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Exchange of views with the

International Law Commission (ILC)

Speaking Notes

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- Madame Chair, ladies and gentlemen, Members of the International Law Commission.

- It is a great privilege and pleasure for me to address your distinguished Commission today as the Legal Adviser to the CoE on issues that have in recent times kept me and my colleagues in Strasbourg extremely busy. Such issues relate to public international law and could hence, I believe, be of common interest.

- As you can certainly guess, the points I would like to address in my presentation will closely relate to the war of aggression waged by the Russian Federation against Ukraine – a topic that was at the very heart of the 4th CoE Summit of Heads of State and Government held in Reykjavik/Iceland this May. The Summit was organised, after a break of 18 years, with a view of recommitting to the common values and standards uniting the member States and to consider the role that the CoE should play in the new geopolitical realities ("*Zeitenwende*").

- I will divide the time allocated to me between two main aspects: First, '**The consequences of the exclusion of the Russian Federation from the CoE'**, and secondly, '**Accountability for Ukraine and the CoE's role therein'**.

The consequences of the exclusion of the Russian Federation from the CoE

- There is no doubt that Europe woke up to a very different world in the morning of February 24, 2022: to a world, where the very foundations of international order had been challenged. Faced with the Russian aggression against Ukraine, qualified by the PACE as an "unprecedented attack on peace and security, international law and the most basic values which are the foundation of the CoE", the CoE was one of the first international organisations to take action globally.

- On 25 February 2022, a day after the full-scale invasion of Ukraine started, the Russian Federation was suspended from its rights of representation in the CoE. This is a measure foreseen in Article 8 of the Statute of the Organisation.

- On 15 March 2022, the Russian Federation announced its withdrawal from the Organisation and its intention to denounce the ECHR.

- However, already on the following day, on 16 March 2022, the CM decided to expel the aggressor country from the Organisation with immediate effect after 26 years of membership. The decision was taken in the context of the procedure already launched under Article 8 of the Statute which foresees, as an *ultima ratio*, the cessation of the membership for a state that has seriously violated Article 3 of the Statute of the Organisation.

- Article 3 of the Statute encloses the core values of the CoE: the rule of law, including international rule of law, human rights and cooperation. As pointed out by the Parliamentary Assembly in its opinion – unanimously adopted on 15 March 2022 - the Russian Federation could not be considered to comply with "the commitments deriving from its membership of the CoE - to settle international

and internal disputes by peaceful means, rejecting resolutely any threats of force against its neighbours, and to denounce the concept of treating neighbouring States as a zone of special influence called the near abroad." Both statutory organs of the CoE thus considered the Russian behaviour against Ukraine to be incompatible with the status of a CoE member state.

European Convention of Human Rights

- Given that the expulsion of the Russian Federation was the first one in the 73 years of history of the CoE, the Organisation was confronted with a series of questions of public international law that had not been examined in detail before. The situation is not comparable to the case of Greece when the latter, following the military coup of 1967, withdrew from the CoE in 1969 before the CM was able to apply any measures under Article 8 of the Statute.

- First, given that the ECHR is a convention only open to member states of the CoE, the Russian Federation could no longer remain party to the Convention after its expulsion. Acting in harmony, both the CM and the Court interpreted the relevant provision in the ECHR, Article 58, to the effect that the status as High Contracting Party to the Convention would not end immediately after the cessation of membership in the Organisation. In analogy to a situation of a denunciation of the Convention by a member State, the CM and the Court considered that a High Contracting Party is released of its obligations under the Convention only 6 months after the cessation of membership, i.e. as of 16 September 2022 in the case of the Russian Federation.

- Accordingly, the Court remains competent to adjudicate on applications directed against the Russian Federation in relation to acts or omissions that occurred until 16 September 2022. It is important to stress that these represent the first six

months of the largescale invasion of Ukraine which is likely to generate an important influx of new applications against the Russian Federation before the Court involving complex questions at the intersection of human rights and international humanitarian law. Although the Russian Government has since March 2022 abstained from further participation in ongoing proceedings before the Court, it remains under the duty to cooperate with the Court in proceedings where it is a respondent. The Court may draw such inferences as it deems appropriate from a Party's failure or refusal to participate effectively in the proceedings (see Rule 44C of the Rules of Court).

- The Court is thus continuing to process over 15,000 individual applications lodged against the Russian Federation. Since the beginning of the year, over 1,500 communicated cases have been decided by committees of three judges and over 4,000 cases have been communicated. Leading judgments in cases such as *Fedotova*, on recognition of same-sex couples, *Navalnyy*, concerning the applicant's poisoning, *S.P. and others*, on the caste system in prisons, and *Glukhin* on the use of facial recognition technology, have been handed down.

- In addition to individual applications, there are furthermore numerous inter-State cases pending against the Russian Federation before the ECtHR, 10 of them deriving from applications lodged by Ukraine. The Court is the only international court which is examining, at the merits stage, events in Ukraine dating back to 2014 and up to the full-scale invasion in February 2022.
- On 25 January 2023, the Grand Chamber declared the first one of these applications in the case of *Ukraine and the Netherlands v. Russia* partly admissible. The case concerns complaints related to the conflict in eastern Ukraine involving pro-Russian separatists which began in spring 2014. The Government of Ukraine principally complains about alleged ongoing patterns ('administrative practices') of violations of several articles of the Convention by

separatists of the 'Donetsk People's Republic' and the 'Lugansk People's Republic' as well as by members of the Russian military. The Government of the Netherlands complains about the shooting down of Malaysia Airlines flight MH17 in eastern Ukraine on 17 July 2014, which resulted in the deaths of 298 people, including 196 Dutch nationals.

- The CM will, furthermore, continue to supervise the execution of the judgments and friendly settlements concerned which the Russian Federation is required to implement. According to decisions taken by the CM, the Russian Federation is invited to continue to participate in the meetings of the CM when the latter supervises the execution of judgments with a view to providing and/or receiving information concerning judgments where the Russian Federation is the respondent or applicant state, without though the right to participate in the adoption of decisions by the Committee nor to vote. So far, however, the Russian Federation has refrained from availing itself of this possibility. It will be a challenge for the CM, as outlined also in the Declaration adopted at the 4th Summit,[1] to develop means to execute judgments in relation to a non-cooperating respondent State which is no longer a High Contracting Party.

'Open' conventions

- Following the expulsion of the Russian Federation from the CoE, another unprecedented situation of interest from the point of view of international treaty law arose in relation to the so-called 'open' conventions elaborated in the framework of the CoE.

[1] Reykjavík Declaration – United around our values, 16-17 May 2023: "Affirm the need to make every effort to ensure the execution of the Court's judgments by the Russian Federation, including through the development of synergies with other international organisations such as the United Nations."

- Unlike the ECHR, most of the 224 CoE conventions are also open to non-member states of the Organisation. The Russian Federation has so far denounced only one, the Criminal Law Convention on Corruption and thus remains party to 41 of them. Its exclusion from the Organisation had no bearing on its quality as contracting party to these conventions – in accordance with the principle of *pacta sunt servanda*. Unsurprisingly, and understandably, some member states consider it problematic to continue treaty relations with a State that has so blatantly violated all the values on which the conventional regime established within the CoE is based. This is especially the case with regard to collaboration in monitoring or other follow-up mechanisms foreseen by many of the conventions and in the framework of which meetings and visits take place on a regular basis.

- Although Articles 60 and 62 of the VCLT appear to offer solutions for terminating or suspending the operation of a treaty as a consequence of its breach or due to a fundamental change of circumstances, an in-depth analysis of the case at stake - in which also the CAHDI was closely involved at different stages[2]- revealed that it would not be easy to remedy the situation via the procedures foreseen in the VCLT. First, the applicability of Article 60 of the VCLT is quite limited in the area of human rights treaties, a category to which most of the treaties elaborated within the CoE belong. Article 62 of the VCLT, on the other hand, is not well-fitted to be applied in a situation in which it is the intention of the other Contracting Parties to force a defaulting state to withdraw from the treaty against its will while the other Contracting Parties continue to maintain the contractual relationship. Moreover, any action under Article 60 or 62 of the VCLT would have required unanimous agreement from the other Contracting Parties to exclude the Russian Federation from the treaty regime. It is more than doubtful – for

[2] See, for instance, CAHDI Guidance Note to the Committee of Ministers - Continued participation of the Russian Federation in 'open' conventions elaborated in the framework of the Council of Europe, 4 May 2022, CM/Inf(2022)17-rev.

various reasons – to expect that such unanimity would have been achieved within the heterogenic groups of Contracting Parties in each case.

- It was hence already clear, quite early on, that innovative solutions needed to be looked for elsewhere. With this in mind, on 30 June 2022, the CM adopted decisions entitled 'Modalities for the participation of the Russian Federation in open conventions' inviting "where relevant, each body representing all the Parties of treaties to which the Russian Federation remains a Party […], to decide, on the basis of its rules of procedure, on the modalities of participation of the Russian Federation in the respective body […];" ; and "to consider, […], measures which may include restricting the participation of the Russian Federation in the above-mentioned treaty bodies or limiting its participation exclusively to the monitoring of its own compliance with the obligations under those conventions, without the right to participate in the adoption of decisions by those bodies nor to vote."

- Similar decisions with regard to Belarus, party to 12 'open' conventions established within the CoE, were adopted on 5 October 2022.

- Though innovative, this approach is consistent with international treaty law. It is based on the understanding that the status of the Russian Federation and Belarus respectively as Contracting Parties to the treaties concerned would not be put into question. Instead, these measures only affect the *modalities* in which both states participate in the follow-up mechanisms of the different treaties. In this context, it is important to stress that the way in which such bodies work is mainly regulated on the level of their rules of procedure in the adoption of which the bodies act autonomously as stipulated in most of the conventions in question. Moreover, only restrictions of the modalities of participation were adopted at the level of the rules of procedure which did not result in any infringement of the rights of the

Contracting Parties as enshrined in the conventions themselves. If done otherwise, the principle of the hierarchy of norms would have been violated.

- Ultimately, a great majority of the 12 treaty bodies called upon to decide on the adoption of measures of this kind by the CM have inserted, since September 2022, new rules in their respective RoP prohibiting, for e.g., a representative of a Contracting Party - that has been excluded from the CoE for a serious violation of Article 3 of the Statute or with which the CoE has suspended its relations for a comparable reason - from being elected to the office of a Chair, Vice-Chair or Bureau member of the Conference of the Parties or prohibiting the Contracting Party in question from nominating candidates for an expert body. Further examples of measures adopted in this connection relate to the prohibition of physical participation in meetings of the treaty body or limitations on online participation. In contrast, the right to vote on all treaty-related issues, to access documents and to comment on them have been usually left untouched as they were considered to represent core rights of the Contracting Parties stemming from the respective treaties.

Accountability for violations of international law committed in Ukraine

- I will now move on to the issue of holding the Russian Federation accountable for the events taking place in Ukraine and the role the CoE can play in such endeavours. From the very beginning of the largescale invasion, the CoE has been part of endeavours aimed at ensuring accountability for the crimes committed by the Russian Federation in Ukraine.

Register of Damage

- One of the key contributions and the main deliverable of the 4th Summit was the establishment of the Register of Damage Caused by the Aggression of the Russian Federation Against Ukraine as an enlarged partial agreement ('EPA') of the CoE.

- It is important to underline that the Register was thus not established by an international treaty. Partial agreements are a particular form of cooperation within the Organisation allowing for some member states – and, in the case of EPAs, also invited non-member states - to participate in a certain activity without the need for all 46 states to do so. From a statutory point of view, partial agreements remain an activity of the Organisation in the same way as other programme activities, except that a partial agreement has its own budget and working methods which are determined solely by its members.

- So far, 44 countries and the EU have joined or indicated their intention to join the Register as a platform for intergovernmental cooperation, acting within the institutional framework of the CoE.

- The Register shall serve as a "record, in documentary form, of evidence and claims information on damage, loss or injury caused, on or after 24 February 2022, in the territory of Ukraine […] to all natural and legal persons concerned, as well as the State of Ukraine […] by the Russian Federation's internationally wrongful acts in or against Ukraine." When preparing the Register's Statute, the rules and regulations of the United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory established by UNGA Resolution A/RES/ES-10/17 served as a source of inspiration.[3]

[3] The Rules and Regulations can be found at the website of the UNRoD: https://www.unrod.org/docs/Rules.pdf

- The Registry will serve as a record of eligible claims for the purposes of setting up at, a later stage, a compensation mechanism aimed at their examination and compensation. The Register as such shall, however, not have any adjudicatory functions with respect to such claims, including determination of responsibility and allocation of any payments or compensation.

- It is hence important to note that the establishment of the Register is merely a first step of ensuring a comprehensive compensation mechanism for Ukraine. Once such a mechanism is established, the work of the Register will be transferred to it, including its digital platform and all information about claims and evidence. Even though it is still too early to say anything on the details of such a future mechanism, it has been an aspect highlighted throughout the procedure – most recently at the first Conference of the Parties to the Register held at the CoE on 27 June. At this conference, the Executive Secretary of the Register was elected, the provisional budget for 2023 discussed and the RoP for the organs of the Register adopted. As we speak, the Register is starting its operations in The Hague, a host state agreement with the Netherlands having been approved by the CM on 12 July.

- The primary purpose of the Register is to ensure that victims of human rights violations have a platform to document their experiences and to seek justice. The Register is expected to follow a victim-centred approach. As such the Register represents a tool towards accountability and reinforces the principle of individual responsibility. By allowing victims to document their claims, it helps establish a factual record of the violations committed and identifies those responsible for the damages. The work of the Register will eventually serve as a foundation for legal proceedings and efforts to hold perpetrators accountable for their actions.

Special tribunal for the crime of aggression

- Lastly, I would like to inform you about recent developments regarding the establishment of a special tribunal to prosecute Russian and Belarusian leaders for the crime of aggression against Ukraine.

- On 24 February 2023, on the anniversary of the largescale aggression of the Russian Federation against Ukraine, the Ministers' Deputies "reiterated their decision to make sure that the CoE mobilises all its instruments to ensure the Russian Federation's full accountability for violations of human rights; reaffirmed the need for a strong and unequivocal international legal response to the aggression against Ukraine […] including for the crime of aggression […] and emphasised that individual legal responsibility of the perpetrators of such violations is of utmost importance."

- The Secretary General had discussed the issue of a possible special tribunal with President Zelensky and Foreign Minister Kuleba for the first time already in May 2022 during her visit to Kyiv. On 31 January 2023, she issued an information document (SG/Inf(2023)7) which discusses various options for the setting up of such a tribunal and a possible CoE contribution.

- Also the Reykjavik Declaration of the 4th Summit included language on the matter by welcoming *"international efforts to hold to account the political and military leadership of the Russian Federation for its war of aggression against Ukraine and the progress towards the establishment of a special tribunal for the crime of aggression […]"* and noted that *"[t]he CoE should participate, as appropriate, in relevant consultations and negotiations and provide concrete expert and technical support to the process."*

- The Secretary General asked me to represent the CoE in the Core Group, a group of legal advisers from more than 30 like-minded countries, as well as the EU, dedicated to ensuring accountability for Russia's aggression against Ukraine. The Group held its second meeting in Strasbourg in March, back-to-back with the 64th meeting of the CAHDI. Two more meetings have taken place since, one in Tallinn in May and another one in Warsaw end of June.

- To conclude, nothing has been decided yet as important international law issues remain unsolved. These include the options for establishing a special tribunal – whether as an internationalised tribunal based on Ukrainian law, as an entity endorsed by the UNGA or created by a free-standing international treaty. Furthermore, it will be necessary to agree on the definition of aggression that the future tribunal should apply. Important questions of immunities and issues relating to human rights, such as trials *in absentia* or questions of victim protection, need to be clarified. One link that is constantly made in the discussions to the work of the ILC is the one concerning the Immunity of state officials from foreign criminal jurisdiction and the question whether the crime of aggression should be included in the exceptions from immunity in Article 7 of the respective draft Articles or not.

- The question of immunities was also one of the issues at the heart of the CAHDI opinion adopted in September 2022 on Recommendation 2231 (2022) of the Parliamentary Assembly of the CoE on 'The Russian Federation's aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes'. The CAHDI noted in this regard that the law on immunities is under constant evolution as evidenced notably by the work of your commission and concluded that the prospects of any international tribunal to effectively contribute to individual accountability of

members of the Troika for acts of aggression committed against Ukraine will depend on whether the issue of immunities is addressed in an accurate manner.

- Whenever it is decided whether to go forward with the idea of a special tribunal and in which form, we shall be able to see more clearly what role – if any – the CoE will or could play in any such endeavours. Its role will ultimately 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 CoE is in my view well-placed to play a role in the efforts towards ensuring accountability for the crime of aggression.

- The CoE could, for instance, support a new tribunal by providing assistance in the selection and appointment of judges, the elaboration of RoP and the secondment of experts.

- I personally believe our mandate to be broad enough to encompass support for a special tribunal. The lack of competence over "matters of national defence" as enshrined in Article 1 (d) of the Statute of the CoE does not prevent the examination of issues aimed at securing peace and international security through justice and international cooperation.

Conclusion

- This concludes my overview of recent developments within the CoE in relation to the aggression against Ukraine. It has been an honour for me to be with you today, and I am looking forward to a vivid exchange of views with you.

- We are living through unprecedented times, and I think it is the duty of lawyers to find innovative solutions to respond to barbarity. Impunity anywhere sends the wrong signal everywhere.

- At the same time, we must be aware that whatever we do will create a precedent. Arguing for an international legal order based on the rule of law, we must ourselves be irreproachable.

- Your work provides important elements which will support states in taking informed and legally sound decisions, including in the framework of international organisations such as the CoE.