

5 September 2022

**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"**

1. On 11 May 2022, the Ministers' Deputies, at their 1434th meeting, agreed to communicate Recommendation 2231 (2022) of the Parliamentary Assembly of the Council of Europe (PACE) on "[The Russian Federation's aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes](#)" to the Committee of Legal Advisers on Public International Law (CAHDI) for information and possible comments. The Ministers' Deputies agreed also to communicate it to the European Committee on Crime Problems (CDPC) and to the Steering Committee for Human Rights (CDDH).

2. In its Recommendation 2231 (2022), the Assembly stresses the need to ensure accountability for war crimes, crimes against humanity and possible genocide as well as the crime of aggression in connection with the Russian war of aggression against Ukraine and invites the Committee of Ministers to:

- 2.1 strengthen the competent services of the Council of Europe in order to enable them to provide technical assistance and advice to Ukraine and those member States exercising their universal jurisdiction<sup>1</sup> to investigate and document gross human rights violations, including those amounting to war crimes, crimes against humanity and possible genocide, on the scale required,
- 2.2 invite the expert bodies of the Council of Europe, notably the Consultative Council of European Judges and the Consultative Council of European Prosecutors, the European Commission for the Efficiency of Justice and the European Commission for Democracy through Law (Venice Commission), and other monitoring and standard-setting mechanisms of the Council of Europe concerned, to produce expert recommendations and guidelines relating to these issues within the ambit of their competence;
- 2.3 encourage all member States to participate in setting up an ad hoc international criminal tribunal to prosecute the crime of aggression allegedly committed by the political leaders and military commanders of the Russian Federation against Ukraine, by way of a multilateral treaty between like-minded States;

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<sup>1</sup> Türkiye refers to its positions at the UNGA Sixth Committee and the CAHDI as regards the so-called "the principle of universal jurisdiction" and reserves its right to further comment on the matter.

- 2.4 examine ways and means for the Council of Europe as a whole to play an active role in setting up and operating such a tribunal, including by providing logistical or other technical assistance.
3. While underlining its unwavering support for attaining accountability for the alleged atrocity crimes committed since the beginning of the Russian Federation's invasion of Ukraine, including for the crime of aggression, the CAHDI notes the following with regard to paragraphs 2.3. and 2.4. of the PACE Recommendation.
4. There is, currently, no international mechanism that has jurisdiction *rationae personae* in relation to a crime of aggression committed against Ukraine by Russian political and military leadership.
5. On the basis of the Rome Statute as amended by Resolution RC/Res.6 of 2010 on the crime of aggression, corroborated by Resolution ICC-ASP/16/Res.5 on the activation of the jurisdiction of the Court over the crime of aggression, the jurisdiction of the International Criminal Court will not be realistically triggered in this specific case beyond the crimes with which it has been already seized and in relation with which the Office of the Prosecutor has already opened an investigation: crimes against humanity, war crimes and crime of genocide. There is an understanding that, except for a referral of the situation by the UN Security Council, both States concerned have to be Party to the Rome Statute.
6. Consequently, in order to pursue individual criminal accountability at international level for the crime of aggression committed against Ukraine, an adequate legal basis would have to be established for the international or internationalised investigation, prosecution and adjudication of this crime. To this end several potential international options could be envisaged:
- 6.1 A hybrid tribunal incorporated into Ukraine's legal system set up through an agreement between Ukraine and an international organisation, e.g., the Council of Europe, the EU or the UN, on which the international assistance would be based upon. For this option, several precedents exist even if they do not concern the crime of aggression, including, *inter alia*, the Kosovo\* Specialist Chambers, the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia;
- 6.2 Since a proposal for an ad hoc international tribunal established on the basis of United Nations Security Council resolution does not appear promising due to the likely exercise of its veto right by the Russian Federation, it could be further analysed if, under the UN Charter, a tribunal of this type could be recommended by the United Nations General Assembly (UNGA), if sufficient support were to be secured, which is unclear at present. In any case, such a resolution adopted by the UNGA would not create international obligations binding on any State;
- 6.3 An international tribunal based on a multilateral international treaty concluded by States, including Ukraine, following the examples of the International Military

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\*All references to Kosovo, whether the territory, institutions or population, in this text shall be understood in full compliance with United Nations' Security Council Resolution 1244 and without prejudice to the status of Kosovo.

Tribunal and the International Criminal Court, possibly with the Council of Europe providing the institutional framework for the negotiations.

7. CAHDI is of the opinion that compliance with international criminal justice standards must be the basis for any consideration in this regard. Several important legal, practical and political issues arise. With the exception of the tribunal created by the Security Council resolution, one of the most difficult subject 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).

8. The CAHDI notes in this regard 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. 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.

9. Other aspects that should be considered together with the most appropriate legal basis for the establishment, especially in connection with the treaty-based option are the length of the process, as such treaties usually require the consent to be bound expressed by way of ratification, although parts of such a treaty could be suitable for provisional application.

10. The CAHDI also wishes to stress the need for close coordination. Any activity within the framework of the Council of Europe should be co-ordinated with the relevant mechanisms for investigating and prosecuting the most serious crimes that already exist at national, regional and international level - including the International Criminal Court. Close and effective coordination ensures the protection of victims and the effectiveness of justice. Consideration should be given in particular to avoiding duplication of structures with the International Criminal Court and diversion of resources from existing mechanisms as well as on cost and feasibility issues.

11. Lastly, the CAHDI declares that it will remain seized with the matter and, furthermore, continue discussions on the issue of the prosecution of most serious crimes allegedly committed in Ukraine in the ongoing war of aggression at its forthcoming 63rd plenary meeting on 22-23 September 2022 in Bucharest (Romania). In the framework of this meeting, the CAHDI will also hold a seminar on "States' obligations under public international law in relation to immunity of State officials" on 21 September 2022. The CAHDI stands ready to assist relevant competent Council of Europe bodies wherever it can offer its support related to questions of public international law.