Presentation by Ms Kerli VESKI,
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Public International Law (CAHDI)

at the meeting of the Drafting Group on the Eradication of Impunity for Serious Human Rights Violations (CDDH-ELI)

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Mister Chair,
Members of the Drafting Group,
Ladies and Gentlemen,

I represent the Committee of Legal Advisers on Public International Law of the Council of Europe (CAHDI), an intergovernmental committee composed of the Legal Advisers of the Ministries of Foreign Affairs of the member and observer states of the Council of Europe (CoE). One of the main tasks of the CAHDI is to provide **legal opinions** on issues related to public international law at the request of the Committee of Ministers or at the request of other Steering or ad hoc Committees, transmitted via the Committee of Ministers.

In the framework of a pan-European setting, including not only the observer states of the Council of Europe but also 4 further observers states (Australia, Israel, Republic of Korea and New Zealand) and 12 participating international organisations,[1] the CAHDI is a legal forum for coordination, but also for discussion, reflection and advice - a **laboratory of ideas**, essential for the development of public international law. Its biannual meetings enable all participants to inform each other about topical issues and to exchange national experiences and practices, during the official two-day meetings and at their margins, sometimes also in the context of additional seminars. All in all, the CAHDI counts representatives from 67 states and international organisations. In this respect, CAHDI is building bridges and establishing personal contacts among Legal Advisers on public international law beyond Europe and across continents. CAHDI plays also an important role in fostering co-operation between the Council of Europe and the United Nations, and especially with the **International Law Commission** (ILC) to the work of which I will come back later in the course of my presentation on several occasions.

[1] EU, UN, OECD, CERN, The Hague Conference on Private International Law, INTERPOL, NATO, ICRC, OSCE, AALCO, IDLO and the Permanent Court of Arbitration.

The two main issues that I would like to address you with today are the following:

1. Whether the revised Guidelines should widen their scope from that of the 2011 Guidelines and, this time, explicitly include international crimes?
2. The state of personal and functional immunities under current international law and the significance of these for the Guidelines on the Eradication of Impunity for Serious Human Rights Violations

Explicit inclusion of international crimes – a clear YES

Starting with the first point, my reply to the question of whether the revised *Guidelines on eradicating impunity for serious human rights violations* should explicitly include international crimes would definitely and simply be yes. In the middle of the 1990s before the International Criminal Court became a reality M. José Ayala-Lasso, the former United Nations High Commissioner for Human Rights, described the prevailing situation as follows: *"A person stands a better chance of being tried and judged for killing one human being than for killing 100,000."* Although positive developments have since been achieved in the field of international criminal law, e.g., by way of intensified domestic prosecutions and by heightened reliance on universal jurisdiction, the fight against impunity remains a constant battle. Any Guidelines on Eradication of Impunity should therefore not leave out international crimes.

In general, speaking of "serious human rights violations" without expressly mentioning **international crimes** sounds dangerously like stopping halfway – leaving an inexplicable gap, especially when looking at the current realities facing our continent devastated by an aggressive war initiated by the Russian Federation against Ukraine. International crimes – war crimes, crimes against humanity, genocide and the crime of aggression – often legally require a nexus to an existing internal or international armed conflict (war crimes) or, even without requiring such a link (crimes against humanity), typically still occur in the context of a conflict. Since the start of the full-scale invasion of Ukraine by the Russian Federation the news has been full of reports of alleged war crimes and crimes against humanity having been committed. Equally, of course, already the waging of an aggressive war as such amounts to the crime of aggression. With this in mind, the correlation between a war being fought and the heightened risk of international crimes being committed is obvious.

Bearing that in mind, we need to acknowledge the ongoing work in the Core Group led by Ukraine to establish a **Special Tribunal for the crime of aggression** of the Russian Federation against

Ukraine and the initiative led by Germany to review the Kampala amendments of the Rome Statute to strengthen the International Criminal Court's jurisdiction for the crime of aggression.

Therefore, it appears timely and necessary to include, in any discussion on impunity for serious human rights violations in Europe, the duty of states to prevent, investigate and prosecute the commission of these international core crimes.

There is in particular one set of international crimes, **crimes against humanity**, that has been looked at with particular thoroughness by the international community in recent years. The crime of genocide and war crimes are already the subject of global conventions that require States within their national law to prevent and punish such crimes, and to cooperate among themselves toward those ends. By contrast, there is no global convention dedicated to preventing and punishing crimes against humanity and promoting inter-State cooperation in that regard. At its 71st session in 2019, the ILC adopted, on second reading, the entire set of Draft articles on prevention and punishment of crimes against humanity (i.e., draft preamble, 15 draft articles and a draft annex, together with commentaries thereto) and decided to recommend these to the UN General Assembly, in particular, that a convention would be elaborated by the General Assembly or by an international conference of plenipotentiaries on the basis of the draft articles. Whether this recommendation will be followed upon by the General Assembly is at the moment still unknown as the examination of the draft articles continues in the Sixth Committee of the UNGA. Be that as it may, the ILC draft articles represent the current gold standard for crimes against humanity foreseeing, for instance, an obligation upon states to criminalise crimes against humanity under their national law, to take effective measures to prevent crimes against humanity and to ensure a prompt, thorough and impartial investigation of acts alleged to constitute crimes against humanity. States shall, furthermore, refrain from expelling, returning, surrendering or extraditing a person to a state where there are substantial grounds for believing that he or she would be in danger of being subjected to a crime against humanity (*non-refoulement*). Many of these obligations sound familiar as principles already included in the Guidelines you are due to revise. Yet their current version does not take account of any specificities of international crimes in general or crimes against humanity in particular.

Dogmatically, the two branches of law follow **distinct objectives**: International criminal law is based on the criminal responsibility of the individual perpetrator for the acts he or she has committed and that fulfil the objective and subjective elements of an international crime, whereas international human rights law puts the state as such – instead of the individual – under the obligation not only to ***respect*** human rights and to refrain from violating them but also to ***protect*** individuals and groups of individuals against human rights abuses, including the duty to

criminalise certain behaviour as well as to investigate and prosecute abuses and to hold perpetrators responsible. The existence of an **intrinsic link** between these two distinct branches of law cannot, however, be denied. Serious human rights violations may constitute crimes against humanity under international criminal law, and, vice versa, the omission by the state to hold perpetrators of international crimes accountable within its jurisdiction can seriously violate the human rights of the victim of the international crime. While the two fields of law differ as to their vantage point on the issue, there is considerable overlap as to their substance. Moreover, some selected topics already addressed in the current Guidelines as well, such as amnesties, statute of limitations and the right to a fair trial are topics of paramount importance for both of these bodies of law.

On the international level, a trend can also be identified towards dealing with situations of systemic and widespread patterns of serious human rights violations committed in the context of a conflict in a **comprehensive manner**. To reach the shared goal of justice and accountability one must create robust linkages between criminal justice, reparation, truth-seeking and measures against recurrence. The objectives of "holding perpetrators accountable" and "ending a culture of impunity" must logically go hand in hand. It appears almost artificial to separate serious violations of human rights and international crimes in this endeavour. Also the 2005 *Updated United Nations Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* (the so-called Orentlicher Principles) highlight the duty of states to ensure "that those responsible for serious crimes under international law are prosecuted, tried and duly punished".

The **Council of Europe** is a particularly well-fitted contributor to the fight against impunity also in the context of international crimes. For one, the European Court of Human Rights has dealt with cases related to international crimes on a number of occasions, e.g., in the context of the right to life under Article 2 of the ECHR or the compatibility of domestic proceedings with Article 7 of the ECHR (principle of legality/no punishment without law). Moreover, the Organisation has contributed significantly to facilitating international cooperation in criminal matters through its arsenal of international treaties in this field (e.g., the 1957 European Convention on Extradition [ETS No. 24] and the 1959 European Convention on Mutual Legal Assistance in Criminal Matters [ETS No. 30]); treaties that can equally be applied to international crimes. Most recently, the Council of Europe has been active in accountability efforts for Ukraine by establishing the Register of Damage Caused by the Aggression of the Russian Federation against Ukraine and through the active participation of the Secretary General, represented by her Legal Adviser, in the Core Group on the establishment of a Special Tribunal for the crime of aggression of the Russian Federation against Ukraine.

Another aspect bearing great importance to efforts to fight impunity for international crimes is the obligation to extradite or prosecute (***aut dedere aut judicare***). The ILC completed its work on the issue with the adoption of a Final Report in 2014 noting that "*States have expressed their desire to cooperate among themselves, and with competent international tribunals, in the fight against impunity for crimes, in particular offences of international concern, and in accordance with the rule of law*". The Report further referred to the Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, in which the Heads of State and Government and heads of delegation attending the meeting on 24 September 2012 committed themselves to "*ensuring that impunity is not tolerated for genocide, war crimes, crimes against humanity and for violations of international humanitarian law and gross violations of human rights law, and that such violations are properly investigated and appropriately sanctioned, including by bringing the perpetrators of any crimes to justice, through national mechanisms or, where appropriate, regional or international mechanisms, in accordance with international law …*". Also the CAHDI has previously dealt with the principle of *aut dedere aut judicare* recalling, for example, that "*a number of international treaties on specific offences establish the principle of aut dedere aut judicare requiring the custodial State to prosecute the suspect in case of non-extradition*" and that "*the principle […] is incorporated also in a number of conventions concluded within the Council of Europe [that] oblige their State parties to prosecute or extradite offenders in their custody*".[2] Notwithstanding the above, the CAHDI underlined that "*the primary responsibility to prosecute lies with the State or States with direct jurisdictional links, notably those with territorial or personal jurisdiction*".[3] In my view it would be useful – or even necessary – for the revised Guidelines to include the principle of *aut dedere aut judicare*.

Also, with the aim to facilitate international cooperation in criminal matters and to strengthening the fight against impunity, **Ljubljana-The Hague Convention on International Cooperation** in the Investigation and Prosecution of the Crime of Genocide, Crimes against Humanity, War Crimes and other International Crimes was negotiated among states last year and is now open for signature. The initiative addresses the primary responsibility of states to prosecute crimes and the need to improve the effectiveness of the investigation and prosecution of these crimes at national level.

Immunity of State officials from foreign criminal jurisdiction

Turning then to the second point in my presentation – that of immunities – I will shortly present to you the current state of play as regards the ILC's work in this field. In a way, you could say that

[2] Reply of the Committee of Legal Advisers on Public International Law (CAHDI) on Recommendation 2201 (2021) of the Parliamentary Assembly, 24 September 2021, para. 6.
[3] Ibid. para. 7.

the message I just endeavoured to convey to you as regards the necessity to include international crimes into the revised Guidelines is somewhat thwarted by the "Immunity of State officials from foreign criminal jurisdiction".

The word ***foreign*** deserves to be underlined in this context for two reasons. First, international law naturally places no restrictions on the ability of a state to prosecute its own nationals for international crimes. And, secondly, the ILC's work on the topic concentrates on domestic prosecutions and therefore only has indirect effect on the discussion of immunities that should apply when prosecutions of international crimes are carried out by international courts and tribunals. In this regard, the CAHDI stated in one of its opinions to the Committee of Ministers on a PACE Recommendation that *"[w]ith the exception of the tribunal created by the Security Council resolution, one of the most difficult subjects to address from the legal standpoint is the question of immunity from criminal jurisdiction, based on customary international law, which particularly applies to certain State officials (so called Troika: Head of State, Prime Minister and Minister for Foreign Affairs of any State).*"[4] The CAHDI further notes, within the same opinion, that "*the law on immunities is under constant evolution as evidenced by the case law of the International Criminal Court, the Special Court for Sierra Leone and the work of the International Law Commission*."[5] One can sense here the open-endedness of the debate when it comes to the issue of immunities in the framework of international prosecutions of international crimes. The question of immunities at the international level does not, however, need to be an imminent concern for the revision of the Guidelines you are tasked with. Indeed, this is a question that is either addressed in instruments constituting such courts and tribunals or, alternatively, left for the judges of the same institutions to decide upon. It is my understanding that, in the context of the Guidelines to be reviewed, you should be looking at the question of immunities from a purely national angle, albeit with an encouragement to enhance international cooperation when it comes to the investigation and prosecution of international crimes.

With these caveats, I turn back to the ILC's work on the topic of "Immunity of State officials from foreign criminal jurisdiction", which was commenced in 2007, at the Commission's 58th session, where the issue was first placed on the long-term programme of work and to the consideration of which priority was later given. Thanks to years of tireless efforts on what has proven to be quite a controversial topic amongst scholars and states alike, the ILC has been able to provisionally adopt most of the draft articles. A complete draft text remains, however, to be finalised in the

[4] 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 2023, para. 7.
[5] Ibid. para. 8.

future. Throughout the process states have actively submitted their comments on the individual draft articles showing significant divergence of views on a number of issues.

As to the substance addressed in the ILC draft articles so far, the current draft articles state that immunity ***ratione personae*** applies to Heads of State, Heads of Government and Ministers for Foreign Affairs, i.e., to the members of the so-called Troika, only during their term of office (draft Articles 5 and 6). This covers all acts performed during or prior to their term of office. As such, international law as it currently stands foresees no exceptions to personal immunities of members of the Troika when it comes to foreign prosecutions.

While members of the Troika therefore enjoy all-encompassing personal immunity while in office, he or she loses this immunity, according to the current draft Articles, upon leaving office. From this moment on, the outgoing member of the Troika, as with any other state official, is only protected by immunity *ratione materiae,* i.e., the so-called **functional immunity** that covers acts performed in the discharge of the official's mandate and which can be described as 'official acts' (draft Article 3.d). It is exactly at this point where the ILC draft Articles envisage the introduction of exceptions to immunity. Draft Article 7 outlines the *"Crimes under international law in respect of which immunity ratione materiae shall not apply*". The crimes currently warranting an exception to immunity as listed by the ILC are: genocide, crimes against humanity, war crimes, apartheid, torture, and enforced disappearance. Many states have expressed dissatisfaction at the exclusion of the crime of aggression from these exceptions, while some have criticised their very articulation. This is also one of the questions of crucial importance in the context of consultations for the possible establishment of a Special Tribunal for the Crime of Aggression against Ukraine.

In sum, the ILC has attempted to establish clear restrictions on immunities when it comes to cases of the most grievous of international crimes, providing a valuable contribution to fight impunity in this important area. The diverging views expressed in the comments by states to the ILC reveal the absence of consensus on whether these rules identified by the ILC indeed reproduce already codified international law, reflect current state of customary law or, rather, should only be considered as ***lex ferenda***. In my view, an inclusion of international crimes into the revised Guidelines as well as clear rules on when and how personal and functional immunities should apply in this context could contribute towards dispersing the concerns of states that are so far more hesitant than others to acknowledge that the fight against impunity for international crimes necessitates this step. In their comments to the ILC, all states emphasise the importance of immunities in international law as a paramount safeguard to the international legal order. While this is undeniably true and reflective of international law as it stands today, this does not have to

mean that anything short of a blanket immunity of state officials would undermine the protection of sovereignty and independence of states.

Conclusion

I would like to end with a quote by a former Judge of the International Criminal Court, Hans-Peter KAUL, who said, at an international conference in Bangkok, Thailand, some 10 years ago that "*peace, absence of war and violence is the best protection, the best guarantee against human rights violations. War making, armed conflicts and political violence are the deadliest threat to human rights*."[6] In my view, at this hour in European history, it is paramount to understand the fight against impunity as one that also encompasses accountability efforts for international crimes – whether in the domestical, transnational or vertically in an international setting.

On behalf of the CAHDI, I would like to express my sincere gratitude for the opportunity to address this Drafting Group today. Let me further assure you that once you move on to the drafting exercise of the revised Guidelines, the CAHDI stands ready to assist you with regard to all issues pertaining to public international law.

I thank you for your attention.

[6] Judge Hans-Peter Kaul, Address at the international conference "The Protection of Human Rights through the International Criminal Court as a Contribution to Constitutionalization and Nation-Building", 21 January 2011 at the German-Southeast Asian Center of Excellence for Public Policy and Good Governance (CPG) Thammasat University – Faculty of Law, Bangkok, Thailand.