES provided the delegations with an overview of selected issues currently dealt with by the United Nations Office of Legal Affairs such as accountability in South Sudan, the issue of sexual exploitation and abuse in the context of UN peacekeeping operations as well as recent questions related to the topical issue of immunities enjoyed by the United Nations, in particular against the backdrop of the outbreak of cholera in Haiti.⁴

Equally at the 52nd meeting, the CAHDI welcomed **Mr Pedro COMISSARIÓ AFONSO**, Chair of the United Nations International Law Commission (ILC), in the framework of annual interaction between the CAHDI and the ILC which is further marked by the exchange of views between the CAHDI Chair and Secretary with the ILC in its session in Geneva every July. Indeed myself and the Secretary of the CAHDI, Ms Marta Requena, will attend the forthcoming ILC meeting in Geneva on 6 July. In his address to the CAHDI, Mr COMISSARIÓ AFONSO gave an overview of the recent activities of the ILC and the topics discussed during the ILC’s 68th Session. His presentation touched on topical issues related to the protection of persons in the event of disasters, the identification of customary international law, subsequent agreements and subsequent practice in relation to the interpretation of treaties, crimes against humanity, the protection of the atmosphere, *jus cogens*, the protection of the environment in relation to armed conflicts, the immunity of State officials from foreign criminal jurisdiction and the provisional application of treaties.

At the meeting that I was chairing in March of this year, the CAHDI was again privileged to welcome two outstanding personalities from the international law community as special guests: On the one hand, **Mr Ronny ABRAHAM**, the President of the International Court of Justice (ICJ) - also a former CAHDI member, and on the other hand **Mr Guido RAIMONDI**, President of the European Court of Human Rights (ECHR).

Mr ABRAHAM, for his part, provided the CAHDI with an overview of selected challenges currently being faced by the ICJ. In his presentation Mr ABRAHAM underlined that during 2016 the ICJ

³ According to the *United Nations Convention on Special Missions* of 1969 a “special mission” is a temporary mission, representing the State, which is sent by one State to another State with the consent of the latter for the purpose of dealing with it on specific questions or of performing in relation to it a specific task.

⁴ United States Court of Appeals for the Second Circuit, *Georges v. United Nations*, judgment of 18 August 2016, 834 F.3d 88 (2016).

experienced a high level of judicial activity and he observed that most of these cases relate to preliminary objections concerning either jurisdiction or admissibility of certain claims. Furthermore, he focused on the essential question of the jurisdiction of the ICJ and noted that jurisdiction would be less frequently based on declarations recognising the compulsory jurisdiction of the ICJ (pursuant to Article 36 of the ICJ Statute) than on jurisdictional clauses, so-called compromissory clauses, contained in multilateral treaties concerning a specific subject matter.

Mr. RAIMONDI, provided the CAHDI experts with a general overview of the role and functioning of the European Court of Human Rights (ECHR) as well as its current caseload before turning, in more detail, to recent judgments of the ECHR relating to public international law. He in particular addressed the recent judgment rendered by the Grand Chamber of the ECHR in the *Al-Dulimi*-case⁵ concerning the national implementation of United Nations Security Council Resolutions in cases related to terrorism and the respect for human rights of the individual and the enterprises concerned by such sanctions. This is clearly a case that has universal reach beyond the Council of Europe member States.

IV. FUTURE CHALLENGES

As you can see, the CAHDI is a forum in which debates are dynamic between member States, non-member States and international organisations on contemporary issues of public international law. You can well imagine that in order to do all this - and I have listed only about a quarter of our activities - it is necessary to have **an adequate budget and a permanent Secretariat**. As regards the budget, despite the fact that the financial resources allocated to us are rather reduced, we are aware of the budgetary restrictions imposed throughout Europe and I will NOT ask you to increase the CAHDI operational budget for the next biennium 2018-2019. By contrast, with regard to the Secretariat, I would like to emphasise, as did my the predecessor last year, the importance of having a stable and specialised Secretariat, with staff covered by the Ordinary Budget of the Organisation and therefore not subject to the uncertainties of voluntary contributions. Until 2011, the CAHDI had indeed a permanent staff included in the Ordinary Budget of the Organisation. This is no longer the case which I deeply regret. This temporary staff structure which lasts already six years is showing adverse consequences in the preparation of the CAHDI meetings. We are confronted at present with an extremely difficult situation without being able to confirm a secretarial assistant for the CAHDI next year. Therefore, I would like to request you, on behalf of the CAHDI, to include in the Council of Europe's next biennium ordinary budget a post for a CAHDI secretarial assistant and to make permanent the current position of the administrator in charge of the CAHDI.

On behalf of the Committee that I have the honor to chair, I wish to thank you for the confidence you have placed in the CAHDI in all those over 26 years. I am most grateful for the opportunity to speak to you today. I believe that, especially in the light of the increasing challenges faced by different actors in the context of international law today, a forum like the CAHDI with its tradition and reputation of thriving for a steady development of public international law represents a great asset for the member States and the Council of Europe as a whole.

⁵ ECHR, *Al-Dulimi and Montana Management Inc. v. Switzerland*, no. 5809/08, Grand Chamber judgment of 21 June 2016.