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“Council of Europe’s answer to the aggression against a member State – from expulsion to providing accountability”

CAHDI Seminar on the Special Tribunal for the Crime of Aggression, 10 April 2024

Dear Ambassadors, ladies and gentlemen. I would like to thank the CAHDI for inviting me to speak today in this important topic that the Parliamentary Assembly has been closely following since 2022.

Soon after the full-scale invasion of Ukraine by the Russian Federation (RF) in February 2022, more than two years ago, the Council of Europe as a whole and its Parliamentary Assembly took a leading role in condemning the war of aggression against Ukraine¹. As you all know, the Committee of Ministers took the unprecedented decision to exclude the Russian Federation from the organisation, finding that the aggression constituted a serious violation by Russia of its obligations under the Statute of the Council of Europe. This was in line with the unanimous position previously expressed by the Assembly in its [Opinion 300 \(2022\)](#). The Assembly considered that the large-scale attack qualified as a “crime against peace” under the Nuremberg Charter and constituted an “aggression” under international law.

Since then, the Russian Federation’s aggression against Ukraine and its legal consequences have been at the core of the work of the Parliamentary Assembly. The Committee on Legal Affairs and Human had a first report in April 2022². The [resolution](#) (Resolution 2436 (2022)) that was adopted by the Assembly expressed unanimous support for the establishment of an *ad hoc* international criminal tribunal to investigate and prosecute the crime of aggression committed by the political and military leadership of the RF. The Assembly was thus the first body of an international character to support the creation of such a tribunal. As regards the

¹ PACE focus page: [Russian Federation's war of aggression against Ukraine: special page \(coe.int\)](#)

² ["The Russian Federation \(RF\)'s aggression against Ukraine: ensuring accountability for serious violations of International humanitarian law and other international crimes"](#) (Mr Pocij Rapporteur).

modalities for its establishment, the resolution recommended that the tribunal be established by a group of like-minded States in the form of a multilateral treaty³.

Our Committee adopted a second report on accountability called “Legal and human rights aspects of the Russian Federation’s aggression against Ukraine” in January 2023 (Mr Damien Cottier Rapporteur). For this work we heard several experts in international law, including Dapo Akande who is our distinguished moderator today. On the basis of this report, PACE unanimously adopted [Resolution 2482 \(2023\)](#):

- With this resolution, the Assembly expressed a clear position on the different aspects that must be part of a comprehensive system of accountability for Russia's violations of international law in the context of its aggression against Ukraine. I will focus today on the first aspect, the crime of aggression.
- The Assembly considered that the acts of aggression committed by the Russian Federation meet the threshold of the crime of aggression as set out in the ICC Statute (Art. 8 *bis*) and that the Russian political and military leaders responsible should be identified and prosecuted for this crime. Given that the ICC has no jurisdiction over the current crime of aggression v. Ukraine (in the absence of a UNSC referral and Russia not being party to the ICC Statute), the Assembly reiterated its 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 UN General Assembly. It also asked the 4th Summit of Heads of State and Government of the Council of Europe (May 2023) to give its political support to the creation of such a tribunal and provide the Council of Europe’s concrete expert and technical support to its establishment, in close co-ordination with other interested organisations and States.

³ In the explanatory memorandum, the Rapporteur, while also referring to the possibility of establishing the tribunal through an agreement between Ukraine and an international organisation, for instance the Council of Europe, expressed a preference for the “multilateral treaty” option. [par. 29: “The competence of the Council of Europe to assist Ukraine in the establishment of a criminal accountability mechanism could be justified by the fact that the ongoing aggression amounts to a serious breach of the Statute of the Council of Europe and that in response to large-scale human rights violations committed on the territory of one of its members, member States have a collective responsibility to further the aims of the Organisation and safeguard its common ideals and principles, in line with Article 1 of the Statute. In addition, the Preamble of the Statute establishes a clear link between the pursuit of peace and justice, supporting the idea that justice and accountability for gross human rights violations are key to the restoration of peace.”]

- Such a special tribunal should have the following features, according to the Resolution:
 - Jurisdiction *ratione materiae* limited to the crime of aggression against Ukraine, in line with the definition of Article 8bis of the ICC Statute and customary international law.
 - Temporal jurisdiction: aggression started in February 2014 (Crimea) not in 2022.
 - Have also jurisdiction over the role and complicity of Belarusian leaders.
 - Statute should address the issue of personal immunities of incumbent high-ranking officials (e.g. troika members: head of state, head of government, minister of foreign affairs) and say that they are not applicable⁴,
 - Statute should contain list of fair trial rights.
 - Role would be complementary to the ICC and not affect its jurisdiction over other crimes⁵.
 - Seat: in The Hague, to ensure complementarity with the ICC.
 - As regards the type of tribunal (purely “international” or “hybrid”) or its legal basis (“multilateral treaty” or “agreement between Ukraine and an international organisation”), the resolution left this question open. According to the rapporteur, this should be decided according to the consensus that emerges among the States and actors concerned.
 - In parallel to the creation of a special tribunal and in order to be credible, States, including Ukraine, should ratify the ICC Statute and the Kampala amendments on the crime of aggression. They should also try to amend the ICC Statute’s jurisdictional regime on the crime of aggression⁶.

In May 2023, at the Reykjavik Summit, the Heads of State and Government recognized the role played by the Committee and Ministers and the Assembly in providing a robust response

⁴ In line with the current practice of other international criminal tribunals [case-law of the ICC and UN Special Tribunal for Sierra Leone].

⁵ Other crimes committed in Ukraine (war crimes, crimes against humanity, genocide) which fall under the jurisdiction of the ICC by virtue of a declaration submitted by Ukraine in accordance with the ICC Statute.

⁶ Either by allowing referrals to the ICC by the UNGA (when the UNSC is blocked) or by removing the existing limits on jurisdiction over crime of aggression (which do not apply to other crimes). These changes would reinforce legitimacy and universality of international criminal justice and allow the ICC to prosecute similar aggressions in the future.

to Russia's war of aggression. As regards the Special Tribunal, the Heads of State and Heads of Government welcomed international efforts and progress towards its establishment. Following PACE's previous language, they stated that that the Council of Europe should participate in relevant consultations and negotiations.

More recently, the Assembly, in its [Resolution 2516 \(2023\)](#) (October 2023, Political Affairs Committee), has explicitly supported the activity of the Core Group and called on it to come to an agreement of the legal form of the tribunal as soon as possible, taking into account the need to maximise its international legitimacy and to minimise legal challenges (immunities).

The Committee on Legal Affairs and Human Rights of the Assembly has a pending follow-up report on "Legal and human rights aspects of the Russian Federation's aggression against Ukraine". This report is due for debate in the Plenary during the June part-session. Its Rapporteur, Mr Davor Ivo Stier, published a statement addressed to the Core Group last November, where he called for a substantial contribution of the Council of Europe. While still leaving the model issue open (agreement between an international organisation such as the UN and Ukraine or a multilateral treaty), he insisted that the tribunal should be "as international as possible", partly to overcome legal challenges based on immunities⁷.

What seems clear today is that the UN is unlikely to take the lead in the establishment of a special tribunal, for instance through a vote in the UNGA and/or an agreement with Ukraine. This incapacity of the UN could explain and justify the Council of Europe's willingness to assume its responsibilities in this area and take on the task of establishing such a tribunal. I will not go into the legal issues concerning the Council of Europe's powers to take such action under its Statute, which have already been covered by other panelists. But I would like to

⁷ [PACE rapporteur urges swift creation of a tribunal to try Russia's aggression against Ukraine, 'as international as possible' \(coe.int\)](#)

"To maximise the future tribunal's international legitimacy and authority, and to minimise potential legal risks linked to issues of the personal and functional immunity of senior officials, the tribunal should be as international as possible – ideally set up by an agreement between the UN and Ukraine based on a majority vote of the UN General Assembly, or by a multilateral treaty between the 'core group' countries endorsed by as many international bodies as possible, including the Council of Europe, or even as a strongly internationalised hybrid Ukrainian tribunal, located in The Hague and staffed by Ukrainian and international judges and prosecutors.

The Council of Europe could make a substantial contribution to the future tribunal. It could host a diplomatic conference to negotiate a multilateral treaty establishing the tribunal and make available its legal expertise and experience in negotiating international agreements, with the participation of interested non-member states. After adoption of the treaty, it could act as depositary so that no participating state needs to be singled out for this task. And the Council of Europe could also help to generate synergies with compensation mechanisms, including the newly established Register of Damage, and with the European Court of Human Rights."

conclude by saying that the Parliamentary Assembly is ready to support the establishment of an international or 'internationalised' tribunal for the crime of aggression against Ukraine in whatever form it takes, and as soon as possible. If there is sufficient political will for the Council of Europe to fill the gap left by other international organisations and take the lead, the Assembly will certainly support this, to be coherent with its previous positions and its unwavering support for Ukraine and accountability. Some say that this is mainly a European problem. I disagree, because the crime of aggression affects the international community as a whole and calls into question the international law-based order. But if others do not or cannot play their part, Europe will have to use its own legal tools and be innovative, in order to find a solution and ensure accountability for the crime of aggression. Impunity is not an option for Ukraine and is not acceptable for the Council of Europe.

Thank you very much for your attention.