

## The Work of the Committee of Legal Advisers on Public International Law (CAHDI) of the Council of Europe

Statement by

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(CAHDI) in 2019-2020*

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First of all, I would like to express my sincere gratitude to the **African-Asian Legal Consultative Organization (AALCO)** and, in particular, to its Secretary-General, **Prof. Kennedy Gastorn**, for offering me this opportunity to present the work of the Committee of Legal Advisers of Public International Law - which is known by its acronym **CAHDI** – the name of the Committee in its French version, *Comité Ad Hoc sur le droit international public*. I also thank him for his participation in several meetings of the CAHDI.

I have recently taken part in – and I believe many of you too – the Second World Meeting of Societies for International Law in The Hague, where the title of the first plenary round table has been “New Crisis of International Law or Threat of Collapse of the International Legal Order?”. In the discussion that followed afterwards one of the speakers challenged the very title of this round table by saying that there is no crisis of international law, but rather the crisis caused by the lack of political will of States to respect international law. I believe he had a point. In this context, I see the role of us, legal advisers on international law, as crucial for shaping the decisions of our political leadership. And the same can be said about CAHDI and AALCO whose mandate and work is quite similar, as I will try to point out in my statement. My presentation will be focused on the three following issues:

- I. The background of the CAHDI, and its current composition;
- II. The contribution of the CAHDI to the development of Public International Law;
- III. The contribution of the CAHDI to the work of the UN International Law Commission (ILC) and the Sixth Committee of the UN General Assembly.

## **I. BACKGROUND AND MEMBERSHIP OF THE CAHDI**

The CAHDI is an intergovernmental committee which brings together the Legal Advisers of the Ministries of Foreign Affairs of the member States of the Council of Europe, as well as a significant number of observer States and Organisations. The CAHDI reports directly to the Committee of Ministers, the executive body of the Council of Europe.

Its **origins** can be traced back to the 1990s, when the political architecture of Europe was being redesigned and the Council of Europe was playing a key role in the political changes in the Central and Eastern Europe. The Legal Advisers of the Ministries of Foreign Affairs actively participated in this process. In **1991**, its predecessor - the Committee of Experts - was transformed into the current "**Committee of Legal Advisers on Public International Law**" (**CAHDI**). Its first meeting took place in Strasbourg in April 1991 under the chairmanship of Mr Helmut Türk, the Austrian Legal Adviser at the time, and on that occasion the CAHDI welcomed a special guest: the Crown Prince of Spain, now King Felipe VI, who attended the meeting during a working visit to the Council of Europe. The long life of the CAHDI started with key legal discussions for the Council of Europe at that moment: State succession in Europe in relation to treaties, State property, archives and debts.

Sixteen legal advisers attended the first meeting of the CAHDI. At present, 28 years after its birth, the CAHDI brings together the Legal Advisers of the Ministries of Foreign Affairs of the **47 member States** of the Council of Europe, as well as 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 (Australia, Belarus, Israel and New Zealand), and the following **10 participating international organisations**:

- the European Union;
- United Nations and its specialised agencies;
- the North Atlantic Treaty Organisation (NATO);
- the Organisation for Economic Co-operation and Development (OECD);
- the International Criminal Police Organisation (INTERPOL);
- the Organisation for Security and Co-operation in Europe (OSCE);
- the International Committee of Red Cross (ICRC);
- The Hague Conference on Private International Law;
- the European Organisation for Nuclear Research (CERN);
- In **2017**, participant status was granted to you: the **Asian-African Legal Consultative Organisation (AALCO)** and I would like to emphasise the importance that the CAHDI attaches to your Organisation.

Most of the Head of Delegations participating in the CAHDI meetings are the **Legal Advisers** of the respective Ministries of Foreign Affairs themselves, thus ensuring representation of the States at the highest possible rank. Moreover, the delegations participating in our meetings are often composed of two or three members and, hence, we have welcomed around 90 participants at each of our two biannual meetings in the past years.

I have been the **Chair of the CAHDI** since 2019 and was re-elected as Chair for 2020.

## **II. THE CONTRIBUTION OF THE CAHDI TO THE DEVELOPMENT OF PUBLIC INTERNATIONAL LAW**

In the framework of a truly pan-European setting, the CAHDI is a legal forum for coordination, but also for discussion, reflection and advice, being a laboratory of ideas, which is essential for the development of international law. CAHDI's biannual meetings allow all participants to inform each other on topical issues of common interest and to exchange national experiences and practices, so we do not have "to re-invent the wheel."

As concrete examples of CAHDI's contribution to the development of public international law, I would like to mention the **"Pilot Project on State Practice regarding State Succession and Issues of Recognition"** which can be found in a **1999 Book** encompassing the practice of 16 member States of the Council of Europe.

Furthermore, the CAHDI prepared number of Recommendations of the Committee of Ministers to Member States in the area of diplomatic and treaty law.<sup>1</sup> Another task successfully conducted by CAHDI has been **an evaluation of the Council of Europe conventions and protocols.**<sup>2</sup>

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<sup>1</sup> [Recommendation No. R\(97\)10](#) on debts of diplomatic missions, permanent missions and diplomatic missions "with double accreditation", as well as those of their members;  
[Recommendation No R \(99\) 13](#) on responses to inadmissible reservations to international treaties as well as its appendix containing model response clauses to reservations;  
[Recommendation CM/Rec \(2008\) 8](#) on the acceptance of the jurisdiction of the International Court of Justice and its appendix containing Model clauses for possible inclusion in declaration of acceptance of the compulsory jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court;  
[Recommendation CM/Rec\(2008\)9](#) on the nomination of international arbitrators and conciliators.

<sup>2</sup> Two Conventions (1957 European Convention for the Peaceful Settlement of Disputes ETS No.23 and the 1968 European Convention on the Abolition of Legalization of Documents executed by Diplomatic Agents or Consular Officers ETS No.63) are still very useful for States, even if they were adopted in the 1960s. The CAHDI encouraged the Council of Europe and its member States, as well as other CAHDI delegations, to ensure their promotion. Three Conventions and one Protocol (1967 *European Convention on Consular Functions* ETS No.61; 1972 *European Convention on State Immunity* ETS No.74 and its 1972 *Additional Protocol*/ETS No.74A; 1974 *European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes* ETS No.82) have not been much used by States due to the adoption of universal conventions, such as the 1963 *Vienna Convention on Consular Relations*, the 2004 *United Nations Convention on Jurisdictional Immunities of States and Their Property* or the 2002 *Rome Statute of the International Criminal Court*. However, the CAHDI considered that some of these conventions could

An important initiative, in which the CAHDI was directly involved, was the revised "***Model Final Clauses for Conventions, Additional Protocols and Amending Protocols concluded within the Council of Europe***", adopted by the Committee of Ministers of the Council of Europe **on 5 July 2017**, duly taking into account the latest developments in treaty law and the fact that the Conventions concluded under the auspices of the Council of Europe have not only become more varied as regards their subject matter, but also in relation to an ever widening reach beyond Europe.

This **global reach** of the more recent Council of Europe conventions and protocols has led to an increased participation of non-member States, alongside the European Union and other international organisations. Today, out of the **223 treaties** concluded within the Council of Europe, 153 are open to non-member States, upon invitation by the Committee of Ministers. For instance, since 2012 the Treaty Office has received **over a hundred requests from non-member States** to become party to Council of Europe conventions (e.g., the *Convention on Mutual Administrative Assistance in Tax Matters* - ETS No.127 - has far more signatures and ratifications from non-member States - 67 - than the number of Council of Europe member States, which is 47).

Let's continue with another example in the field of treaty law, which is also one of CAHDI's flagship activities: in its capacity as the "***European Observatory of Reservations to International Treaties***", the CAHDI examines reservations and declarations subject to objection at its meetings thereby promoting and monitoring the States' adherence to the international law. The CAHDI examines **both the reservations and declarations** made to Council of Europe conventions as well as to the conventions deposited with the UN Secretary-General. This function, which the CAHDI has operated for more than **18 years**, has proved its effectiveness. In carrying out this examination, the CAHDI makes use of the so-called "***dialogue réservataire***", a concept based on good faith and fostering dialogue and conciliation.

This working method not only allows 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 allows other delegations to understand the rationale behind reservations **before formally objecting to them**. In this regards, we are observing the revival of a **trend to subordinate the application of treaty provisions to domestic law**. As we know, such reservations are inadmissible under international law due to Art. 27 of the Vienna Convention on the Law of Treaties and sometimes because they are against the object and purpose of a treaty too.

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constitute evidence of international custom. In any case, it did not encourage any "massive denunciation" or termination as it is up to the Parties to decide about the "life cycle" of these Conventions.

### **III. THE CONTRIBUTION OF THE CAHDI TO THE WORK OF THE UN INTERNATIONAL LAW COMMISSION (ILC) AND THE SIXTH COMMITTEE OF THE UN GENERAL ASSEMBLY.**

The CAHDI also plays an important role in fostering **co-operation and collaboration between the Council of Europe and the United Nations**. The external dimension of the CAHDI is illustrated by the fact that CAHDI's experts - the Legal Advisers of the Council of Europe member and observer States - equally take part in the sessions of Sixth (Legal) Committee of the UN General Assembly, which allows us to have legal coherence on certain issues and to act as a link between the two Organisations. Furthermore, in order to strengthen this co-operation, the CAHDI invites as guest speakers the UN Legal Counsel, the President of the International Court of Justice (as well as presidents of other international courts and tribunals) and, each September, has an exchange of views with the Chair of the International Law Commission (ILC). Indeed, the work of the ILC is on the **agenda** of all CAHDI meetings as a **permanent item**. These annual exchanges of views are the tangible evidence of the close links developed between the two institutions.

In this context, I would also like to mention the **Observations of the Secretariat of the CAHDI concerning the Draft Articles on Crimes against Humanity**, adopted by the ILC on first reading at its 69<sup>th</sup> Session. Indeed, the Council of Europe was one of the first actors to address the prevention of impunity for crimes against humanity with the adoption in 1974 of its *European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes* (ETS No. 82). As it was concluded by the CAHDI in 2016, this Convention has been interpreted and understood as constituting evidence of international custom.

This year, the CAHDI Secretary submitted **observations and comments on the draft Guide to Provisional Application of Treaties**, adopted on first reading by the ILC at its 70<sup>th</sup> Session in 2018. Historically, the CAHDI also highly contributed to the Study on Reservations conducted by Mr Alain Pellet as Special Rapporteur which led to the adoption by the ILC at its 63<sup>rd</sup> session in 2011 of the [Guide to Practice on Reservations to Treaties](#).

Furthermore, I would like to raise here the "**Declaration on Jurisdictional Immunities of State Owned Cultural Property**"<sup>3</sup>, which I believe can have a direct impact on the practice of States. The Declaration, developed within the framework of the CAHDI, is a non-legally binding document which 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, a State recognises the customary nature of the relevant provisions of the **UN Convention on Jurisdictional Immunities of States and Their Property (2004)** which, as you know, has not yet entered into force.

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<sup>3</sup> "[Declaration on Jurisdictional Immunities of State Owned Cultural Property](#)", presented at the 46<sup>th</sup> meeting of the CAHDI (Strasbourg, 16-17 September 2013).

The Declaration was a joint initiative of the Ministers of Foreign Affairs of the Czech Republic and Austria, who signed it in Brussels on 18 November 2013 and opened it for signature by other States, members and non-members of the Council of Europe. To date, the Declaration has been signed by the **Ministers of Foreign Affairs of 20 States**<sup>4</sup>, members and non-members of the Council of Europe. The CAHDI Secretariat performs the functions of depositary of the Declaration. Furthermore, the Declaration was circulated among the members of the United Nations under the agenda item "*The rule of law at the national and international levels*" of the UN General Assembly in 2017 in order to raise the awareness about the Declaration beyond the Council of Europe.

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. In-between the meetings, the evidence on State practice concerning a certain topic currently under consideration is being collected and, on several occasions, has served as a basis for a publication. This allows us to make our research available to the outside public.

For instance, at its 53<sup>rd</sup> meeting in March 2017, the CAHDI agreed on the preparation of a publication on the topic of "**Immunities of special missions**". This CAHDI publication was prepared by **Sir Michael WOOD**, member of the ILC and former Chair of the CAHDI, together with Mr Andrew SANGER and it contains an analytical report on legislation and practice, including the main trends arising from the replies to the questionnaire prepared by the CAHDI on this matter and provided by 38 CAHDI delegations.

I would also like to mention the three databases set up by the CAHDI and which correspond to major research projects, covering:

- [The immunities of States and international organisations](#)
- [The organisation and functions of the Office of the Legal Adviser in the Ministry of Foreign Affairs](#)
- [The implementation of United Nations sanctions and respect for Human Rights](#)

These databases reflect the States' practice in specific fields of public international law, through the contributions of member and observer States of the Council of Europe, based on domestic legislation and case-law, as well as any other relevant documents.

## **FINAL REMARKS**

I would like to reiterate that the CAHDI is a **legal forum** which assists to and co-operates with member and non-member States and international organisations in order to **develop the rule of law at the international level**, as a key factor in the inter-state relations. The CAHDI has played and continues to play after 28 years of its existence, an important role in the development of public international law.

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<sup>4</sup> 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