Excellencies!
Dear colleagues and friends!
Ladies and gentlemen!

Many thanks to the Council of Europe's Committee of Legal Advisers on Public International Law for the invitation to deliver this key note.

It is a great honour to do so - and it is a special pleasure to take the floor after Ambassador Wanger and my dear and esteemed friend Judge Gnatovskyy.

I.

"Accountability for the Crime of Aggression against Ukraine" – the European Contribution"!

I shall offer reflections on both components of this title – that is first, on the need to ensure accountability, and, second, on the best way in which Europe might contribute to make accountability happen.

For essentially three reasons, the Council of Europe is the perfect place to offer such reflections. The most important contribution of the Council's Parliamentary Assembly to the topic is the first reason. Second, the Council of Europe is a fitting location for a European scholar to make an appeal to Europe's political leadership to unite and to take decisive action. Third, the Council of Europe could open up an avenue in order to eventually achieve a breakthrough on the question by what institutional design the accountability in question should be ensured. I shall take up those three reasons in turn:

II.

Through its Resolution 2482, unanimously adopted in January 2023, the Parliamentary Assembly of the Council of Europe produced the single most enlightened official document on accountability for the crime of aggression against Ukraine. At the outset, the Assembly determined what is beyond reasonable doubt:

> "The unprovoked acts of aggression by the Russian Federation, given their character, scale and gravity, constitute manifest violations of the Charter of the United Nations, in particular of the prohibition of the use of force contained in Article 2 (4)."

Rightly, the Assembly pointed out that these acts therefore fulfil the requirements of the definition of the crime of aggression in Article 8 bis of the ICC Statute and under customary international law. Then, the Assembly made it crystal clear why accountability for the horrendous injustice inflicted by Russia on Ukraine and its people and for Russia's fundamental attack on the international legal order would remain fatally incomplete without proceedings specifically for the crime of aggression. For, as the Assembly stated,

> "(w)ithout the decision made by the Russian leaders to wage this war of aggression against Ukraine, the atrocities that flow from it, as well as all the destruction, death and damage resulting from the war, including from lawful acts of war, would *not* have occurred."

From this, the Assembly concluded that the Russian leaders who planned, prepared, initiated and executed these acts should be identified and prosecuted.

By and large, European governments have come to share this compelling conclusion. And it is encouraging that the government of the United States not only concurs grudgingly, but with all due passion: Beth van Schaack, the U.S. Ambassador-at-Large for Global Criminal Justice, astutely observed, that there are

"compelling reasons for why the crime of aggression must be prosecuted".

Ambassador van Schaack did not leave it there: Instead, she declared that the world is

"at a critical moment in history".

One cannot but wholeheartedly agree with Ambassador van Schaack who has situated herself squarely within a shining U.S. legacy to the international legal order. For, at the end of the Second World War, the United States recognized that Germany's wars of aggression required a criminal sanction in order to preserve the still recent idea of an international law against aggressive war. Most notably, Nuremberg's leading figure, U.S. Chief Prosecutor Robert Jackson, understood that the legal response could not remain an isolated one in order to reach this objective. Hence, he famously stated in his opening address before the Nuremberg Tribunal:

"The ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by other nations, including those which sit here now in judgment."

One may read this famous call as the implicit admission that Nuremberg itself was selective: Stalin got away with his aggressions – a historic fact which is today best remembered in East and Central Europe – by those whose ancestors immediately suffered these aggressions. At the same time, however, Jackson's call recognized the potential of a powerful judicial precedent for the future – if such precedent would subsequently be generalized. I have always read Jackson's call as the commitment to generalize Nuremberg's foundational precedent! And as a warning – the warning that Nuremberg's potential will evaporate without such generalization. As we know, the Nuremberg judgment did set a powerful precedent, the UN General Assembly almost immediately affirmed it and the Tokyo Judgment essentially followed it. As a result, German crimes against peace, as crimes of aggression were called at the time, were at the heart of the Nuremberg precedent on international criminal justice *stricto sensu*.

But, despite that, there can be no denial: The commitment to generalization has not been met to date. Quite to the contrary: Subsequent to the Tokyo trial, the development regarding the prosecution of the crime of aggression amounts to a story of decline. While having been the central crime at Nuremberg and Tokyo, in 1998, the crime of aggression only barely made it into the Statute for the International Criminal Court. And when the jurisdiction of the ICC was belatedly activated as from 17 July 2018, this occurred under debilitating restraints governing the Court's exercise of jurisdiction. As a result, when Russia began its aggression against Ukraine in 2014, the crime of aggression, while belonging to it, was hanging by a thread in the firmament of international offences. And when Russia, on 24 February 2022, escalated its course of action into an all-out war of aggression which has been shaking the authority of the prohibition of the use of force at its very core, the hands of the Prosecutor of the ICC have remained tied with respect to precisely that crime which is in most urgent need of being adjudicated – the crime of aggression. This means that not only has Jackson's Nuremberg commitment not yet been met, also his warning has proven to be warranted:

Under these dire circumstances, a failure even now to act, resulting in a negative precedent regarding the crime of aggression, would entail the serious risk to embolden President Putin and future leaders of other most powerful States to move forward toward a fundamentally different international order: This order would be one where the world got divided into a couple of vast spaces, each under the domination of an imperial power. In such an order, the prohibition of the use of force would cease to provide all States – including, most importantly, the weaker ones – with protection. Posthumously, the infamous German theorist Carl Schmitt would then have prevailed with his vision of a world structured along "Großräume" – to use his German word. This is why I wholeheartedly agree with Ambassador van Schaack that Russia's war of aggression against Ukraine, which continues unabated as we are gathering here today, marks a critical moment in history.

III.

I consider the Council of Europe a most suitable place to appeal, through you, the distinguished Legal Advisers, to Europe's political leadership to eventually rise to the historic challenge.

I have always been of the view that the most principled course of action would be to harmonize the jurisdictional regime in the ICC Statute as a matter of absolute priority, and to do so with retroactive force. Yet, the political leadership not only, but also in Europe has formed the view that the necessary reform of the ICC Statute cannot be achieved quickly enough to meet the urgency of a meaningful international criminal law response to Russia's war of aggression. If this is the general political assessment, it should be accepted.

But then, it cannot be noted but with deep regret that even after long months of diplomatic conversations, this sense of urgency has translated in nothing more tangible than the establishment of the International Centre for the Prosecution of the Crime of Aggression in The Hague – important as this Centre of course is.

The reason for this unsatisfactory state of affairs is well known: There is still no agreement about the proper format of a Special Tribunal for the Crime of Aggression against Ukraine. It would be a serious error to conceive of the question of format as nothing but a technical legal issue. Let us not be mistaken: Whether or not a Special Tribunal for the Crime of Aggression Against Ukraine can send out precisely that message which is now urgently needed for the future of the international legal order, depends on the choice of a proper format: As I have already said, Russia's all-out war of aggression against Ukraine has been shaking the authority of the prohibition of the use of force at its very core, a prohibition which the International Court of Justice has rightly called

"cornerstone of the UN Charter".

In this situation, the only criminal sanction that would appropriately convey the reprobation of the international society in its entirety, would be one for the crime of aggression under international law. As I have also said already, today, due to a decade long side-lining, the crime of aggression, while belonging to it, remains hanging by a thread in the firmament of international offences. Therefore, a core part of the historic challenge before us is to confirm the rightful place of the crime of aggression in the firmament of crimes under international law through a properly constituted Special Tribunal for the Crime of Aggression. It is thus imperative that the Special Tribunal, by its design, send out the message to the world, that its

work transcends the national prosecution interest of Ukraine important as it is, and also fulfils a vital interest of the international community as a whole.

I wish to take this occasion to recall that the – EU – European Council has recognized precisely this in the clearest possible terms: For, in December 2022, that Council solemnly declared that

"the prosecution of the crime of aggression is of concern to the international community as a whole".

It was in full harmony with this declaration that the Parliamentary Assembly of the Council of Europe then unanimously called for setting up

> "a special international tribunal, supported and endorsed by as many States and international organizations as possible, and in particular by the United Nations General Assembly."

Obviously, this call would be headed best if the Special Tribunal would be established in direct connection with the United Nations. And as we know, such a solution would be perfectly possible as a matter of international law and many members of the Council of Europe have voiced their preference for it. Yet, it seems as if the political mood is currently not overly conducive to implementing this option. In this situation, the Council of Europe could, while falling short of the UN path, provide an avenue for a compromise solution which is not only workable, but also meets essential demands of legitimacy.

IV.

I have thus arrived at my third reason for being pleased to deliver this key note here, at the Council of Europe. The distinguished speakers whom you will hear in a moment, will shed light, first, on the legal foundations of a possible connection of the Special Tribunal with the Council of Europe and, second, on cooperation issues which are important from a perspective of workability. I shall use my remaining time to make the appeal that the Special Tribunal should by all means apply the definition of the crime of aggression contained in Article 8 bis of the ICC Statute instead of relying on the national criminal law of Ukraine.

The definition enshrined in Art. 8 *bis* of the ICC Statute constitutes nothing less than the culmination of a century long search for the crime of aggression under international law. While it formally constitutes treaty law, its significance goes far beyond: In fact, the definition in Article 8 *bis* of the ICC Statute reflects an international consensus achieved after painstaking negotiation work in which States, which are not yet party to the ICC Statute, took an active part, States such as China, Russia and, at the end of the negotiations, in particular the United States. Russia's negotiators Gennady Kuzmin and Igor Panin stated that

"Russia is satisfied with the outcome of the Review Conference with regard to the definition of the crime of aggression."

And *China*'s representative *Zhou Lulu* wrote that in *her* view

"the threshold clause reflects customary international law and distinguishes appropriately between illegal international acts and international crimes."

It would be a most serious failure not to confirm this international consensus definition of the crime of aggression at this historic juncture and instead to make a step backwards and rely on the old national definition of the crime in Ukraine's criminal law.

To rely on Ukraine's national definition, whether or not after some tinkering about its terms, would detract from the message that the crime of aggression is a crime under international law and it would result in fragmentation at a moment where consolidation is so badly needed.

Perhaps even worse, to rely on Ukraine's national definition would – by necessity – weaken the authority of the ICC Statute. I sincerely wonder how one could possibly be prepared to allow this to happen, despite all the solemn assurances that the establishment of a Special Tribunal should complement the ICC rather than causing damage to it?

Do also consider this: In order to be considered a principled step – one guided by the spirit of sustainability instead of that of selectivity – a Special Tribunal for the Crime of Aggression against Ukraine must be conceived as an instrument of transition, as a stepping stone towards a genuine embrace of Nuremberg's promise through a more principled jurisdictional regime in the ICC Statute. Placing reliance on the consensus definition enshrined in this Statute would properly articulate such an intent.

Rumours have it that two considerations have nevertheless been advanced in support of reliance on Ukraine's national law. First, the customary status of Article 8 *bis* of the ICC Statute appears to have been doubted by a few voices. But such doubts, if indeed expressed, would be unfounded: The carefully drafted threshold clause in Article 8 bis of the ICC Statute not only assures that the definition is as modest and realistic as that of a crime under international law should be. The same threshold clause also ensures that the definition can be interpreted in perfect harmony with customary international law. If it were otherwise, how could there have been consensus beyond the State Parties to have the ICC apply Article 8 bis to crimes of aggression committed by nationals of non-State parties if the UN Security Council agrees?

The second consideration apparently put forward did not entail a general preference for Ukraine's definition, but one that was tied to a specific proposal that, as I understand, had been ventilated a while ago – namely to establish the Special Tribunal on the basis of a transfer of national Ukrainian proceedings. Indeed, if proceedings before a Special Tribunal would be the result of a transfer of Ukrainian proceedings, it might seem natural to rely on Ukraine's national law definition. But if this is to show anything, then that the idea of basing the Special Tribunal on a transfer of proceedings is unsuitable for the occasion and should therefore be abandoned.

In my view, the idea to connect the Special Tribunal with the Council of Europe is so promising precisely because it would open an avenue which is different from that of a transfer of proceedings. One could think, for example, of the possibility of Ukraine and the Council of Europe concluding a bilateral treaty – a path clearly distinct from that of a transfer of proceedings. I am sure we will hear further on this possibility in a moment.

V.

Let me conclude my remarks with a reflection on how Europe's contribution to ensuring accountability for the Crime of Aggression against Ukraine should be properly conceived, if a Special Tribunal came to be established in connection with the Council of Europe.

Even then, the Special Tribunal should not be seen as a European solution to what is in fact a challenge of a global dimension. The proper understanding should be that Europe places the Council of Europe in the service of the international community as a whole. The choice of the international consensus definition of the crime, as enshrined in Article 8 *bis* of the ICC Statute, would be a first strong indicator of such an intent. Another such indicator could be the possibility to elect non-European judges to the bench. These and other bridges between a Council of Europe-based Special Tribunal and the outside world could eventually result in an endorsement of the institutional design by the UN General Assembly – here again in line with the vision so persuasively articulated by this Council's Parliamentary Assembly. In a nutshell, the less introverted a European contribution through the Council of Europe would be, the better it would meet the historic challenge before us which consists of giving an international criminal law response that duly reflects the fundamental assault by the Russian leadership both on Ukraine and its incredibly brave people and on the global legal order.

VI.

May Europe's political leadership now unite and take courageous action in this spirit!