

Information Documents

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Accountability for human rights violations as a result of the aggression of the Russian Federation against Ukraine: role of the international community, including the Council of Europe

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I. Introduction

1. Soon after the aggression of the Russian Federation against Ukraine, the Council of Europe took a leading role in condemning it¹ as well as in sanctioning the act of aggression as a serious violation by the Russian Federation of its obligations under Article 3 of the Statute of the Council of Europe by terminating the Russian Federation's membership in the Organisation.² The Organisation is well equipped to play an important role also as regards efforts to achieve accountability for the crimes and human rights violations allegedly committed in the course of this war, including full reparation for the damage, loss or injury caused.

2. The Ad hoc Working Party on the 4th Summit of Heads of State and Government of the Council of Europe (GT-SOM4), at its meeting on 13 December 2022, invited the Secretary General to contribute on accountability by 1 February 2023. The present document is a response to that request. It begins by outlining the adjustments already made in the field of co-operation activities in support of Ukraine (Part II) after the outbreak of the war as well as other activities undertaken in assisting Ukraine in dealing with the alleged crimes and human rights violations in accordance with the Organisation's mandate. It then turns to discuss the possible levels of engagement of the Council of Europe with regard to current initiatives to establish an international compensation mechanism for Ukraine with a Register of damage (Part III) as well as a special tribunal for the crime of aggression against Ukraine (Part IV).

II. Council of Europe assistance to Ukraine in dealing with alleged crimes and human rights violations in the context of the war

3. Following the start of the aggression of the Russian Federation against Ukraine and the subsequent decision by the Committee of Ministers on the cessation of membership of the Russian Federation to the Council of Europe, the Organisation swiftly adjusted its support to Ukraine in response to the national partners' requests and needs in times of war. Priority Adjustments to the Council of Europe Action Plan for Ukraine 2018-2022 (CM(2022)89) were adopted by the Committee of Ministers in Turin on 20 May 2022 and implemented throughout that year. Co-operation activities were refocused to support the Ukrainian judicial and social support systems, as well as the rule of law machinery, to ensure that they have the capacity to continue to function in times of war and to ensure accountability for any alleged crimes and human rights violations resulting from the Russian Federation's aggression against Ukraine, in line with the requirements of the European Convention on Human Rights (hereinafter "the Convention").

¹ The Secretary General was among the first to react in the early hours of 24 February 2022 condemning "the flagrant violation of the Statute of the Council of Europe" by the Russian Federation. The Committee of Ministers immediately reacted too through a decision adopted by the Ministers' Deputies at their extraordinary 1426bis meeting on 24 February 2022 (CM/Del/Dec(2022)1426bis/2.3).

² See Committee of Ministers, Resolution CM/Res(2022)2 on the cessation of membership of the Russian Federation to the Council of Europe, adopted on 16 March 2022 at the 1428ter meeting of the Ministers' Deputies.

4. Support was (and still is – see below) channeled to the Office of the Prosecutor General of Ukraine, the Supreme Court and the judiciary in general, the Ombudsperson's Office and the National Preventive Mechanism (NPM), as well as the law enforcement authorities, social service staff and civil society. It included:

- Strategic legal expert advice to the Office of the Prosecutor General through the Council of Europe Expert Advisory Group on cross-cutting issues of European human rights standards and international humanitarian law in the process of investigating war-related gross human rights violations in Ukraine³, as well as strategic advice on communication in the war context⁴;
- Legal and policy expert advice on access to justice in times of war, online judicial proceedings (developed in the light of tools by the European Commission for the Efficiency of Justice, CEPEJ), effectiveness of investigations of war-related crimes, specialised procedural powers and collection of electronic evidence, challenges and implications of the “derogation in time of emergency” introduced by Ukraine under Article 15 of the Convention, military prosecution, etc.;
- Capacity building and technical assistance to investigation and prosecution authorities, the judiciary and the Ombudsperson's Office, based on Council of Europe human rights and rule of law standards, to facilitate documenting and reporting, investigation, prosecution and consideration of cases of war-related crimes. These included legal expertise on legislative initiatives, demand-driven knowledge sharing, international expertise and experience exchange, training, guidance and methodological recommendations, accompanied by providing technical and IT equipment to support the relevant stakeholders to carry out their day-to-day duties efficiently in the context of war;
- Capacity building of first line professionals working with victims of violence (especially victims of sexual violence), including hotline operators, psychologists and social workers based on the standards of the Convention on Combating Violence against Women and Domestic Violence (hereinafter the “Istanbul Convention”). Expanded support was provided to local NGOs to protect and promote women's and girls' rights, support for gender-sensitive reception procedures and support services for women on the move, and countering violence against women and domestic violence in emergencies;
- Capacity building on very practical and innovative aspects of effective investigation techniques in the war context (e.g., open-source intelligence, cybercrime and electronic evidence – building on Council of Europe instruments and expertise in this field – or operation of unmanned aerial vehicles (UAV) for evidence collection), emphasis always being placed on ensuring that the techniques used be in line with the Convention requirements.

³ Advice on amendments to legislation regarding the procedural regulation of work of Joint Investigating Teams; provision of analytical notes and expert discussions on aspects related to application of the Convention standards, e.g. proceedings *in absentia*; admissibility of open-source intelligence data and electronic evidence in national criminal proceedings; application of pre-trial detention standards under Article 5 of the Convention; public outreach related to war crimes in the light of the principle of presumption of innocence; application of relevant provisions of criminal legislation in the light of Article 7 of the Convention; overview of the Convention standards related to forced disappearances, etc.

⁴ Development and implementation of a comprehensive communication strategy on gross human rights violations and war crimes of the Office of the Prosecutor General of Ukraine. The information and communication strategy is focused on information, content and guidelines on the collection of evidence of gross human rights violations, aiming at a custom-made reporting to two types of audiences (international and domestic). Support also includes inputs and guidance in drafting and producing media and communication content (news and press releases of regular frequency) of the Office of the Prosecutor General on informing the public/reporting on war crimes and human rights violations, as well as their prosecution.

5. This Council of Europe assistance to Ukrainian stakeholders continues in the framework of the new Council of Europe Action Plan for Ukraine “Resilience, Recovery and Reconstruction” 2023-2026 (CM(2022)187), prepared in close consultation with the Ukrainian authorities and adopted by the Committee of Ministers on 14 December 2022. Taking into consideration the continued war context and large-scale dimension of investigation/prosecution of war-related gross human rights violations⁵, this assistance largely focuses on the observance, in war-related criminal proceedings, of the safeguards deriving from the procedural obligations under Articles 2 and 3 of the Convention to carry out an effective investigation into alleged breaches of the right to life and the prohibition of torture⁶, alignment with the requirements of Article 5 of the Convention regarding detention in the context of war, and fair trial guarantees of Article 6 of the Convention. It includes a victim-oriented approach, with the prioritisation of expertise provided to national justice stakeholders in response to alleged war-related crimes and human rights violations for the most vulnerable categories of victims including torture, forced disappearance and conflict-related sexual violence. The following areas are further prioritised in order to contribute to achieving justice and accountability:

- Legal advice and capacity building for the Office of the Prosecutor General and other competent authorities in the process of investigation and prosecution of war-related crimes and human rights violations, with a focus on Convention requirements and guarantees;
- Capacity building for all criminal justice actors (investigators, prosecutors, judges, lawyers/legal aid lawyers) in light of Convention requirements and guarantees, in particular on fair trial rights and rights of victims of human rights violations;
- Support to the organisation and functioning of the judiciary as a whole in the context of war; more specifically, support to the functioning of the criminal justice system, with a focus on the practical implications of the implementation of recently adopted legal and institutional reforms;
- Expert and legal advice on access to justice and judicial protection of the rights of individuals and legal entities affected by the aggression; strengthening judicial and non-judicial remedies for the human rights protection of war-affected people in Ukraine;
- Continued support to the Office of the Prosecutor General in facilitating the implementation of the communication strategy on gross human rights violations and war crimes;
- Support for the establishment of a rehabilitation mechanism for the victims of torture and ill-treatment and its further functioning, in line with international and European standards;
- Assistance to the authorities with the adoption of measures for the protection of witnesses and collaborators of justice;
- Following its ratification of the Istanbul Convention in 2022, support to Ukraine continues through the following actions: (i) expanded professional guidance on protecting the rights of displaced women and girls to reach increasing numbers of social workers, psychologists and hotline workers; (ii) professional development courses on violence against women and emergencies to strengthen the judicial chain, including police and lawyers; (iii) awareness raising on the standards of the Istanbul Convention, which will also help authorities in the process of the baseline evaluation report. Considering the particular needs during armed conflict, expanded support is given to selected Ukrainian women’s rights NGOs;

⁵ At the date of 11 January 2023 per statistics of the Office of the Prosecutor General 63,610 alleged war crimes and war-related crimes are registered by the Ukrainian authorities.

⁶ Articles 2 and 3 of the Convention require States parties not only to refrain from the intentional and unlawful taking of life and from torture and inhuman or degrading treatment or punishment but also provide for a procedural obligation to carry out an effective investigation into alleged breaches of the substantive limbs of these provisions.

- Institutional capacity support for forensic institutions, including through needs-driven training, with the aim of developing effective mechanisms of evaluation of damage caused to victims of grave human rights violations in the war context and within a broader context of criminal justice and law-enforcement reform.

6. In sum, the Council of Europe is assisting Ukraine in dealing with alleged crimes and human rights violations in line with European standards on human rights and the rule of law, in accordance with the Organisation's mandate.

7. In so doing and in the spirit of the high-level Ukraine Accountability Conference in The Hague on 14 July 2022, the Ukraine Recovery Conference in Lugano on 4-5 July 2022, the Standing with the Ukrainian People Conference in Paris on 13 December 2022, and the terms of the new Council of Europe Action Plan for Ukraine "Resilience, Recovery and Reconstruction" 2023-2026, the Council of Europe remains very attentive to the co-ordination efforts led by the Office of the Prosecutor General, aimed at ensuring coherence of international expertise and advice provided. Since the start of the Russian aggression against Ukraine, co-ordination with the work of the International Criminal Court (ICC) has also been a priority. Officials of the Directorate General of Human Rights and Rule of Law met with ICC Prosecutor Karim A. Khan in May 2022 and in January 2023 (in addition to their participation in the high-level Ukraine Accountability Conference in The Hague on 14 July 2022). The Council of Europe's action in reinforcing the capacity of Ukraine's rule of law machinery contributes to ensuring accountability for alleged war-related crimes (including war crimes, crimes against humanity and possibly genocide) by enabling investigations and securing evidence in line with European human rights standards. This in turn facilitates the work of the ICC, whose mandate is to conduct its own investigations with respect to alleged crimes committed on the Ukrainian territory.

III. International Compensation Mechanism for Ukraine and a Register of damage: first steps to be taken

1. Current support for the establishment of the compensation mechanism

8. Pursuant to a well-established principle of international law, internationally wrongful acts entail an obligation of full reparation.⁷ These reparations should aim to erase consequences of illegality, provide redress to the injured party and to restore, as much as possible, the situation which existed before the wrongful act had occurred.

9. The exigent necessity to ensure comprehensive accountability in the context of Russian Federation's aggression against Ukraine has been underlined by the Council of Europe bodies on several occasions.⁸ On Human Rights Day on 10 December 2022, for instance, the Chair of the Committee of Ministers and the Secretary General called for "common and decisive action to ensure accountability for all crimes committed in Ukraine in the context of Russia's aggression". Moreover, the Committee of Ministers already noted with interest the initiative of the Ukrainian authorities on the establishment of a comprehensive international compensation mechanism and a Register of damage. It called on the member states and the Council of Europe to remain actively seized of the matter and engage in efforts to ensure accountability.⁹

10. The Parliamentary Assembly, at its January 2023 session, reiterated its call¹⁰ on member states to set up an international compensation mechanism and, as a first step, an international Register of damage; it considered that the Council of Europe should play a leading role in the setting-up and management of the future mechanism.¹¹

11. The Council of Europe's Action Plan for Ukraine "Resilience, Recovery and Reconstruction" 2023–2026 foresees that the Organisation shall provide expert support to the Ukrainian authorities in their efforts to ensure accountability and full reparation for the damage, loss or injury caused by Russian Federation's violations of international law in and against Ukraine.

12. At the global level, the United Nations General Assembly (UNGA), in its recent resolution of 14 November 2022¹², recognised that the Russian Federation must bear the legal consequences of its internationally wrongful acts vis-à-vis Ukraine, including by providing reparation for the injury and any damage caused by such acts. It further recognised a need to establish an international mechanism for reparation and an international Register of damage. The Register's task would be to record, in documentary form, evidence and claims on damage, loss or injury to all natural and legal persons concerned, as well as to the State of Ukraine. It would also promote and coordinate evidence-gathering.

⁷ Article 1 of the Draft Articles of Responsibility of State for Internationally Wrongful Acts (DARSIIWA) and commentary to Article 31, § 4, as regards the reparations. UNGA in its Resolution 56/83 of 12 December 2001. See also the Permanent Court of International Justice (PCIJ), *Case Concerning the Factory at Chorzów (Claim for Indemnity) (Jurisdiction)*, judgment of 26 July 1927, para. 55.

⁸ Committee of Ministers, "Consequences of the aggression of the Russian Federation against Ukraine – Accountability for international crimes", CM/Del/Dec(2022)1442/2.3, adopted by the Ministers' Deputies at their 1442nd meeting on 15 September 2022.

⁹ *Ibid.*, para. 3.

¹⁰ See, notably, PACE, Resolution 2463 (2022), "Further escalation in the Russian Federation's aggression against Ukraine", adopted on 13 October 2022, para. 13.6; Resolution 2436 (2022), "The Russian Federation's aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes", adopted on 28 April 2022, paras 11.9 and 13.2; Resolution 2448 (2022), "Humanitarian consequences and internal and external displacement in connection with the aggression of the Russian Federation against Ukraine", adopted on 22 June 2022, para. 10; Resolution 2434 (2022), "How to put confiscated criminal assets to good use?", adopted on 27 April 2022, para. 9.6; Resolution 2433 (2022), "Consequences of the Russian Federation's continued aggression against Ukraine: role and response of the Council of Europe", adopted on 27 April 2022, paras. 5 and 14.2.

¹¹ PACE, "Legal and human rights aspects of the Russian Federation's aggression against Ukraine", Draft Resolution, para. 18 of the Report adopted on 26 January 2023.

¹² UNGA Resolution of 14 November 2022 on "Furtherance of remedy and reparation for aggression against Ukraine".

13. Whereas the nature and form of the compensation mechanism as a whole remains to be further clarified, the urgency of setting up the Register is widely recognised, in order to secure evidence and prioritise the victim-centred approach by making timely redress to victims possible.¹³ The Register should be empowered to receive applications for registering damages and claims from:

- natural persons (e.g., victims of displacement, war crimes, conflict-related sexual violence, personal injury or death; those suffering from property damage or loss);
- legal entities (e.g., claims of privately-owned corporations, and other non-public legal entities, including NGOs, religious organisations and political parties);
- state-related entities (e.g. claims of public sector enterprises and state-owned or controlled entities, municipal entities); and
- the State of Ukraine (e.g. claims filed by the Government and/or other governments, including for damage caused to state and other public infrastructure, environment, resources).

¹³ This approach is aligned against the approach taken by the UN in the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by UNGA Resolution 60/147 of 16 December 2005.

2. Possible role of the Council of Europe

14. Putting in place such a comprehensive compensation mechanism will require in-depth reflection on the legal basis for its establishment and its efficient operation. However, pending this, the Council of Europe should play a leading role in the establishment and the functioning of the Register of damage, as a first and necessary step for the operation of any future compensation mechanism. In so doing, the Council of Europe would fulfil its role as an international organisation competent to take action in many areas of international law, including action with regard to respect for human rights and the international rule of law and to ensure compliance with its principles (including the victim-centred approach mentioned above).

15. It should be noted, in this respect, that the European Court of Human Rights (hereinafter “the Court”), as an international jurisdiction empowered to adjudicate claims of human rights violations, has a solid experience in examining cases related to damages caused in conflicts, including – precisely – in the framework of Russian Federation’s aggression against Ukraine. Indeed, the Court is already considering cases (e.g., inter-state cases concerning MH17 and Eastern Ukraine, in which admissibility decisions were already adopted¹⁴) and will continue considering inter-state and individual applications related to the aggression in the near future, as it has jurisdiction in respect of any violations and damages caused until 16 September 2022, a period that covers *ratione temporis* an important part of the aggression. The Court’s judgments as such, but also – most importantly – its case law relating to the establishment of responsibility, admissibility of evidence, evaluation of evidence, as well as individual reparation, can – and should – be the basis for the Register of damage and the future adjudication of compensation. Thus, beyond any binding and enforceable judgments or awards made by any international jurisdiction or any other dispute settlement institution, the Register could consolidate liabilities for the losses caused by aggression based on the Court’s case law and practice.

16. In this respect, the Court’s experience in dealing with numerous applications (both individual and inter-state), its capacity to categorise the situations and issues brought before it, as well as its ability to identify related systemic problems and to set possible compensation award principles and practices, would make the Court’s case management expertise instrumental for the proper and efficient functioning of the Register. Similar experience exists within the Committee of Ministers when supervising the execution of judgments of the Court.

17. It is to be recalled that both the Court, when making use of its pilot judgment procedure, and the Committee of Ministers have provided guidance on complex reparation processes and compensation schemes, by:

- identifying and establishing claimants’ eligibility, the rights holders and methods for determining the compensation amounts;
- setting the legal criteria for claims’ admission, resolving adjacent administrative issues, foreseeing judicial recourse, ensuring co-ordination and efficiency of procedures;
- designating priority areas by pilot experience transposed to “target groups” of claimants and framing a systemic problem to resolve it gradually;
- establishing global compensation schemes with defined criteria, repayment schemes for unpaid savings and judicial debts’ registration schemes.

¹⁴ Admissibility decisions in the cases of *Ukraine v. Russia* [Re: Crimea] [GC], Application Nos. 20958/14 and 38334/18, decision of 16 December 2020; *Ukraine and the Netherlands v. Russia* [GC], Application nos. 8019/16, 43800/14 and 28525/20, decision of 25 January 2023.

18. Should the Council of Europe engage in establishing and operating the Register of damage, it could also rely on and extensively use the experiences of the United Nations Compensation Commission (UNCC)¹⁵ and the United Nations Register of Damage (UNRoD)¹⁶ to define the concept and the model of the overall compensation mechanism and its structural relation with the Register.

19. The Secretariat stands ready to further explore the concrete modalities of establishment and operation of the Register, should the Committee of Ministers find this helpful.

¹⁵ The United Nations Compensation Commission (UNCC) was established in 1991 as the subsidiary organ of the UN Security Council. Its mandate was to process claims and to pay compensation for losses of individuals, corporations, governments, and international organisations suffered from the invasion and occupation of Kuwait by Iraq in 1990–1991.

¹⁶ The UN Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory is a subsidiary organ of the UN General Assembly. Its aim is to serve as a record, in documentary form, of damage caused to all natural or legal persons concerned by the Wall construction.

IV. A special tribunal for the crime of aggression against Ukraine

20. Soon after the aggression of the Russian Federation against Ukraine, voices were raised in favour of creating an ad hoc special international tribunal for the prosecution and punishment of the perpetrators of the crime of aggression committed against Ukraine. The need for the establishment of a novel institution, a “special tribunal”, was felt by the proponents of such initiatives especially due to the lack of prospects of prosecuting Russian perpetrators for the crime of aggression before the International Criminal Court (ICC).¹⁷ Even if suggestions have been made to reform the Rome Statute of the ICC in order to fill this jurisdictional gap, it is questionable whether this will be possible to achieve in a timely manner.¹⁸

21. The Secretary General discussed this issue with President Zelensky and Foreign Minister Kuleba in May 2022 during her visit to Kyiv, and the Secretariat embarked thereafter on a thorough legal analysis of the available options. Both statutory organs of the Council of Europe have issued statements on the matter. On 28 April 2022, the Parliamentary Assembly encouraged “*all member States to participate in setting up an ad hoc international criminal tribunal to prosecute the crime of aggression allegedly committed by the political leaders and military commanders of the Russian Federation against Ukraine, by way of a multilateral treaty between like-minded States*” as well as “*to examine ways and means for the Council of Europe as a whole to play an active role in setting up and operating such a tribunal, including by providing logistical or other technical assistance*”.¹⁹ In reply to the PACE and by decision of 15 September 2022, the Committee of Ministers “*welcomed ongoing efforts, in co-operation with Ukraine, to secure accountability for the crime of aggression against Ukraine*” as well as “*noted with interest the Ukrainian proposals to establish an ad hoc special tribunal for the crime of aggression*”.²⁰ During its January 2023 session, the PACE reiterated its support for the special tribunal by calling on the Heads of State and Government of the Council of Europe, at their forthcoming Summit, to “*support and lead the initiative to set up an ad hoc international criminal tribunal to investigate and prosecute the crime of aggression committed by the political and military leadership of the Russian Federation*” and the Council of Europe “*to have an active leading role in the establishment of such an ad hoc international criminal tribunal*.”²¹

¹⁷ In order for the ICC to have jurisdiction over the crime of aggression, either both states – the one on which the act of aggression is committed and the State whose nationals are the authors of the aggression – must be Parties to the Rome Statute and must also have ratified the Amendments on the crime of aggression to the Statute, or, the exercise of jurisdiction requires the referral by the UN Security Council, which can be vetoed by the Russian Federation.

¹⁸ See, in this regard, PACE, Resolution 2482 (2023) on “Legal and human rights aspects of the Russian Federation’s aggression against Ukraine”, adopted on 26 January 2023, para. 9., calling on member states and observer states to “*take the necessary steps to amend the ICC Statute’s jurisdictional regime, either by allowing referrals to the ICC by the United Nations General Assembly when the UNSC is blocked, or by removing the existing limits on the jurisdiction over the crime of aggression in order to make it consistent with the other crimes subject to its jurisdiction*”. According to the PACE “*these changes would reinforce the overall consistency, legitimacy and universality of international criminal justice, in particular with regard to the crime of aggression*” and “*the proposal to create a special tribunal to respond to the ongoing criminal aggression against Ukraine and the long-term reform of the ICC Statute enabling the ICC to prosecute and punish similar (future) aggressions are not mutually exclusive and should be pursued in parallel*.” See, also, C. Kress / S. Hobe / A. Nußberger, *The Ukraine War and the Crime of Aggression: How to fill the Gaps in the International Legal System*, 23 January 2023, at: justsecurity.org.

¹⁹ PACE, Recommendation 2231 (2022) on “The Russian Federation’s aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes”, adopted on 28 April 2022, paras 2.3 and 2.4.

²⁰ Committee of Ministers, CM/Del/Dec(2022)1442/2.3, *supra* n. 8. See also CM/AS(2022)Rec2231-final for the reply adopted by the Ministers’ Deputies at their 1445th meeting on 5 October 2022.

²¹ PACE, Recommendation 2245 (2023) on “The Reykjavik Summit of the Council of Europe: United around values in the face of extraordinary challenges”, adopted on 24 January 2023, para. 8.3.1; See also, PACE, Resolution 2482 (2023), *supra* n. 18, para. 6, reiterating the Assembly’s “*unanimous call on member States and observer States of the Council of Europe to set up a special international criminal tribunal for the crime of aggression against Ukraine, which should be endorsed and supported by as many States and international organisations as possible, and in particular by the United Nations General Assembly*”. Equally, the European Parliament, in its resolution of 19 January 2023 on the establishment of a tribunal on the crime of aggression against Ukraine (2022/3017(RSP)), underscored “*the urgent need for the EU and its Member States, in close cooperation with Ukraine and the international community, preferably through the UN, to push for the creation of a special international tribunal to prosecute the crime of aggression against Ukraine perpetrated by the political and military leadership of the Russian Federation and its allies and to find a legally sound, common way forward on this matter*”.

22. 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, as recognised by the Committee of Legal Advisers on Public International Law (CAHDI) in its opinion of 5 September 2022 to the Committee of Ministers.²²

²² Opinion of the Committee of Legal Advisers on Public International Law (CAHDI) on Recommendation 2231 (2022) of the Parliamentary Assembly of the Council of Europe on "The Russian Federation's aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes", 5 September 2022.

1. Options for establishing a special tribunal

23. A variety of options by which a special tribunal could be established have been put forward – all of which are ultimately treaty-based.²³ It has been suggested, for example, that a special tribunal could be created by a multilateral agreement between Ukraine and other interested states following the precedents of the Nuremberg International Military Tribunal (NIMT), the International Military Tribunal for the Far East (IMTFE) or the ICC.²⁴ This would indeed be a possibility offered under international law given that Ukraine has the sovereign right to delegate the exercise of its jurisdiction for the crime of aggression under its national criminal code to a tribunal established by treaty.²⁵ Alternatively, the definition of the crime of aggression found in Article 8*bis* of the Rome Statute of the ICC could be assumed also by the special tribunal. For both options, due regard should be given to the necessity for the chosen definition to reflect customary international law in order to avoid problems as to retroactivity or the principle of *nullum crimen sine lege*.

24. Another option could be that the special tribunal is established by agreement between Ukraine and an international organisation, notably the United Nations with its global and hence widest reach. A creation of the special tribunal directly by the United Nations, based on a United Nations Security Council (UNSC) resolution is legally possible but does not appear promising due to the likely exercise of its veto right by the Russian Federation. A resolution adopted by the United Nations General Assembly (UNGA), acting under its resolution 377 (“Uniting for Peace”), would not be able to create international obligations binding on any state. It does therefore not appear feasible to maintain that the United Nations could, as such, establish an international tribunal.²⁶ Instead, an UNGA resolution could invite the Secretary General of the United Nations to conclude an agreement between Ukraine and the United Nations for the creation of an international tribunal for the prosecution of the crime of aggression against Ukraine.²⁷ Such a bilateral treaty would be easier to finalise and could enter into force more rapidly than a multilateral one.

25. A further option could be a hybrid tribunal based on Ukrainian law and endorsed/supported by the UNGA. Such a hybrid tribunal would most probably be linked to Ukraine’s legal system with more or less strong international components, as a comparison between the precedents of, *inter alia*, the Extraordinary Chambers in the Courts of Cambodia (ECCC), the Kosovo*²⁸ Specialist Chambers or the Extraordinary African Chambers (EAC) show (even if none of them concern the crime of aggression).

²³ See, for a quite comprehensive list, O. Corten / V. Koutroulis, “Tribunal for the crime of aggression against Ukraine – a legal assessment”, December 2022, Fn. 6.

²⁴ An important fact differentiates the NIMT and the IMTFE, however, from the situation at hand with regards to Ukraine: The latter were created as an act of States exercising authority in the name of Germany and Japan respectively. No such authority is exercised over the Russian Federation.

²⁵ O. Corten / V. Koutroulis, *supra* n. 23, p. 17.

²⁶ This was different for the tribunals set up with the involvement of the UNSC, the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL), see O. Corten / V. Koutroulis, *supra* n. 23, p. 14-16.

²⁷ It needs to be born in mind in this context, however, that according to Article 18, paragraph 2 of the Charter of the United Nations “decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting”. Recommendations with respect to the maintenance of international peace and security are expressly included among such important questions.

²⁸ * All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

2. Questions of legitimacy and open legal issues

26. The discussed options raise complex issues, first of all as regards the (perceived) legitimacy of the establishment (allegations of selective justice) and operation or effectiveness of the special tribunal, considering that, at least as long as the war is still ongoing, one cannot count on the Russian Federation to accept the jurisdiction of the newly established institution.²⁹ Any tribunal that is not established by the UNSC is likely to face criticism as to its legitimacy; therefore, the stronger the international support (including the implication of international organisations, possibly also the Council of Europe, see paragraph 28 below) on which the newly-established institution can rely, the better its chances to respond to such criticism.

27. Furthermore, there are a number of legal issues that need to be addressed, in particular the issue of immunities under public international law. Again, the higher the international legitimacy, the easier it should be to overcome obstacles related to immunities. It might otherwise be difficult to argue for an exception to immunity *ratione materiae* for the most serious international crimes in general or, the crime of aggression, in particular.³⁰ While the question remains contested³¹, international jurisprudence appears to increasingly suggest that immunity *ratione personae* applicable to a limited number of state officials of the highest rank during their time in office (the so-called “troika” of Head of State, Prime Minister and Minister for Foreign Affairs of any state) would not apply in the prosecution of crimes under international law by international courts but only concern immunities from foreign criminal jurisdiction before national courts.³² A tribunal with some degree of hybridity established regionally or nationally without the participation of the Russian Federation might have more difficulty invoking exceptions to immunities. Yet also the apprehension of the leadership below the rank of the troika but who are equally responsible for the waging of a war of aggression is an important objective to pursue.

28. Finally, the creation of a special tribunal raises issues under Ukrainian constitutional law, arising notably from the prohibition of extraordinary/special courts and the requirement that judges and prosecutors must be citizens of Ukraine³³. It is thus doubtful whether a hybrid structure or extraordinary chambers of a domestic Ukrainian court could satisfy the prevailing prerequisites set by the Ukrainian Constitution. Amendments to the Ukrainian Constitution are, furthermore, not possible during a state of emergency or under conditions of martial law.

²⁹ This could be argued, for instance, in the case of the NIMT, the SCSL, the ECCC and the Kosovo* Specialist Chambers.

³⁰ O. Corten / V. Koutroulis, *supra* n. 23, p. 23-25. See, also the International Law Commission (ILC), Sixth report by Special Rapporteur Concepción Escobar Hernández, A/CN.4/722, 12 June 2018, para. 7.

³¹ CAHDI, *supra* n. 22, para. 18.

³² ICTY, *Prosecutor v. Slobodan Milošević*, Decision on Preliminary Motions, IT-99-37-PT, 8 November 2001, paras. 26; International Court of Justice (ICJ), Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), judgment of 14 February 2002, I.C.J. Reports 2002, p. 3, para. 61; SCSL, Prosecutor against Charles Ghankay Taylor, Case No. SCSL-2003-01-1, Appeals Chamber, Decision on Immunity from Jurisdiction, 31 May 2004, para. 51; ICC, The Prosecutor v. Omar Hassan Ahmad Al-Bashir, Case-MP- ICC-02/05-01/09 OA2, Appeals Chamber, judgment in the Jordan Referral re Al-Bashir Appeal, 6 May 2019, para. 101.

³³ See A. Komarov / O. Hathaway, Ukraine's Constitutional Constraints: How to Achieve Accountability for the Crime of Aggression, 5 April 2022, at: justsecurity.org. The authors conclude, inter alia, that, due to the constitutional constraints, “if any new tribunal is established under Council of Europe auspices, it must be designed as a purely international court rather than as a hybrid one”.

3. Possible role of the Council of Europe

29. The role of the Council of Europe as regards the special tribunal will depend on the political will of member states. Having taken a leading role in condemning the aggression by excluding the Russian Federation from the Organisation, the Council of Europe is well-placed to play a role in efforts towards achieving accountability for the crime of aggression committed by the leadership of the Russian Federation. The extent of the support by the Council of Europe could range, for example, from assistance in the selection and appointment of judges, the elaboration of rules of evidence and procedure, the provision of technical or legal support in the area of case management, to the secondment of experts.³⁴ In the same vein, the Council of Europe could offer its expertise and technical support already to an “interim prosecutor’s office”, the establishment of which is currently underway.³⁵

30. The mandate of the Organisation – as the guarantor of human rights, democracy and the rule of law in its member states – is broad enough to encompass support for any jurisdiction, including a special tribunal aiming at contributing to the fight against impunity and the establishment of the rule of law by ensuring accountability for the most serious international crimes. The prohibition to deal with “*matters of national defence*” (Article 1 (d) of the Statute of the Council of Europe) does not prevent the examination of issues aimed at securing peace and international security as long as they are merely founded on justice and international co-operation (leaving purely military aspects aside).³⁶

³⁴ See also PACE, Resolution 2482 (2023), *supra* n. 18, para. 6, considering that “*the Council of Europe should have an active leading role in the establishment of the special tribunal, participate in relevant consultations and negotiations and provide concrete expert and technical support for the process of establishment of the special tribunal*”.

³⁵ R. Goodman, *Toward an Interim Prosecutor’s Office in The Hague for the Crime of Aggression Against Ukraine*, 17 January 2021, at: justsecurity.org. See, also, PACE, Resolution 2482 (2023), *supra* n. 18, para. 8, calling on member States and the Council of Europe, pending the establishment of a special tribunal “*to support and provide concrete expert and technical assistance to the process of setting up of an Interim Prosecutor’s Office to investigate the crime of aggression, in close co-operation with the Prosecutor General’s Office of Ukraine*.”

³⁶ See the Statute’s preamble which refers explicitly to “*the pursuit of peace based upon justice and international co-operation*” as well as S. Schmahl, ‘The Council of Europe within the system of international organisations’, in: S. Schmahl/M. Breuer (eds.), *The Council of Europe – Its Law and Policies*, Oxford University Press, Oxford 2017, para. 37.04, referring to Committee of Ministers Resolution (53)18 on relations between the Council of Europe and NATO, adopted on 7 May 1953.

4. Synergies with the International Criminal Court (ICC)

31. As underlined by the CAHDI in its abovementioned opinion, any activity related to the special tribunal should be co-ordinated with the relevant mechanisms for investigating and prosecuting the most serious crimes that already exist at national, regional and international level – in particular the ICC. Close and effective co-ordination ensures the protection of victims and the effectiveness of justice. The aim should be to avoid duplication of structures with the ICC and diversion of resources from existing mechanisms as well as to comprehensively consider cost and feasibility issues.³⁷ Provided there is sufficient political support for the creation of a special tribunal, ways and means can be found to ensure complementarity between such a tribunal and the ICC with a view to preventing fragmentation of international criminal law (as developed by the ICC and other international criminal tribunals). The special tribunal could for example use the ICC's substantive and procedural law as well as share evidence.³⁸

32. Amendments to the Rome Statute of the ICC, with the aim to removing currently existing obstacles to the exercise of its jurisdiction over the crime of aggression could be pursued in parallel in order to avert any potential damage to the rules-based international legal order. In this respect, it should also be borne in mind that there seems to exist already a constitutional basis for Ukraine to ratify the Rome Statute of the ICC, including the "Kampala amendments" on the crime of aggression. Such a ratification should be encouraged by the international community.

³⁷ CAHDI, *supra* n. 23, para. 10.

³⁸ See D. Scheffer, Forging a Cooperative Relationship Between International Criminal Court and a Special Tribunal for Aggression Against Ukraine, 25 October 2022, at: [justsecurity.org](https://www.justsecurity.org).