THE COUNCIL OF EUROPE EXPERT ADVISORY GROUP FOR SUPPORT TO THE OFFICE OF THE PROSECUTOR GENERAL OF UKRAINE

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The creation of the Council of Europe's expert advisory group to the Office of the Prosecutor General of Ukraine arose out of the clear need to provide immediate assistance to Ukraine in the context of the human rights and rule of law consequences of the war caused by the aggression of the Russian Federation.

Its mandate is to provide strategic advice to the Office of the Prosecutor General of Ukraine regarding gross violations of human rights in the times of the war. In particular, the focus is on issues of a cross-cutting nature involving the standards of the Council of Europe, especially as regards the European Convention on Human Rights, and the requirements arising from International Humanitarian Law.

The group is comprised of three members: Nona Tsotoria, a former Judge of the European Court of Human Rights and former Deputy Prosecutor General of Georgia; James Johnston, senior British Army lawyer with extensive criminal, operational and human rights law experience in the United Kingdom and abroad; and myself, a barrister with a practice before the Europe Court and much advisory work related to the implementation of Council of Europe standards.

The context in which the group is working is not just one of an ongoing conflict and the commission of a multitude of potential offences requiring an effective response by the Prosecution Service of Ukraine. It is also one in which many different actors have come from outside Ukraine both to provide support and to undertake investigations either themselves or in cooperation with the Office of the Prosecutor General.

All this involvement is much appreciated. However, at the same time, it is putting considerable demands on the Office when it already has its own extensive commitments to deal

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with the very large number of cases generated by the aggression against Ukraine. It is important, therefore, that the work of the group does not add to this burden but, rather, responds in an effective and practical manner to the specific needs arising from the cases that have to be investigated and prosecuted.

The aim, therefore, is respond to concrete requests for assistance on issues which are arising, or are seen as having the potential to arise, from the work of the prosecution service. At the same time, there is a need to ensure that its work is coordinated with that of other relevant Ukrainian authorities, such as the Ministries of Justice and of Foreign Affairs, as well as with other international experts working with the Office of the Prosecutor General. It is clearly important to provide advice that is not only relevant but also is not contradictory or a source of confusion.

In the early days of its operation, there was a focus on working with the Office of the Prosecutor General to identify issues and sub-issues which were likely to affect its work. These included, in particular, ones relating to the investigation of cases and the conduct of this in a way which would ensure that ultimate prosecutions were not hampered or undermined by shortcomings.

Notable concerns in this connection related to the adequacy of the training of those who first arrived on the scene of possible offences, who were likely to be soldiers with priority for securing a particular place against further attack. This can have implications for preserving evidence and even ensuring that it is not destroyed. There is thus a need to provide training and practical guidelines for the military, law enforcement and prosecutors – most of whom do not have a war crimes background – on preserving and gathering evidence, as well as to put in place protocols for local inhabitants and services who will want to clean their neighbourhoods upon their return.

Another issue that needed to be consider related to the interviewing of victims and witnesses. In particular, two points were of concern.

Firstly, it is not only investigators and prosecutors who may be interviewing them. They will also be spoken to by journalists and non-governmental organisations, both of which have their own role to play in establishing what happened and promoting the need for accountability.

However, the repeat examining of victims and witnesses can not only affect the way they tell their stories - potentially making it this less reliable as they respond to the perceived needs of those to whom they talk – but also add to the trauma suffered.

Secondly, there is the regrettable likelihood that not all victims and witnesses will actually be available for a trial at a later stage, whether through their death or illness. There is a need, therefore, to take steps to ensure that trials do not fall foul of the standards elaborated by the European Court with respect to the use of the testimony of absent witnesses, that is, those who cannot be cross-examined by the defendant. One safeguard identified by the European Court in this connection is the video-recording of interviews with witnesses, although that will not necessarily be a sufficient counterbalancing factor in all cases.

Subsequently, work has focused on more specific advice on issues seen as important in proceedings of those suspected of committing offences in the course of the aggression.

Two examples, of this have related to the adaptation of provisions of the Criminal Procedure Code to facilitate investigations and the use of open source material – such as that derived from the satellites and social media – as evidence in prosecutions and, with in both cases the need being to ensure that this does not lead to any conflicts with requirements under the European Convention on Human Rights and other Council of Europe standards.

The co-operation between the Office of the Prosecutor General and a number of teams of investigators and prosecutors from other countries has the potential to facilitate the effectiveness of investigations of the considerable number of alleged offences, which by their very nature require painstaking work to ensure that prosecutions can ultimately be brought.

However, it is not simply a matter of such teams arriving in Ukraine, there is also a need for them to have a proper legal basis for their work, at least insofar as this work is intended to lead to proceedings before the Ukrainian courts. This has given rise to the need to review the terms of the Criminal Procedure Code so as to ensure that the work of the joint investigative teams that are being established has an appropriate foundation in law.

In providing such a foundation, not only is the European Convention on Human Rights relevant but so is the Second Additional Protocol to the Council of Europe's European Convention

on Mutual Assistance in Criminal Matter of 2001, which deals specifically with joint investigative teams.

Amongst the issues to take into account are: should the team be one that is just judicial (comprised of judges, prosecutors and investigative judges) or one that is law enforcement (comprised essentially of investigators) or a mixture of these types; the duration and for a specific purpose; and whether participation of officers from a different jurisdiction to that where the investigation takes place should be active (i.e., where there is some ability for those officers to exercise operational powers) or passive (i.e., where those officers only have an advisory or consultative role).

Moreover, in view of the right to a fair trial, and especially the right to an effective defence, it is important that the legal position of suspects should not be weakened as a result of the participation of officers from different States in the joint investigation. This will require a clear determination of the law that is applicable to matters such as the conduct of interrogation of both suspects and witnesses, undercover activities and interception of communications.

Furthermore, mechanisms of control over investigative measures, such as the requirement for judicial authorisation, should be applicable in the same way as they would in the more usual form of criminal proceedings.

It is also important that there be clarity as to the State in which any trial will eventually be held so that there is no ultimate difficulty regarding the admissibility of evidence, particularly if there are different approaches regarding this between the State where the investigation occurs and the State where the trial is held.

Where information can be shared between those involved in a joint investigative team, it will be desirable to clarify whether this is subject to any limitations on its subsequent use, i.e., will it be limited to the purpose for which the team was established? The agreement can certainly provide that there is to be no such limitation.

Similarly, it is desirable for the agreement establishing a joint investigative team to deal with the extent to which information shared can or must be included in the proceedings ultimately brought and may be disclosed to the parties to them, as well as at what stage such disclosure might occur. Addressing this issue at the outset is crucial since difficulties may emerge should it

later be found that the approach of the States concerned on these matters differs in important respects.

All these issues need to be properly addressed in the legislation applicable to the conduct of criminal proceedings – the Criminal Procedure Code in the case of Ukraine – and any shortcoming in dealing with them in that legislation could prejudice the outcome of a prosecution. It is crucial, therefore, that this is all regulated before any extensive reliance is placed on joint investigative teams in addressing the multitude of potential offences requiring attention. Thus, providing advice on them has been part of the activities undertaken by the advisory group.

So far, specific reference to the concept of open source material as a form of evidence has barely featured in proceedings before the European Court. In particular, such evidence – as opposed to electronic evidence more generally - has not yet been specifically discussed from the perspective of its admissibility

No rules as to admissibility of evidence or the form that this takes are, of course, prescribed in the European Convention. As a result, the European Court regards these as issues as primarily one for regulation under national law, with its concern being rather with the question of whether the proceedings as a whole, including the way in which the evidence was obtained, can be regarded as fair.

It is unlikely that the European Court will take a different approach to open source evidence, albeit that the character of it could make the issue of reliability or authenticity a much more significant issue than seen in many of the cases where it has been dealing with digital evidence that is not of an open source character. In particular, there will be concerns about the provenance of the material; does it come from a reputable body or is derived from social media, with difficulties in establishing when it was gathered and being sure that it has not been modified in some way.

Also important will be the procedure followed in gathering the open source evidence, something about which the European Court has already been concerned with in the use of evidence supposed obtained through forensic examinations and searches.

This underlines the importance of having a clear procedure to be followed when gathering open source digital evidence, including the documentation of the way in which this takes place,

and of ensuring that this procedure has been followed and can be demonstrated. In this connection, the *Berkeley Protocol on Digital Open Source Investigations* that was developed in collaboration between the Office of the United Nations High Commissioner for Human Rights and the Human Rights Center at the University of California, Berkeley can be seen as providing practical guidelines for collecting, preserving and verifying online open source information which chime with the more general concern of the European Court that the proceedings as a whole, including the way in which the evidence was obtained, should be regarded as fair.

Moreover, useful practice in using digital evidence, including that of an open source nature, can be found in the application of the Council of Europe's Convention on Cybercrime, generally referred to as the Budapest Convention. This practice can also be drawn upon in developing the procedures to be followed in dealing with the crimes arising from Russia's aggression that need to be investigated and prosecuted.

It will also be of fundamental importance that a defendant be given a real opportunity to challenge the reliability or authenticity of open source material.

Furthermore, although material in social media accounts may not generally be sufficient to sustain a conviction by themselves or to a significant extent, it should be borne in mind that such material might be regarded by the European Court as in effect the testimony of a witness. In the event that the persons whose accounts are being relied upon do not give evidence in person, there would then be a need to take account of the requirements elaborated by the European Court regarding the need for a good reason for their non-attendance and sufficient counterbalancing factors to compensate for the handicaps under which the defence might then labour where this evidence became the sole or decisive basis for a conviction.

Finally, the group has also been involved in preparing information sheets/brief guidelines for prosecutors and investigators on the applicable procedural guarantees/requirements under the European Convention on Human Rights to different stages of the criminal proceedings concerning gross human rights violations in the context of the ongoing war. The aim being to highlight the key points for those working in the field who have little time for extensive study but who need to keep in mind some key points as they go about their tasks.

For example, there is inevitably pressure from the media for information about the progress of investigation into war crimes and other offences committed in the course of the aggression by the Russian Federation, as well as about the conduct of proceedings against suspected offenders. Moreover, it is important to keep members of the general public informed about such progress in order to maintain their confidence in the administration of justice.

However, statements about the progress of investigations and the conduct of proceedings, as well as the release of information relating to them, can have a detrimental effect on the ultimate success of those proceedings. This is because such statements and information can undermine the right to a fair trial under ECHR Article 6 - whether because this is contrary to the presumption of innocence or has a prejudicial effect - and the right to respect for private life under ECHR Article 8.

This prompted the preparation of a brief guide on the key points, illustrated in an explanatory bullet point format and with links to illustrative cases. The aim was to show what should not be done in the course of public outreach by prosecutors and investigators but also what would not be problematic.

This is also where the extensive body of material that has been produced by HELP can be invaluable as the present situation makes it all the more important that all professionals working in the field of criminal justice are aware of the relevant human rights standards. There may be a need for some of this material to be adjusted to take account of the circumstances in which they are currently operating. However, there can be little doubt that strengthening their access to this material will help them as they seek to deliver justice in what are extraordinarily difficult situations.

I hope that this gives you a flavour of what the Council of Europe's advisory expert group to the Office of the Prosecutor General has been doing. It is very much work in progress, shaped inevitably by the effects of the ongoing war.